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Abstract

In recent years a number of authors have approached antitrust differently, looking not to parse the economics that inform antitrust outcomes, but to the role that institutions play in antitrust decision-making. My paper further contributes to this institutional discourse by arguing that Congress founded the FTC to be the primary antitrust decision maker, yet courts have failed to yield to Congressional desires and the FTC's antitrust expertise. Paradoxically, the judiciary has recognized their institutional foibles as antitrust has grown more complex, while at the same time neglecting to yield to FTC decision-making. I argue that the FTC should assert, and courts should grant, Chevron deference to protect FTC expert decisions from judicial meddling and to ultimately establish the technocratic institutional structure that Congress sought in 1914.

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I. Introduction

The Federal Trade Commission ("FTC") turns 100 years old this year, prompting reflection on its founding principles. Why was the Federal Trade Commission created? What was the Federal Trade Commission's institutional role? What should be the Federal Trade Commission's institutional role?

As it turns out, the answers to these questions are not so simple. The FTC was founded to rein in judicial decision-making and place the expert decisions with the experts. However, the FTC does not serve the institutional role that Congress sought in 1914. One Senator sought "an administrative body of practical men thoroughly informed in regard to business, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations." This Senator's charge, and the charge of his fellow Congressman, has not been heeded.

Courts have acted contrary to congressional desires and not deferred to the independent expert body tasked with preventing unfair competition, the FTC. This is particularly troubling today, as modern antitrust economics have made courts increasingly less able to make normatively appropriate decisions. Courts themselves have recognized this, erecting procedural and substantive barriers to protect themselves from disturbing the market status quo. Yet, at the same time, they have chosen not to defer to the FTC, the expert body tasked with regulating the market. Courts have usurped agency decision-making power with occasionally questionable results. The FTC should assert, and courts should grant, Chevron deference when the FTC makes antitrust legal decisions in order to mitigate judicial error and protect FTC expert decisions from the generalist judiciary's institutional shortcomings.

Part II of this paper addresses the FTC's founding principles and agency structure. Part III highlights the complexity of antitrust cases and how courts have used Chevron to respect agency expertise and agency policymaking. Part IV discusses two FTC cases that may have
benefitted from judicial deference, as well as two cases that illustrate the possibility of applying *Chevron* deference in the antitrust context. Finally, Part V dismisses the primary counterargument to *Chevron*’s application and points to two reforms that may encourage the judiciary to heed to FTC decision-making. Indeed, letting the experts make the expert decisions is all the more important as the economy becomes ever more technical. As William Kovacic has put it, “one cannot deliver broadband-quality policy outcomes through dial-up institutions.”

II. THE FTC ACT AND THE FTC’S FOUNDATIONS

Twenty-four years after the Sherman Act was passed in 1890, Congress acted to correct the haphazard way that antitrust law was being enforced and created the FTC. Congress found judges insufficient as both experts and as policy makers. Legislators created an administrative agency that has grown to include rulemaking authority and a mature technocratic structure.

A. *FTC* Founding Principles

In 1911, one Senator remarked before the Senate that “trusts are more powerful to-day than when the antitrust act was passed, and that evils have grown [] so interwoven with the general business of the country as to make men tremble at the consequence of their disruption.” The Sherman Act had failed to free the market and some lawmakers found the problem to be institutional. Legislators were concerned that “the opinion of any given man in any given case . . . whether he be judge or not, must depend largely, not upon his learning in the law but upon his training and bent in the economy of commerce.”

A commission of “trained, skillful, men” was needed for

7. See id.
11. See id.
12. See id. at 3731.
"the better administration of the law and to aid in its enforcement." Enforcing the Sherman Act required more than general knowledge.

Antitrust's expertise problem was further compounded by legal ambiguities that gave an unmoored judiciary free rein to determine economic policy. The Sherman Act § 1 prohibited "[e]very contract, combination . . . or conspiracy in restraint of trade." Read literally, the statute's sweeping language could prohibit fundamental business relationships and the establishment of business hours. But the Supreme Court found in Sinclair Oil that Congress could not have intended such a result and read a reasonableness exemption into § 1. While this was no doubt the correct result, what restraints were reasonable and what restraints were not?

The rule of reason left the antitrust landscape uncertain. Worse in Congressional eyes, unaccountable courts were wielding an ambiguous reasonableness standard to determine antitrust legality. Courts were "employ[ing] the functions of the legislator rather than the lawyer." Whenever the rule of reason was "invoked, the court d[id] not administer the law, but ma[de] the law." Courts not versed in commerce's niceties were left to make policy decisions based on their own political bent.

B. FTC Powers and Structure

Thus, the need for an independent expert agency forced Congressional hands. Congress and President Woodrow Wilson took action in 1914 to pass the Federal Trade Commission Act and establish the Federal Trade Commission. Today, the Act empowers the Commission to prohibit "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices." The FTC Act's broad lan-

13. See id. at 3737.
14. See id. at 3735–37.
15. Cummins Report, supra note 8, at 3731.
17. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).
18. 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 302 (3d. ed. 2007) (quoting Robert E. Cushman, The Problem of the Independent Regulatory Commissions, in REPORT OF UNITED STATES PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 205, 211 (1937)).
19. Id.
21. Id. at 3731.
22. Id. at 3736.
23. 15 U.S.C. § 45 (2006). As originally passed in 1914, § 5 would condemn only "unfair methods of competition." Section 5 was amended in 1938 to include "unfair or deceptive acts or practices in commerce," partly to no longer require injury to a competitor as a prerequisite to
guage permits the FTC to enforce the Sherman Act and condemn "conduct that violates 'the spirit' of the Sherman [Act] . . . and even conduct that is otherwise 'unfair.'" 24

The FTC may enforce the FTC Act through informal adjudication, formal adjudication, and rulemaking.25 Informally the FTC may conduct investigations, issue guidance, and establish consent order agreements.26 Consent order agreements have become a favored tool for resolution as they shorten disputes and correct market inefficiencies in a speedy manner.27 If an FTC Act offender does not agree to a consent order in the public interest, the Commission may institute formal adjudicative proceedings.28 In formal adjudicative proceedings, an Administrative Law Judge ("ALJ") will make findings of fact and conclusions of law like a trial court.29 The ALJ's determinations are then automatically reviewed by the Commission as a whole.30 The Commission may approve, modify, or rescind any order.31 The Commission's findings of fact and conclusions of law are reviewable by a Federal Court of Appeals.32

The FTC also has rulemaking authority under 15 U.S.C. § 46(g).33 Initially there was some doubt whether the FTC Act granted the FTC rulemaking authority as to unfair or deceptive acts or practices and unfair competition.34 Today, the Commission has explicit statutory rulemaking authority with regard to unfair or deceptive acts or practices and must follow the procedures spelled out in the Federal Trade Commission Improvement Act of 1975 ("Improvement Act").35 While the Improvement Act did not address unfair competition rules or antitrust rules, it did note that the stipulated procedures for unfair or deceptive acts or practices rules "shall not affect any authority of

24. AREEDA & HOVENKAMP, supra note 18, ¶ 302b; see also FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 (1972) (noting that § 5 may be used to condemn a practice that is unfair yet neither a violation of the antitrust laws nor deceptive).
25. AREEDA & HOVENKAMP, supra note 18, ¶¶ 302d, 302g.
26. KINTNER & KRATZKE, supra note 23, §§ 45.46–49.
27. See id.
28. Id. § 45.49.
29. AREEDA & HOVENKAMP, supra note 18, ¶ 302b.
30. Id. ¶ 302e.
31. Id.
34. KINTNER & KRATZKE, supra note 23, ¶ 43.24.
35. Id.
the Commission to prescribe rules (including interpretive rules) and general statements of policy, with respect to unfair methods of competition in or affecting commerce." This suggests that the Commission has the authority to pass antitrust rules and is consistent with a 1973 D.C. Circuit opinion that found the agency to have such authority, as well as other courts finding rulemaking authority in ambiguous regulatory statutes. In fact, the Commission did enact one antitrust rule in 1968, regarding discriminatory practices in men's tailored clothing, and "has considered promulgating [other] antitrust rules from time to time, but has never followed through." Thus, the Commission likely has both unfair or deceptive acts or practices rulemaking authority and unfair competition rulemaking authority.

The FTC Act also established five commissioners who are "appointed by the President, by and with the advice and consent of the Senate." The commissioners must maintain some political balance as no more than three of the five commissioners may be from the same political party. A Commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." Commissioners may not be removed for political disagreement or any other reason. Each commissioner currently serves for a period of seven years.

The FTC Commissioners supervise a mature organizational structure including competition lawyers, economists, and administrative law judges. The FTC's Bureau of Competition is the FTC's legal
core of antitrust enforcement. The Bureau of Competition houses experienced antitrust litigators and investigators in the areas of mergers, competition policy, healthcare competition, anticompetitive practices, and compliance. Drawing on their specialized experience, the Bureau of Competition’s lawyers diligently “work . . . to preserve the free market system and assure the unfettered operation of the forces of supply and demand.”

The Bureau of Economics is the Commission’s quantitative arm. Roughly seventy Ph.D. level economists assist the Commission, the Bureau of Competition, and other departments in economic and statistical matters related to the FTC’s enforcement activities. The Bureau of Economics helps to provide “an understanding of the actual or probable effects of past or prospective government actions, as well as an understanding of the industries or markets affected by such actions.” The agency’s economists issue internal memos assessing both factual questions and legal doctrine to better advise the agency in proper market functioning.

In sum, the FTC was born of institutional concerns. Displeased with the Sherman Act’s enforcement in the courts, Congress sought the help of an independent market expert. Congress passed the FTC Act, ultimately giving the FTC broad administrative powers and structuring the FTC to maximize agency expertise. In the words of Senator Newlands in 1914:

It is expected that the [FTC] will be composed not only of eminent lawyers but of eminent economists, businessmen of large experience, and publicists, and that their knowledge and information and experience will be of such a varied nature as to make them more competent to deal with the practical question of the dissolution of these combinations than any court or Attorney General could be.

III. ANTITRUST ECONOMICS AND JUDICIAL INCOMPETENCY

Despite Congress’s desire to remove antitrust decisions from judicial hands, judges have again usurped antitrust authority and ultimately neutered a potentially competent antitrust regime. Antitrust is
complicated. Although antitrust has always been grounded in economic theory, antitrust has seen a dramatic ideological shift "from a debate about political economy to one about economic theory." But the complex and sometimes ambiguous analytical tools of contemporary economic theory have made generalist judges poor institutional decision makers. Judges themselves have recognized their incapacity and erected heavy procedural barriers in antitrust cases to limit generalist judge's false positives; yet, judges have refused to defer to agency antitrust experts. Courts have failed to give the FTC Chevron deference in antitrust cases despite contemporary antitrust's expert focus.

A. Antitrust Economics and Complexity

The noneconomic ideological themes of "tyranny," 'autonomy,' and 'freedom' that drove antitrust's early years better lent antitrust to judicial decision-making. Rather than having to choose between opposing, sophisticated, economic arguments, judges could rely on squishy populist notions to tip their decision. Since antitrust's founding "these themes . . . have found expression in antitrust decisions." Courts have referred to the Sherman Act as the "Magna Carta of free enterprise," and as important to "providing an environment conducive to the preservation of our democratic[,] political and social institutions." In Appalachian Coal, Inc. v. United States, a case widely thought to have prioritized political considerations over economic analysis, the court referred to the Sherman Act as a "charter of freedom."

This is not to say that economics did not play a role in early antitrust decision-making. Economics has always been part of antitrust law. Neoclassical economics heavily influenced early interpretations of the Sherman Act, and New Deal economics reframed antitrust dis-

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56. See e.g. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007); Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010).
57. GAVIL ET AL., supra note 54, at 64.
60. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933); see also HOVENKAMP, supra note 55, § 5.2a.
61. GAVIL ET AL., supra note 54, at 65.
62. Id.
course in the 1930s. Yet, "[c]asual observation of business behavior, colorful characterizations . . ., eclectic forays into sociology and psychology, descriptive statistics, and verification by plausibility took the place of the careful definitions and parsimonious logical structure of economic theory." "[B]y the 1950's, more defined schools of economic thought began to exert increasing influence on antitrust enforcers and lawyers." Economists began to have a more prominent role in shaping antitrust law.

The Chicago School and the subsequent antitrust schools of thought have eroded antitrust analysis's noneconomic, populist considerations in favor of more rigorous economic considerations. The Chicago School's triumph represented the increasing view that economic efficiency should be the exclusive goal of antitrust law. The previous school's "eclectic forays" gave way to price theory, merger review, and rigorous cost-benefit analysis. The Harvard School and post-Chicago School added pragmatic considerations to the Chicago School's analysis, as well as game theory and strategic modeling. Contemporary antitrust analysis, while valid, has grown "more complex and more ambiguous than Chicago orthodoxy."

Courts are ill-equipped to sort through contemporary antitrust complexities. Generalist judges cannot be expected to understand, much less sort through, the subtleties of economic theories and the assumptions they are based on. In a bench trial, a judge will have to make a binary legality determination without fully grasping the economics. One White House advisor noted in 2007 that very few candidates for judicial selection have a "background in antitrust . . . [and the candidates are] particularly daunted by the economics." Furthermore, as technology companies come under increasing antitrust scrutiny, judges will be even less equipped to understand complex technological products, dynamic markets, and claimed exclusionary conduct.

63. Hovenkamp, supra note 55, § 2.2a.
65. Gavil et al., supra note 54, at 65
66. Id.
67. Hovenkamp, supra note 55, § 2.2b.
68. Posner, supra note 64, at 929; Hovenkamp, supra note 55, at 60–63.
69. Gavil et al., supra note 54, at 66–69.
70. Hovenkamp, supra note 55, § 2.2e.
71. Haw, supra note 2, at 1263.
72. See Crane, supra note 2, at 3, 97.
Contemporary antitrust litigation almost always requires expert economic testimony "on market definition, market structure, market power, the competitive significance of business conduct, antitrust injury, and damages."74 Entire books have been dedicated to selecting and preparing economists for antitrust litigation.75 Statistical methodologies, like regression analysis, may be key to an antitrust case. However, statistical methodologies are often based on hidden assumptions, "draw[ ] conclusions much stronger than the data permit[,]" or ignore other causes.76 The adversarial process may draw these flaws out, and it may not. For example, in an antitrust damages assessment, the Sixth Circuit failed to fault an expert that used inappropriate statistical methods and developed a "damage estimate [that] was not robust to different econometric specifications or to the elimination of outliers."77 And in another case, a court of appeals improperly vindicated an expert's use of net rather than gross profits, which might have reduced the damage estimate by half.78 Moreover, even if the adversarial process brings flaws in expert testimony to light, the judge is still tasked with assessing the flaw's legal salience.

B. Courts Appreciate Their Antitrust Aptitude

Judges themselves seem to have recognized the limits of their antitrust knowledge. They have erected procedural barriers and placed substantive burdens on antitrust plaintiffs to protect themselves from false positive antitrust rulings.79

For many years, courts used procedural devices sparingly to dismiss antitrust cases.80 In the 1962 case of Poller v. Columbia Broadcasting, Inc., the Supreme Court emphasized that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."81 But, as

74. See 2A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 399 (3d. ed. 2007).
77. Areeda & Hovenkamp, supra note 74, ¶ 399c (discussing Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002)).
78. Id. ¶ 399c2 (discussing PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 Fed. Appx. 464 (5th Cir. 2006)). The defendant was later found not liable on unrelated legal grounds.
79. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); Allied Ortho-
80. Gavil et al., supra note 54, at 279.
the Chicago School took hold, there was an increasing recognition of
the judiciary's limitations. In *Matsushita Electric Industry Co. v.
Zenith Radio Corp.*, the Supreme Court found that "antitrust law lim-
its the range of permissible inferences from ambiguous evidence in a
§ 1 case." To survive a motion for summary judgment or for a di-
rected verdict, a plaintiff seeking damages for a violation of § 1 must
present evidence 'that tends to exclude the possibility' that the alleged
conspirators acted independently." Similarly, the Supreme Court
placed heightened procedural standards on antitrust plaintiffs in the
2007 *Bell Atlantic Corp. v. Twombly* case. The court overruled de-
cades of precedent interpreting Federal Rule of Civil Procedure
8(a)(2) to merely require notice pleading. Prior to *Twombly*, one
could make "an allegation of parallel conduct and a bare assertion of
conspiracy," but that will no longer suffice. Plaintiffs have to
"nudge[ ] their claims across the line from conceivable to plausible,
[or] their complaint must be dismissed." Although the aforementioned heightened procedural standards
could be part of a general hostility to plaintiffs in business litigation,
they are consistent with the "contracted liability norms" that have
stemmed from antitrust's "substantive and institutionalist con-
cerns." For example, in a 2010 Ninth Circuit product design case, Tyco ac-
cused a healthcare appliance manufacturer of purposefully designing
its appliances to be incompatible with Tyco's sensors "forcing custom-
ers and OEMs to adopt the [manufacturer's sensors] by discontinuing
[Tyco's sensors] and implementing other exclusionary business prac-
tices." The court noted that "changes in product design are not im-
une from antitrust scrutiny and in certain cases may constitute an
unlawful means of maintaining monopoly under Section 2." But
product design changes that have a predatory result do not establish
liability so long as the plaintiff can show that the product was an im-
provement and that there was no accompanying antitrust violation.
"There is no room in [the product design] analysis for balancing the

82. *Crane*, supra note 2, at 59.
84. *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).
88. *Id.* at 570.
89. *Crane*, supra note 2, at 61.
90. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998 (9th
Cir. 2010).
91. *Id.*
92. *Id.* at 1000.
benefits or worth of a product improvement against its anticompetitive effects.”

Courts are ill-equipped “[t]o weigh the benefits of an improved product design against the resulting injuries to competitors . . . [as t]here are no criteria that courts can use to calculate the ‘right’ amount of innovation.”

Narrow liability rules can also be seen in the predatory pricing area. Wary of the adjudicative system’s ability to make antitrust decisions, Judge Breyer, sitting on the Court of Appeals, neglected to adopt a predatory pricing test that would find a Sherman Act § 2 violation when the defendant’s prices exceeded “both ‘average cost’ and ‘incremental cost.’” Judge Breyer found that while such a broad rule may better “embody every economic complexity and qualification [it] may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.”

Law, “unlike economics, . . . is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients.” Courts must “take account of the institutional fact that antitrust rules are court-administered rules.”

C. Chevron’s Possibilities

Despite the Chicago School and post-Chicago School’s emphasis on economic theory, a corresponding recognition of the judiciary’s limited ability to assess complex antitrust arguments, and the limitations the judiciary has placed on its own discretion in antitrust matters, the judiciary has neglected to defer to the agency created in 1914 to confine judicial decision making and address antitrust’s fomenting economic complexities: the FTC. The Supreme Court’s watershed decision in Chevron, U.S.A., Inc., v. NRDC held that deference should be given to agency interpretations of the statutes that agencies administer when the statute is ambiguous and the statutory interpretation is reasonable. Nevertheless, the FTC has not received Chevron defer-
The FTC's statutory interpretations have been wrongly ignored in a number of cases, though some cases seem to acknowledge that *Chevron* deference may be possible in the antitrust context. The *Chevron* case concerned environmental regulation; a similarly complicated regulatory area. The Clean Air Act required States that had not met proscribed air quality standards to implement "a permit program regulating 'new or modified major stationary sources' of air pollution." As part of this implementation, the Environmental Protection Agency ("EPA") defined "stationary source" expansively to allow "an existing plant that contains several pollution-emitting devices [to] install or modify one piece of equipment without meeting the permit conditions if the alteration would not increase the total emissions from the plant." The National Resource Defense Council (NRDC) challenged this definition, arguing that such a broad definition of "stationary source" was not permissible under the Clean Air Act.

Notwithstanding the NRDC's arguments, the Supreme Court deferred to the EPA's statutory construction, explicitly carving out a schema of judicial deference to agency decisions. "First, always, is the question whether Congress has directly spoken to the precise question at issue." When Congressional intent is clear, the court and the agency must abide by Congressional wishes. But, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." The agency, not the court, is to resolve statutory ambiguity as Congress has "left a gap for the agency to fill."

The *Chevron* court properly recognized that the EPA's "regulatory scheme is technical and complex, [that] the agency considered the matter in a detailed and reasoned fashion, and [that] the decision in-

100. See e.g. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1067 (11th Cir. 2005).
101. *Id.* at 840.
102. *Id.* at 840, 860–61.
103. *Id.* at 837, 843–44.
104. *Id.*
105. *Id.* at 842.
106. *Id.* at 1141 n.9 (D. Idaho 2011).
volve[d] reconciling conflicting policies.\footnote{110}{See id. at 865.} Congress may have meant for the agency to bring its expertise to bear on competing policy concerns; may have not considered the specific policy question at issue; or may have been "unable to forge a coalition on either side of the question."\footnote{111}{Id. at 865--66.} But this is irrelevant for judicial purposes.\footnote{112}{Chevron, 467 U.S. at 865.} "Judges are not experts in the field, and are not part of either political branch of the Government. . . . [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."\footnote{113}{Id. at 865--66.}

IV. \textit{Chevron}, Unapplied

The FTC, an independent agency, has invoked the \textit{Chevron} doctrine at least one time.\footnote{114}{See Cal. Dental Ass'n v. FTC, 526 U.S. 756, 765--66 (1999).} When it did, as discussed below, the Supreme Court neglected to acknowledge the FTC's interpretive power and ultimately ruled against the FTC's substantive antitrust interpretation.\footnote{115}{Id. at 765--66.} This is consistent with the judicial respect for the FTC's expertise generally and has led to questionable antitrust decisions in some cases.\footnote{116}{See id. at 767 n.6; Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1067 (11th Cir. 2005).} However, at least two courts have acknowledged the possibility of \textit{Chevron} deference to agency antitrust decisions, proffering an alternative to the antitrust institutional status quo.\footnote{117}{See Mich. Citizens for an Indep. Press v. Thornburgh, 868 F.2d at 1285, 1291 (D.C. Cir. 1989); \textit{In re Fresh & Process Potatoes Antitrust Litig.}, 834 F. Supp. 2d 1141, 1155 n.9 (D. Idaho 2001).}

In \textit{California Dental Association v. FTC}, the FTC invoked the \textit{Chevron} doctrine when the defendant challenged the FTC's jurisdiction.\footnote{118}{Cal. Dental, 526 U.S. at 765--66.} Enforcing the Sherman Act through \S \textit{5} of the FTC Act, the FTC brought suit against the California Dental Association (the "Association"), a nonprofit professional association, for establishing advertising restrictions that restrained trade.\footnote{119}{Id. at 760.} The dentists who belonged to the Association agreed to adhere to a Code of Ethics as part of their membership.\footnote{120}{Id. at 762.} The Code of Ethics, on its face, restricted members from advertising in a false or misleading manner, advertising in a way that detracted from the dental profession generally, and advertising in a way that misrepresented the quality of dental
services provided.\textsuperscript{121} Members who violated the Association’s regulations were subject to “censure, suspension, or expulsion from the [Association].”\textsuperscript{122}

The Federal Trade Commission accused the Association of using the restrictions “so as to restrict truthful, nondeceptive advertising.”\textsuperscript{123} According to the FTC, the Association “unreasonably prevented members and potential members from using truthful, nondeceptive advertising, all to the detriment of both dentists and consumers of dental services.”\textsuperscript{124} The advertising restrictions prevented the dentists from effectively competing on terms of price or quality.\textsuperscript{125} The Commission found the Association’s restrictions on advertising to be per se illegal or, in the alternative, to be illegal under a quick-look analysis.\textsuperscript{126} The Association appealed, challenging both the FTC’s jurisdiction over nonprofit entities and the FTC’s legal analysis.\textsuperscript{127}

When the case came before the Supreme Court, the FTC invoked \textit{Chevron} deference to protect its jurisdiction over the nonprofit Association.\textsuperscript{128} Under the FTC Act, the FTC has authority over “corporations,” defined as “any company . . . or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest . . . which is organized to carry on business for its own profit or that of its members.”\textsuperscript{129} While one could interpret “business for its own profit or that of its members” to not include nonprofit entities, the court did not think so.\textsuperscript{130} The FTC had jurisdiction over the Association, as this was “clearly the better reading of the statute under ordinary principles of construction.”\textsuperscript{131} Rather than providing the FTC with interpretive power, the Court parsed the statute’s language and legislative history itself.\textsuperscript{132} The Supreme Court was almost hostile to the FTC’s attempt to assert \textit{Chevron} deference over the FTC’s own antitrust jurisdiction.\textsuperscript{133}

But the FTC fared much worse on \textit{California Dental Association’s} substantive side: the FTC neglected to assert \textit{Chevron} deference over

\begin{footnotesize}
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 762.
\textsuperscript{123} \textit{Cal. Dental}, 526 U.S. at 762.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 762-63.
\textsuperscript{127} Id. at 763.
\textsuperscript{128} \textit{Cal. Dental}, 526 U.S. at 765.
\textsuperscript{130} \textit{Cal. Dental}, 526 U.S. at 766.
\textsuperscript{131} See id.
\textsuperscript{132} See id. at 766-69.
\textsuperscript{133} See id.
\end{footnotesize}
its interpretation of § 5 of the FTC Act and the Court let its own economic analysis be its guide. The FTC Act's prohibition of unfair competition and unfair acts or practices is obviously ambiguous and requires a policy judgment. The FTC exercised its expertise to find that the Association's advertising restrictions were either illegal per se or illegal "under an abbreviated, or 'quick-look,' rule of reason analysis." The FTC Chairman who authored the FTC's opinion, Chairman Pitofsky, was insistent "on making a clear distinction between per se rules and rule of reason analysis." A longtime antitrust academic and practitioner, Chairman Pitofsky was worried about per se's "doctrinal erosion" and its accompanying uncertainty and increased litigation costs.

The Supreme Court, however, found the FTC's abbreviated analyses insufficient. The Court was uncomfortable with the FTC's abbreviated choice of legal analysis preferring to demand its own. Nevermind the FTC's expertise and that "[a] large body of empirical work examining . . . the effects of restraints on advertising and other practices in various professions, leaves no real doubt that such restraints are anticompetitive." The Court paid no heed to the FTC's expert role, ordering an "enquiry meet for the case."

Ultimately, the point is twofold: (1) there is some doubt as to whether California Dental Association was appropriately decided, and (2) the Supreme Court should not have been deciding a matter within the FTC's expert wheelhouse. A similar conclusion can be made regarding the Eleventh Circuit's treatment of the FTC in Schering-Plough Corp. v. FTC. In Schering-Plough, the FTC brought suit against Schering-Plough ("Schering"), a pharmaceutical manufacturer, for paying two generic pharmaceutical manufacturers to delay the introduction of generic equivalents to Schering's patented potas-

134. See id. at 759.
136. See Cal. Dental, 526 U.S. at 763.
138. Id. at 1034–35.
139. See Cal. Dental, 526 U.S. at 759.
140. See id.
142. See Cal. Dental, 526 U.S. at 781.
143. See id.; Kwoka, supra note 141, at 1011.
144. See Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1067 (11th Cir. 2005).
sium chloride supplement.\textsuperscript{145} Schering paid one generic manufacturer sixty million dollars and another manufacturer thirty million dollars to refrain from entering the market.

The FTC Commissioners found Schering's payments to be in violation of § 5 of the FTC Act, as they were "veiled attempts to disguise a quid pro quo arrangement aimed at preserving Schering's monopoly in the potassium chloride supplement market."\textsuperscript{146} The Commission had been studying drug company settlements since the mid-1990s and "performing empirical research on the entry of generics and monitoring settlement developments."\textsuperscript{147} After analyzing the industry, and Schering's settlements, the Commission placed a two million dollar limit on reverse settlement agreements, "announc[ing] a bright-line rule that was meant to apply generally to the pharmaceutical industry."\textsuperscript{148}

While the FTC may not have invoked \textit{Chevron}, the Eleventh Circuit did not hesitate to overrule the FTC's interpretation of the FTC Act and bright-line policy pronouncement.\textsuperscript{149} The court disagreed with the Commission's "interpretation of the evidence bearing upon the motive for Schering's decision to pay two generic entrants . . . to delay the introduction of generic equivalents . . . [and] rebuked the agency for not adhering to the analytical approach and policy perspective that the Eleventh Circuit had endorsed" in another case.\textsuperscript{150}

The court's criticism of the FTC's bright-line rule and finding of liability was misplaced.\textsuperscript{151} First, the court's analysis overlooked the fact that "a larger payment suggests a more socially costly outcome—namely, preserving the exclusion power of the patent . . . [and] [t]he result is to deny the public the benefits of competition that it could otherwise obtain."\textsuperscript{152} It is unlikely that Schering had another motive for the payment, and the Commission's forty pages of fact finding support the FTC's two million dollar rule.\textsuperscript{153} Second, the FTC's analytical framework was "much more sensitive to the administrative difficulties and anticompetitive threats presented by [reverse pay-}

\textsuperscript{145} \textit{Id.} at 1058.
\textsuperscript{146} \textit{See id.} at 1068.
\textsuperscript{147} \textit{Gavil et al.}, \textit{supra} note 54, at 1247–48.
\textsuperscript{148} \textit{Crane}, \textit{supra} note 2, at 143; \textit{see Schering-Plough}, 402 F.3d at 1062.
\textsuperscript{149} \textit{See Schering-Plough}, 402 F.3d at 1076.
\textsuperscript{150} \textit{Gavil et al.}, \textit{supra} note 54, at 1247.
\textsuperscript{152} Hovenkamp, \textit{supra} note 151, at 26.
\textsuperscript{153} \textit{See id.; Gavil et al.}, \textit{supra} note 54, at 1247.
The Eleventh Circuit’s focus on circumstantial evidence was misplaced given the multitude of uncertainties related to the patent’s validity, the “anticipated future profits, the risk of the defendants’ inability to satisfy a judgment, [and] anticipated litigation costs.” The direct evidence of the payment size and the defendant’s own estimate of the “anticipated loss of huge sales as a consequence of generic entry” were sufficiently probing in this uncertain context to shift the burden to the “respondent to come forward with a procompetitive justification for the payment.”

Again, there are two points here: (1) the Eleventh Circuit likely got Schering-Plough wrong, and (2) the court should have given the FTC Chevron deference. Schering-Plough—an antitrust case at the intersection of complex pharmaceutical and intellectual property markets—exemplifies the need to defer to an agency whose sole purpose is to regulate markets. Courts are ill-equipped to make expert judgments, and when they do, they often cross the line into policy making. This raises the same democratic concerns that animated the FTC’s creation.

Putting aside California Dental Association and Schering-Plough’s missteps, at least two courts have acknowledged the possibility of giving Chevron deference to agency statutory interpretations in the antitrust realm. In In re Fresh & Process Potatoes, the court acknowledged that the FTC should receive Chevron deference when antitrust laws are ambiguous and the agency’s interpretation is reasonable. Given that the Fresh & Process case was between private litigants, the court had to resolve the case by determining the statute’s meaning. But in interpreting the statute, the court acknowledged that “to the degree there is ambiguity in the statute on [the exemption issue], agencies with jurisdiction over the statute are typically entitled to Chevron deference.” As the FTC is one of the primary agencies

155. Id. at 29.
156. Id. at 30.
157. See Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1062 (11th Cir. 2005); Crane, supra note 2, at 143; Hovenkamp, supra note 151, at 26.
158. See Schering-Plough, 402 F.3d at 1062–66.
159. See id.
160. See Cummins Report, supra note 8, at 3737.
163. See id.
164. Id.
"responsible for enforcing the antitrust laws" the agency's interpretation should be given weight.165

The court in *Michigan Citizens for an Independent Press v. Thornburg* gave *Chevron* deference to the Attorney General's interpretation of the Newspaper Preservation Act's joint operating agreement exemption to antitrust law.166 The dispute centered on the Attorney General's interpretation of whether one of the parties entering into the joint operating agreement was "in probable danger of financial failure."167 But the court refused to interject its own interpretation, respecting the Attorney General's economic assessment of whether the parties legally met the probable danger standard as a matter of law. The court found that "[t]he Attorney General's interpretation of the probable danger of financial failure test draws content from" the case's economic facts and that the Attorney General's interpretation was reasonable.168 The Attorney General used his expertise, and it was not the court's job to second-guess the Attorney General's decision.169

V. INSTITUTIONAL SOLUTIONS

By now the point should be clear: Antitrust's decision-making locus needs to move from generalist Article III courts to the expert FTC in order to satisfy Congress's original desires and to place the expert decisions with the experts. The aforementioned cases should suggest that courts are less capable than the FTC to handle complex antitrust doctrine, and *Chevron* can be applied in the antitrust context.170 Some have argued that limited agency oversight reduces accountability and is antidemocratic; but this ignores the realities of antitrust decision-making in an increasingly complex world. Going forward, the FTC may be more likely to receive *Chevron* deference if the agency undertakes two reforms.171 The FTC should gradually use its "norm-creation" ability to encourage courts to grant the agency *Chevron* deference.172 Additionally, the agency's expertise is not perfect.173 The

165. *Id.*
167. *Id.* at 1291.
168. *Id.* at 1291–94.
169. *See id.* at 1293.
171. *See Crane*, supra note 2, at 142.
173. *See Kovacic*, supra note 9, at 950.
agency needs to augment its expertise in key areas in order to keep up with complex markets.\textsuperscript{174} Doing so would strengthen the case for \textit{Chevron} deference and help to outweigh the counterarguments to greater FTC decision-making authority.

The primary counterargument to granting the FTC \textit{Chevron} deference is common to \textit{Chevron} deference generally: By making FTC decisions subject to less judicial scrutiny, one is reducing expert accountability and eroding democracy.\textsuperscript{175} Judicial deference would nurture a technocratic state where agency decision makers bury opaque scientific decisions in mounds of incomprehensible data.\textsuperscript{176} Judicial review fosters accountability by unearthing improper economic decisions, translating obscure agency decisions for mass consumption, and tying agency decisions to congressional or popular desires.\textsuperscript{177}

But the judiciary's ability to discover normatively inappropriate FTC legal decisions is overestimated. Disregarding transaction costs, an additional layer of review could be beneficial. However, a generalist judge reviewing highly technocratic rulings only adds another chance for mistakes. This is not to say that the FTC does not make mistakes. The FTC certainly has expertise deficiencies, which are addressed below. Rather, the benefits conferred by discerned improper decisions are minimal relative to the costs of incorrectly overturned decisions. Furthermore, while some have argued that courts foster accountability by translating agency decisions,\textsuperscript{178} this presumes that judicial translations are correct. Courts may actually cloud or misrepresent agency decisions.

Even if the judiciary could unearth improper FTC decisions, would greater deference to FTC decision making risk accountability? Perhaps not: One study has found that FTC enforcement actions are highly correlated with the preferences of FTC congressional oversight


\textsuperscript{175} Emily Hammond Meazell, \textit{Super Deference, The Science Obsession, and Judicial Review as Translation of Agency Science}, 109 Mich. L. Rev. 733, 735 (2011) ("As noted by scholars in other contexts, extraordinary deference as a general matter stands in tension with the expectation that courts must reinforce administrative-law values like participation, transparency, and deliberation."). In addition to the two counterarguments discussed here, some have pointed out that giving the FTC \textit{Chevron} deference would upset the current antitrust dual enforcement regime. To resolve this, Professor Crane has argued for unifying the DOJ and FTC's antitrust enforcement under one agency, or at least making FTC rulemaking binding on DOJ enforcement actions. Crane, \textit{supra} note 172, at 1209-10.

\textsuperscript{176} Meazall, \textit{supra} note 175, at 750–56.

\textsuperscript{177} \textit{Id.} at 735.

\textsuperscript{178} \textit{Id.} at 778.
committees.179 Assuming a causal relationship, this suggests that the 
FTC is quite accountable to congressional desires under the current 
system, perhaps acknowledging the true nature of scientific poli-
cymaking.180 Ambiguities and uncertainties must always be resolved 
by some degree of political choice.181 Who should ultimately make 
the decision, courts or the FTC, is a relative question. The court in 
Schering-Plough itself noted, "[o]ur conclusion, to a degree, and we 
hope the FTC is mindful of this, reflects policy."182 But unaccounta-
ble federal courts are the least appropriate venue for policy making.183 
Both courts and the FTC have political dispositions, but only the FTC 
can bring expertise to bear on scientific questions.

Putting counterarguments aside, the FTC can do at least two things 
to fortify its expertise and encourage Chevron deference to agency 
antitrust decisions. First, the FTC will be more likely to receive Chev-
ron deference if it frames its decisions as legal rules.184 Legal rules, 
unlike factual findings, should be entitled to Chevron deference.185 
Economic conclusions may even be entitled to Chevron deference, but 
cases conflict on this issue.186 The FTC can frame its decisions as legal 
rules either through the agency's formal rulemaking authority or by 
announcing legal rules in formal adjudication.187 The FTC has the 
power to make antitrust rules in an informal rulemaking proceeding 
under 15 U.S.C. § 46(g).188 A court may be particularly apt to grant 
Chevron deference to an antitrust rule instituted in an informal 
rulemaking proceeding, given the thoroughness and industry partici-
pation that informal rulemaking proceedings include.189 The informal 
rulemaking process may also "help to refocus the deference question 
by highlighting the FTC's administrative (as opposed to law enforce-
ment) character and underlying...statutory rule-making powers."190

179. CRANE, supra note 2, at 35.
180. Meazall, supra note 175, at 743-44.
181. Id.
182. Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1076 (11th Cir. 2005).
184. CRANE, supra note 2, at 142.
185. See Chevron, 467 U.S. at 865; Schering-Plough, 402 F.3d at 1062; CRANE, supra note 2, at 142.
interpretations, rooted in economic analysis, and standalone economic conclusions is hard to 
parse.
187. CRANE, supra note 2, at 142.
188. For further discussion, see supra notes 39-41.
189. CRANE, supra note 2, at 142.
190. Id.
It is true that legal rules can also be announced in formal adjudication, as the agency did in \textit{Schering-Plough}. But rules announced in such settings may provide parties with less certainty, as their binding authority on future FTC decisions may be unclear. Courts may also be less likely to defer to these decisions, as agency adjudications bear more resemblance to Article III court proceedings than notice and comment rulemakings.

Some have argued that antitrust rulemaking "do[es] not lend [itself] to categorical resolution," but this may not be the case. One could establish a per se presumption against the use of trade association advertising restrictions, like those in \textit{California Dental Association}. The Commission's two million dollar limit on reverse settlement agreements in \textit{Schering-Plough} suggests another possibility. A rule could also be made to require specific cost measurements in varying predatory pricing contexts.

Second, the FTC can strengthen its case for \textit{Chevron} deference by augmenting its expertise in key areas. As discussed in section II, the FTC's several technocratic layers are superior to a single decision maker in the antitrust setting. The FTC has five expert commissioners who serve seven-year terms. Ideally these commissioners are drawn from the antitrust legal community, are economists, are experienced in business, or are some combination thereof. Working in the same area for years does help commissioners that lack these experiences to "develop an understanding of economic markets." However, learning on the job may not be sufficient. Commissioners have often been appointed "as rewards for faithful political service" without truly assessing their qualification. As William Kovacic notes in a 1997 legal article: "Virtually all appointees since the late 1960s have been bright individuals, but only a handful have been experts of truly exceptional accomplishment and stature, and only a minority have brought significant antitrust or consumer protection expertise to the FTC."

\begin{thebibliography}{99}
\bibitem{191} See \textit{Schering-Plough}, 402 F.3d at 1062; \textit{Crane}, supra note 2, at 143.
\bibitem{192} \textit{Crane}, supra note 2, at 142–43.
\bibitem{193} See Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999); Baker, supra note 137, at 1034.
\bibitem{194} See \textit{Schering-Plough}, 402 F.3d at 1062; \textit{Crane}, supra note 2, at 143; Hemphill, supra note 33, at 673.
\bibitem{195} \textit{Areeda & Hovenkamp}, supra note 18, ¶ 302h5.
\bibitem{196} Kovacic, supra note 9, at 950.
\bibitem{198} Kovacic, supra note 9, at 950.
\end{thebibliography}
the nation's preeminent competition policy institution and to persuade the courts, Congress, and other observers that its policy choices are worthy of respect."\(^{199}\)

Though not writing in the \textit{Chevron} deference context, William Kovacic's comments are quite relevant. The President and Senate must put political priorities aside when appointing commissioners if the agency is to successfully oversee the market.\(^{200}\) Fortunately, there has been some progress since William Kovacic's alarming assessment of commissioner expertise. All of the FTC's current commissioners have spent at least a decade working in antitrust for the agency, in private practice, or for a state attorney general.\(^{201}\) For example, Commissioner Brill served as an Assistant Attorney General in antitrust for the State of Vermont for over twenty years, was an associate at Paul, Weiss, Rifkind, Wharton & Garrison, and has been a Lecturer-in-Law at Columbia University's School of Law.\(^{202}\)

One of President Obama's most recent appointees, Joshua D. Wright, is the consummate antitrust expert.\(^{203}\) Commissioner Wright holds a Ph.D. in Economics and a law degree from UCLA.\(^{204}\) He has worked at the Commission in several capacities—including as its first Scholar-in-Residence—authored more than sixty articles and book chapters on antitrust law, and held a dual appointment in George Mason University's Law and Economics departments.\(^{205}\) Commissioner Wright clearly alleviates commission level expertise concerns.\(^{206}\) One hopes the recent string of quality appointments continues.

In addition to reforms at the commission level, the FTC needs to strengthen its staff's ability to assess complex technological markets and products in order to maintain its advantage over the judiciary. An agency's staff is only expert in areas it understands.\(^{207}\) All administrative agencies must "routinely . . . examine the fit between its activities

\(^{199}\) Id. at 951.
\(^{200}\) Id.
\(^{202}\) Julie Brill, supra note 201.
\(^{203}\) Joshua D. Wright, supra note 201.
\(^{204}\) Id.
\(^{205}\) Id.
\(^{206}\) See id.
Technology has rapidly changed over the last decade, and even more so in the last two or three years. The problem is not new, but the pace of change may be. Microsoft, once the target of many an antitrust suit, is currently scrambling to grapple with the decline of the personal computer industry as consumer interest in mobile devices has spiked. Social networking did not exist ten years ago, yet Facebook and Twitter may be FTC antitrust targets in the near future.

In order to protect these innovative markets, the FTC needs to be able to understand them. Technology’s constant, rapid change “complicates each major task associated with the application of the federal antitrust statutes: the measurement of market power, the assessment of competitive effects, and the formulation of remedies.” To deal with this, the agency needs to recruit “more professionals with expertise in disciplines related to high technology.” Up until the early 2000s, the FTC had only one patent attorney. Currently, the agency has roughly ten patent attorneys, but “it is apparent that the maintenance of superior human capital in this area will require continuing attention.”

In addition to adding specialty attorneys, the FTC should also consider adding computer science professionals. A monopolist’s exclusionary practices are often inherent to the product itself in Sherman Act § 2 cases. While some courts have balked at examining product design, at least a cursory probing of a product’s technological underpinnings may be necessary in some cases. Without a background in computer science, the product may be too complicated for one to assess the product’s exclusionary effects, or too complicated to assess its pro-competitive benefits.

The FTC’s recent Google antitrust investigation is illustrative. Among other practices, the Commission examined whether “Google unfairly promoted its own vertical properties through changes in its search results page,” such as using Google’s algorithm to demote com-

208. Id.
211. Id. at 1102.
212. Id.
213. Id. at 1103.
214. See Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 1000 (9th Cir. 2010).
petitors' links in search results and introducing a "Universal Search" box that pushed competitor links down the page.216 While there was no doubt that "some of Google's algorithm and design changes resulted in the demotion of websites," the critical issue was whether Google may have done so to "improve the quality of its search product and the overall user experience."217 The Commission did "conduct[ ] empirical analyses to investigate the impact of Google's design changes on search engine traffic and user click-through behavior."218 However, the opaque nature of Google's search engine, and Google's ability to manipulate consumer choice, make click-through rates an incomplete measure of product quality. They may reflect carefully manipulated behavioral desires rather than informed decisions about product quality. Thus, to better understand the relationship between the consumer and Google's search engine, one has to analyze the algorithm itself. The algorithm and the way it performs in relation to consumer inputs—both in terms of a consumer's current search and a consumer's previous search history—can help one to better discern whether Google's search engine manipulation is indeed a pro-competitive product improvement. Having staff with computer science backgrounds would make such analysis possible. It is unclear whether this analysis would have changed the Google investigation's outcome, but at the very least it would have allowed for a more developed rule of reason analysis. Adding staff versed in technology would improve the FTC's ability to analyze dynamic technological markets and allow courts to more comfortably defer to FTC decisions.

VI. Conclusion

The FTC should assert, and courts should grant, Chevron deference to protect FTC expert decisions from judicial meddling and to ultimately establish the technocratic institutional structure that Congress sought in 1914. Congress may have felt that antitrust law had reached a "technical" tipping point in 1914 when it founded the FTC to be "more competent to deal with the practical . . . dissolution of [business] combinations than any court or Attorney General could be."219 Yet contrary to Congressional desires, the judiciary has charted a path to maintain the same institutional role that it had prior to the FTC

217. Id. at 2.
218. Id. at 1.
219. Kovacic, supra note 9, at 920.
Act’s passing. It is true that courts have recognized their institutional foibles as antitrust law has grown more complex; indeed, courts have erected procedural barriers and created heightened substantive standards to protect themselves from false positive rulings. But the judiciary has yet to grant the FTC supplemental deference to protect the FTC’s role as experts and policymakers. The FTC would be more likely to receive *Chevron* deference if it used its rulemaking power and bolstered its expertise in key areas.

In closing, it seems doubtful that antitrust will get less technical, less complex, or less opaque. The economy will likely grow more specialized, and antitrust economics will require a more discerning eye. Perhaps antitrust is merely at an interim point; despite not adhering strictly to Congress’s 1914 desires, courts have gradually been moving in a technocratic direction with the modern economy. For the sake of this modern economy, one hopes the FTC will be proactive, seize on this technocratic shift, invoke *Chevron* deference, and courts will trust the FTC’s relative superiority.