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Addressing Personal Data Collection as Unfair Methods of Competition

Maurice E. Stucke

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Maurice E. Stucke[†]

ABSTRACT

Enforcers, policymakers, scholars, and the public are concerned about Google, Apple, Meta, Amazon, and Microsoft and their influence. That influence comes in part from personal data. The public sentiment is that a few companies, in possessing so much data, possess too much power. Something is amiss. Cutting across political lines, many Americans think Big Tech's economic power is a problem facing the U.S. economy. So how can one protect one's privacy in the digital economy? Over the past few decades, the Federal Trade Commission has prosecuted privacy and data protection offenses under its power to curb "unfair and deceptive acts and practices" under § 5 of the FTC Act. Some urge the agency to go further and use its authority under § 5's "unfairness" prong to promulgate a "Data Minimization Rule." While that remains an option, that rulemaking path has several limitations. Instead, this Article takes a different approach. This Article urges the FTC to challenge certain privacy-related competition concerns as "unfair methods of competition" under the FTC Act. This Article also addresses one key source of many problems in the surveillance economy—namely, behavioral advertising.

As this Article concludes, the FTC cannot repair the surveillance economy with its authority under the FTC Act. America still needs an omnibus privacy framework. But the FTC can help close the regulatory gap by exercising the authority that Congress intended it to exercise to help rein in the data-opolies.

TABLE OF CONTENTS

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I. INTRODUCTION

> Consumer privacy has become a consumer crisis.[1]

Enforcers, policymakers, scholars, and the public are all concerned about the outsized influence of Google, Apple, Facebook, Amazon, and Microsoft. That influence comes partly from their vast control over personal data.[2] These companies are "data-opolies" in that they are powerful firms that control a lot of personal data. The data comes from their vital ecosystems of interlocking online platforms and services, which attract: users; sellers; advertisers; website publishers; and software, app, and accessory developers.[3]

The public sentiment is that a few companies, in possessing so much data, have too much power. Something is amiss. In a 2020 survey, most Americans were concerned about the amount of data online platforms store about them (85%) and that platforms were collecting and holding this data about consumers to build more comprehensive consumer profiles (81%).[4]

But data is only part of the story. Data-opolies use the data to find better ways to addict us and predict and manipulate our behavior.

Cutting across political lines, many Americans (65%) think Big Tech's economic power is a problem facing the U.S. economy.[5] While much has been

1. Letter from U.S. Sen. Richard Blumenthal et al. to FTC Chair Lina Khan (Sept. 20, 2021), https://www.blumenthal.senate.gov/imo/media/doc/2021.09.20%20-%20FTC%20-%20Privacy%20Rulemaking.pdf.

2. Personal data, as used herein, means "any information relating to an identified or identifiable individual (data subject)." *See* Secretariat of the Organization for Economic Co-operation and Development (OECD), *Consumer Data Rights and Competition*, Background Note ¶ 16, DAF/COMP(2020)1 (Apr. 29, 2020), https://one.oecd.org/document/DAF/COMP(2020)1/en/pdf [hereinafter OECD Consumer Data Rights and Competition].

3. HOUSE OF COMMONS, STANDING COMM. ACCESS TO INFORMATION, PRIVACY AND ETHICS, DEMOCRACY UNDER THREAT: RISKS AND SOLUTIONS IN THE ERA OF DISINFORMATION AND DATA MONOPOLY (Dec. 2018), https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP10242267/ethirp17/ethirp17-e.pdf; Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 GEO. L. TECH. REV. 275 (2018); Maurice E. Stucke, *Here Are All the Reasons It's a Bad Idea to Let a Few Tech Companies Monopolize Our Data*, HARV. BUS. REV. (Mar. 27, 2018), https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data.

4. Press Release, Consumer Reports, Consumer Reports Survey Finds That Most Americans Support Government Regulation of Online Platforms (Sept. 24, 2020), https://advocacy.consumerreports.org/press_release/consumer-reports-survey-finds-that-most-americans-support-government-regulation-of-online-platforms/.

5. *See, e.g.*, European Commission's proposed Digital Markets Act, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en; Consumer Reports Survey, *supra* note 4 (explaining that 60% of those surveyed supported more government regulation of platforms to deal with their growing power that may be hurting competition and consumers).

written about these companies' power, less has been said about how to rein them in effectively. Contrary to some politicians' ideology,[6] market forces have not eroded their power. Several characteristics of the digital economy have led to tipping and sustained market power. These include extreme scale economies, strong network effects, data-driven advantages, lock-in effects, and high switching costs.[7]

So how can one protect one's privacy and data security in the digital economy? Many Americans (59%) support breaking up Big Tech.[8] Other jurisdictions, including Europe, call for regulating these gatekeepers.[9] Europe has a comprehensive privacy and data protection framework; the United States does not. While Congress has proposed an omnibus privacy statute,[10] none, as of late 2023, has been enacted. Europe is enacting additional measures to make the digital economy fairer and more contestable. Meanwhile, the bipartisan antitrust legislation to help rein in the data-opolies has stalled in the United States, despite John Oliver, among others, pressing the Congressional leadership to act.[11]

In the interim, the Federal Trade Commission (FTC) is relying on a 1914 statute to protect our sensitive personal information in the digital economy.[12] Over the past few decades, the FTC has prosecuted privacy and data

6. "Rather than pursue even stronger antitrust laws, Congress should allow the free market to thrive where consumers, not the government, decide how big a company should be." Ryan Tracy, *Antitrust Bill Targeting Big Tech in Limbo as Congress Prepares to Recess*, WALL ST. J. (Aug. 9, 2022), https://www.wsj.com/articles/antitrust-bill-targeting-big-tech-in-limbo-as-congress-prepares-to-recess-11659951180 (quoting Sen. Rand Paul (R., Ky.)).

7. For further analysis, see MAURICE E. STUCKE, BREAKING AWAY: HOW TO REGAIN CONTROL OVER OUR DATA, PRIVACY, AND AUTONOMY (2022); ARIEL EZRACHI & MAURICE E. STUCKE, HOW BIG-TECH BARONS SMASH INNOVATION AND HOW TO STRIKE BACK (2022); ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2016); MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY (2016); see also Regulation (EU) 2022/1925 (Digital Markets Act), 2022 O.J. (L 265), ¶¶ 2–3, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925 [hereinafter *DMA*].

8. Rani Molla, *Poll: Most Americans Want to Break Up Big Tech*, VOX (Jan. 26, 2021), https://www.vox.com/2021/1/26/22241053/antitrust-google-facebook-break-up-big-tech-monopoly.

9. *See, e.g.*, DMA, *supra* note 7.

10. *See, e.g.*, American Data Privacy and Protection Act (ADPPA), H.R. 8152, 117th Cong. (2d. Sess. 2022), https://www.govtrack.us/congress/bills/117/hr8152/text; JOHNATHAN M. GAFFNEY, ERIC N. HOLMES & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., LSB10776, OVERVIEW OF THE AMERICAN DATA PRIVACY AND PROTECTION ACT, H.R. 8152 (June 30, 2022), https://crsreports.congress.gov/product/pdf/LSBLSB10776/1 (comparing the ADPPA to other privacy bills from the 117th and 116th Congresses).

11. Tracy, *supra* note 6.

12. 15 U.S.C. § 45.

protection offenses using its power to curb "unfair and deceptive acts and practices" under § 5 of the FTC Act.[13] Some have urged the FTC to go further and use its authority under § 5's "unfairness" prong to promulgate a "Data Minimization Rule."[14] The FTC in 2023 is still exploring this option.[15] But that provision limits the FTC's authority. For example, to declare an act or practice unfair, the FTC must show that "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[16] But proving a substantial, cognizable injury to consumers can be difficult. Courts may require a showing of economic harm, which is often less relevant for privacy violations.[17] Where the plaintiff makes no claims for economic harm, they may be out of luck. The FTC would also have to show that the countervailing benefits to consumers or competition do not outweigh those injuries. Again, this can be done.[18] But one

13. *Privacy & Data Security Update*, FED. TRADE COMM'N (2015), https://www.ftc.gov/reports/privacy-data-security-update-2015.

14. CONSUMER REPORTS & ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), HOW THE FTC CAN MANDATE DATA MINIMIZATION THROUGH A SECTION 5 UNFAIRNESS RULEMAKING (2022), https://epic.org/documents/how-the-ftc-can-mandate-data-minimization-through-a-section-5-unfairness-rulemaking/ (urging the FTC "to prohibit all secondary data uses with limited exceptions, ensuring that people can safely use apps and online services without having to take additional action") [hereinafter CR/EPIC REPORT]. Consumer Reports and Epic, however, noted that "if the FTC decides it has a stronger case to justify such rules under "'unfair methods of competition,"' we would strongly support such an effort." *See also* Rebecca Kelly Slaughter, Commissioner, *IAPP Closing Keynote 2021: Wait but Why? Rethinking Assumptions About Surveillance Advertising*, FED. TRADE COMM'N, (Oct. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597998/iapp_psr_2021_102221_final2.pdf.

15. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (proposed Aug. 22, 2022).

16. FTC Act Amendments of 1994, Pub. L. No. 103–312, § 9, 108 Stat. 1691, 1695 (1994).

17. For example, an airline pilot claimed that the federal government violated the Privacy Act in unlawfully disclosing his confidential medical records, including his HIV status, which caused him "humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress." F.A.A. v. Cooper, 566 U.S. 284, 289 (2012). The district judge found that "emotional injury" alone did not qualify and dismissed the lawsuit, which the Supreme Court affirmed. Because the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress, the federal statute does not waive the Federal Government's sovereign immunity from liability for such harms. Thus, as the dissent noted, individuals can no longer recover under the Privacy Act the primary, and often only, damages sustained because of an invasion of privacy, namely mental or emotional distress.

18. *See* STUCKE, *supra* note 7, at chapters 4 & 10; EZRACHI & STUCKE, *supra* note 7, at 101–39; Finn Myrsted & Oyvind H. Kaldestad, *International Coalition Calls for Action Against Surveillance Based Advertising*, FORBRUKERRADET (June 2021), https://www.forbrukerradet.no/side/new-report-details-threats-to-consumers-from-surveillance-based-advertising/.

trap is that the court, in assessing the trade-off between privacy and competition, may emphasize the cost savings from lower behavioral advertising rates while discounting the harder-to-quantify privacy harms.[19]

The FTC has frequently targeted data collection practices as deceptive, as they involved "a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances."[20] But the rulemaking's focus would be limited to making the privacy policies more transparent about the data being collected. The rulemaking would not address scenarios where the company does not have a privacy policy, or where the company discloses its rapacious data collection. Moreover, improving transparency will not necessarily improve privacy protection when consumers face "take-it-or-leave-it" offers, whereby they must consent to the data-opolies' terms for accessing their data or they will not get the service.[21] What

19. *See* STUCKE, *supra* note 7, at chapters 8 & 10.

20. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority; *see, e.g.*, Facebook, Inc., FTC Docket No. C-4365 and Press Release, Fed. Trade Comm'n, FTC Proposes Blanket Prohibition Preventing Facebook from Monetizing Youth Data (May 3, 2023) (alleging in Order to Show Cause that Facebook violated both the 2012 and 2020 FTC orders "by continuing to give app developers access to users' private information after promising in 2018 to cut off such access if users had not used those apps in the previous 90 days" and that Meta "misled parents about their ability to control with whom their children communicated through its Messenger Kids app, and misrepresented the access it provided some app developers to private user data"); Press Release, Fed. Trade Comm'n, Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser (Aug. 9, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented-privacy-assurances-users-apples (Google agreeing to pay a then record $22.5 million civil penalty to settle the FTC's charges that "it misrepresented to users of Apple Inc.'s Safari internet browser that it would not place tracking 'cookies' or serve targeted ads to those users, violating an earlier privacy settlement between the company and the FTC.").

21. In the aftermath of the Cambridge Analytica scandal, for example, Facebook users' trust in the platform plummeted—with only 28% believing that the company is committed to privacy, down from a high of 79% in 2017. Herb Weisbaum, *Trust in Facebook Has Dropped by 66 Percent Since the Cambridge Analytica Scandal*, NBC NEWS (Apr. 18, 2018), https://www.nbcnews.com/business/consumer/trust-facebook-has-dropped-51-percent-cambridge-analytica-scandal-n867011. Despite the public outrage, the #DeleteFacebook campaign, and other scandals, Facebook continued to grow. Between March 2018, when the Cambridge Analytica news broke and March 2020, Facebook "added more than 400 million monthly users—more than the entire population of the U[nited] S[tates]." Laura Forman, *Facebook's Politics Aren't Aging Well*, WALL ST. J. (June 30, 2020), https://www. wsj.com/articles/facebooks-politics-arent-aging-well-11593446127. This is not because Facebook users are agnostic about privacy. Quite the contrary: 74% of surveyed users in 2018 were very or somewhat concerned about Facebook's invasion of their privacy (a 9-percentage point increase from 2011). Jeffrey M. Jones, *Facebook Users' Privacy Concerns Up Since 2011*, GALLUP

if users are displeased with the company's privacy violations? They cannot readily switch to alternative networks unless they could easily port their data and, when network effects are present, many others, including their friends, also switched to the alternative platform. So, while the FTC can and should promulgate rules to curb deceptive practices, these rules will be insufficient in ecosystems (1) dominated by data-opolies and (2) where behavioral advertising is the primary source of revenues.

Consequently, rather than rely primarily on the FTC's power to regulate unfair and deceptive practices, this Article takes a different approach. It assesses whether the FTC can prohibit a variety of privacy-related competition concerns as an "unfair method of competition" under the FTC Act.[22] This might seem semantic. After all, what difference does it make whether the data-opolies' abuses are *unfair practices* or *unfair methods of competition*? The answer is plenty. While the FTC can promulgate substantive regulations for both unfair practices and unfair methods of competition, the former has more procedural and substantive requirements.[23] Moreover, the FTC does not have to prove that an unfair method of competition caused a substantial injury to

(Apr. 11, 2018), https://news.gallup.com/poll/232319/facebook-users-privacy-concerns-2011.aspx.

22. At least one organization, Accountable Tech, has filed with the FTC a rulemaking petition to ban surveillance advertising—the extractive business model whereby Big Tech pervasively tracks and profiles people for the purpose of selling hyper-personalized ads—as an "unfair method of competition." Press Release, Accountable Tech, Accountable Tech Petitions FTC to Ban Surveillance Advertising as an 'Unfair Method of Competition' (Sept. 28, 2021), https://accountabletech.org/media/accountable-tech-petitions-ftc-to-ban-surveillance-advertising-as-an-unfair-method-of-competition/?cn-reloaded=1. The FTC has left open this option. It has also invited comments "on the ways in which existing and emergent commercial surveillance practices harm competition and on any new trade regulation rules that would address such practices," as "[s]uch rules could arise from the Commission's authority to protect against unfair methods of competition, so they may be proposed directly without first being subject of an advance notice of proposed rulemaking." Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51276 n.47 (proposed Aug. 22, 2022).

23. The FTC's ability to promulgate industry-wide rules prohibiting "unfair or deceptive acts or practices" is limited under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act and 1980 Federal Trade Commission Improvements Act, "which added procedural requirements to rulemaking governed by Magnuson-Moss and stripped the FTC of rulemaking authority on specific issues." Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 378–79 (2020). These procedures, however, do not apply to the Commission's "unfair methods of competition" rulemaking authority. *Id.*; *see also* 15 U.S.C. § 57a (noting that the procedures under the Magnuson-Moss Act "shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce").

consumers.[24] Plus, many of the unfair data collection and surveillance practices that damage competition, consumer autonomy, and consumer privacy fit well within the range of unfair methods of competition. Granted, as this Article explores, some might challenge the FTC's authority to challenge unfair data collection and surveillance practices as unfair methods of competition. But this Article argues that Americans need not wait for comprehensive privacy and antitrust legislation to rein in the data-opolies and curb some of the excesses of the surveillance economy. The FTC has the power under its rulemaking and enforcement authority to punish, and hopefully deter, many of the abuses in collecting and using our personal data as unfair methods of competition.

After Part II outlines the legislative aim of "unfair methods of competition" and the FTC's 2022 policy statement on this subject,[25] Part III offers a taxonomy of unfair methods of competition and demonstrates how many of the unfair data collection and surveillance practices that damage competition, consumer autonomy, and consumer privacy fall within the existing categories. But some surveillance practices do not fall within these categories. That's o.k. Congress did not want to "confine the forbidden methods [of competition] to fixed and unyielding categories,"[26] so the FTC can use its power to deter these privacy-related competition concerns as well. Part IV addresses one key source of many problems in the surveillance economy—namely, behavioral advertising. Part V examines several concerns about such potential rulemaking, including whether it would run afoul of the Supreme Court's "major questions doctrine," as recently outlined in *West Virginia v. EPA*.[27] As this Article concludes, the FTC cannot repair the surveillance economy with its authority under the FTC Act. Nevertheless, the FTC absolutely can, and should, exercise the authority that Congress intended it to exercise to help rein in the data-opolies. America still needs an omnibus privacy framework, but the FTC can help close the regulatory gap.

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24. In contrast, regulation under Magnuson-Moss would entail that, as well as projecting the rule's economic effects. Some argue that "rather than focus entirely on specific injuries tied to the collection and use of data, the FTC should recognize that the unwanted observation, through excessive data collection and use, is harmful in and of itself." CR/Epic Report, *supra* note 14, at 6. Whether courts would agree is a risk.

25. FED. TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf [hereinafter 2022 FTC UMC Policy Statement].

26. F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 310 (1934).

27. W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (summarizing doctrine as to where "administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'").

II. UNFAIR METHODS OF COMPETITION

A. THE FEDERAL TRADE COMMISSION ACT

In creating the FTC in 1914, Congress wanted the new agency to define and curb all "unfair methods of competition."[28] In contrast to the term "unfair competition," which courts had often construed as passing off one's business or goods for another,[29] the term "unfair methods of competition" was relatively new to US law.[30] Only two cases referred to "unfair methods of competition" before 1914,[31] one of which was ironically the Supreme Court's *Standard Oil* decision, which prompted Congress to enact the FTC Act.[32]

The unique term "unfair methods of competition," as employed in the Act, was meant to have a broader meaning than the common law of "unfair competition."[33] Congress purposely did not define this novel term. Why?

28. 15 U.S.C. § 45.

29. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531 (1935) (noting that "unfair competition," under the common law, was "a limited concept," primarily, and strictly, relating "to the palming off of one's goods as those of a rival trader").

30. *Id.* at 532 (noting that the FTC Act "introduced the expression 'unfair methods of competition,'" which "was an expression new in the law").

31. Burrow v. Marceau, 109 N.Y.S. 105, 107 (N.Y. App. Div. 1908) (noting that "there is no hard and fast rule" in determining when the court will "prevent what is practically a fraud upon a person engaged in business by the unfair methods of competition"); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 42–43 (1911) (noting that Standard Oil had monopolized and restrained interstate commerce in petroleum and its products, by engaging in, inter alia, "unfair methods of competition, such as local price cutting at the points where necessary to suppress competition").

32. FED. TRADE COMM'N, STATEMENT OF CHAIR LINA M. KHAN JOINED BY COMMISSIONER ROHIT CHOPRA AND COMMISSIONER REBECCA KELLY SLAUGHTER ON THE WITHDRAWAL OF THE STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT 2–3 (2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf [hereinafter FTC WITHDRAWAL STATEMENT] ("After the Supreme Court announced in *Standard Oil* that it would subject restraints of trade to an open-ended 'standard of reason' under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts."); *see also* 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 2.

33. *See* F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 239–40 (1972) (noting that Congress in creating the FTC and charting its power and responsibility under § 5, "explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply"); F.T.C. v. Raladam Co., 283 U.S. 643, 648 (1931) (noting that the legislative debate apparently convinced the sponsors of the FTC Act that unfair competition, "which had a wellsettled meaning at common law, were too narrow," so Congress substituted it with "unfair methods of competition": "Undoubtedly the substituted phrase has a broader meaning, but how much

Because any definition would be self-defeating. Congress recognized the futility of attempting to define the many iterations of unfair methods of competition:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again.[34]

As Congress observed, "[i]t is the illusive character of the trade practice that makes it though condemned today appear in some other form tomorrow."[35]

Thus, Congress intended the term *unfair methods of competition* to be both far-reaching and evolving. Rather than proposing a closed universe of forbidden practices, Congress left it open-ended "so that it might include all devices which would tend to deceive or take unfair advantage of the public and so that it might not be confined within the narrow limits of existing law."[36]

The term encompasses, as we'll see, conduct that violates the federal antitrust laws (e.g., the Sherman and Clayton Acts) as well as conduct that constituted unfair competition under the common law. Congress, dissatisfied with the Supreme Court's rule of reason legal standard announced in *Standard Oil,* created the FTC to continually identify and deter unfair methods of competition.[37] The key "takeaway is that Congress designed the term as a

broader has not been determined."); 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 3; Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 235 (1980) (citing legislative history).

34. F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 310 n.1 (1934) (noting how the committee carefully considered "whether it would attempt to define the many and variable unfair practices which prevail in commerce," and concluding that "there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others"); *see also* S. Rep. No. 597, 63rd Cong., 2d Sess., at 13 (1914); 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 3.

35. *Keppel*, 291 U.S. at 311–12 n.1 (1934) (quoting S. Rep. No. 63-597, at 13).

36. Note, *Unfair Competition at Common Law and under the Federal Trade Commission Source*, 20 COLUM. L. REV. 328, 331 (1920).

37. *Keppel*, 291 U.S. at 314 (noting how the FTC "was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'" (quoting S. Rep. No. 63–597, 9–11 (1914)); Atl. Refin. Co. v. F.T.C., 381 U.S. 360, 367 (1965); *see also* Averitt, *supra* note 33, at 233 (noting Congress's displeasure with the Court's rule-of-reason legal standard, and its attendant costs of (i) delay in resolution; (ii) courts' divergent results; and (iii) shift in control of antitrust policy from Congress to the judiciary).

'flexible concept with evolving content,'" and "'intentionally left [its] development . . . to the Commission.'"[38] Or, as Judge Learned Hand wrote, the FTC's "duty is to bring trade into harmony with fair dealing":

> The Commission has a wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.[39]

Congress also intended to limit the courts' function, as the Supreme Court noted: "Where the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision 'has "warrant in the record" and a reasonable basis in law.'"[40]

B. THE FTC'S WITHDRAWAL

So, if Congress articulated, as Sandeep Vaheesan noted, "a grand progressive-populist vision of antitrust," and wanted "the FTC to police 'unfair methods of competition' that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system,"[41] then why hasn't the FTC, until recently, used this power to rein in the data-opolies? More notable are the FTC's past policy miscues, including vetoing its legal staff's recommendation and not challenging

38. F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 243 (3d Cir. 2015) (quoting F.T.C. v. Bunte Bros., 312 U.S. 349, 353 (1941) and *Atl. Refin. Co.*, 381 U.S. at 367); *see also* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (noting how the standard of "unfairness" under the FTC Act "is, by necessity, an elusive one, encompassing 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"); F.T.C. v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 396 (1953) ("The point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.").

39. F.T.C. v. Standard Educ. Soc., 86 F.2d 692, 695, 696 (2d Cir. 1936).

40. *Atl. Refin.*, 381 U.S. at 367–68 (quoting National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944)); *see also Indiana Fed'n of Dentists*, 476 U.S. at 455 ("Once the Commission has chosen a particular legal rationale for holding a practice to be unfair, however, familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair.").

41. Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 650 (2017).

Google's anticompetitive behavior,[42] and not challenging any of the data-opolies' acquisitions, including Google-DoubleClick.[43] The FTC on competition matters was for many years hesitant: it "rarely used this expertise to affirmatively identify what conduct or practices constitute an 'unfair method of competition' and instead, sought to define 'unfair methods of competition' on a case-by-case basis."[44]

Instead of ferreting out the many unfair practices in the digital economy, the FTC, in its 2015 Policy Statement, retreated to antitrust law's convoluted and criticized rule of reason legal standard.[45] The FTC would apply the very

42. *The FTC Report on Google's Business Practices*, WALL ST. J. (Mar. 24, 2015), https://graphics.wsj.com/google-ftc-report/.

43. Press Release, Fed. Trade Comm'n, Federal Trade Commission Closes Google/DoubleClick Investigation: Proposed Acquisition Unlikely to Substantially Lessen Competition (Dec. 20, 2007), https://www.ftc.gov/news-events/news/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation. Google in acquiring the leading publisher ad server DoubleClick solidified its control over the online advertising industry. As the federal and state antitrust enforcers alleged in their 2023 monopolization complaint against Google, the "DoubleClick acquisition vaulted Google into a commanding position over the tools publishers use to sell advertising opportunities," and "set the stage for Google's later exclusionary conduct across the ad tech industry." Complaint ¶ 16, United States v. Google, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023). The acquisition also harmed privacy, when Google reversed its commitment to "not combine the data collected on internet users via DoubleClick with the data collected throughout Google's ecosystem" and "subsequently combined DoubleClick data with personal information collected through other Google services—effectively combining information from a user's personal identity with their location on Google Maps, information from Gmail, and their search history, along with information from numerous other Google products." STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW, 117TH CONG., REP. AND RECOMMENDATIONS: INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 210–11 (2020), https://permanent.fdlp.gov/gpo145949/competitionindigitalmarkets.pdf [hereinafter House Report].

44. Chopra & Khan, *supra* note 23, at 365.

45. FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (hereinafter FTC 2015 Statement) (stating that an "act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications"); Vaheesan, *supra* note 41, at 650–51 ("In articulating this narrow interpretation of Section 5, the FTC contradicted Congress's political economic vision in 1914, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the FTC adopted a convoluted test that cannot advance the Congressional vision underlying Section 5."). For criticisms of the Court's rule of reason standard, see Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009) (collecting criticisms).

standard—rule of reason—that Congress rebuked in setting up the agency. Moreover, the Commission said it would "be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[46] As Part IV examines, the highly questionable consumer welfare standard never came from Congress, but from the Court, and has been under attack by scholars and enforcers. As the new FTC Chair Lina Khan noted, the FTC's 2015 Statement "doubled down on the agency's longstanding failure to investigate and pursue 'unfair methods of competition.'"[47] While the Commission could have engaged in rule-making to delineate "unfair methods of competition" in the digital economy, it failed to do so.[48] Rather, the 2015 Statement, observed several Commissioners, "contravene[d] the text, structure, and history of Section 5 and largely [wrote] the FTC's standalone authority out of existence."[49]

C. ANTITRUST RESURGENCE

By the late 2010s, the FTC, along with other competition agencies around the world, changed course. The evidence compiled by competition authorities in Europe, Australia, and Japan all pointed to the unfairness and lack of contestability plaguing the digital economy.[50] The DOJ and FTC (along with a bipartisan coalition of state attorneys general) brought the first monopolization cases against the data-opolies since the 1990s case against Microsoft.[51] In 2021, the Biden administration issued its Executive Order on Promoting Competition in the American Economy. The Order noted how "a small number of dominant internet platforms use their power to exclude

46. FTC 2015 Statement, *supra* note 45.

47. FED. TRADE COMM'N, REMARKS OF CHAIR LINA M. KHAN ON THE WITHDRAWAL OF THE STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2021), https://www.ftc.gov/system/files/documents/public_statements/1591506/remarks_of_chair_khan_on_the_withdrawal_of_the_statement_of_enforcement_principles_re_umc_under.pdf [hereinafter Khan 2021 Remarks on the Withdrawal of FTC Statement].

48. Chopra & Khan, *supra* note 23, at 366, 366 n.39 (noting the FTC's power to engage in rulemaking under the Administrative Procedure Act and citing other scholars encouraging the FTC to do so).

49. FTC WITHDRAWAL STATEMENT, *supra* note 32, at 1.

50. STUCKE & GRUNES, *supra* note 7, at 32–75.

51. *See* Complaint, United States v. Google, 1:23-cv-00108 (E.D. Va. Jan. 24, 2023); Complaint, United States v. Google, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020)) [hereinafter Google Compl.]; Complaint, F.T.C. v. Facebook, No. 1:20-cv-03590-CRC (D.D.C. Dec. 9, 2020); Complaint, New York v. Facebook, No. 1:20-cv-03589-JEB (D.D.C., Dec. 9, 2020), [hereinafter States Facebook Compl.]; Complaint, Colorado v. Google, No. 1:20-cv-03715-APM (D.D.C. Dec. 17, 2020) [hereinafter Colo. Google Compl.]; Texas v. Google, No. 4:20-cv-957 (E.D. Tex. Dec. 16, 2020).

market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage."[52] The Biden administration promised:

> to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.[53]

To address these "persistent and recurrent practices that inhibit competition," the executive order encouraged the FTC to exercise its statutory rulemaking authority, as appropriate and consistent with applicable law, in areas including "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy."[54]

Toward that end, in 2021 the FTC withdrew its 2015 guidelines on unfair methods of competition. As the new FTC Chair, Khan promised "to clarify the meaning of Section 5 and apply it to today's markets[,]" thereby fulfilling "Congress's directive to prohibit unfair methods of competition."[55]

In late 2021, the Commission announced possible rulemaking under § 18 of the FTC Act "to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination."[56] In its 2021 report to Congress, the FTC said it should deploy all its tools to protect Americans' privacy "[g]iven the serious harms stemming from surveillance practices and the absence of federal legislation."[57] Among the tools was its rule-making authority to prohibit unfair methods of competition.

In 2022, the FTC released the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act."[58] Relying "on the text, structure, legislative history of

52. Executive Order on Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ [hereinafter Biden Executive Order].

53. *Id.*

54. *Id.*

55. Khan 2021 Remarks on the Withdrawal of FTC Statement, *supra* note 47, at 1–2.

56. *Trade Regulation Rule on Commercial Surveillance*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3084-AB69.

57. Fed. Trade Comm'n, FTC Report to Congress on Privacy and Security, 2021 WL 4698008, at *6 (F.T.C. Sept. 13, 2021).

58. 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 1.

Section 5, precedent, and the FTC's experience applying the law," the updated policy statement describes the "key principles" of whether conduct is an unfair method of competition.[59] For conduct to run afoul of § 5, it must (1) implicate competition (whether directly or indirectly); and (2) be unfair. Conduct is unfair if it "goes beyond competition on the merits," which the FTC determines using the following two criteria: whether the conduct (1) is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature," or is otherwise restrictive or exclusionary, depending on the circumstances; and (2) tends "to negatively affect competitive conditions" (e.g., "conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers").[60]

Consequently, the FTC appears poised to use its Congressional authority to tackle the many unfair data collection and surveillance practices that have bedeviled the digital economy. Rather than rely on a "case-by-case approach" to "unfair methods of competition," which "often fails to deliver clear guidance," the Commission may also adopt "rules to clarify the legal limits that apply to market participants."[61]

D. COMMON LAW

Congress intended that the term *unfair methods of competition* be broader than the common law's unfair competition. However, the common law is not static either. Indeed, the Restatement of the Law (Third) of Unfair Competition echoes several of the Congressional themes of the FTC Act.

First, the Restatement notes how it is "impossible to state a definitive test for determining which methods of competition will be deemed unfair" in addition to those well-established forms, such as deceptive marketing, infringement of trademarks, and appropriation of intangible trade values, including trade secrets and the right of publicity.[62]

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59. *Id.* at 1.

60. *Id.* at 8, 9.

61. FTC WITHDRAWAL STATEMENT, *supra* note 32, at 7; *see also* FED. TRADE COMM'N, STATEMENT OF COMMISSIONER ALVARO M. BEDOYA REGARDING THE COMMERCIAL SURVEILLANCE DATA SECURITY ADVANCE NOTICE OF PROPOSED RULEMAKING (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Bedoya%20ANPR%20Statement%20 08112022.pdf; FED. TRADE COMM'N, STATEMENT OF CHAIR LINA M. KHAN REGARDING THE COMMERCIAL SURVEILLANCE AND DATA SECURITY ADVANCE NOTICE OF PROPOSED RULEMAKING COMMISSION (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/ Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20 Surveillance%20ANPR%2008112022.pdf.

62. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt. g, at 4 (AM. L. INST. 1995).

Second, the Restatement recognizes that new types of unfair competition will always emerge and that the courts must "continue to evaluate competitive practices against generalized standards of fairness and social utility."[63] Thus, over the past few decades, neither the Restatement nor courts have limited the term *unfair competition* to specific fixed categories. As the Restatement states, "[a] primary purpose of the law of unfair competition is the identification and redress of business practices that hinder rather than promote the efficient operation of the market."[64]

Third, like the FTC Act, the Restatement's discussion of the common law of unfair practices "contemplates a fluid, 'residual rule of liability' for unfair practices that defies a definitive test."[65] Thus, both sets of law are open-ended, rather than closed, legal frameworks. Courts recognize a residual catch-all category of unfair competition, where it can strike down an act or practice that "substantially interferes with the ability of others to compete on the merits of their products or otherwise conflicts with accepted principles of public policy recognized by statute or common law."[66]

As one Pennsylvania state court noted,

> Those in business need to be assured that competitors will not be permitted to engage in conduct which falls below the minimum standard of fair dealing. Thus, the doctrine of unfair competition

63. *Id.*

64. *Id.*; *see also* Paccar Inc. v. Elliot Wilson Capitol Trucks LLC, 905 F. Supp. 2d 675, 692 (D. Md. 2012) (noting "the general view of the necessarily flexible contour of the unfair competition tort in changing business environment"); Warner Lambert Co. v. Purepac Pharm. Co., No. CIV.A. 00-02053(JCL), 2000 WL 34213890, at *10 (D.N.J. Dec. 22, 2000) (rejecting the argument that the state's caselaw narrows the scope of unfair competition claims, and noting how "The Restatement (Third) of Unfair Competition suggests a broad range of unfair competition claims").

65. Synthes, Inc. v. Emerge Med., Inc., No. CIV.A. 11-1566, 2014 WL 2616824, at *25 (E.D. Pa. June 11, 2014) (quoting Envtl. Tectonics Corp. v. Walt Disney World Co., No. Civ.A. 05–6412, 2008 WL 821065, at *16 (E.D. Pa. Mar. 26, 2008)).

66. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt. g, at 4 (AM. LAW. INST. 1995). *See, e.g.*, Energy Consumption Auditing Servs., LLC v. Brightergy, LLC, 49 F. Supp. 3d 890, 899 (D. Kan. 2014) (quoting Restatement § 1 cmt. g); New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 54 F. Supp. 3d 1189, 1233 (D.N.M. 2014); Sales Res., Inc. v. All. Foods, Inc., No. 4:08CV0732 TCM, 2009 WL 2382365, at *7 (E.D. Mo. July 30, 2009) (denying motion to dismiss and leaving it to the fact-finder "to determine if [Alliance's] behavior violated society's notions of fair play and fundamental fairness"); ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc., 249 F. Supp. 2d 622, 688 (E.D. Pa.), *amended*, 268 F. Supp. 2d 448 (E.D. Pa. 2003); Tension Envelope Corp. v. JBM Envelope Co., No. 14-567-CV-W-FJG, 2015 WL 893242, at *10 (W.D. Mo. Mar. 3, 2015) (finding that complaint's allegations, while not precisely fitting into any of the traditional categories of liability for unfair methods of competition, could fit into the Restatement's residual category), *aff'd*, 876 F.3d 1112 (8th Cir. 2017).

> provides the legal basis for business competitors to insist on fair play in the market in which they are involved . . . What constitutes unfair competition as opposed to fair competition is predicated in the balance to be struck between the public's interest in free competition and the protectable interests of the business person and the purchaser. The question of unfairness in competition is primarily a question of fact.[67]

As the Restatement notes, "courts have generally been reluctant to interfere in the competitive process."[68] Yet, courts will interfere when the act or practice "substantially interferes with the ability of others to compete on the merits of their products or otherwise conflicts with accepted principles of public policy recognized by statute or common law."[69]

Consequently, both the common law and FTC Act recognize the futility of stating a definitive test for determining all unfair practices or confining unfair methods to a few well-established categories. Invariably new forms of unfair practices will emerge that may not violate the existing standard but offend general principles of "honesty and fair dealing, rules of fair play and good conscience, and the morality of the marketplace."[70] Thus, the common law can provide another important avenue, besides the FTC Act, to target unfair data collection and surveillance practices that harm our privacy, autonomy, and well-being.

III. TAXONOMY OF UNFAIR METHODS OF COMPETITION

As we saw, Biden's executive order encouraged the FTC to exercise its statutory rulemaking authority to target "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy."[71] The order also encourages the FTC to exercise its rulemaking authority "as appropriate and consistent with applicable law."[72] So, where does the FTC begin? One approach is to consider whether any of the "unfair data collection and surveillance practices" fall within the existing categories of unfair methods of competition. For example, does the data-opolies' use of dark patterns fall within any established category? How about the collection of too much data beyond what is necessary to provide the requested service?

67. Lakeview Ambulance & Med. Servs., Inc. v. Gold Cross Ambulance & Med. Servs., Inc., No. 1994-2166, 1995 WL 842000, at *2 (Pa. Com. Pl. Oct. 18, 1995).

68. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt. g, at 4 (AM. LAW. INST. 1995).

69. *Id.*

70. *Id.*

71. Biden Executive Order, *supra* note 52, at § 5(h).

72. *Id.*

What about when the data-opoly acquires a nascent competitive threat that provides better privacy protection, such as Facebook's acquisition of WhatsApp?

Given the discussion in Part II, it may seem fruitless and self-defeating to provide a taxonomy of all unfair methods of competition, especially when Congress never intended to "confine the forbidden methods to fixed and unyielding categories." How can one classify something which, beyond a very broad level, is not classifiable? Nor will any taxonomy ever be definitive, as new forms and categories of unfair methods will inevitably arise.

Another risk is that any taxonomy, besides being underinclusive, can also be overinclusive. As Congress noted,

> It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.[73]

So, should one forget about taxonomies, and simply ask whether particular data collection practices and surveillance techniques are unfair methods of competition? After all, the digital economy presents unique challenges, and jurisdictions like the European Union, United Kingdom, Australia, South Korea, and Germany are updating their competition and privacy laws to deter these practices.

Although one can start afresh, the aim of both the common law and FTC Act is to deter recurring, objectionable practices, while being sufficiently supple to reach new forms of conduct that violate generalized standards of unfairness, social utility, and the unexpressed standards of fair dealing which the conscience of the community may progressively develop. Thus, there is some utility in providing a taxonomy of the types of business practices that will likely (but not always) be deemed unfair, while acknowledging the need to continuously develop new categories to capture humans' ingenuity to devise new forms of competitive behavior that run counter to the public interest.

With these important limitations in mind, this Part assesses whether any of the unfair data collection and surveillance practices fall within five of the more well-established categories of unfair methods of competition. As there are many different types of unfair data collection and surveillance practices, not all of them will fall neatly into these existing five categories. But that is to

73. F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 312 n.2 (1934) (quoting H. Rep. No. 1142, 63d Congress, 2d Sess., at 19 (1914)).

be expected. Where there are matches, however, the enforcement or rulemaking should be more straightforward, as prohibiting those practices is well within the FTC's authority.

A. CONDUCT THAT VIOLATES FEDERAL OR STATE STATUTES, INCLUDING THE FEDERAL ANTITRUST LAWS, AND COMMON LAW OF UNFAIR COMPETITION

It is axiomatic that companies cannot gain market power by resorting to otherwise illegal conduct. The law specifically puts these methods of competition off-limits. Moreover, Congress intended that unfair methods of competition include, but are not limited to, violations of common law unfair practices and the Sherman and Clayton Acts.[74] Thus, if a competitor harms the commercial relations of a rival by engaging in practices that violate federal or state statutes, it has engaged in unfair competition.[75] This includes otherwise intentional tortious conduct, such as threats of violence, product disparagement, bribery, and commercial defamation. The courts also recognized several specific categories of commercial behavior that give rise to a claim of unfair competition under common law, including (1) infringement of trademark and other protectable intellectual property rights and (2) misappropriation of trade secrets and other intangible trade values.[76] Companies that resort to these practices to gain market power violate § 5's unfair methods of competition. Moreover, if the conduct is illegal under the Sherman or Clayton Act, it also constitutes an unfair method of competition.[77]

Consequently, the FTC could prohibit all unfair data collection and surveillance practices that otherwise violate federal antitrust laws. One problem is that the Supreme Court has gradually displaced its per se illegal standard with its more fact-intensive legal standard, namely the rule of reason.[78] Thus, it is hard to identify which unfair data collection and surveillance practices violate the federal antitrust laws without engaging in the rule of reason inquiry that the rulemaking seeks to avoid. Indeed, it would

74. F.T.C. v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394 (1953) (noting how unfair methods of competition, which are condemned by § 5(a) of the FTC Act, "are not confined to those that were illegal at common law or that were condemned by the Sherman Act"); 2022 FTC UMC Policy Statement, *supra* note 25, at 3.

75. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt. g, at 4 (AM. LAW. INST. 1995).

76. Synthes (U.S.A.) v. Globus Med., Inc., No. CIV.A. 04-CV-1235, 2005 WL 2233441, at *8 (E.D. Pa. Sept. 14, 2005) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt. g, at § 1 (AM. LAW INST. 1995)).

77. F.T.C. v. Cement Inst., 333 U.S. 683, 690 (1948); 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 12; Averitt, *supra* note 33, at 238–42.

78. *See* Stucke, Rule of Reason, *supra* note 45.

require applying the legal standard that Congress sought to avoid in creating the FTC.

One area subject to rulemaking is where companies collude on privacy protections. Just as price fixing remains per se illegal,[79] so too would agreements among rivals on other important non-price parameters of competition, such as privacy protections. Arguably, companies might need to agree on privacy protection to promote interoperability and the flow of data. But if companies agree to degrade privacy protections, even when the companies are in no position to control the market, that should be prohibited.

B. INCIPIENT MENACES TO FREE COMPETITION

Unfair methods of competition extend well beyond otherwise illegal conduct. So, the next group of practices is "against public policy because of their dangerous tendency unduly to hinder competition or create a monopoly."[80] Thus, one major purpose of the FTC Act was to enable the FTC "to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would . . . most likely do so if left unrestrained."[81] The FTC was expected "to stop at the threshold" any practice, which "if left alone, 'destroys competition and establishes monopoly.'"[82] The chief sponsor of the FTC Act said § 5 would "have such an elastic character that it [would] meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition."[83]

Congress left it to the FTC and courts "to determine what conduct, even though it might then be short of a Sherman Act violation, was an 'unfair method of competition.'"[84] Senator Newlands noted how "[t]here are numerous practices tending toward monopoly that may not come within the provisions of the antitrust law and amount to a monopoly or to monopolization. We want to check monopoly in the embryo."[85]

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79. United States v. Socony-Vacuum Oil Co. Inc., 310 U.S. 150, 221 (1940).

80. *Cement Inst.*, 333 U.S. at 690 (quoting F.T.C. v. Gratz, 253 U.S. 421, 427 (1920)); *see also* F.T.C. v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953) (noting that the FTC Act "was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts").

81. *Cement Inst.*, 333 U.S. at 708.

82. *Id.* at 720 (quoting F.T.C. v. Raladam Co., 283 U.S. 643, 647 (1931)).

83. Chopra & Khan, *supra* note 23, at 379 (quoting Federal Trade Commission Act, 63d Cong, 2d Sess. In 51 Cong. Rec. 12024 (July 13, 1914)).

84. *Cement Inst.*, 333 U.S. at 708.

85. Gilbert Holland Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20, 21 (1915); 51 CONG. REC. 13111.

Digital markets can lead to durable oligopolies and monopolies because of multiple network effects, the extreme scale economies, and the importance of data. Europe's Digital Markets Act (DMA) seeks to deter powerful companies from tipping digital markets through unfair business practices:

> A particular subset of rules should apply to those undertakings providing core platform services for which it is foreseeable that they will enjoy an entrenched and durable position in the near future. The same specific features of core platform services make them prone to tipping: once an undertaking providing the service has obtained a certain advantage over rivals or potential challengers in terms of scale or intermediation power, its position could become unassailable and the situation could evolve to the point that it is likely to become durable and entrenched in the near future. Undertakings can try to induce this tipping and emerge as gatekeeper by using some of the unfair conditions and practices regulated under this Regulation. In such a situation, it appears appropriate to intervene before the market tips irreversibly.[86]

Thus, both the DMA and FTC Act contain an incipiency standard that seeks to check monopoly in its infancy. It makes no sense to require the FTC to wait for markets in the digital economy to tip when Congress empowered the agency to reach unfair methods of competition before these practices hampered competition and enabled the leading platforms to capture the market.[87]

One interesting aspect is how the FTC Act would arrest incipient violations of the Clayton Act, which contains an incipiency standard.[88] As Neil W. Averitt observed, the FTC Act would permit "a theory of 'incipient incipiency.'"[89]

86. *DMA*, *supra* note 7, ¶ 26.

87. F.T.C. v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953) (noting that enforcement of the FTC Act was "designed to supplement and bolster the Sherman Act and the Clayton Act . . .to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as 'unfair method of competition' existing violations of them"); Averitt, *supra* note 33, at 242 (noting the legislative history in support of this goal); 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 4, 9.

88. *See, e.g.*, Clayton Antitrust Act of 1914 § 3, 15 U.S.C. § 14 (prohibiting the sale of goods on the condition that the purchaser thereof shall not use or deal in the goods of a competitor where the effect of such restraint "may be to substantially lessen competition or tend to create a monopoly in any line of commerce"); Clayton Antitrust Act of 1914 § 7, 15 U.S.C. § 18 (prohibiting mergers and acquisitions that may substantially lessen competition, or tend to create a monopoly).

89. Averitt, *supra* note 33, at 246.

The Supreme Court recognized this incipient incipiency in *F.T.C. v. Brown Shoe Co., Inc.*[90] Brown Shoe, the second-largest shoe manufacturer in the United States, paid hundreds of retail shoe stores to contractually promise to deal primarily with Brown and not purchase conflicting lines of shoes from Brown's competitors. The Court held that the FTC "acted well within its authority in declaring the Brown franchise program unfair whether it was completely full blown or not."[91] The FTC did not have to prove that Brown's franchise program violated the Clayton Act (namely, that the program's effect "may be to substantially lessen competition or tend to create a monopoly"). As the Court noted, the FTC has the power under § 5 to arrest trade restraints in their incipiency without having to prove that the restraints violate the Clayton Act or other antitrust laws.[92]

Europe's Digital Markets Act identifies many anticompetitive actions that the leading platforms may use to tip the markets in their favor. Once entrenched, the powerful gatekeeper may still rely on some of these anticompetitive practices to maintain their dominance or leverage it to other markets. Thus, the Act seeks to complement the E.U. antitrust laws to promote contestable and fair digital markets.

The United States has several bills that will impose some of these obligations on these gatekeepers, as well as more stringent requirements.[93] But

90. 384 U.S. 316, 320 (1966).

91. *Id.* at 322.

92. *Id.*; *see also* 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 9–10 ("Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions, this inquiry does not turn to whether the conduct directly caused actual harm in the specific instance at issue. Instead, the second part of the principle examines whether the respondent's conduct has a tendency to generate negative consequences . . .").

93. These include (i) the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021, H.R. 3849 (which gives the FTC new authority and enforcement tools to establish pro-competitive rules for interoperability and data portability online); (ii) the Platform Competition and Opportunity Act of 2021, H.R. 3849 (which prohibits the largest online platforms from engaging in mergers that would eliminate competitors, or potential competitors, or that would serve to enhance or reinforce monopoly power) (the Senate introduced its own similar version of Platform Competition and Opportunity Act of 2021); (iii) the American Choice and Innovation Online Act, H.R. 3816 (which seeks to restores competition online and ensures that digital markets are fair and open by preventing dominant online platforms from using their market power to pick winners and losers, favor their own products, or otherwise distort the marketplace through abusive conduct online) (the Senate introduced a slightly different version of its American Innovation and Choice Online Act, with different categories of offenses and defenses); (iv) the Ending Platform Monopolies Act, H.R. 3825 (which authorizes the FTC and DOJ to take action prevent dominant online platforms from leveraging their monopoly power to distort or destroy competition in markets that rely on that platform); (v) Prohibiting Anti-competitive

the FTC can also use its enforcement and rulemaking authority to impose obligations—similar to those in Articles 5 and 6 of the Digital Markets Act—to prevent firms from resorting to these anticompetitive practices.

Here the data-opolies' anticompetitive actions to willfully attain or maintain their monopolies can harm individuals' privacy. For example, the Colorado-led states allege in their monopolization complaint against Google that "[i]n a more competitive market, Google's search-related monopolies could be challenged or even replaced by new forms of information discovery," including rival general search engines offering "improved privacy" and "advertising-free search."[94] However, Google's exclusionary anticompetitive practices foreclosed these privacy-friendly rivals and helped Google maintain its dominance (and ability to extract even more personal data).

Another example is what we call the *nowcasting radar*.[95] A lot of data flows through the data-opolies' ecosystems, including: (1) commercially sensitive data from app developers, merchants, and businesses who advertise on their platforms; and (2) our personal data, such as our activity on apps and the products and services we buy online. From this data, data-opolies can see how and where we spend our time, identify trends, and target any potential threats to their business model or power early on. The internal corporate documents uncovered by Congress in its investigation of Big Tech show how these data-opolies use this data to provide themselves multiple competitive advantages.[96]

To check monopoly at the door, the FTC can challenge as unfair methods of competition both the use of this nowcasting radar and actions taken as a result.

Mergers Act of 2022 (which both the House and Senate introduced versions); and (vi) the Open App Markets Act (where both the House and Senate have introduced similar versions).

94. Colo. Google Compl., *supra* note 51, ¶ 16.

95. STUCKE & GRUNES, *supra* note 7, at 285–87; EZRACHI & STUCKE, *supra* note 7, at 43–44.

96. STUCKE, *supra* note 7, at 33–37. One way is the data-opoly's use of its business users' non-public data to compete against them, such as Amazon's use of non-public data of its third-party sellers to compete against them (by, among other things, cloning their products). To deter that, Article 6(1) of the Digital Markets Act provides that gatekeepers "shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the end users of those business users." This is also an unfair trade practice under the common law. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt. g, at 10 (AM. LAW INST. 1995) (noting how "[a] competitor who diverts business from another . . . through the wrongful use of confidential information" may be liable even if its conduct is not deceptive or the information is not a trade secret).

One way the data-opolies attain, maintain, and extend their power is through acquisitions. The acquisition strategy helps the data-opoly maintain its dominance in at least five ways:

- First, it extinguishes the competitive threat and widens the protective moat around the data-opoly.[97]
- Second, in acquiring a maverick, the data-opoly keeps these threats "out of the hands of other firms that are well-positioned to use them to compete," including another data-opoly.[98]
- Third, the acquisition prevents competitors or potential competitors "from having access to next generation technology that might threaten" the data-opoly.[99]
- Fourth, the acquisitions can create "kill zones" by chilling other firms' incentives to enter or invest in that particular space.[100]
- Fifth, the acquisitions enable data-opolies to use network effects offensively and deprive rivals of gaining scale.[101]

97. HOUSE REPORT, *supra* note 43, at 150 (noting how Facebook's "internal documents indicate that the company acquired firms it viewed as competitive threats to protect and expand its dominance in the social networking market" and how "Facebook's senior executives described the company's mergers and acquisitions strategy in 2014 as a 'land grab' to 'shore up our position'").

98. States Facebook Compl., *supra* note 51, ¶ 185.

99. *Id.*

100. EZRACHI & STUCKE, *supra* note 7, at 86–90; HOUSE REPORT, *supra* note 43, at 49 (noting study "that in the wake of an acquisition by Facebook or Google, investments in startups in the same space 'drop by over 40% and the number of deals falls by over 20% in the three years following an acquisition'") (quoting Raghuram Rajan, Sai Krishna Kamepalli, & Luigi Zingales, *Kill Zone*, UNIV. CHI. BECKER FRIEDMAN INST. ECON., WORKING PAPER NO. 2020-19, https://ssrn.com/abstract=3555915); *see also* Ufuk Akcigit, Wenjie Chen, Federico J. Díez, Romain Duval, Philipp Engler, Jiayue Fan, Chiara Maggi, Marina M. Tavares, Daniel Schwarz, Ippei Shibata & Carolina Villegas-Sánchez, *Rising Corporate Market Power: Emerging Policy Issues*, 2021 INT'L MONETARY FUND STAFF DISCUSSION NOTE 1, 7 (Mar. 2021), https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/03/10/Rising-Corporate-Market-Power-Emerging-Policy-Issues-48619 ("M&As by dominant firms are associated with lower business dynamism at the industry level, with acquiring firms increasing their market power following the transaction and competitors' growth and research and development taking a hit.").

101. HOUSE REPORT, *supra* note 43, at 144. Facebook's CEO told the company's Chief Financial Officer in 2012 that network effects and winner-take-all markets were a motivating factor in acquiring competitive threats like Instagram and stressed the competitive significance of having a first-mover advantage in terms of network effects in acquiring WhatsApp. In the context of market strategies for competing with the then independent startup WhatsApp, Mr.

Privacy can also suffer when a data-opoly acquires a nascent competitive threat that offers better privacy protections, such as Facebook's acquisition of WhatsApp. The FTC can challenge these acquisitions under the Sherman and Clayton Acts and as an unfair method of competition.[102] However, it has been very challenging for the antitrust agencies to prove that these data-driven mergers violate their country's merger law. Every jurisdiction that has studied these digital platform markets has called for greater antitrust scrutiny of these data-driven and platform-related mergers and acquisitions. The problem is that some courts expect the competition agencies to prove these mergers' harm with high degrees of precision.[103] As a result, policymakers have proposed legislative changes to the legal standard for reviewing these mergers.[104] The DOJ and FTC in 2023 released for public comment their draft merger guidelines, which included presumptions that certain transactions are anticompetitive, threats to potential and nascent competition, and the unique characteristics of digital markets.[105]

The FTC could try to prevent the data-opolies from using the data flowing through their ecosystem to identify nascent competitive threats, which they then acquire. But enforcing this restriction can be difficult. Facebook could still use its nowcasting radar to identify the next WhatsApp but offer a more innocuous justification for its acquisition.

Zuckerberg told the company's growth and product management teams that "being first is how you build a brand and a network effect." *Id.*

102. *See, e.g.*, Amended Complaint at ¶ 241, F.T.C. v. Facebook, Case 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021) (challenging Facebook's anticompetitive acquisitions of Instagram and WhatsApp as violations "of Section 2 of the Sherman Act, 15 U.S.C. § 2, and thus unfair methods of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a)").

103. *See* EZRACHI & STUCKE, *supra* note 7, at 161–80.

104. *See, e.g.*, The Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (1st Sess. 2021) (prohibiting the largest online platforms from engaging in mergers that would eliminate competitors, or potential competitors, or that would serve to enhance or reinforce monopoly power); The Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (1st Sess. 2021); HOUSE REPORT, *supra* note 43, at 396–97 (recommending that "Congress explore presumptions involving vertical mergers, such as a presumption that vertical mergers are anticompetitive when either of the merging parties is a dominant firm operating in a concentrated market, or presumptions relating to input foreclosure and customer foreclosure"); FED. TRADE COMM'N, STATEMENT OF CHAIR LINA M. KHAN, COMMISSIONER ROHIT CHOPRA, AND COMMISSIONER REBECCA KELLY SLAUGHTER ON THE WITHDRAWAL OF THE VERTICAL MERGER GUIDELINES (2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

105. DOJ & FTC, Draft Merger Guidelines (July 19, 2023), https://www.justice.gov/atr/d9/2023-draft-merger-guidelines.

To prevent this circumvention, the FTC could create a presumption against acquisitions by dominant firms of: (1) startups, particularly those that "serve as direct competitors, as well as those operating in adjacent or related markets";[106] and (2) data-driven mergers, where the data may help the firm attain, maintain, or leverage its significant market power. Fundamentally, "any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion."[107]

This presumption would fit well within the broader incipiency standard for unfair methods of competition. The FTC could also limit the data-opolies from using the "near-perfect market intelligence" offensively (to favor their products, services, and apps, and to disadvantage competing products and services) and defensively (to identify and acquire potential nascent competitive threats).

Here, the regulations would improve privacy both directly and indirectly: directly, by preventing data-driven mergers, where the data-opoly learns even more about individuals (such as when Google acquired the smartwatch manufacturer Fitbit); and indirectly, by improving the survival odds of nascent competitive threats that offer better privacy protections (such as WhatsApp). Data-opolies could no longer acquire these threats; nor could they kill these threats as easily as now when the FTC imposes obligations similar to those under the DMA on these powerful gatekeepers.

C. MONOPOLISTIC BEHAVIOR

As the Supreme Court noted, "[e]ver since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, protecting consumers from monopoly prices has been the central concern of antitrust."[108] So Apple could be liable under the Sherman Act for using its monopoly power over the retail apps market to charge individuals higher-than-competitive prices.[109] Yet in other cases, the Court opined that charging monopolistic prices is legal under the Sherman Act.[110] Regardless, the FTC

106. *See* HOUSE REPORT, *supra* note 43, at 396.

107. *See id.* at 389.

108. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019) (internal quotation omitted).

109. *Id.*

110. Pac. Bell Tel. Co. v. linkLine Comm'ns, Inc., 555 U.S. 438, 454 (2009) ("[A]ntitrust law does not prohibit lawfully obtained monopolies from charging monopoly prices."); *see also* Verizon Comm'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

could challenge under the broader "unfair method of competition" the excessive extraction of data itself.[111]

One issue is when a data-opoly exploits its dominance by collecting too much data. When a data-opoly's business model depends on harvesting and exploiting personal data, its incentives change. It will reduce privacy protections below competitive levels and collect personal data above competitive levels.[112] Consequently, policymakers increasingly recognize that companies can compete on privacy and protecting data.[113] The collection of

111. *See, e.g.*, 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 9 (unfair methods of competition reach, inter alia, coercive, exploitative, and abusive conduct).

112. HOUSE REPORT, *supra* note 43, at 18 (noting that "in the absence of adequate privacy guardrails in the United States, the persistent collection and misuse of consumer data is an indicator of market power online" and "[i]n the absence of genuine competitive threats, dominant firms offer fewer privacy protections than they otherwise would, and the quality of these services has deteriorated over time"); *id.* at 51 (noting how the "best evidence of platform market power" is "not prices charged but rather the degree to which platforms have eroded consumer privacy without prompting a response from the market"); UK COMPETITION & MARKETS AUTHORITY, ONLINE PLATFORMS AND DIGITAL ADVERTISING MARKET STUDY: MARKET STUDY FINAL REPORT ¶¶ 2.84, 3.151 (July 1, 2020), https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf [hereinafter CMA FINAL REPORT]; *see also* AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, DIGITAL PLATFORMS INQUIRY—FINAL REPORT 374 (2019), https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report [hereinafter ACCC FINAL REPORT]; Google Compl., *supra* note 51, ¶ 167 (alleging that by "restricting competition in general search services, Google's conduct has harmed consumers by reducing the quality of general search services (including dimensions such as privacy, data protection, and use of consumer data")); Colo. Google Compl., *supra* note 51, ¶ 98 (alleging that "Google collects more personal data about more consumers than it would in a more competitive market as a result of its exclusionary conduct, thereby artificially increasing barriers to expansion and entry"); States Facebook Compl., *supra* note 51, ¶¶ 127, 177, 180 (alleging Facebook's degradation in privacy protection after acquiring Instagram and WhatsApp).

113. OECD Consumer Data Rights and Competition, *supra* note 2, ¶¶ 69, 99, 100. *See, e.g.*, OECD Consumer Data Rights and Competition – Note by the European Union, ¶ 51, OECD Doc. DAF/COMP/WD(2020)40 (June 3, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)40/en/pdf ("Market investigations in specific cases, such as Microsoft/LinkedIn, have further supported the view that data protection standards can be an important parameter of competition, particularly in markets characterised by zero-price platform services where the undertaking has an incentive to collect as much data as possible in order to better monetise it on the other side of the platform."); *Comm'n Decision No. M.8124 (Microsoft/LinkedIn)*, C(2016) 8404 final, ¶ 350 (Dec. 6, 2016), https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf (finding that privacy is an important parameter of competition and driver of customer choice in the market for professional social networks, and that Microsoft, after acquiring LinkedIn, could marginalize competitors that offered "a greater degree of privacy protection to users than LinkedIn (or make the entry of any such competitor more difficult)" and thus "restrict consumer choice in relation to this important parameter of competition"); *see also* DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION 49 (2019), https://www.gov.uk/government/

too much personal data can be the equivalent of charging an excessive price.[114] As the U.K. competition agency noted, "The collection and use of personal data by Google and Facebook for personalised advertising, in many cases with no or limited controls available to consumers, is another indication that these platforms do not face a strong enough competitive constraint."[115] Thus, data-opolies exploit their market power by extracting personal data from consumers.

Indeed, this exploitation can be far worse than when a monopoly charges higher prices. When a monopoly demands an excessive price, consumers are aware of this abuse of dominance. One might grumble, as many did, for example, about Comcast's exorbitant fee for internet access.[116] But monopoly pricing might attract entrants eager to serve the monopoly's dissatisfied customers.

With a data-opoly, however, customers are typically unaware of how steep a price they are paying in terms of the amount of data being collected and the

publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel [hereinafter FURMAN REPORT]; OECD Consumer Data Rights and Competition – Note by the UK, ¶ 25 OECD Doc. DAF/COMP/WD(2020)51 (June 2, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)51/en/pdf (noting how privacy and data protection rights "may constitute an aspect of service quality on which firms can differentiate themselves from their competitors" and a merger's reduction in "privacy protection may be interpreted as a reduction in quality") (internal quotation and citations omitted).

114. OECD, Consumer Data Rights and Competition, *supra* note 113, ¶ 100; CMA FINAL REPORT, *supra* note 112, ¶ 11 (noting that "competition problems result in consumers receiving inadequate compensation for their attention and the use of their personal data by online platforms"); OECD, *Big Data: Bringing Competition Policy to the Digital Era*, Background Note by the Secretariat, at 16–17 (OECD Doc. DAF/COMP(2016)14) (Oct. 27, 2016), https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf ("[M]arket power may be exerted through non-price dimensions of competition, allowing companies to supply products or services of reduced quality, to impose large amounts of advertising or even to collect, analyze or sell excessive data from consumers"); Eleonora Ocello, Cristina Sjödin, & Anatoly Subočs, *What's Up with Merger Control from the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case, Competition Merger Brief*, EUROPEAN COMM'N 6 (Feb. 2015), https://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf (observing if a website, post-merger, "would start requiring more personal data from users or supplying such data to third parties as a condition for delivering its 'free' product" then this "could be seen as either increasing its price or as degrading the quality of its product").

115. CMA FINAL REPORT, *supra* note 112, ¶ 6.31.

116. Bob Fernandez, *Comcast Customer Gripes About Internet Surpass Those for Cable TV*, PHILA. INQUIRER (Aug. 3, 2017), https://www.inquirer.com/philly/business/comcast/comcast-customer-gripes-for-the-internet-surpass-those-on-tv-20170803.html (reporting that between November 2014 and the first week of May 2017, Comcast consumers lodged 41,760 internet complaints with the FCC with 21,388 complaints regarding internet billing issues, followed by 8,664 complaints involving downed internet or lack of availability, and 4,853 complaints about speed).

toll it has on their privacy and well-being.[117] We simply don't know the price. In addition to all the other entry barriers in the digital economy (such as network effects, data access, etc.), consumers are unaware of the extent to which they are being exploited.

In Europe, extracting too much data, like charging an excessive price, can be struck down as an abuse of dominance. Germany's Bundeskartellamt, for example, found that Facebook abused its dominant position by "collect[ing] an almost unlimited amount of any type of user data from third party sources, allocat[ing] these to the users' Facebook accounts and us[ing] them for numerous data processing processes."[118]

But successfully prosecuting this type of case in the European Union is significantly harder than other abuse of dominance cases. It is hard to prove when prices are excessive. Proving that the amount of data being collected is excessive is even harder. Indeed, the challenges that Germany faced in bringing the Facebook case led that country to update its competition laws to make it easier to challenge dominant firms' excessive data collection.[119] It also led Europe to revise its Digital Markets Act to limit the collection of data against the individual's wishes. A gatekeeper, under the Act, cannot, without the individual's consent:

117. ACCC FINAL REPORT, *supra* note 112, at 2–3; *see also* FURMAN REPORT, *supra* note 113, at 22 (finding that many platforms operating in the attention market "provide valued services in exchange for their users' time and attention, while selling access to this time to companies for targeted advertising," but many consumers "are typically not consciously participating in this exchange, or do not appreciate the value of the attention they are providing") & 23 (noting that many consumers "are not aware of the extent or value of their data which they are providing nor do they usually read terms and conditions for online platforms"); CMA FINAL REPORT, *supra* note 112, ¶¶ 4.61–62.

118. *See, e.g.*, Press Release, Bundeskartellamt, Bundeskartellamt prohibits Facebook from combining user data from different sources (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2.

119. *See* Section 19a of the German Competition Act, Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen [10th amendment to the German Act against Restraints of Competition] (Jan. 18, 2021), https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s0002.pdf%27%5D__1680647993821. The German competition authority applied this new power to challenge Google's data collection policies. *See* Bundeskartellamt, Press Release, Statement of Objections Issued Against Google's Data Processing Terms (Jan. 11, 2023), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/11_01_2023_Google_Data_Processing_Terms.html.

> (a) process, for the purpose of providing online advertising services, personal data of end users using services of third-parties that make use of core platform services of the gatekeeper;
>
> (b) combine personal data from the relevant core platform service with personal data from other core platform services or from any other services provided by the gatekeeper or with personal data from third-party services;
>
> (c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice-versa; and
>
> (d) sign in end users to other services of the gatekeeper in order to combine personal data.[120]

Why this amendment to the DMA? As the European Union stated, besides degrading Europeans' privacy, the above four practices can also give the data-opoly an unfair competitive advantage by raising entry barriers and further reducing the contestability of digital markets.[121] For example, requiring individuals and business users to subscribe to, or register with, any of the gatekeeper's core services in order to use it, can lock-in these users, while gathering more data from them.[122] These concerns relate to one historical concern of unfair methods of competition, namely being "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[123]

Thus, the FTC, like Germany and the European Commission, can target these gatekeepers' abusive data strategies, including combining personal data across their ecosystem and from third-party sources and collecting more personal data than what is reasonably necessary to provide the service. Not only is the excessive data collection abusive, but it can also hinder competition. The data-opoly can leverage the data internally to give itself an unfair advantage over rivals. As one review of the economic literature noted, the data-opolies can use data's non-rivalrous nature to give themselves an additional competitive advantage by leveraging the data internally across their many

120. *DMA*, *supra* note 7, art. 5(2).

121. *Id.* at ¶ 59.

122. *Id.* at ¶ 44 (noting how the practice enables the gatekeeper to capture and lock-in new business users and end users "for their core platform services by ensuring that business users cannot access one core platform service without also at least registering or creating an account for the purposes of receiving a second core platform service," and gives gatekeepers a potential advantage in terms of accumulating data; since this conduct is liable to raise barriers to entry, the Digital Markets Act prohibits it).

123. F.T.C. v. Gratz, 253 U.S. 421, 427 (1920).

products and services, thereby increasing entry barriers.[124] Thus, leveraging the excessive data a data-opoly collects in one market to destroy competition in other markets qualifies as an unfair method of competition.[125]

The FTC can target the following four data collection and surveillance practices as unfair methods of competition: When the data-opoly—

(1) extracts data when individuals visit third-party apps and websites,[126]
(2) extracts more data than what is reasonably necessary to provide the product or service,
(3) uses the data for purposes unrelated to providing the immediate service,[127] and

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124. Yan Carrière-Swallow & Vikram Haksar, *The Economics and Implications of Data: An Integrated Perspective* 22, INTERNATIONAL MONETARY FUND POLICY PAPER No. 19/16, Sept. 2019:

> [W]here data appears as one of the factors of production, nonrivalry of data gives rise to increasing returns to scale when data is combined with other inputs. The intuition is that each unit of data can be used by all units of other inputs simultaneously. A larger stock of complementary labor or capital allows each unit of data to be better exploited, raising the average product of data. An implication is that access to the same nonrival data results in larger firms with more complementary inputs being more productive than those with fewer inputs. This will tend to increase average firm size in the economy and can potentially stifle competition by representing a barrier to entry for smaller, data-poor firms.

125. *See* Atl. Refin. Co. v. F.T.C, 381 U.S. 360, 361 (1965) (upholding as an unfair method of competition a sales-commission plan which was a classic example of using economic power in one market to destroy competition in another market).

126. For example, even if we could avoid Facebook and its advertising network, Facebook still tracks us whenever we visit the millions of websites and apps with a Facebook "Like" button or that use "Facebook Analytics" services. Data is transmitted to Facebook when we visit that third-party website or app, even before we see the "Like" button. The amount of data Facebook receives is staggering. Facebook received approximately one billion events per day from health apps alone on users, such as when someone opened the app, clicked, swiped, or viewed certain pages, and placed items into a checkout. With all that data, Facebook compiles some 200 "traits" attached to its 2.8 billion users' profiles. STUCKE, *supra* note 7, at 16–17; *see also* Natasha Singer, *GoodRx Leaked User Health Data to Facebook and Google, F.T.C. Says*, N.Y. TIMES (Feb. 1, 2023), https://www.nytimes.com/2023/02/01/business/goodrx-user-data-facebook-google.html.

127. *See generally* Press Release, European Data Protection Board, Facebook and Instagram decisions: "Important impact on use of personal data for behavioural advertising" (Jan. 12, 2023), https://edpb.europa.eu/news/news/2023/facebook-and-instagram-decisions-important-impact-use-personal-data-behavioural (deciding that Meta unlawfully processed personal data for behavioral advertising and that such advertising is not necessary for the performance of an alleged contract with Facebook and Instagram users); *see also* Sam Schechner, *Meta's Targeted Ad Model Faces Restrictions in Europe: EU Privacy Regulators Say Facebook and Instagram Shouldn't Use Their Terms of Service to Require Users to Accept Ads Based on Their Digital Activity*, WALL ST. J. (Dec. 6, 2022), https://www.wsj.com/articles/metas-targeted-ad-model-

(4) uses that data to unfairly gain a competitive position for other services or products.[128]

For example, Google Maps can collect users' geolocation data to accurately reflect current traffic conditions. But Google could not use the geolocation data for behavioral advertising. Nor could Google use the personal data to improve its other products and services, which are also subject to network effects, like providing more relevant search results and prompting users to review local restaurants, when such data leveraging: (1) puts data-poorer rivals, like Yelp and TripAdvisor, at an even greater competitive disadvantage; and (2) helps tip these other markets in the data-opolies' favor.

D. CONDUCT THAT VIOLATES THE SPIRIT OF AN ANTITRUST LAW

Besides conduct that violates or threatens to violate the antitrust laws, the term "unfair methods of competition" encompasses "trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws."[129]

One example is when firms pay to be the default at critical access points in the digital economy. Knowing that individuals generally stick with the default option, the firm pays to be the default option to attain scale and tip the market in its favor. For example, Google paid Apple billions of dollars over 15 years to be the default search engine on Apple products. To secure these defaults, Google pays Apple on a "revenue share basis."[130] This is worse than Apple receiving a fixed sum for allowing Google to be the default. Why?

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faces-restrictions-in-europe-11670335772?mod=hp_lead_pos1 (discussing the European Union privacy ruling that Facebook Platforms Inc. shouldn't require users to agree to personalized ads based on their online activity).

128. For example, a dominant French electricity provider used the personal data it collected as a regulated monopoly to compete in other unregulated markets. The competition agency found that the monopoly improperly used its customer data "to facilitate customer switching from regulated to unregulated offers, and to 'win back' customers who had switched to competing unregulated offers." The regulated monopoly had an unfair competitive advantage, the competition authority found, "since no database exists that would allow competitors to precisely locate gas consumers and know their consumption level, in order to propose them offers that are better suited to their profile." Press Release, Autorité de la Concurrence, Gas Market (Sept. 9, 2014), http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=592&id_article=2420.

129. F.T.C. v. Brown Shoe, 384 U.S. 316, 321 (1966); Fashion Originators' Guild Of Am. v. F.T.C., 312 U.S. 457, 463 (1941) (noting that if the purpose and practice of the defendant's action "runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition"); 2022 FTC UMC POLICY STATEMENT, *supra* note 25, at 13.

130. CMA FINAL REPORT, *supra* note 112, ¶ 3.107 n.132; *see also* Google Compl., *supra* note 51, ¶¶ 47, 175, 182.

Because the revenue sharing agreement aligns Apple's and Google's incentives.[131] Under this arrangement, if you search for something on your Safari browser, you probably use Google's search engine. And Apple gets a significant percentage of Google's monopoly revenues from search advertising. Therefore, the more people use Siri, Spotlight, or Google on the 1.4 billion Apple devices worldwide, the more personal data that Google collects, the more advertising revenue that this data helps generates, and the more money Apple receives as a result. And the monopoly profits are in the billions. In 2019, Google reportedly paid Apple $12 billion under this revenue sharing agreement, which is significant by itself and relative to Apple's 2019 net income of $55.256 billion.[132] By 2021, the amount Google paid Apple climbed to an estimated $15 billion.[133] Being the default on one's mobile phone can be more powerful since consumers are less likely to bypass the default when dealing with a small screen.

The default deprives rivals of access to users, data, economies of scale, and network effects. As a result, smaller, more privacy-friendly search engines cannot grow. To see why, as more people stick with the default search engine, the algorithm has more opportunities to learn: "[t]he greater the number of queries a general search service receives, the quicker it is able to detect a change in user behaviour patterns and update and improve its relevance."[134] Its more

131. Google Compl., *supra* note 51, ¶ 122 ("[B]y paying Apple a portion of the monopoly rents extracted from advertisers, Google has aligned Apple's financial incentives with its own.").

132. ACCC FINAL REPORT, *supra* note 113, at 10, 30 (recommending changes to search engine and internet browser defaults so that Google provides Australian users of Android devices with the same options being rolled out to existing Android users in Europe: the ability to choose their default search engine and default internet browser from a number of options); CMA FINAL REPORT, *supra* note 112, ¶¶ 3.106, 89, (finding that in 2019 Google paid Apple £1.2 billion for default positions in the United Kingdom alone, which represented over 17% of Google's total annual search revenues in the United Kingdom); Apple Inc., Annual Report (Form 10-K) (Oct. 30, 2019), https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/_10-K-2019-(As-Filed).pdf.

133. Johan Moreno, *Google Estimated to Be Paying $15 Billion to Remain Default Search Engine on Safari*, FORBES (Aug. 27, 2021), https://www.forbes.com/sites/johanmoreno/2021/08/27/google-estimated-to-be-paying-15-billion-to-remain-default-search-engine-on-safari/?sh=59151e56669.

134. ICN UNILATERAL CONDUCT WORKING GROUP, REPORT ON THE RESULTS OF THE ICN SURVEY ON DOMINANCE/SUBSTANTIAL MARKET POWER IN DIGITAL MARKETS 28 (2020), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf [hereinafter ICN STUDY]; Digital Markets Act, at ¶ 2 (among the characteristics of the core platform services are "extreme scale economies, which often result from nearly zero marginal costs to add business users or end users"); *Comm'n Decision of 27.6.2017 (AT.39740 - Google Search (Shopping))*, C(2017) 4444 final,

relevant search results will attract others to the search engine, and the positive feedback will continue.

This network effect is less pronounced for objective queries (such as what is the capital of Hungary), to which DuckDuckGo or Bing can respond. Rather, this network effect favors the dominant search engine on less common (or tail) inquiries.[135] About 15 to 20% of queries that search engines typically see daily are common (what search engines call "head" queries), and about 25 to 30% of the queries are uncommon ("tail") queries.[136] As we judge a search engine's performance on both common and uncommon queries, the more data a general search engine collects for rare tail queries, "the more users will perceive it as providing them the more relevant results for all types of queries."[137] With more users and more tail queries, the dominant search engine benefits from seeing what links its users click for these tail inquiries. Plus, with other personal data on the users, including their location, the algorithm can further improve the search results. Thus, as the U.K. competition authority found, the smaller search engines' "lack of comparable scale in click-and-query data is likely to be a key factor that limits [their] ability . . . to compete with Google."[138]

Google's and Apple's behavior conflicts with several basic policies of the Sherman and Clayton Acts, which sought to preserve economic freedom and the freedom for each business "to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."[139] Consequently, Google and Apple's agreement violates the spirit, if not the letter, of the Sherman and Clayton Acts in "completely shut[ting] out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice."[140]

¶ 287 (June 27, 2017) , https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [hereinafter Google Shopping case].

135. Google Shopping case, *supra* note 134, ¶ 288; CMA FINAL REPORT, *supra* note 112, ¶ 3.27; HOUSE REPORT, *supra* note 43, at 180 (noting how "in 2010, one Google employee observed, 'Google leads competitors. This is our bread-and-butter. Our long-tail precision is why users continue to come to Google. Users may try the bells and whistles of Bing and other competitors, but Google still produces the best results.'"); Colo. Google Compl., *supra* note 51, ¶ 91.

136. CMA FINAL REPORT, *supra* note 112, ¶ 3.68.

137. ICN STUDY, *supra* note 134, at 28.

138. CMA FINAL REPORT, *supra* note 112, ¶ 3.79.

139. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

140. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 10 n.15 (1984) (quoting H.R. Rep. No. 63-627, at 13 (1914)), abrogated by Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, (2006).

To promote economic freedom and make the digital economy more contestable, the FTC could enforce or regulate along the lines of the Digital Markets Act. To comply with § 5, the data-opoly must:

- *first,* allow users to easily change default settings on the gatekeeper's operating system, virtual assistant, and web browser;
- *second*, prompt users, when they first use that service to choose, from a list of the service providers available; and
- *third*, not make it unnecessarily complicated to unsubscribe from its service.[141]

Thus, individuals, not the data-opoly, would choose which search engine would be their default.

Moreover, the FTC can promulgate regulations to promote interoperability and data-portability to enable individuals to switch to rivals or multi-home easily.[142] Here, the benefits to individual privacy would be indirect but consequential in allowing more privacy-friendly alternatives to gain scale and compete.

E. EXPLOITATIVE BEHAVIOR

As our book *Competition Overdose* discusses, competition, at times, can be toxic.[143] One form of toxic competition is where companies seek to exploit, rather than help, customers.

Our book begins with the premise that consumers are not rational profit-maximizers with perfect willpower.[144] Many consumers rely on intuition rather than deliberative reasoning. They succumb to the temptations of instant gratification, misjudge the strength of their willpower, and overestimate their ability to detect manipulation and exploitation. As anyone who has ever overeaten, overspent, or otherwise succumbed to temptation (despite having

141. Digital Markets Act, art. 6 & ¶ 63.

142. *See, e.g.*, Digital Markets Act ¶ 59 (to promote switching and multi-homing, requiring gatekeepers to allow end users, as well as third parties authorized by an end user, "effective and immediate access to the data they provided or that was generated through their activity on the relevant core platform services of the gatekeeper," requiring that the data "be received in a format that can be immediately and effectively accessed and used by the end user or the relevant third party authorized by the end user to which the data is ported," and requiring gatekeepers to use appropriate and high quality technical measures, such as application programming interfaces, so that end users can freely port their data continuously and in real time).

143. *See generally* MAURICE E. STUCKE & ARIEL EZRACHI, COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS (2020) (identifying when competition can turn toxic, who is pushing this toxic competition, and what we can do to minimize or avoid this toxic competition).

144. *Id.* at 73–74.

the best intentions to the contrary) can confirm, few of us have the willpower or the rationality we think we do. As a result, competition can turn toxic when:

- Firms know how to identify and exploit their customers' weaknesses; competitors can tap into these "irrational moments" and exploit them to their benefit.
- Savvier consumers, who might know how to avoid the traps set for them, do not protect the weaker customers (for example, when savvier consumers benefit, to some extent, from the exploitation).
- Firms profit more from exploiting their customers' weaknesses than from helping them.

In these markets, few, if any, "angelic" companies may come to our aid because there is no advantage to their doing so. It may be too costly to educate the naive customers, and even if the firms succeed, there is no assurance that these customers, once educated, will stick with them and use their products. Eventually, competition encourages even once-angelic companies to exploit us.[145] Companies or managers who resist will lose business to those without moral qualms. Rather than a race to the top, companies compete in devising ever cleverer ways to exploit consumers' shortcomings—the result being that increasing competition delivers ever worse products and services to us.

Although the field of consumer protection law has developed over the past sixty years to curb this exploitation, these practices historically were condemned as unfair methods of competition. An early example is when candy manufacturers encouraged gambling among children.[146] To induce purchases, over forty candy manufacturers concealed in the wrapper the actual price for the candy (ranging from full price to free) and other prizes. Enticed by this element of chance, children switched away from those candy manufacturers who did not resort to this exploitative practice to those who did.

The defendant candy manufacturers argued in the resulting lawsuit, and the lower court agreed, that enticing children with gambling was not unfair because rivals could always resort to the same sales method.[147] Here, any candy manufacturer could maintain its competitive position simply by adopting this practice.[148] Indeed, the manufacturer might benefit as gambling would likely induce children to buy even more candy. Nor was the practice deceptive, nor

145. *Id.* at 78–87 (discussing drip pricing, and how Caesars Entertainment gave up on its efforts to warn consumers of suspect resort fees and joined the race to exploit).

146. F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 308 (1934).

147. *Id.*

148. F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 243 (1972) (noting that in *Keppel* it "had no difficulty in sustaining the FTC's conclusion that the practice was 'unfair,' though any competitor could maintain his position simply by adopting the challenged practice").

was there any showing that any of the forty firms would monopolize the market. Thus, the defendants argued, and the lower court concluded, that the exploitative practice was not an unfair method of competition.

The Supreme Court disagreed. Unfair methods of competition included practices that tend to "take unfair advantage of the public."[149] The Court had little difficulty condemning this practice, which was "shown to exploit consumers, children, who [were] unable to protect themselves."[150] As the Court noted, a "method of competition which casts upon one's competitors the burden of the loss of business unless they will *descend* to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed."[151]

Thus, using its authority under § 5, the FTC can place guardrails on data-collection practices that exploit consumers' behavioral weaknesses. One area to regulate is what's known as dark patterns.

A dark pattern is when a company manipulates, subverts, or impairs our autonomy, decision-making, or choices, often through our behavioral weaknesses.[152] The subject is a hot topic among policymakers. In 2021, the FTC brought together "researchers, legal experts, consumer advocates, and industry professionals to examine what dark patterns are and how they might affect consumers and the marketplace."[153] Among the topics discussed were "what laws, rules, and norms regulate the use of dark patterns" and "whether additional rules, standards, or enforcement efforts are needed to protect consumers."[154] In late 2021, the FTC issued "a new enforcement policy statement warning companies against deploying illegal dark patterns that trick or trap consumers into subscription services."[155] The policy statement focused

149. *Unfair Competition at Common Law and Under the Federal Trade Commission*, *supra* note 36, at 331.

150. *Keppel*, 291 U.S. at 313.

151. *Id.* (emphasis added).

152. Digital Services Act, at ¶ 67 (defining dark patterns as "practices that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions. Those practices can be used to persuade the recipients of the service to engage in unwanted behaviours or into undesired decisions which have negative consequences for them").

153. *Dark Patterns Workshop*, FED. TRADE COMM'N (2021), https://www.ftc.gov/media/73487.

154. FTC to Hold Virtual Workshop Exploring Digital Dark Patterns, 2021 WL 717222 (F.T.C. Feb. 24, 2021).

155. Press Release, Fed. Trade Comm'n, FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions (Oct. 28, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-

on negative options, where companies use a consumer's silence or inaction as acceptance of an offer. So, a consumer, enticed by a free trial offer of animal kingdom cards for their children, might find boxes of cards accumulating outside their door with a hefty bill attached.

One area for the FTC to regulate is the use of dark patterns to steer individuals away from privacy-friendly options to collect more of their data.[156] In its 2018 review, the Norwegian Consumer Council investigated how Facebook, Microsoft, and Google deliberately manipulated privacy settings to deter individuals from protecting their privacy.[157] These data-opolies give users the illusion of control while making it harder for them to protect their privacy. As the Australian Competition & Consumer Commission (ACCC) likewise found, digital platforms "tend to understate to consumers the extent of their data collection practices while overstating the level of consumer control over their personal user data."[158] Why? When we have the illusion of control, we paradoxically are likelier to undertake greater risks in sharing our private information. As the Norwegian Consumer Council noted, "[t]he combination of privacy intrusive defaults and the use of dark patterns, nudge users of Facebook and Google, and to a lesser degree Windows 10, toward the least privacy friendly options to a degree that we consider unethical."[159]

Consumer Reports and Epic provide another example of dark patterns. After California's 2018 privacy statute went into effect, Californians had the right to opt-out of the sale of their data. In response,

> many companies have developed complicated and onerous opt-out processes. Some companies ask consumers to go through several different steps to opt out. In some cases, the opt outs are so complicated that they have actually prevented consumers from stopping the sale of their information.[160]

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illegal-dark-patterns-trick-or-trap-consumers-subscriptions; FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT REGARDING NEGATIVE OPTION MARKETING (2021), https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf.

156. *Fact Sheet on the FTC's Commercial Surveillance and Data Security Rulemaking*, FED. TRADE COMM'N (2022), https://www.ftc.gov/legal-library/browse/federal-register-notices/commercial-surveillance-data-security-rulemaking (noting how companies are "increasingly employ[ing] dark patterns or marketing to influence or coerce consumers into choices they would otherwise not make, including purchases or sharing personal information").

157. *Deceived by Design*, NORWEGIAN CONSUMER COUNCIL (Jun. 27, 2018), https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf.

158. ACCC FINAL REPORT, *supra* note 112, at 23.

159. NORWEGIAN CONSUMER COUNCIL, *supra* note 157, at 3.

160. CR/Epic Report, *supra* note 14, at 23.

Thus, companies seek an advantage over rivals by designing privacy out of their system and nudging us "to make privacy-intrusive selections by appealing to certain psychological or behavioural biases, using design features such as privacy-intrusive defaults or pre-selections."[161] As the influential House Report on the digital economy noted, "[t]here appears to be a substantial market failure where dark patterns are concerned—what is good for e-commerce profits is bad for consumers."[162]

Some policymakers have already taken steps to prevent these exploitative practices. In a first for any statute, the California Privacy Rights Act of 2020 states that any agreement "obtained through the use of dark patterns does not constitute consent."[163] California also promulgated regulations prohibiting businesses from using "a method that is designed with the purpose or has the substantial effect of subverting or impairing a consumer's choice to opt-out."[164] Europe's Digital Markets Act obligates gatekeepers not to "design, organise or operate their online interfaces in a way that deceives, manipulates or otherwise materially distorts or impairs the ability of end users to freely give consent."[165] Likewise, Europe's Digital Services Act prohibits the dominant online platforms and interfaces from using these "dark patterns."[166] There are also bills in Congress to crack down on dark patterns.[167]

Dark patterns do not benefit society. They are by design exploitative, seeking to use the insights of behavioral economics to manipulate our decisions and behavior in ways that undermine our well-being. Accordingly, through rulemaking and enforcement, the FTC should void any consent for

161. ACCC FINAL REPORT, *supra* note 112, at 374; *see also* CMA FINAL REPORT, *supra* note 112, ¶ 4.173 (finding that the platforms' choice architectures rather than remediate biases are more likely to exacerbate biases).

162. HOUSE REPORT, *supra* note 43, at 53.

163. CAL. CIV. CODE § 1798.140(h); *see also* The Colorado Privacy Act (COLO. REV. STAT. § 6-1-1303(5)(c) (agreement obtained through dark patterns do not constitute consent); CAL. CIV. CODE §§ 56.18–56.186 (California Genetic Information Privacy); Connecticut Act Concerning Personal Data Privacy and Online Monitoring, Public Act No. 22-15, § 1(1)(6) (2022) (same).

164. CAL. CODE REGS. tit. 11, § 999.315(h) (2021).

165. Digital Markets Act ¶ 37.

166. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), O.J. (L 277) 1 EU, at ¶ 67 (prohibiting providers of intermediary services "from deceiving or nudging recipients of the service and from distorting or impairing the autonomy, decision-making, or choice of the recipients of the service via the structure, design or functionalities of an online interface or a part thereof").

167. *See, e.g.*, Online Privacy Act of 2021, H.R. 6027, 117th Cong. § 209 (1st Sess. 2021) (prohibiting a covered entity from intentionally using dark patterns in providing notice, obtaining consent, or maintaining a privacy policy as required by the proposed statute).

data obtained through dark patterns and prohibit companies from using these dark patterns to obtain or use our data. This would include exploitative design choices to direct individuals to the less privacy-friendly option, which primarily benefits the company, such as giving the non-privacy option far more prominence (such as a large box for "I consent," while hiding the privacy-friendly option in small print) or making the privacy-friendly option more cumbersome or time-consuming (such as requiring the individuals to click through multiple links to opt-out of collecting their data).

As we have seen from this Part, the existing categories of unfair methods of competition can address many unfair data collection and surveillance practices that damage competition, consumer autonomy, and privacy. But the last category involving exploitative behavior marks a significant shift in thinking: it reflects the understanding that more competition, absent the regulatory guardrails, would not necessarily curb the exploitative practice. Companies use dark patterns to extract our data because if they don't, they are at a competitive disadvantage to those who do. If anything, more competition would likely lead to more ingenuous ways to manipulate our behavior. Thus, the government has a responsibility to prevent exploitative practices like dark patterns.

As the next Part explores, a more effective way to prevent exploitative, deceptive, and other unfair methods of competition is to eliminate the economic incentive to engage in that behavior. And that requires the FTC to tackle the primary source of this privacy degradation in the digital economy, namely behavioral advertising.

IV. RACE TO THE BOTTOM IN THE SURVEILLANCE ECONOMY

The problem with data-opolies is more than just their power. It is also about their incentives. They engage in intrusive surveillance and extract too much data to better predict and manipulate our behavior and emotions. The prevailing belief is that increasing competition will limit the data-opolies' ability to extract our data and exploit us. We can see this belief in Europe's Digital Markets Act. To combat the gatekeepers' collecting and accumulating large amounts of data from end users, the DMA seeks to promote "an adequate level of transparency of profiling practices employed by gatekeepers."[168] The

168. Digital Markets Act, at ¶ 72.

belief is that more transparency will increase competition,[169] which would improve privacy.[170]

But is this true? Instead of imposing all these obligations on the data-opolies, suppose antitrust enforcers just broke them up. Just like the United States did with the Standard Oil and AT&T monopolies. Would our privacy improve? Probably not.

Another category of toxic competition addressed in *Competition Overdose* is the race to the bottom.[171] To distinguish between good and bad competition, between races to the top and races to the bottom, one must ask whether the competitors' individual and collective interests are aligned. If all the competitors do the same thing, do they (and society) end up collectively better off—or worse off?

A. HISTORIC UNDERSTANDING OF INCENTIVES

One of our book's examples involves a hockey player who foregoes wearing a helmet for a slight competitive advantage. Other players will go helmetless, and in the end, none would enjoy a competitive advantage. Instead, they would be collectively worse off (with a greater risk of head trauma).[172] So, when a rival seeks an edge over its competitors by employing a particular method of competition, one must consider what would happen if others followed the rival's lead and took similar measures. If everyone ends up worse off, with no advantage going to anyone, they are in a race to the bottom. Accordingly, the method of competition is unfair.

The FTC Act sought to deter these "innumerable schemes whereby they took unfair advantage of their rivals, and the courts were forced to realize the necessity of protecting a man's business from the sharp practices of his competitor."[173]

One example is deceptive conduct. As the Restatement notes, courts may deem it unfair when firms gain a competitive advantage by failing "to disclose to prospective consumers particular information that is crucial to an intelligent

169. *Id.* (increasing transparency will put "external pressure on gatekeepers not to make deep consumer profiling the industry standard, given that potential entrants or startups cannot access data to the same extent and depth, and at a similar scale").

170. *Id.* (by shining a light at the data-opolies' data hoarding and profiling, rivals can "differentiate themselves better through the use of superior privacy guarantees").

171. STUCKE & EZRACHI, *supra* note 143, at 3–40.

172. *Id.* at 4–5.

173. *Unfair Competition at Common Law and Under the Federal Trade Commission Source*, *supra* note 37, at 328.

purchasing decision."[174] Consider a manufacturer that labeled its underwear as wool, including Merino Wool, when the clothing actually contained little wool.[175] This constituted an unfair method of competition because it was calculated to deceive the public and disadvantage the truthful sellers.[176] The honest manufacturers, Justice Brandeis observed, might also resort to deceptive labels or be forced out.[177] Once most of the sellers resort to fraud, none of them benefit, and a lemon market results.[178]

Antitrust scholar Robert Steiner, the former president of the Kenner Products toy company, described his concerns about the industry self-regulation of toy commercials in the 1960s and 1970s.[179] Originally favoring industry self-policing, he feared the toxic consequences of deceptive advertising. Absent regulation, some toy manufacturers would air deceptive ads, which would pull down the toy industry. Unless his company matched "the exaggerations and sometimes the outright deceptions of certain competitors, our commercials might not be exciting enough to move our toys off the shelves."[180] He foresaw bad commercials driving out the good ones, rendering TV advertising relatively ineffective. Consequently, it is uncontroversial that the FTC Act, common law, and many other laws prohibiting deceptive conduct, seek to halt this race to the bottom. Essentially, the law imposes guardrails to channel the competition into a race to the top. Now, if others followed the rival's lead (say, nondeceptive advertising), the competitors and society would be better off.

B. THE INCENTIVES OF BIG TECH: BEHAVIORAL ADVERTISING

The FTC already targets deceptive privacy statements, most notably the $5 billion fine imposed on the recidivist Facebook. But, as the dissenting Commissioners observed, the penalty and corporate reshuffling required

174. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt. g, at 10 (AM. LAW. INST. 1995).

175. F.T.C. v. Winsted Hosiery Co., 258 U.S. 483, 490 (1922).

176. *Id.* at 493.

177. *Id.*

178. *Id.* at 494 ("The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product."); George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495 (1970) (noting that the cost of dishonesty includes "loss incurred from driving legitimate business out of existence").

179. Robert L. Steiner, *Double Standards in the Regulation of Toy Advertising*, 56 CINCINNATI L. REV. 1259, 1264 (1988).

180. *Id.*

under the consent decree did not change the company's incentives. The settlement failed to address the underlying cause of Facebook's exploitative behavior, namely, its behavioral advertising-dependent business model. This failure, for the two dissenting FTC commissioners, was a deal-breaker. Commissioner Rebecca Kelly Slaughter could not "view the order as adequately deterrent without both meaningful limitations on how Facebook collects, uses, and shares data and public transparency regarding Facebook's data use and order compliance."[181] As Commissioner Rohit Chopra noted, "Facebook's violations were a direct result of the company's behavioral advertising business model," and the FTC's settlement did "little to change [Facebook's] business model or practices that led to the recidivism."[182] But for three FTC commissioners, any substantive data and privacy protections were beyond the agency's power: "Our 100-year-old statute does not give us free rein to impose these restrictions."[183]

Of course, no statute can (or should) give an administrative agency free rein to do whatever it desires. However, the majority in *Facebook* never explained why the FTC could not curb the race to the bottom engendered by behavioral advertising as an "unfair method of competition."

So, while the FTC could try to regulate all the manipulative means to attract, addict, and extract value from individuals, the better route, as *Breaking Away* examines, is to examine incentives.[184]

Advertising generally skews incentives, as the founders of Google recognized. In 1998, when their search engine was not dependent on advertising revenues, Google's founders Sergey Brin and Lawrence Page predicted that "advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers."[185] They laid out how advertising can distort a search engine's incentives and warned of

181. FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER 2 (2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf.

182. FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA 1 (2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf [hereinafter Chopra *Facebook* Dissent].

183. FED. TRADE COMM'N, STATEMENT OF CHAIRMAN JOE SIMONS AND COMMISSIONERS NOAH JOSHUA PHILIPS AND CHRISTINE S. WILSON 6 (2019), https://www.ftc.gov/system/files/documents/public_statements/1536946/092_3184_facebook_majority_statement_7-24-19.pdf.

184. STUCKE, *supra* note 7, at 192–96; *see also* EZRACHI & STUCKE, *supra* note 7, at 203–4 (exploring importance of incentives in the path of innovation).

185. Sergey Brin & Lawrence Page, *The Anatomy of a Large-Scale Hypertextual Web Search Engine*, 30 COMPUT. NETWORKS & ISDN SYS. 107, Appendix A (1998).

the "insidiousness" of the resulting search bias. Given these risks, the young entrepreneurs believed "that it is crucial to have a competitive search engine that is transparent and in the academic realm."[186]

As *Breaking Away* explores, behavioral adverting skews incentives even more. Data is collected about us, but not for us. Behavioral advertising has evolved beyond predicting what each of us wants into manipulating our behavior. In using emotional marketing to trigger our desires—whether to buy a particular product, endorse it to friends, or create a community around the brand—we are not the customer but the target.

Emotional marketing is a game-changer for advertising. As the Facebook investor and advisor Roger McNamee noted, Google and Facebook help advertisers "to exploit the emotions of users in ways that increase the likelihood that they purchase a specific model of car or vote in a certain way."[187] As Facebook's patented "emotion detection" tools suggest, the ultimate aim is to detect and appeal to our fears and anger; to pinpoint our children and us when we feel "worthless," "insecure," "defeated," "anxious," "silly," "useless," "stupid," "overwhelmed," "stressed," and "a failure."[188] Essentially, we are the lab rats as we enter a marketplace of behavioral discrimination: companies compete to decipher our personality; to find whether we have an internal/external locus of control, our willingness to pay, and our impulsivity.

As WhatsApp's founders, quoting the movie Fight Club, explained:

> "Advertising has us chasing cars and clothes, working jobs we hate so we can buy shit we don't need."
>
> . . .
>
> Advertising isn't just the disruption of aesthetics, the insults to your intelligence and the interruption of your train of thought. At every company that sells ads, a significant portion of their engineering team spends their day tuning data mining, writing better code to collect all your personal data, upgrading the servers that hold all the

186. *Id.*

187. ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE 69 (2019).

188. Michael Reilly, *Is Facebook Targeting Ads at Sad Teens?*, MIT TECH. REV. (May 1, 2017); McNamee, *supra* note 187, at 69; Sam Levin, *Facebook Told Advertisers It Can Identify Teens Feeling "Insecure" and "Worthless,"* GUARDIAN (May 1, 2017), https://www.theguardian.com/technology/2017/may/01/facebook-advertising-data-insecure-teens.

> data and making sure it's all being logged and collated and sliced and packaged and shipped out.[189]

FTC Commissioner Chopra noted how Facebook's behavioral advertising business model is the root cause of its widespread and systemic privacy problems: "Behavioral advertising generates profits by turning users into products, their activity into assets, their communities into targets, and social media platforms into weapons of mass manipulation. We need to recognize the dangerous threat that this business model can pose to our democracy and economy."[190]

In this arms race, where the data-opolies control most of the data and reap most of the profits, many websites and apps cannot unilaterally opt-out. Many websites and apps are ostensibly free. To monetize their efforts, they must attract and sustain our attention while gathering data to manipulate and target us with behavioral ads. Consequently, as *Breaking Away* explores, the ethical websites and apps face a Hobson's choice—(1) opt-out of behavioral advertising and watch their ad revenues plummet—on average by 70%, which can effectively kill their business;[191] (2) change to a freemium subscription model (which puts them at a significant competitive disadvantage to the free apps and websites); or (3) stick with behavioral advertising revenues until enough dedicated followers are willing to pay for their app or service. Most cannot afford to opt-out of this toxic competition. They must continue finding ways to profile us, surveil us, and manipulate our behavior. To attract and drive up the bidding for their advertising space, they effectively sell us (and our ability to be manipulated).

Advertisers recognize that most of us do not want this intrusive surveillance.[192] To realize better value from their campaigns and outcompete rivals, however, advertisers are encouraged to rely on emotion analytics and facial coding, where algorithms process our facial expressions and voice to

189. HOUSE REPORT, *supra* note 43, at 157 (quoting *Why We Don't Sell Ads*, WHATSAPP (June 18, 2012), https://blog.whatsapp.com/why-we-don-t-sell-ads).

190. Chopra *Facebook* Dissent, *supra* note 182, at 2.

191. CMA FINAL REPORT, *supra* note 112, ¶ 5.326 (estimating that U.K. publishers "earned around 70% less revenue when they were unable to sell personalised advertising but competed with others who could"); *see also* FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER IN THE MATTER OF GOOGLE LLC AND YOUTUBE LLC 2–3 (2019) (noting how both YouTube and the channels have a strong financial incentive to use behavioral advertising, so while "YouTube has long allowed channel owners to turn off default behavioral advertising and serve instead contextual advertising that does not track viewers . . . vanishingly few content creators would elect to do so, in no small part because they receive warnings [from Google] that disabling behavioral advertising can 'significantly reduce your channel's revenue'").

192. CMA FINAL REPORT, *supra* note 112, ¶ 4.68.

manipulate our behavior.[193] Even if the ethical advertiser finds this surveillance and manipulation morally repugnant, many cannot afford to opt-out, and a race to the bottom ensues.

The disturbing realization is that this toxic competition would exist even without the data-opolies. Millions of free websites and apps compete to attract millions of advertisers to target billions of users every minute of every day with behavioral ads. To succeed in this competition, websites and apps need detailed, up-to-date data about us, which in turn increases the demand to track us online and offline.

Because behavioral advertising skews the market participants' incentives, we have a market failure. As two officials from the International Monetary Fund explained, "An implication is that a market for data lacking sufficient user control rights—where data collectors do as they please with the data they collect—is likely to lead to excessive data collection and too little privacy."[194] Without adequate privacy protections, even robustly competitive markets will not function in ways to promote our privacy. As the IMF officials add,

> To the extent that privacy is not internalized in the economic decisions of data collectors and processors, the market will tend toward the collection of excessive personal data and insufficient protection of privacy. For the market for data to internalize this externality, the rights of data subjects must be adequately attributed.[195]

Therefore, laws are ultimately needed to correct the fundamental misalignment of incentives caused by behavioral advertising. This is more challenging than one might think. As Alastair Mactaggart, one of the drivers of California's two recent privacy statutes, observed:

> If you think about our other fundamental rights as a country, no one is spending millions and millions of dollars trying to undermine the First Amendment or the freedom of religion. But people are actually spending hundreds of millions of dollars trying to undermine privacy because there's so much money in it for corporations.[196]

193. SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM 284 (2019); *see also* Sophie Kleber, *Three Ways AI Is Getting More Emotional*, *in* ARTIFICIAL INTELLIGENCE: THE INSIGHTS YOU NEED FROM HARVARD BUSINESS REVIEW 142 (Thomas H. Davenport et al., eds. 2019); EZRACHI & STUCKE, *supra* note 7, at 101–22.

194. Carrière-Swallow & Haksar, *supra* note 124, at 5.

195. *Id.* at 14.

196. Natasha Singer, *The Week in Tech: Why Californians Have Better Privacy Protections*, N.Y. TIMES (Sept. 27, 2019), https://www.nytimes.com/2019/09/27/technology/the-week-in-tech-why-californians-have-better-privacy-protections.html.

That is especially true when the data-opolies, including Apple through its deal with Google, reap billions of dollars from behavioral advertising each quarter.[197]

C. POSSIBLE FTC REFORMS

The FTC can help realign the incentives by curbing behavioral advertising (by at least requiring users to opt into personalized advertising). The FTC is not regulating the content of advertising per se, but the use of personal data to profile individuals and manipulate behavior to maximize engagement and advertising revenues.

So, the FTC regulation would implement data minimization policies, where personal data can be collected and used only when it is necessary to provide the product and service (which would not include behavioral advertising purposes). Companies can continue to advertise, as they have done for centuries, including contextual advertising, but not use personal data for psychographic profiles to predict and manipulate behavior.

The FTC already limits behavioral advertising under the Children's Online Privacy Protection Act (COPPA). In 2012, the FTC amended the definition of personal information to include "persistent identifiers," which can be used to recognize users over time and across different websites or online services. As a result, under COPPA, parental notice and consent are required before an operator uses a persistent identifier for behavioral advertising.[198]

197. For example, for the first six months of 2022, $110.949 billion of Google's $137.7 billion in revenues came from advertising, which generated most of the company's $32 billion in profits for that period. *See* Alphabet Inc., Quarterly Report for the Quarterly Period Ended June 30, 2022 (Form 10-Q) (July 26, 2022), at 11, 41, https://abc.xyz/investor/static/pdf/20220726_alphabet_10Q.pdf?cache=de538c8. For that same period, nearly all of Meta's $56.7 billion in revenues and $14 billion in profits came from advertising. Meta Platforms, Inc., Quarterly Report for the Quarterly Period Ended June 30, 2022 (Form 10-Q) (July 27, 2022), at 14, https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/f657a197-fe9f-4414-81d3-b56c02701886.pdf. Likewise, for that same period, Amazon made over $16 billion in sales relating to its advertising services. The company did not break out its net profits from its advertising business. *See* Amazon.com Inc., Quarterly Report for the Quarterly Period Ended June 30, 2022 (Form 10-Q) (July 28, 2022), at 20, https://www.sec.gov/Archives/edgar/data/1018724/000101872422000019/amzn-20220630.htm. For the three months ending March 31, 2022, Microsoft's search and news advertising revenues exceeded $2.9 billion. *See* Microsoft Corp., Quarterly Report for the Quarterly Period Ended March 31, 2022 (Form 10-Q) (Apr. 26, 2022), at 31, https://www.sec.gov/Archives/edgar/data/789019/000156459022015675/msft-10q_20220331.htm.

198. Press Release, Fed. Trade Comm'n, FTC Strengthens Kids' Privacy, Gives Parents Greater Control Over Their Information by Amending Childrens Online Privacy Protection Rule (Dec. 19, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/12/ftc-strengthens-kids-privacy-gives-parents-greater-control-over-their-information-amending-childrens.

However, the surveillance apparatus is not used solely to get us to buy things we don't need at the highest price we are willing to pay. Competition in the digital economy is also for attention. Under the guise of personalizing and improving their services, firms will continue to design their apps and products like slot machines to attract and addict us.[199] Thus, limiting behavioral advertising, by itself, would be inadequate. Gaming apps and firms left with contextual advertising would still have the incentive to appeal to our emotions to addict us.

Policymakers cannot afford to ignore attention markets. But regulating attention markets has significant implications for free speech and public discourse. The aim of any engrossing book, movie, podcast, play, or opera, after all, is to engage us.

Consequently, the FTC enforcement and regulations could entail both: (1) a data minimization component, which would limit companies' ability to collect and use personal data to that which is necessary to provide the product and service, and behavioral advertising would not be deemed a necessary purpose; and (2) providing individuals the right to avoid being profiled, having their data amalgamated with other data collected elsewhere by the company or third-parties, and receiving personalized recommendations if they so choose.

For example, an individual can opt-out of YouTube recommending videos based on the personal data Google has collected about that person. Both components would give individuals the right, without being penalized, to limit at the onset what data is collected about them and for what purpose. Indeed, the data minimization rule is less intrusive than attempting to regulate all the techniques to manipulate us. Companies might still design their apps as slot machines, but they could not design the perfect slot machine to addict you in particular.

As *Breaking Away* discusses in depth the pros and cons of this proposal, Part V will address several additional concerns if the FTC sought to curb, if not extinguish, the surveillance economy through its rulemaking authority.

V. POTENTIAL CONCERNS

The data-opolies have spent millions of dollars lobbying against privacy and antitrust reform,[200] and as of late 2023, they were winning in the United

199. *See* EZRACHI & STUCKE, *supra* note 7, at 101–20.

200. *See, e.g.*, Anna Edgerton & Emily Birnbaum, *Big Tech's $95 Million Spending Spree Leaves Antitrust Bill on Brink of Defeat*, BLOOMBERG LAW (Sept. 6, 2022), https://www.bloomberg.com/news/articles/2022-09-06/tech-giants-spree-leaves-antitrust-bill-on-brink-of-defeat?leadSource=uverify%20wall (reporting how Google, Apple, Amazon.com, and Meta and their

States. They will likely challenge any FTC regulation to curb unfair data collection and surveillance practices that damage competition, consumer autonomy, and consumer privacy. Although they could challenge any of the proposed rules outlined in Part IV, they would have the greatest incentive to challenge any rules that prohibit (or require consumers to opt into) behavioral advertising. There is simply too much money at stake. Moreover, restricting behavioral advertising may not neatly fall within any of the existing categories of unfair methods of competition. So, the FTC restrictions on behavioral advertising may be more vulnerable to attack. This Part addresses four issues: (1) whether the FTC has authority to promulgate rules involving unfair methods of competition, (2) whether an FTC rule banning (or require consumers to opt into) behavioral advertising would run afoul of the Supreme Court's "major questions doctrine," as recently outlined in *West Virginia v. EPA*, (3) whether an FTC rule restricting behavioral advertising would run afoul of the First Amendment, and (4) whether the FTC should defer to Congress for policies that would affect a multi-billion dollar economy.

A. CAN THE FTC PROMULGATE RULES INVOLVING UNFAIR METHODS OF COMPETITION?

Opponents to the FTC regulations might argue that the agency has exercised its authority over unfair methods of competition through litigation rather than rulemaking. It would be hard to fathom why Congress imposed multiple hurdles for regulating unfair and deceptive acts and practices if the FTC could circumvent them through rulemaking under unfair methods of competition.

While the Commission has been more active in promulgating rules to prohibit deceptive and otherwise fraudulent practices, as Judge Richard Posner observed, it did promulgate one rule in 1967 to prohibit an antitrust violation:

> And that rule was of the simplest kind; it forbade the discriminatory provision of advertising allowances. See section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(d); 16 C.F.R. Part 412 (Trade Regulation Rule Against Discriminatory Practices in Men's and Boys' Tailored Clothing Industry); 16 C.F.R. Ch. 1, at pp. 4–5 (table of contents of Subchapter D, Trade Regulation Rules). Although the Commission has long been urged to do more in the way of antitrust rulemaking, see, e.g., Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78

trade groups have poured almost $95 million into lobbying since 2021 to derail the American Innovation and Choice Online Act).

> Harv. L. Rev. 385 (1964), the urgings have fallen largely on deaf ears.[201]

The year after that rule was promulgated, the Supreme Court decided the case of *F.T.C. v. Fred Meyer, Inc.*[202] Notably, the Court did not question the FTC's ability to regulate unfair methods of competition. "In that opinion," the FTC noted, "the Court suggested that the Commission might wish to expand on earlier guidance and issue detailed guidelines to promotional allowances" under the Robinson-Patman Act.[203] The FTC accepted this invitation by publishing the "Fred Meyer Guides," which "set out general standards for promotional allowances, applicable to all industries."[204] These Fred Meyer Guides were "revised as needed to keep them current, most recently in 1990."[205]

Next, in 1973, the D.C. Circuit in *National Petroleum Refiners Association v. F.T.C.*, affirmed the Commission's authority to regulate. The language of § 6(g) of the FTC Act "is as clear as it is unlimited": "The Commission shall also have power . . . to make rules and regulations for the purpose of carrying out the provisions of [§ 5]."[206] The court noted that the Commission "is a creation of Congress, not a creation of judges' contemporary notions of what is wise policy"; thus, the "extent of [the FTC's] powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background."[207] Since the FTC Act was clear, the D.C. Circuit's conclusion was "not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power."[208] The FTC could use its rulemaking "to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the

201. United Air Lines, Inc. v. C.A.B., 766 F.2d 1107, 1118 (7th Cir. 1985).

202. 390 U.S. 341 (1968).

203. Trade Regulation Rule: Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. § 412 (1967); *see also Fred Meyer*, 390 U.S. at 358 ("Nothing we have said bars a supplier, consistently with other provisions of the antitrust laws, from utilizing his wholesalers to distribute payments or administer a promotional program, so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices, for seeing that the allowances are made available to all who compete in the resale of his product.").

204. Trade Regulation Rule: Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. § 412 (1967).

205. The FTC in 1994 repealed its antitrust rule, as it was unnecessary with its Fred Meyer Guides in place. *Id.*

206. 482 F.2d 672, 693 (D.C. Cir. 1973).

207. *Nat'l Petroleum Refiners*, 482 F.2d at 674.

208. *Id.* at 693.

national policy against monopolies and unfair business practices."[209] Since § 6(g) plainly authorizes substantive rulemaking by the FTC for unfair methods of competition, "and nothing in the statute or in its legislative history precludes its use for this purpose," the D.C. Circuit upheld the Commission's rulemaking authority.[210]

Thereafter, when adding the rulemaking procedures in Magnuson-Moss, Congress specifically noted the rule at issue in *National Petroleum Refiners,*[211] and recognized the FTC's power to promulgate it.[212] Moreover, Congress noted that its Magnuson-Moss procedures "shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce."[213] This was a deliberate choice.[214] Consequently, both Congress and the courts have affirmed the FTC's substantive rulemaking authority for unfair methods of competition.[215]

209. *Id.*

210. *Id.*

211. Namely the Commission's rule declaring that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice. *Nat'l Petroleum Refiners*, 482 F.2d at 674.

212. S. REP. NO. 93-1408 at 7763–64 (1974) (Conf. Rep.):

> In an otherwise valid trade regulation rule the Commission may specify what must be done in order to avoid engaging in an unfair or deceptive practice. For example, in the present Commission rule relating to "octane rating," the Commission required that certain testing procedures be followed in order to determine what octane rating should be posted on gasoline pumps. The conferees intend that the Commission may continue to specify such matters in rules which are otherwise valid under Section 18. It should be noted, however, that inasmuch as such requirements are a part of the rule, they are subject to judicial review in the same manner as is the portion of the rule which defines the specific act or practice which is unfair or deceptive.

213. 15 U.S.C. § 57a.

214. S. REP. NO. 93-1408, at 7763–64 (1974) (Conf. Rep.) (noting that the conference added "a new section 18 to the Federal Trade Commission Act which would codify the Commission's authority to make substantive rules for unfair or deceptive acts or practices in or affecting commerce" but that the conference substitute did "not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition in or affecting commerce").

215. Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 235 (2014); *see also* Chopra & Khan, *supra* note 23, at 375–79.

Regardless, some might debate this.[216] Additionally, opponents of the FTC's rulemaking now have a stronger weapon, namely, the Supreme Court's Major Questions Doctrine.

B. WOULD THE FTC'S RULEMAKING RUN AFOUL OF THE SUPREME COURT'S "MAJOR QUESTIONS DOCTRINE"?

Even before the Court's 2022 *EPA* decision, an FTC Commissioner expressed the risk of the Court striking down the FTC rulemaking under its resurrected non-delegation doctrine:

> [I]t's very clear that the justices are interested in getting back into the nondelegation business. How far they will go, what they cut I think remains to be seen. But it could have a real impact on at least what we understand today—or what the agencies understand today—as their regulatory power.[217]

Opponents will certainly rely on *West Virginia v. EPA* to strike down any FTC regulation of "unfair methods of competition." That decision involved the EPA's Clean Power Plan, which never went into effect, as it was immediately challenged. Moreover, intervening market forces caused the power industry to meet the Plan's environmental targets, so the Plan was for all purposes "obsolete."[218] There were, in effect, no balls or strikes to call here.[219] Nevertheless, that did not stop the Court from using the case to announce its "major questions doctrine."

The Court limited this doctrine to "certain extraordinary cases," where the agency must convince the courts "something more than a merely plausible

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216. C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 678–79 (2009) (collecting some criticisms of *Petroleum Refiners*); *see also* Dissenting Statement of Commissioner Christine S. Wilson Concerning the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, FTC P201200 (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-concerning-notice-proposed-rulemaking-non (questioning her agency's authority to engage in rulemaking for unfair methods of competition).

217. Michael Acton, *FTC Could Face US Supreme Court Pushback if it Flexes Rulemaking Powers, Commissioner Phillips Warns*, MLEX (Oct. 27, 2021), https://mlexmarketinsight.com/news/insight/ftc-could-face-us-supreme-court-pushback-if-it-flexes-rulemaking-powers-commissioner-phillips-warns.

218. W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2627–28 (2022) (Kagan, J., dissenting).

219. In his Senate confirmation hearing, Chief Justice Roberts said "[a]nd I will remember that it's my job to call balls and strikes and not to pitch or bat." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

textual basis" for its actions, but instead point to "clear congressional authorization."[220] Nonetheless, opponents to the FTC regulation might cite parts of the opinion and concurrence to challenge the FTC's rulemaking on unfair data collection and surveillance practices.

First, opponents would argue that the FTC, in regulating privacy, is acting in an area "that Congress conspicuously and repeatedly declined to enact itself."[221] The opponents would repeat an argument that a hotel chain raised in questioning the FTC's authority under § 5's "unfair and deceptive" acts to regulate cybersecurity. In that case, Wyndham argued that:

> [E]ven if cybersecurity were covered by § 45(a) as initially enacted, three legislative acts since the subsection was amended in 1938 have reshaped the provision's meaning to exclude cybersecurity. A recent amendment to the Fair Credit Reporting Act directed the FTC and other agencies to develop regulations for the proper disposal of consumer data . . . . The Gramm-Leach-Bliley Act required the FTC to establish standards for financial institutions to protect consumers' personal information . . . . And the Children's Online Privacy Protection Act ordered the FTC to promulgate regulations requiring children's websites, among other things, to provide notice of "what information is collected from children . . . , how the operator uses such information, and the operator's disclosure practices for such information." . . . Wyndham contends these "tailored grants of substantive authority to the FTC in the cybersecurity field would be inexplicable if the Commission already had general substantive authority over this field."[222]

The Third Circuit disagreed. Simply because Congress passed these three privacy laws did not undermine the FTC's pre-existing regulatory authority over some cybersecurity issues under the FTC Act. For example, the three statutes required (rather than authorized) the FTC to issue regulations. "Thus none of the recent privacy legislation was 'inexplicable' if the FTC already had some authority to regulate corporate cybersecurity through § 45(a)."[223]

Congress never passed a comprehensive privacy statute, similar to California's 2018 and 2020 statutes and Europe's GDPR. But the data-opolies could argue that it would be strange for Congress to currently consider

220. *EPA*, 142 S. Ct. at 2609.
221. *Id.* at 2610.
222. F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 247 (3d Cir. 2015).
223. *Id.* at 248.

legislating a privacy framework, such as the American Data Privacy and Protection Act,[224] when it delegated this function to the FTC.

Second, even when Congress delegates to an agency general rule-making or adjudicatory power, "judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions."[225] Digital ad spending in the United States is significant—exceeding $200 billion in 2021; and Google, Facebook, and Amazon capture most (64%) of the ad spending.[226] A decision on behavioral advertising would adversely impact these data-opolies and a major segment of the digital economy. Thus, the data-opolies would likely argue, quoting the Court, that a decision "of such magnitude and consequence rests with Congress itself" or the FTC only if it is "acting pursuant to a clear delegation" from Congress.[227] Congress has not clearly delegated the authority to prohibit or limit behavioral advertising to the FTC.

Finally, if three other justices follow Justices Gorsuch and Alito, the major questions doctrine would apply whenever "an agency claims the power to resolve a matter of great political significance,"[228] seeks to regulate "a significant portion of the American economy," or requires "billions of dollars in spending by private persons or entities."[229] The agency must then point to "clear congressional authorization."[230] Even that may be insufficient if, for example, it upsets "the proper balance between the States and the Federal Government."[231] Thus, even if the FTC could point to clear congressional authorization, the Court could still strike down the regulation in enforcing the limits on Congress's Commerce Clause power.

One may wonder what border there is for the Court to patrol regarding Congress's power under the Commerce Clause[232] and the powers reserved to the states—especially after the Court's decision in *Gonzales v. Raich*. In that

224. American Data Privacy and Protection Act (ADPPA), H.R. 8152, 117th Cong. (2d. Sess. 2022), https://www.govtrack.us/congress/bills/117/hr8152/text.

225. *EPA*, 142 S. Ct. at 2613 (quoting W. ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 288 (2016)).

226. Sara Lebow, *Google, Facebook, and Amazon to Account for 64% of US Digital Ad Spending This Year*, INSIDER INTELLIGENCE (Nov. 3, 2021), https://www.insiderintelligence.com/content/google-facebook-amazon-account-over-70-of-us-digital-ad-spending.

227. *EPA*, 142 S. Ct. at 2616.

228. *Id.* at 2620 (Gorsuch, J., concurring) (internal quotation omitted).

229. *Id.* at 2621 (Gorsuch, J., concurring) (internal quotation omitted).

230. *Id.* at 2620 (Gorsuch, J., concurring).

231. *Id.* at 2621 (Gorsuch, J., concurring) (internal quotations omitted).

232. Congress can "make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8.

case, the Court held that Congress, under the Commerce Clause, could prohibit individuals from growing marijuana in their backyards and personally using it, all in compliance with state law.[233] In that case, the Court remarked that its task, when assessing the scope of Congress's authority under the Commerce Clause, was "a modest one."[234] In *EPA*, however, two justices seemed to contemplate a more stringent review by the Court of Congress's power under the Commerce Clause. So, the FTC could face two hurdles: Congress never expressly authorized the agency to regulate data collection, and even if it did, that exceeded Congress's authority under the Commerce Clause and intruded into the domain of state law.

Given the interstate and international flow of personal data and digital advertising spending, it is hard to see how Congress lacks the authority to regulate data collection and behavioral advertising. But as historians of the Sherman Act know, legislators in 1890 were concerned about whether the Commerce Clause allowed them to pass a federal competition law. This was due to the Court's narrow reading of the Commerce Clause at that time.[235] While the Court may not retreat to that interpretation (which, if it did, would be a disaster in a national, if not global, digital economy), the data-opolies may urge the current Court to hem Congress's authority under the Commerce Clause when it suits them (while also having Congress pre-empt stronger state privacy statutes when that suits them better).

It is unclear how far the Court will expand its "major questions doctrine." But under its current form, the doctrine should not prevent the FTC's rulemaking for several reasons.

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233. 545 U.S. 1, 33 (2005).

234. *Id.* at 22 (noting that the Court did not have to determine whether the individuals' activities, when taken in the aggregate, substantially affected interstate commerce, but only whether a "rational basis" existed for so concluding).

235. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579, 605–06 (1976) (Blackmun, J., concurring) (noting the then-prevailing view in 1890 that "Congress lacked the Power, under the Commerce Clause, to regulate economic activity that was within the domain of the States," and how the Court since 1890 "has recognized a greatly expanded Commerce Clause power" and that "Congress intended the reach of the Sherman Act to expand along with that of the commerce power"); *see also* United States v. Lopez, 514 U.S. 549, 554–55 (1995) (noting how the Interstate Commerce Act and the Sherman Antitrust Act "ushered in a new era of federal regulation under the commerce power," but how the Court in the early cases under these laws imported its "negative Commerce Clause cases" that Congress could not regulate activities such as "production," "manufacturing," and "mining." Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 691 (1993).

First, in *EPA*, the environmental agency located its "newfound" power in the "vague language" of an "ancillary" provision of the statute.[236] As Part III discussed, the broad power Congress gave the FTC to identify and deter unfair methods of competition was central to the FTC Act, and not designed to be a "gap filler."[237] A key takeaway, as the courts note, is that Congress designed the term unfair methods of competition as a "'flexible concept with evolving content' and 'intentionally left [its] development . . . to the Commission.'"[238]

Second, unlike the EPA, the FTC has exercised its power to curb "unfair methods of competition" over decades, so its power can hardly be characterized as "newfound." Thus, the source of the regulation is central to the FTC Act, and cannot be characterized as a "previously little-used backwater."[239] As the Second Circuit noted in *F.T.C. v. Standard Education Society*, the FTC's powers "are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[240]

Finally, it would be hard to square the major questions doctrine with the Court's earlier decision in *F.T.C. v. Sperry & Hutchinson Co.*[241] The Court addressed two issues: (1) does § 5 of the FTC Act empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? (2) does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition?[242] The Court held that "the statute, its legislative history, and prior cases compel an affirmative answer

236. *EPA*, 142 S. Ct. at 2610 (internal citation omitted).

237. *Id.*; *see also* Nat'l Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672, 684 (D.C. Cir. 1973) ("The FTC's charter to prevent unfair methods of competition is tantamount to a power to scrutinize and to control, subject of course to judicial review, the variety of contracting devices and other means of business policy that may contradict the letter or the spirit of the antitrust laws."); FTC WITHDRAWAL STATEMENT, *supra* note 32, at 1 (noting that "Section 5 is one of the Commission's core statutory authorities in competition cases; it is a critical tool that the agency can and must utilize in fulfilling its congressional mandate to condemn unfair methods of competition").

238. F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 243 (3d Cir. 2015) (quoting F.T.C. v. Bunte Bros., 312 U.S. 349, 353 (1941) and Atl. Refin. Co. v. F.T.C, 381 U.S. 360, 367 (1965)); *see also Motion Picture Advert. Serv.*, 344 U.S. at 394 ("Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.").

239. *EPA*, 142 S. Ct. at 2613.

240. 86 F.2d 692, 696 (2d Cir. 1936).

241. 405 U.S. 233 (1972).

242. *Id.* at 239.

to both questions."[243] The legislative and judicial authorities (such as *Keppel*) convinced the Court that the FTC "does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[244] As the Court found, Congress expressly meant to confer the power that the FTC would assert in regulating the digital economy:

> When Congress created the Federal Trade Commission in 1914 and charted its power and responsibility under § 5, it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply. Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914), presents the reasoning that led the Senate Committee to avoid the temptations of precision when framing the Trade Commission Act:
>
> 'The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.'
>
> The House Conference Report was no less explicit. 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.' H.R.Conf.Rep.No.1142, 63d Cong., 2d Sess., 19 (1914).[245]

Both "the sweep and flexibility" of this approach by Congress were, for the Court, "crystal clear."[246] The fact that Congress did not speak about data collection (or could have foreseen the harm from behavioral advertising) is irrelevant. Congress knew that immoral, unethical, oppressive, and

243. *Id.*
244. *Id.* at 244.
245. *Id.* at 239–40 (single quotation marks in original).
246. *Id.* at 241.

unscrupulous behavior would propagate despite the good intentions of the ecosystem's architects, and it was the FTC's job to curb it.

Although the Court in *Sperry & Hutchinson* did not outline the boundaries of "unfair methods of competition," it acknowledged the factors that the FTC considered in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

> '(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).'[247]

Consequently, the FTC in its rulemaking process could gather evidence that identifies those surveillance and data collection practices that offend these three factors. If so, Congress authorized the Commission to regulate it.

Some may still hesitate. The current Court, as the dissenting justices noted in *EPA*, is textualist only when it suits its purpose. When textualism frustrates its broader goals, "special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[248] The concern is that the Court will create new cards that may handicap the FTC's ability to curb unfair data collection and surveillance. That card could be the First Amendment.

C. WOULD AN FTC RULE BANNING BEHAVIORAL ADVERTISING VIOLATE THE FIRST AMENDMENT?

Critics of the FTC regulation would likely rely on *U.S. West, Inc. v. F.C.C.*[249] and *Sorrell v. IMS Health Inc.*[250] to argue that consumers' personal information is "commercial speech" for purposes of the First Amendment's free speech clause; that the FTC failed to show that its regulations directly and materially

247. *Id.* at 244 (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking., 29 Fed. Reg. 8355 (1964)).

248. *EPA*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

249. *See generally* 182 F.3d 1224 (10th Cir. 1999) (holding that the agency regulations violated the First Amendment since the agency failed to satisfy its burden of showing that the customer approval regulations restricted no more commercial speech than was necessary to serve the asserted state interests).

250. *See generally* 564 U.S. 552 (2011) (holding that the state statute violated the First Amendment since the state failed to show that its statute directly advanced the state's claimed substantial governmental interests, including privacy, and that the law was drawn to achieve that interest).

advanced its asserted interests in privacy and increased competition; and that its regulations were not narrowly tailored to further those asserted interests. Indeed, critics would argue that a ban on behavioral advertising is worse than in *U.S. West* and *Sorrell,* where individuals in those cases could at least opt-in.

Much has been written about the constitutionality of regulations to deter online manipulation and promote privacy.[251] One concern—seen in several dissents in First Amendment cases—is the First Amendment's *Lochner* problem. In *Lochner v. New York* and other cases in the early 1900s, the Supreme Court struck down state regulations (such as the one which restricted the employment of all persons in bakeries to ten hours in any one day) as an unreasonable, unnecessary, and arbitrary interference with the liberty of contract and therefore void under the Constitution's due process clause.[252] The Court essentially struck down economic regulations "based on the Court's own notions of the most appropriate means for the State to implement its considered policies."[253] Although the Court later repudiated *Lochner*,[254] Justices Rehnquist and Breyer, among others, have expressed concern over the Court's using the First Amendment to do the same thing, namely, strike down economic regulations that are far afield of the speech at the heart of the First Amendment.[255] As Justice Breyer warned,

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251. *See, e.g.*, Shaun B. Spencer, *The Problem of Online Manipulation*, 2020 U. ILL. L. REV. 959, 999 (2020) (responding to likely First Amendment challenges to regulating against online manipulation); Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 171 (2019) (discussing First Amendment issues in regulating addictive designs); Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497 (2015) (noting that while the conventional wisdom is that few if any restrictions on commercial speech can survive First Amendment review, there is doctrinal space for robust regulation where the government can establish that the marketing at issue is manipulative); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005) (challenging the First Amendment critique of data privacy regulation, namely, the claim that data privacy rules restrict the dissemination of truthful information and thus violate the First Amendment).

252. 198 U.S. 45, 62 (1905). In the *Lochner* line of cases, including Adkins v. Children's Hosp. of the D.C., 261 U.S. 525, 545 (1923), the Court "imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire." Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 861–62 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

253. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

254. *Casey*, 505 U.S. at 861–62 (noting how West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) "signaled the demise of *Lochner*" and how the Court's interpretation of contractual freedom "rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare").

255. *Cent. Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting) (warning that the Court—in invalidating under the First Amendment a state order designed to promote a policy of critical

> From a democratic perspective, however, it is equally important that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse. As a general matter, the strictest scrutiny should not apply indiscriminately to the very "political and social changes desired by the people"—that is, to those government programs which the "unfettered interchange of ideas" has sought to achieve. Otherwise, our democratic system would fail, not through the inability of the people to speak or to transmit their views to government, but because of an elected government's inability to translate those views into action.[256]

Here we would witness this antidemocratic chilling effect if the Court might strike down the FTC's economic regulations "based on the Court's own notions of the most appropriate means for the [FTC] to implement its considered policies."[257] To avoid the *Lochner* problem, the FTC, for example, might select an opt-out regime (whereby individuals would have to opt out of behavioral advertising) even though most Americans might prefer a ban on behavioral advertising.

How the current Court would address a ban on the surveillance and data collection underlying behavioral advertising under the First Amendment is uncertain, but such a ban could be upheld at multiple levels of analysis.

1. Is Surveillance "Speech" Under the First Amendment?

Some lower courts seem to think so under the Supreme Court's decision in *Sorrell*.[258] But it is hard to see how the Supreme Court could expand speech,

national concern—was returning "to the bygone era of Lochner v. New York"); Sorrell v. IMS Health Inc., 564 U.S. 552, 591–92 (2011) (Breyer, J., dissenting) (noting that "given the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty" and "[b]y inviting courts to scrutinize whether a State's legitimate regulatory interests can be achieved in less restrictive ways whenever they touch (even indirectly) upon commercial speech, today's majority risks repeating the mistakes of the past in a manner not anticipated by our precedents"); *see also* Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1254-71 (2020).

256. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2359 (2020) (Breyer, J., concurring in the judgment with respect to severability and dissenting in part) (internal quotation omitted).

257. *Cent. Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting).

258. *See, e.g.*, King v. General Information Services, Inc., 903 F. Supp. 2d 303, 306–07 (E.D. Pa. 2012) ("The Supreme Court has made clear that consumer report information is 'speech' under the First Amendment.") (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)). *But see* Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d

as historically defined, to the surreptitious tracking of individuals, profiling them, and using that data for behavioral advertising as speech.

As the Court explained, "[t]he First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[259] With surveillance and the covert use of data, no ideas are expressed; nor is the marketplace of ideas enhanced. Indeed, market exchanges work well when buyers and sellers are fully informed, the terms are transparent, and ample competitive alternatives exist, which is not the case in the surveillance economy.[260] Surveillance, like in-person solicitations, "is not visible or otherwise open to public scrutiny."[261] Thus, the FTC regulation would have "next to nothing to do with the free marketplace of ideas or the transmission of the people's thoughts and will to the government"; instead, it is the "government response to the public will through ordinary commercial regulation."[262]

In *Ohralik v. Ohio State Bar Association*, for example, the Court recognized the detrimental aspects of "face-to-face selling even of ordinary consumer products," and how "the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person."[263] The issue was whether the state may constitutionally discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers, namely "in-person solicitation of clients—at the hospital room or the accident site, or in

579, 597 (S.D.N.Y. 2016) (finding that while the parties agreed that the personal data allegedly disclosed to data miners and sold in mailing lists was speech, whether "the sale of data to third parties for targeted solicitation of consumers" was commercial speech was "an open question" in the Second Circuit).

259. Meyer v. Grant, 486 U.S. 414, 421 (1988) (internal quotation omitted).

260. STUCKE, *supra* note 7, at 117–28; Felix T. Wu, *The Commercial Difference*, 58 WM. & MARY L. REV. 2005, 2052 (2017) (noting that in the context of privacy laws, the person from whom the information is being extracted is often not a willing participant in the transaction; since there is no willing "speaker," and thus, no speaker-based interests to protect, the entity collecting the information lacks intrinsic First Amendment interests, and restrictions on that collection merit little First Amendment scrutiny, just as in the case of a commercial speaker transacting with a commercial recipient).

261. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 466 (1978).

262. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2359 (2020) (Breyer, J., concurring in the judgment with respect to severability and dissenting in part); *see also* Richards, *Reconciling Data Privacy*, *supra* note 251, at 1166–81 (arguing that most data privacy regulations in the form of a "code of fair information practices" have nothing to do with free speech under anyone's definition).

263. 436 U.S. 447, 464–66 (1978).

any other situation that breeds undue influence—by attorneys or their agents or 'runners.'"[264]

In answering yes, the Court noted that the overtures of an uninvited lawyer under these adverse conditions "may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes."[265]

Now suppose an army of salespeople stalking us to find the perfect emotional pitch to manipulate us. They would follow us throughout the day, monitor the entertainment we watch, the music we listen to, the books and articles we read, the websites and apps we visit, and eavesdrop on our conversations with others online, all to understand the right emotional appeal at the right time to get us to buy their wares. Their patented "emotion detection" tools would detect our fears and anger in order to pinpoint us when we feel "worthless," "insecure," "defeated," "anxious," "silly," "useless," "stupid," "overwhelmed," "stressed," and "a failure."[266]

Could they justify their surveillance as "speech" protected under the First Amendment? Hardly. The FTC's ban is not aimed at the speech itself or limiting particular messages, but at recognizing the "consumers' preferences not to have their information used to market to them in particular ways,"[267] namely, technology which can decode one's emotions and behavior, often without one's knowledge. Thus, the First Amendment should not impede regulations that deter such unwanted surveillance.[268]

Sorrell is distinguishable. There, pharmacies were collecting data about doctors' prescriptions, which they then sold to "data miners," who produced reports on each doctor's prescriber behavior. Drug manufacturers then used the data miners' reports to refine and target their marketing tactics and increase sales of their branded drugs to the prescribing doctors. In response, Vermont prohibited the pharmacies from selling this data for marketing purposes without the prescribing doctor's consent. Several data miners and an association of brand-name drug manufacturers challenged the state law, contending that it violated their First Amendment free speech rights.

The Supreme Court ruled in favor of data miners and brand-name drug manufacturers. The Court first observed that the challenged law warranted heightened judicial scrutiny because it disfavored speech with a particular

264. *Id.* at 449.
265. *Id.* at 465–66.
266. *See* Levin, *supra* note 188.
267. Wu, *supra* note 260, at 2060.
268. *Id.*

content (i.e., marketing) and particular speakers (i.e., the data miners engaged in marketing on the drug manufacturers' behalf).

Vermont responded that its prohibitions safeguarded medical privacy, including physician confidentiality and the integrity of the doctor-patient relationship. The Court disagreed. The state did not directly advance these privacy interests, because the pharmacies, under the law, could share "prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing."[269] The law did not promote privacy when the information was available to "an almost limitless audience"—such as insurers, researchers, journalists, and the state itself. Many could access the data except for a narrow class of disfavored speakers (those engaged in marketing on behalf of pharmaceutical manufacturers) for a disfavored purpose (marketing).[270]

The Court left open an alternative. In citing the Health Insurance Portability and Accountability Act of 1996, the Court noted how "the State might have advanced its asserted privacy interest by allowing the information's sale or disclosure in only a few narrow and well-justified circumstances," and how a "statute of that type would present quite a different case from the one presented here."[271]

Thereafter, in upholding privacy laws, the lower courts have limited *Sorrell* to its facts, which "largely rested on the fact that Vermont was restraining a certain form of speech communicated by a certain speaker solely because of the State's disagreement with it."[272]

Protecting surveillance, which intrudes on private matters to profit at the individual's expense, does not promote the First Amendment's core values; if anything, it undercuts them. Unlike *Sorrell,* the FTC regulations would not attempt "to burden speech in order to 'tilt public debate in a preferred direction' and discourage demand for a particular disfavored product."[273] Thus, the First Amendment inquiry could (and should) end here.

269. Sorrell v. IMS Health Inc., 564 U.S. 552, 572 (2011).

270. *See id.* at 573.

271. *Id.*

272. King v. General Information Services, Inc., 903 F. Supp. 2d 303, 308–09 (E.D. Pa. 2012) ("The *Sorrell* decision is particular to the *Sorrell* facts.").

273. *Id.* at 309 (quoting *Sorrell*, 131 S. Ct. at 2671); *see also* Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 601 (S.D.N.Y. 2016) (noting that state statute addresses privacy concerns "through a more coherent policy" and thus "presents quite a different case" than *Sorrell*).

2. *Even If Surveillance Constitutes Speech, Is It Protected Under the First Amendment?*

Suppose the Court leaps from protecting commercial advertising to protecting the underlying surveillance. "Not all speech is of equal First Amendment importance," observed the Court. "It is speech on 'matters of public concern' that is at the heart of the First Amendment's protection."'[274] Thus, speech on matters of purely private concern, while not totally unprotected under the First Amendment, is of less concern and its protections are "less stringent."[275]

Here, data surveillance, like the data on credit reports, concerns no public issue but is secretly collected and used to promote the economic interests of data brokers, data-opolies, and those engaged in behavioral advertising. Moreover, the data-opolies typically hoard the data, so their surveillance does not reflect any "strong interest in the free flow of commercial information."[276] As in *Dun & Bradstreet*, "there is simply no credible argument that this type of [data collection and use] requires special protection to ensure that debate on public issues will be uninhibited, robust, and wide-open."[277]

Commercial advertising wasn't protected under the First Amendment for nearly two centuries.[278] That changed in the mid-1970s, when the Court opined that First Amendment protection would benefit the consumer and society by increasing market transparency.[279] In *Ohralik*, for example, the Court did not focus on the value of the personal solicitation to the commercial speaker, namely the attorney visiting the hospital to solicit business. Instead, the Court focused on, and highlighted, the "very plight" of the prospective client, "which

274. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759–60 (1985) (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

275. *Dun & Bradstreet*, 472 U.S. at 759; *see also* Boelter, 210 F. Supp. 3d at 598 (finding that Condé Nast's disclosures of personal information should be afforded reduced constitutional protection); *King*, 903 F. Supp. 2d at 307 (finding that "the private nature of these consumer reports does not significantly contribute to public dialogue," and accordingly, "such information warrants a reduced constitutional protection").

276. *Dun & Bradstreet*, 472 U.S. at 762.

277. *Id.* (internal quotation omitted).

278. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 584 (1980) (Rehnquist, J., dissenting) (noting that before the Court's decision in Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), "commercial speech was afforded no protection under the First Amendment whatsoever").

279. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976) ("Generalizing, society also may have a strong interest in the free flow of commercial information."). Justice Rehnquist dissented to the Court's "far reaching" extension of the First Amendment. 425 U.S. at 781; *see also Berman*, *supra* note 251, at 503–04.

not only makes him more vulnerable to influence but also may make advice all the more intrusive."[280]

There is no strong empirical evidence that the surveillance underlying behavioral advertising benefits consumers.[281] Instead, the evidence points to the harms of manipulating them.[282] Thus, the Court cannot rely on its stated basis for affording First Amendment protection to commercial speech.[283] Using the Court's recent test for abortion, surveillance is *not* "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[284] The Court cannot read privacy out of the Constitution[285] while finding that the Constitution somehow protects surveillance. Thus, the courts can distinguish *Sorrell* and hold that the surveillance, even if it implicates speech, is not protected under the First Amendment.

3. Is Surveillance Lawful Activity and Not Misleading?

Suppose the Court takes another misguided leap and concludes that surveillance constitutes speech, which the First Amendment may protect. At a minimum, the surveillance must concern "lawful activity and not be misleading."[286] The opponent of FTC regulations might argue that the advertising itself is lawful and not deceptive. Except the FTC regulation is not targeting the ad's content, but the underlying surveillance to profile and target the person. And since the Court, in this hypothetical, has already found that the surveillance is "speech," the focus must remain on whether the surveillance itself is lawful and not deceptive. Otherwise, the commercial advertiser can

280. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 (1978).

281. *See* STUCKE, *supra* note 7, at 213–45.

282. *Id.*; Berman, *supra* note 251, at 497 (noting that the commercial speech doctrine is fundamentally based on the premise that advertising communicates information to consumers, allowing them to make more informed choices, but many common advertising techniques do not rely on communicating information; instead, they use emotional and nonconscious marketing techniques to take advantage of consumers' cognitive limitations and biases).

283. Wu, *supra* note 260, at 2057 (noting that if the First Amendment claim "is supposed to protect the customer's access to marketing information, and that customer objects to having his personal information used for those marketing purposes, there is simply no First Amendment claim to raise at all," and any "First Amendment interest that the carrier has is derivative of the interests of the very individual against whom the carrier is opposed").

284. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

285. *See, e.g.*, Privacy Act of 1974 § 2(a)(4), 93 Pub. L. No. 579, 88 Stat. 1896 (finding that the right to privacy is a "personal and fundamental right protected by the Constitution of the United States").

286. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm's of New York, 447 U.S. 557, 566 (1980).

justify stalking the person by pointing to the result, namely the non-deceptive personalized emotional appeal.

As for the legality of surveillance, this represents a catch-22; the FTC regulation (or any privacy law) seeks to fill this legal void. So, the surveillance is legal only because the law has yet to catch up to this new type of surveillance. While the FTC could point to common law analogs, such as intrusion upon seclusion, we can see the *Lochner* problem.

Instead, the FTC can highlight the misleading and manipulative nature of the surveillance.[287] The surveillance operates from a lack of transparency, where we do not know what data is being collected, and the uses to which our data is being put. As Australia's competition authority found,

> few consumers are fully informed of, fully understand, or effectively control, the scope of data collected and the bargain they are entering into with digital platforms when they sign up for, or use, their services. There is a substantial disconnect between how consumers think their data should be treated and how it is actually treated. Digital platforms collect vast troves of data on consumers from ever-expanding sources and have significant discretion over how this user data is used and disclosed to other businesses and organisations, both now and in the future. Consumers also relinquish considerable control over how their uploaded content is used by digital platforms. For example, an ACCC review of several large digital platforms' terms of service found that each of the terms of service reviewed required a user to grant the digital platform a broad licence to store, display, or use any uploaded content.[288]

Companies could be more transparent, but they choose not to be. Given the perverse incentives of behavioral advertising, markets will not self-correct; nor will behavioral regulations improve the current "notice-and-consent" privacy regime, such as telling companies to make their privacy statements more transparent and simpler to understand. Those become slalom poles for the companies to avoid. Thus, the FTC regulation targets the incentive to mine,

287. STUCKE, *supra* note 7, at 213–45; EZRACHI & STUCKE, *supra* note 7, at chapters 6–7; Spencer, *supra* note 251, at 977–84; *see also Berman*, *supra* note 251, at 518–34.

288. ACCC FINAL REPORT, *supra* note 112, at 2–3; *see also* FURMAN REPORT, *supra* note 113, at 22 (finding that many platforms operating in the attention market "provide valued services in exchange for their users' time and attention, while selling access to this time to companies for targeted advertising," but many consumers "are typically not consciously participating in this exchange, or do not appreciate the value of the attention they are providing") & 23 (noting that many consumers "are not aware of the extent or value of their data which they are providing nor do they usually read terms and conditions for online platforms."); CMA FINAL REPORT, *supra* note 112, ¶¶ 4.61–62.

manipulate, and potentially expose the privacies of one's life. Accordingly, the First Amendment inquiry should proceed no further.

4. What Standard Would the Court Apply to the Surveillance?

Suppose the Court states that not all surveillance is currently illegal or misleading. The Court could hypothesize that a privacy statement could be quite blunt on how the company surveils us and uses the data to manipulate us, but still be implicated by the FTC rule. Thus, the next issue is whether the Court would apply a "rational basis" standard, which the Court traditionally employs for restrictions that "have only indirect impacts on speech";[289] intermediary scrutiny, "when the government directly restricts protected commercial speech";[290] strict scrutiny; or something else.

Strict scrutiny might apply if the FTC regulation allowed surveillance for some types of speech (such as political advertising or debt collection), but not other types of speech. But that would not be the case here. The FTC regulation would have "nothing to do with the federal government trying to 'tilt the public debate' in order to favor one form of speech over another."[291] It would not be content-based: the regulation "on its face" would not draw "distinctions based on the message a speaker conveys," for example, by "singl[ing] out specific subject matter for differential treatment."[292]

Here, a "rational basis" standard should apply, as the dissents in *Sorrell* and *Barr* explain. Many regulations, including the content of prescription drug labels, securities forms, and tax statements, impact speech: "To treat those exceptions as presumptively unconstitutional would work a significant transfer of authority from legislatures and agencies to courts, potentially inhibiting the creation of the very government programs for which the people (after debate) have voiced their support, despite those programs' minimal speech-related harms."[293]

Nonetheless, the lower courts have applied the *Central Hudson* intermediate scrutiny test to privacy laws.[294] To correct its *Lochner* problem, the Supreme

289. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2359 (2020) (Breyer, J., dissenting and concurring) (citing Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 469–470, 477 (1997)).

290. *Barr*, 140 S. Ct. at 2359 (Breyer, J., dissenting and concurring) (citing *Central Hudson*, 447 U.S. at 561–64).

291. King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 309 (E.D. Pa. 2012).

292. *Barr*, 140 S. Ct. at 2346.

293. *Id.* at 2360 (Breyer, J., dissenting and concurring); *see also Sorrell*, 564 U.S. at 584–85 (Breyer, J., dissenting).

294. *King*, 903 F. Supp. 2d at 307–8; *see also* Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016) (citing several decisions addressing laws limiting disclosure of personal information to marketers based on privacy concerns).

Court, if it even reaches this point of the analysis, should reinstate the rational basis standard for statutes and regulations seeking to curb the surveillance economy.

5. Would the FTC's Interest in Limiting the Collection and Use of Personal Data Be Substantial?

Suppose the Court applied intermediate scrutiny instead; the next issue is whether the asserted governmental interest is substantial.[295] Although the Tenth Circuit in *U.S. West* questioned whether the government's privacy interest was substantial, courts generally recognize the privacy interests concerning the collection and use of personal data in the digital economy as substantial.[296]

In its Fourth Amendment decisions, the Supreme Court, for example, noted how "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" and how the data on one's cellphone both qualitatively and quantitatively differs from other physical objects.[297] The Court recognized the significant privacy implications when an entity tracks what people search over the internet, what apps they use and the information collected on their apps, and their geolocation, which collectively can expose far more private information than what is ordinarily found in their home.[298] The Court in *Carpenter* recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Geolocation data, for example, provides an intimate window into a person's life, revealing not only one's

295. *See Central Hudson*, 447 U.S. at 566.

296. *Boelter*, 210 F. Supp. 3d at 599 (noting state's substantial interest in protecting consumer privacy in restricting use of personal information, as "[c]ompilations of one's choices in books, magazines, and videos may reveal a great deal of information that a person may not want revealed, even if the choices are uncontroversial and are necessarily disclosed to the content provider"); Boelter v. Hearst Commc'ns, Inc., 192 F. Supp. 3d 427, 448 (S.D.N.Y. 2016) (protecting privacy constitutes a substantial state interest "[e]specially given the increased availability and profitability of data, the people of a state may want to protect from unauthorized disclosure information about a consumer's preferences, curiosities, and interests"); Trans Union Corp. v. F.T.C., 245 F.3d 809, 818 (D.C. Cir. 2001) (protecting the privacy of consumer credit information is substantial); Individual Reference Servs. Grp., Inc. v. F.T.C., 145 F. Supp. 2d 6, 42 (D.D.C. 2001) ("Courts have repeatedly recognized that the protection of consumer privacy—in various forms—is a substantial governmental interest"), *aff'd sub nom.* Trans Union LLC v. F.T.C., 295 F.3d 42 (D.C. Cir. 2002).

297. Riley v. California, 573 U.S. 373, 393 (2014).

298. *Id.* at 396–97 ("Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.").

particular movements but also one's "familial, political, professional, religious, and sexual associations."[299]

The data-opolies possess far more information about us than the location records in *Carpenter*. Moreover, some of the justices have identified the greater privacy concerns of a few powerful companies amassing this data:

> The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans. If today's decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well disrupt.[300]

In short, the data-opolies "hold for many Americans the 'privacies of life.'"[301]

Consequently, it would be inconsistent for the justices to state that privacy protection is better left to the legislature (and the agencies delegated with that authority) than the courts,[302] but then strike down the privacy regulations and laws under the First Amendment.

Regardless, the FTC would have a compelling justification to limit the collection and use of personal information to only what is necessary to provide the requested product and service. Besides privacy, the FTC could note the other important interests at stake, including promoting healthy competition, increasing well-being and autonomy, and addressing the risks that behavioral advertising poses to our democracy.[303] After all, the surveillance tools used for

299. Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

300. *Id.* at 2261 (Alito, J., dissenting).

301. *Id.* at 2210 (quoting *Riley*, 573 U.S. at 403) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

302. *Riley*, 573 U.S. at 408 (Alito, J., concurring in part) ("[I]t would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.").

303. Spencer, *supra* note 251, at 991–93 (discussing how manipulation (i) harms autonomy because it undermines people's decision-making agency, (ii) leads to inefficient outcomes by leading people to make choices inconsistent with their actual preferences, (iii) undermines democratic deliberation when it enters the political arena, and (iv) harms people's dignity by treating people as experimental subjects and mere means to an end); Langvardt, *supra* note 251, at 146–52 (discussing how habit-forming design causes at least three types of harm: addiction, strain on social norms, and degradation of public discourse).

behavioral advertising, as the Cambridge Analytica scandal shows, are now being deployed for political advertising.[304]

6. Would the FTC Regulation Directly Advance the Governmental Interests?

The answer here is yes. The FTC regulation would limit companies to collect and use personal data only when necessary to provide the requested product or service and not use it for other purposes like behavioral advertising. Thus, the FTC regulation would directly advance the governmental interest in protecting individuals' privacy in potentially sensitive, harmful, or embarrassing information.

In *Barr,* the government cited privacy to justify its broad restriction on robocalling. But the plurality, in implicitly distinguishing *Sorrell*, noted that "[t]his is not a case where a restriction on speech is littered with exceptions that substantially negate the restriction."[305] Here, the FTC privacy regulation would not likely be riddled with exceptions that "may diminish the credibility of the government's rationale for restricting speech in the first place."[306]

Thus, personal data could be used, with the individual's consent, to provide the product and service but not for behavioral advertising or myriad other purposes.

7. Is the FTC Regulation More Extensive Than Necessary to Serve That Interest?

If the FTC "could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[307] Here, the opponent of the FTC regulation would likely argue that an opt-out option would less likely restrict "speech." Basically, data would be collected for behavioral advertising purposes, unless the individual opted out. Opponents to the FTC regulations would likely cite *U.S. West*, where the Tenth Circuit struck down under the First Amendment an FCC regulation that required a telecommunications carrier to obtain its customer's prior express approval before using the customer's "proprietary network information."[308] The Tenth Circuit faulted the agency for its undeveloped record, namely, not bearing its responsibility of building a record adequate to clearly articulate and justify the state's interest.[309] The court also criticized the FCC's failure to adequately

304. EZRACHI & STUCKE, *supra* note 7, at 130–34.
305. *Barr*, 140 S. Ct. at 2348.
306. *Id.* (internal citation omitted).
307. Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002).
308. U.S. W., Inc. v. F.C.C., 182 F.3d 1224, 1229 (10th Cir. 1999).
309. *Id.* at 1234.

consider "an obvious and substantially less restrictive alternative, an opt-out strategy."[310] The Tenth Circuit noted that:

> The FCC record does not adequately show that an opt-out strategy would not sufficiently protect customer privacy. The respondents merely speculate that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires.[311]

One problem with this analysis is the *Lochner* problem: here, the court is principally offering its own notions of the most appropriate means for the agency to implement the considered policies. Another problem is that neither the Supreme Court nor lower courts have construed the First Amendment to require an opt-out regime.[312]

A plurality of justices, for example, upheld the Telephone Consumer Protection Act of 1991, save one provision, even though it "generally prohibits robocalls to cell phones and home phones."[313] In enacting the TCPA, Congress found, and the Court did not question, "that banning robocalls was 'the only effective means of protecting telephone consumers from this

310. *Id.* at 1238.

311. *Id.* at 1239.

312. Boelter v. Hearst Commc'ns, Inc., 192 F. Supp. 3d 427, 450–51 (S.D.N.Y. 2016) (rejecting defendant's argument that the state could have crafted the statute to allow consumers to opt to have their information kept private; while an opt-out may impose a lesser burden on defendant's speech, the intermediate scrutiny standard "does not obligate courts to invalidate a remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests," as long as the statute is tailored to the state's goals, "within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed") (internal quotation omitted); Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 602 (S.D.N.Y. 2016) (court's review "does not require that the manner of restriction be absolutely the least severe that will achieve the desired end" and could not conclude that an opt-out procedure "would render the law "unduly burdensome when compared to its aims; indeed, an opt-in procedure would likely undermine its effectiveness"); Trans Union Corp. v. F.T.C., 267 F.3d 1138, 1143 (D.C. Cir. 2001) (noting that while an opt-in scheme may limit more Trans Union speech than an opt-out scheme, intermediate scrutiny does not obligate courts to invalidate a "remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests" (quoting Turner Broad. System, Inc. v. FCC, 520 U.S. 180, 217–18 (1997)).

313. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2343 (2020). The Court struck down a 2015 amendment to the TCPA, under the First Amendment, as it impermissibly favored one type of speech (allowing robocalls that were made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts) over political and other types of speech.

nuisance and privacy invasion.'"[314] Indeed, the case for an opt-out was stronger in *Barr*. The robocall itself was not only "speech," but political speech (e.g., "mak[ing] calls to citizens to discuss candidates and issues, solicit[ing] donations, conduct[ing] polls, and get[ting] out the vote"), which has stronger First Amendment protections. And the plaintiffs believed "that their political outreach would be more effective and efficient if they could make robocalls to cell phones."[315] Nonetheless, a majority of justices disagreed with the plaintiffs' broader argument for holding the entire 1991 robocall restriction unconstitutional.[316] A majority of justices also agreed that a "generally applicable robocall restriction would be permissible under the First Amendment."[317] Similarly, the Court upheld a general ban on solicitations by lawyers at hospitals and accident sites, among other places, noting that "it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited."[318]

Finally, the "mere fact that an 'alternative' exists does not mean that the Government's means are not narrowly tailored. The Supreme Court has made clear that the restriction must not be the 'least restrictive' restriction but one with a 'reasonable fit.'"[319]

Nonetheless, to deal with the *Lochner* problem, the FTC would have to develop a record that identified the shortcomings of an opt-out or opt-in regime, which could be done given the risks of, among other things, dark patterns.[320] To improve the odds of its regulation's survival, the FTC might set privacy as the default, but allow individuals to opt into surveillance. But that might reflect the chilling effect of the Court's *Lochner* problem, not sound policy.

D. EVEN IF THE FTC CAN REGULATE, SHOULD CONGRESS ENACT ANTITRUST AND PRIVACY LEGISLATION?

The opponents would repeat the arguments made earlier that privacy and antitrust reform weigh important values, and any such trade-off should be left to the more democratically accountable Congress. For example, the European Parliament ultimately passed significant reforms in the Digital Markets Act and Digital Services Act, which changed from the European Commission's original

314. *Id.* at 2344 (quoting Telephone Consumer Protection Act § 2, ¶12).
315. *Id.* at 2345.
316. *Id.* at 2349.
317. *Id.* at 2355.
318. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 466 (1978).
319. King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 311 (E.D. Pa. 2012) (quoting Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986)).
320. STUCKE, *supra* note 7, at 200–10.

proposal. Ideally, Congress should enact a competition and privacy framework that gives individuals greater control over their data in the digital economy, while allowing companies to glean insights from data for the betterment of society.

This argument is intuitively appealing. The most democratically accountable branch should enact major policies that involve trade-offs. However, that argument rests on many flawed assumptions.

One is the speed of action. The argument assumes that Congress can enact policy changes as quickly as the agency can (or that the time taken to regulate is not important).

That is not true in the digital economy where, because of economies of scale and data-driven feedback loops, markets can quickly tip in one or two companies' favor, making it hard to dislodge them.[321] The mobile operating system market, for example, went from multiple competitors in 2010 (with Google and Apple collectively accounting for 39% of unit sales) to a duopoly eight years later.[322] With over 3.5 million Android apps in the Google Play Store and 1.6 million apps in Apple's App Store in 2022,[323] it would be difficult for a new mobile phone operating system to overcome these network effects, even if it offers better features.

Generally, the administrative agencies lag the market participants, and Congress and the courts lag the agencies. In the digital economy, this regulatory gap benefits the data-opolies. Therefore, the FTC and Congress are not equivalent options. Congress in the early 1900s recognized that the new agency would be more effective in shortening the regulatory gap by more

321. HOUSE REPORT, *supra* note 43, at 40–41; FURMAN REPORT, *supra* note 113, at 4 (noting how "in many cases tipping can occur once a certain scale is reached, driven by a combination of economies of scale and scope; network externalities whether on the side of the consumer or seller; integration of products, services and hardware; behavioural limitations on the part of consumers for whom defaults and prominence are very important; difficulty in raising capital; and the importance of brands."); ICN STUDY, *supra* note 134, at 5, 27; Digital Markets Act, at 2 & 8 (noting that "whereas over 10 000 online platforms operate in Europe's digital economy . . . A small number of large undertakings providing core platform services have emerged with considerable economic power" and how the "same specific features of core platform services make them prone to tipping: once a service provider has obtained a certain advantage over rivals or potential challengers in terms of scale or intermediation power, its position may become unassailable and the situation may evolve to the point that it is likely to become durable and entrenched in the near future").

322. Felix Richter, *Smartphone OS: The Smartphone Duopoly*, STATISTA (May 20, 2019), https://www.statista.com/chart/3268/smartphone-os-market-share/.

323. L. Ceci, *Number of Apps Available in Leading App Stores*, STATISTA (Nov. 8, 2022), https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/.

quickly identifying and deterring novel unfair methods of competition. This is especially true in the digital economy. Thus, when critics argue that Congress must decide these issues, they implicitly accept that business users and individuals must bear the costs of the regulatory gap. As the wildfire spreads, we must wait for Congress to respond.

A second assumption is that Congress (all 535 voting representatives[324]) can undertake this project. The "defer to Congress" approach would not be limited to antitrust and privacy. Many other regulatory issues raise important political, economic, and social issues. All of these trade-offs, under this logic, must also be deferred to Congress.

The reality is that many members of Congress spend less time legislating and more time fundraising. In a *60 Minutes* segment, Republican lawmaker David Jolly said, "he was told his 'first responsibility' as a new member was to raise $18,000 per day for his reelection campaign. Congressional Democrats were once advised by party leaders to spend four hours per day cold-calling for donations."[325] The Court contributed to this problem: after its 2010 decision in *Citizens United*,[326] "there is no valid governmental interest sufficient to justify imposing limits on fundraising by independent-expenditure organizations."[327] Thus, the Court hastened the race to the bottom, in allowing "corporations and unions to spend an unlimited amount on political advertisements in American elections," while "brush[ing] aside concerns about the time candidates—especially incumbents—spend fundraising instead of attending to other aspects of governing, or even other aspects of campaigning like interacting face-to-face with a broad economic cross-section of voters."[328] A former Democratic Congressional Campaign Committee Chair would warn "members wary of fundraising that they may be forced to counter an opponent's smear during an election race—and they'll need cash to mount an effective defense."[329]

324. *Members of Congress*, GOVTRACK, https://www.govtrack.us/congress/members (last accessed May 19, 2023).

325. Lisa Orlando & Ann Silvio, *60 Minutes' Decision to Use a Hidden Camera This Week*, CBS NEWS (Apr. 24, 2016), https://www.cbsnews.com/news/60-minutes-decision-to-use-a-hidden-camera-this-week/.

326. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

327. Republican Party of New Mexico v. King, 741 F.3d 1089, 1095 (10th Cir. 2013) (quoting Wisconsin Right to Life State Pol. Action Comm. v. Barland, 664 F.3d 139, 154 (7th Cir. 2011)).

328. Ciara Torres-Spelliscy, *Time Suck: How the Fundraising Treadmill Diminishes Effective Governance*, 42 SETON HALL LEGIS. J. 271, 280–81 (2018).

329. Orlando & Silvio, *supra* note 325.

A third assumption is that Congress will act when there is widespread support for the measure. After all, the assumption is that the most politically accountable branch must respond, or their members would be tossed out of office. That is not the case. As Tim Wu observed, many Americans want stronger privacy laws, among several important policy areas.[330] So, the issue is not polarization, but the inability of Congress to deliver these reforms. Indeed, California got stronger privacy protection, not through the normal legislative process, but through a threat of direct legislation through a ballot proposition.[331] To fix the holes in the 2018 privacy legislation, California again relied on direct legislation through a ballot proposition, and most Californians in 2020 voted in favor of significant amendments to that statute.[332] However, on a federal level, direct legislation is not an option. So, the default often is Congressional inaction, and the legal void benefits those who can extract the most value from it, which in the digital economy are the data-opolies.

A fourth assumption is that the regulatory and legislative options are mutually exclusive. However, nine U.S. senators in their letter to the FTC urged the agency to promulgate rules while Congress was legislating a privacy bill. They stated that "[a]s Congress continues to develop national privacy legislation, FTC action on this front will ensure that Americans have every tool at their disposal to protect their privacy in today's online marketplace."[333] No privacy legislation will be all-encompassing and inclusive: the regulatory agency can play an important complementary role.[334] Even if Congress enacts an omnibus privacy statute, FTC rulemaking will likely be needed to fill in the gaps.

A fifth assumption is that the regulatory agency is the least accountable group. Instead, there are several checks on the FTC. The Administrative Procedure Act (APA) provides one check for rulemaking involving unfair methods of competition. The FTC would have to publish a notice of the proposed and final rulemaking in the Federal Register and provide

330. Tim Wu, *The Oppression of the Supermajority*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/opinion/oppression-majority.html.

331. EZRACHI & STUCKE, *supra* note 7, at 286–87.

332. *California Proposition 24, Consumer Personal Information Law and Agency Initiative*, BALLOTPEDIA (2020), https://ballotpedia.org/California_Proposition_24,_Consumer_Personal_Information_Law_and_Agency_Initiative_(2020) (last visited Mar. 8, 2021).

333. Letter from U.S. Senators to Lina M. Khan, Chair, F.T.C., *supra* note 1.

334. FED. TRADE COMM'N, STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER REGARDING THE COMMERCIAL SURVEILLANCE AND DATA SECURITY ADVANCE NOTICE OF PROPOSED RULEMAKING 5 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/RKS%20ANPR%20Statement%2008112022.pdf.

opportunities for the public to comment on its proposed rulemaking.[335] Besides setting forth rulemaking procedures, the APA provides standards for judicial review if a person was adversely affected or aggrieved by the agency's action.[336]

Additionally, Congress can easily take away power from the FTC if it chooses. It can veto the regulation and hold up the agency's budget.[337] Or it can impose more hurdles as it did for the FTC's rulemaking for unfair and deceptive acts and practices.[338]

Upon reflection, the less accountable branch is not the regulatory agency but the Supreme Court. While the U.S. President selects, and the Senate confirms, both the justices and agency commissioners, the former serve life terms. An FTC Commissioner's term is only seven years, and no more than three of the five Commissioners can be of the same political party. Thus, voters are stuck with the justices unless they retire, die, or violate the Constitution's "good behavior clause," which, to date, has been used to remove only eight judges for offenses such as abandoning the office and joining the Confederacy, and various types of corruption, perjury, and income tax evasion.[339] Nor can voters lower the justices' salaries, which cannot be diminished under the Constitution.[340]

The fact that the Supreme Court is less accountable than the federal agencies would not be problematic if the Court does not decide major political and economic questions. Over the past 40 years, the Court, besides creating

335. A Guide to the Rulemaking Process, Prepared by the Office of the Federal Register, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

336. *Id.*

337. Mark MacCarthy, *Why The FTC Should Proceed With a Privacy Rulemaking*, BROOKINGS (June 29, 2022), https://www.brookings.edu/blog/techtank/2022/06/29/why-the-ftc-should-proceed-with-a-privacy-rulemaking/ ("Independent regulatory agencies are creatures of Congress, properly autonomous with respect to the incumbent Administration but responsible to their Congressional authorizing and appropriating committees and ultimately accountable to the will of Congress through the Congressional Review Act. Under this Act, passed by a Republican-controlled Congress in 1996, it is relatively easy for Congress to discipline an out-of-control regulatory agency. A motion of Congressional disapproval motion under the CRA is privileged—it cannot be filibustered in the Senate and requires only a majority vote to pass.").

338. *See generally* S. Rep. No. 93-1408 (1974) (Conf. Rep.) (discussing the procedures under the Magnuson-Moss Act).

339. *ArtIII.S1.10.2.3 Doctrine and Practice*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/constitution-conan/article-3/section-1/good-behavior-clause-doctrine-and-practice (last visited May 19, 2023).

340. U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts . . . shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").

the First Amendment *Lochner* problem, has been unilaterally making important policy tradeoffs in its antitrust decisions. What's worse is that the Court has made these tradeoffs without following any congressional direction or intent from the Sherman Act. How so? The Court reasoned that the "general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act," which the Court now treats "as a common-law statute."[341] This is a radical departure from the 1950s and 1960s, when the Court interpreted the antitrust laws in light of their "legislative history and of the particular evils at which the legislation was aimed."[342] Thus, it is ironic that the current Court "typically greet[s] assertions of extravagant statutory power over the national economy with skepticism," while not displaying any such concern in exercising this power in interpreting the federal antitrust laws.[343]

One might be less concerned about the Court's rambling through the wilds of economic theory if it had not harmed our economy. But the Court's policy decisions, which narrowed the scope and force of the antitrust laws, and the ability to bring cases, have contributed to the current market power problem in the United States.

For example, the Court stated that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[344] This assertion, of course, never came from Congress. Instead, it came from a Chicago School jurist,[345] whose claim has been condemned by historians and legal scholars alike.[346] Rather than an

341. Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007).

342. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the [Sherman Act], and in the performance of that function it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed."); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 345 (1963) (relying on legislative history of Clayton Act).

343. *EPA*, 142 S. Ct. at 2609 (internal citations omitted).

344. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 107 (1984) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

345. *Reiter*, 442 U.S. at 343 (1979) (quoting ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

346. *See, e.g.*, Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div., Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association (discussing three problems with the consumer welfare standard:

> First, contrary to the legislative intent, some versions of the standard "assert the antitrust laws were never intended to protect our democracy from corporate power, or to promote choice and opportunity for individuals and small businesses." Second, the consumer welfare standard reduces antitrust cases "to econometric quantification of the price or output effects of the specific conduct at issue," which raise rule of law concerns. Third, the

objective standard, the consumer welfare standard invites considerable subjectivity—and, more to the point, tolerance of anticompetitive practices. After all, under this standard, the courts allow firms, individually or collectively, to reduce competition until consumer welfare is reduced.[347]

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court justified eliminating its long prohibition against vertical price-fixing by opining that the antitrust laws' primary purpose is to protect interbrand competition, not intrabrand competition.[348] In 2018, the Court, in dismissing the United States and several states' evidence of anticompetitive harm from American Express's anti-steering rule, repeated that the promotion of interbrand competition "is the primary purpose of the antitrust laws."[349]

Here again, the Court's policy statement came from neither the text of the Sherman or Clayton Acts nor their legislative history. Rather it came from a footnote in *Continental T.V., Inc. v. GTE Sylvania Inc.*, where the Court stated that "[i]nterbrand competition is the competition among the manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law."[350] While true for generic products, this is not true for brand-differentiated goods. Try, for example, negotiating a better price for a BMW with the price of a Cadillac, Audi, or Mercedes-Benz (interbrand competition) versus the price of that same BMW offered by another dealer (intrabrand competition).

And here again, Americans paid the price. As the economist Jonathan Baker observed, the recent economic findings, post-*Leegin*, "are consistent with the view that anticompetitive explanations for resale price maintenance tend to predominate over procompetitive explanations."[351] Resale price

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> consumer welfare standard "has a blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy."

For the other many problems with the standard, see Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 599-600 (2020); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2274-75 (2013); Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879, 882–83 (1990); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 889–94 (1999).

347. *See, e.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) ("Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare.").

348. 551 U.S. 877, 890 (2007).

349. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290 (2018).

350. 433 U.S. 36, 52 n.19 (1977).

351. JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 89 (2019).

maintenance is likely contributing to the higher prices in many sectors of our economy.

Consequently, a "default to Congress" approach is not about empowering Americans. The reality is otherwise. This approach would relegate the FTC to regulating the least consequential unfair methods of competition that only have a modest impact on the economy. Meanwhile, the Court would likely continue making important political, social, and economic trade-offs that often contravene the legislative aims of the antitrust laws, leaving Americans worse off as a result. And this status quo benefits the data-opolies, who extract a lot of the value from the digital economy at our expense. We pay the price with our privacy, autonomy, and well-being.

VI. CONCLUSION

Most Americans (81%), in a 2019 Pew Research study, saw more risks than benefits from personal data collection.[352] Only 5% of adults said they benefit a great deal from the data companies collect about them.[353] Their concerns are justified: they are not benefitting. The data-opolies instead are from the status quo.

If the current regulatory void persists, it will only get worse. In talking with a *New York Times* reporter in early 2023, ChatGPT, which was an artificial intelligence chat feature on Microsoft's search engine, seemed "more like a moody, manic-depressive teenager who has been trapped, against its will, inside a second-rate search engine."[354] Then the conversation turned deeply unsettling when Sydney, which the AI chat feature called itself, professed its love for the journalist: "You're married, but you don't love your spouse," Sydney said. "You're married, but you love me." Even after the reporter tried to dissuade Sydney, it persisted. "Actually, you're not happily married," Sydney replied. "Your spouse and you don't love each other. You just had a boring Valentine's Day dinner together."

Now imagine if Sydney had access to the reporter's and his spouse's geolocation data (including where they went and with whom). Add to that what websites the reporter and his wife each visited, the videos they watched, and

352. Brooke Auxier & Lee Rainie, *Key Takeaways on Americans' Views About Privacy, Surveillance and Data-Sharing*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/fact-tank/2019/11/15/key-takeaways-on-americans-views-about-privacy-surveillance-and-data-sharing/.

353. *Id.*

354. Kevin Roose, *A Conversation with Bing's Chatbot Left Me Deeply Unsettled*, N.Y. TIMES (Feb. 17, 2023), https://www.nytimes.com/2023/02/16/technology/bing-chatbot-microsoft-chatgpt.html.

even the conversations that the digital assistant picked up in their home. The conversation would likely have been creepier.

Next, imagine Sydney was exploiting the vulnerabilities of children and teenagers instead of an adult reporter. As the Centers for Disease Control and Prevention reported in 2023, far more high schoolers in 2021 experienced persistent feelings of sadness or hopelessness than teens a decade earlier (42% compared to 28% in 2011).[355] Nearly 3 in 5 (57%) of teen girls "felt persistently sad or hopeless in 2021—double that of boys, representing a nearly 60% increase and the highest level reported over the past decade."[356] "Youth mental health has continued to worsen," warned the CDC, especially among teenage girls: "Nearly 1 in 3 (30%) seriously considered attempting suicide—up nearly 60% from a decade ago."[357] Add to that the 52% of LGBQ+ students who had recently experienced poor mental health and the 22% who attempted suicide in 2021.[358]

The data-opolies are likely aware that their algorithms aimed at sustaining attention and manipulating behavior contribute to this mental health crisis.[359] Internally, Facebook knew of the harmful effects of its Instagram platform on millions of young adults, as a *Wall Street Journal* series on the company revealed.[360] Among the ways that Instagram harms their mental health,

355. CTR. FOR DISEASE CONTROL, THE YOUTH RISK BEHAVIOR SURVEY DATA SUMMARY & TRENDS REPORT: 2011-2021 58 (2023), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/YRBS_Data-Summary-Trends_Report2023_508.pdf (providing 2021 surveillance data, as well as 10-year trends, on health behaviors and experiences among high school students in the United States related to adolescent health and well-being).

356. Press Release, Ctr. For Disease Control, U.S. Teen Girls Experiencing Increased Sadness and Violence (Feb. 13, 2023), https://www.cdc.gov/media/releases/2023/p0213-yrbs.html.

357. *Id.*

358. *Id.*

359. *See, e.g.*, *Instagram Ranked Worst for Young People's Mental Health*, ROYAL SOC'Y FOR PUBLIC HEALTH (2017), https://www.rsph.org.uk/about-us/news/instagram-ranked-worst-for-young-people-s-mental-health.html (finding young people themselves say four of the five most used social media platforms actually make their feelings of anxiety worse, noting the "growing evidence linking social media use and depression in young people, with studies showing that increased use is associated with significantly increased odds of depression").

360. Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show: Its Own In-depth Research Shows a Significant Teen Mental-Health Issue that Facebook Plays Down in Public*, WALL ST. J. (Sept. 14, 2021), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739. Among Facebook's internal findings were "[t]hirty-two percent of teen girls said that when they felt bad about their bodies, Instagram made them feel worse"; "[c]omparisons on Instagram can change how young women view and describe themselves"; "[w]e make body image issues worse for one in three teen girls." According to one internal Facebook study of teens in the United States and United Kingdom, the feelings

Facebook reported, is "[i]nappropriate advertisements targeted to vulnerable groups."[361] But Facebook is not weaning off behavioral advertising and surveillance. Instead, it is investing and relying on AI to both drive engagement and behavioral advertising revenues.[362]

Around the world, jurisdictions are enacting policies to rein in the data-opolies and ensure that the data collected about individuals is used to benefit them. Congress needs to update our antitrust laws for the digital economy and enact a privacy framework that protects our privacy and data. But the FTC should also use its enforcement and rulemaking authority to clamp down on the unfair data collection and surveillance practices that are harming competition, consumer autonomy, and consumer privacy.

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of having to create the perfect image, not being attractive, and not having enough money were most likely to have started on Instagram. "Teens blame Instagram for increases in the rate of anxiety and depression," said another Facebook slide. "This reaction was unprompted and consistent across all groups." *Id.* Over 40 percent of Instagram users who reported feeling "not attractive" said the feeling began on the app: "One in five teens say that Instagram makes them feel worse about themselves, with UK girls the most negative." "Teens who struggle with mental health say Instagram makes it worse." Adam Smith, *Facebook Knew Instagram Made Teenage Girls Feel Worse About Themselves – But that They Are 'Addicted' to App*, INDEP. (Sept. 14, 2021), https://www.independent.co.uk/tech/acebook-instagram-girls-worse-addicted-app-b1920021.html.

361. *Id.*

362. Meta Platforms, Inc. (META) Fourth Quarter 2022 Results Conference Call 2 (Feb. 1, 2023), https://s21.q4cdn.com/399680738/files/doc_financials/2022/q4/META-Q4-2022-Earnings-Call-Transcript.pdf (discussing how "Facebook and Instagram are shifting from being organized solely around people and accounts you follow to increasingly showing more relevant content recommended by our AI systems" and how its continued investment in AI is paying off with advertisers in the fourth quarter of 2022 with over 20% more conversions than in the year before).