

# From Privacy to the Data Economy: The FTC’s Reframing of Its Regulatory Priorities

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*In 2022, the Federal Trade Commission sought public comment on “Commercial Surveillance and Data Security” in anticipation of a proposed rulemaking. This initiative was widely interpreted as another bid to regulate information privacy by this historically assertive consumer watchdog. In reality, however, the FTC’s word choice signals a deep, strategic reframing of its regulatory priorities.*

*This Article argues that the FTC’s use of the term “commercial surveillance” marks a departure from traditional data privacy frameworks, towards a broader approach focused on the structural power dynamics of the data economy. It further identifies three normative commitments at the core of this reframing: (1) a shift toward addressing systemic data-driven harms, (2) an embrace of political economy as an analytic frame, and (3) a pledge to meaningfully constrain corporate power.*

*Drawing on a document analysis of 112 official FTC materials published between May 2018 and January 2025, the Article traces this transformation back to both internal institutional forces and broader social norms. In addition, it contends that this shift was both timely and necessary in the age of artificial intelligence, as it more adequately aligns the FTC’s consumer protection mandate and institutional role with the realities of the contemporary data ecosystem.*

*Finally, this Article assesses the prospects of this transformation in light of the Trump Administration’s efforts to curtail the FTC’s authority. Although the proposed rulemaking may no longer advance, the normative*

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*commitments examined here should continue to shape the work of other privacy regulators, including a future FTC.*

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## INTRODUCTION

In 2022, the Federal Trade Commission (“FTC”) launched an Advanced Notice of Proposed Rulemaking (“ANPR”) on Commercial Surveillance and Data Security.<sup>1</sup> The primary aim of this proceeding was to solicit public comments on whether new trade regulation rules were necessary to address “the ways in which companies collect, aggregate, protect, use, analyze, and retain consumer data, as well as transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive.”<sup>2</sup>

Upon its publication, this initiative was widely interpreted by both the news media and commentators as *another* bid from “the de facto data protection authority of the United States and its chief privacy ambassador to the outside world”<sup>3</sup> to regulate information privacy.<sup>4</sup> If anything, the use of the term “commercial surveillance” was read by some critics as adversarial toward industry practices.<sup>5</sup> This Article argues, however, that the omission of the term “privacy” from the ANPR’s title—and the choice to use “commercial surveillance” instead—is significant. More than a mere play on words or a critical stance, this choice of vocabulary signals a deep, strategic reframing of the FTC’s regulatory priorities.

As will be seen, the FTC’s ANPR on Commercial Surveillance and Data Security gestures the agency’s intent to move beyond traditional data privacy frameworks—based on customary privacy harms and notice-and-consent—and toward a broader approach focused on the structural power dynamics of the data economy. This transformation is grounded in three newly articulated normative commitments: (1) a clear shift towards addressing broadly conceived data-driven harms, (2) a pivot toward examining the data economy through a political economy lens, and (3) a pledge to meaningfully constrain corporate power.

Based on an analysis of 112 official materials published by the FTC between May 2018 and January 2025, this Article traces this reframing of regulatory priorities back to institutional and social forces that predate FTC Chair Lina Khan’s leadership. Additionally, it contends that this shift was both timely and necessary in the age of artificial intelligence (AI), as the

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1. Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022).

2. *Id.*

3. Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 682 (2015).

4. *See infra* notes 85–89 and accompanying text.

5. *See infra* notes 90–95 and accompanying text.

change more adequately aligns the FTC’s consumer protection mandate and institutional role with the realities of the contemporary data ecosystem.

The historical influence and importance of the FTC in information privacy law cannot be overstated. Given privacy law’s sectoral approach in the United States, several sectors and data practices have remained unregulated by federal statutes. As was the case eleven years ago, as of today “there is no federal law that directly protects the privacy of data collected and used by merchants such as Macy’s and Amazon.com. Nor is there a federal law focused on many of the forms of data collection in use by companies such as Facebook and Google.”<sup>6</sup> Similarly, as it was true in 2016, “[g]iven the political economy of online regulation, Congress is unlikely to take action on online privacy.”<sup>7</sup> As a result, in these and other cases the FTC has become the primary source of federal regulation on the matter, turning over time into one of “the best alternatives for regulation of privacy”<sup>8</sup> and “the largest and arguably the most important component of the U.S. privacy regulatory system.”<sup>9</sup>

Against this backdrop, the FTC’s reframing of its regulatory priorities is particularly noteworthy. In recent years, states have attempted to fill the regulatory gap left by Congress through data privacy laws<sup>10</sup> and bills<sup>11</sup> but, with few exceptions,<sup>12</sup> their efforts have largely remained rooted in notice-and-consent models and individual privacy rights.<sup>13</sup> In contrast, this Article shows how the FTC—widely seen as the *de facto* information privacy

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6. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 587 (2014).

7. CHRIS HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY xiii (2016).

8. *Id.* at xv.

9. Solove & Hartzog, *supra* note 6, at 588.

10. As of October 10, 2025, nineteen states had enacted state data privacy laws. See David Botero, *US State Privacy Legislation Tracker 2025*, IAPP (Apr. 21, 2025), <https://iapp.org/resources/article/us-state-privacy-legislation-tracker> [<https://perma.cc/3AV4-ZND2>].

11. As of October 10, 2025, data privacy bills were active in five states. *Id.*

12. For example, the Maryland Online Data Privacy Act of 2024 (MODPA) imposes stricter obligations than existing state privacy laws, including robust data minimization requirements, tight restrictions on the sale of sensitive data, and a ban on targeted advertising to minors. See Daniel K. Alvarez et al., *Maryland Enacts One of the Strictest Privacy Laws in the Nation*, WILLKIE FARR & GALLAGHER LLP (May 10, 2024), [https://www.willkie.com/-/media/files/publications/2024/05/maryland\\_enacts\\_one\\_of\\_the\\_stricest\\_privacy\\_laws\\_in\\_the\\_nation.pdf](https://www.willkie.com/-/media/files/publications/2024/05/maryland_enacts_one_of_the_stricest_privacy_laws_in_the_nation.pdf) [<https://perma.cc/V6ND-6E3P>].

13. See, e.g., Margot E. Kaminski, *The Case for Data Privacy Rights (Or, Please, A Little Optimism)*, 97 NOTRE DAME L. REV. REFLECTION 385, 388 (2022) (“Only in the past few years have several U.S. states begun enacting comprehensive data privacy laws structured around the [Fair Information Practices] individual rights.”).

regulator in the United States<sup>14</sup>—began to shift its focus by advancing a novel approach centered on power and its effects.

However, President Donald Trump’s early second-term actions concerning the FTC have disrupted the agency’s transformational momentum.<sup>15</sup> Accordingly, this Article also considers the future of the reframing of regulatory priorities it documents. It argues that even though the sitting Republican-led FTC may shift the agency’s emphasis and likely result in a rollback of the considered rulemaking on Commercial Surveillance and Data Security, the normative commitments outlined here remain deeply rooted in current social norms and should find continued life through the work of other privacy regulators.

The Article proceeds in six Parts. Part I presents the design of the document analysis conducted for this project. Part II outlines the ANPR’s focus on key data practices, harms, and potential trade regulation measures. Part III outlines the strategic reframing of regulatory priorities embodied in the ANPR, highlighting the three normative commitments at its core.

Building on Alicia Solow-Niederman’s proposal of the “FTC’s Overton Window of Enforcement Possibility,”<sup>16</sup> Part IV extends this framework to the FTC rulemaking activities, tracing the possible origins of the transformation identified here. For this purpose, I identify shifts in both internal institutional norms and social norms that may have influenced the agency’s adoption of this novel approach. I argue that the three normative commitments at the heart of the strategic reframing originated in three reform needs initially raised by Democratic Commissioner Rebecca Kelly Slaughter and later embraced and advanced by other FTC officials, including Chair Lina Khan. Moreover, this Part demonstrates how society’s growing focus on the need to address the harms of the digital economy; a

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14. See generally Solove & Hartzog, *supra* note 6; Woodrow Hartzog & Daniel Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015); Steven Hetcher, *The FTC As Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041 (2000) [hereinafter Hetcher, *FTC As Internet Privacy Norm Entrepreneur*]; Steven Hetcher, *The De Facto Federal Privacy Commission*, 19 J. MARSHALL J. COMPUT. & INFO. L. 109 (2000) [hereinafter Hetcher, *De Facto Federal Privacy Commission*]; Denis Hirsch, *That’s Unfair! Or Is It? Big Data, Discrimination and The FTC’s Unfairness Authority*, 103 KENTUCKY L.J. 345 (2014); HOOFNAGLE, *supra* note 7.

15. Megan Brown, *Trump Directs FTC to Lead Government-Wide Rescission and Modification of Anticompetitive Federal Regulations*, WILEY (Apr. 17, 2025), <https://www.wiley.law/alert-Trump-Directs-FTC-to-Lead-Government-Wide-Rescission-and-Modification-of-Anticompetitive-Federal-Regulations> [https://perma.cc/D8SN-3BJ6].

16. Alicia Solow-Niederman, *The Overton Window and Privacy Enforcement*, 37 HARV. J.L. & TECH. 1007, 1028 (2023).

broader societal interest in the power dynamics behind the tech industry; a widespread societal disillusionment with consent and growing demands for substantive norms and prohibitions; and a global shift toward privacy-antitrust integration may have also contributed to this conceptual and institutional transformation.

In Part V, I turn to the potential implications of the FTC's reframing of regulatory priorities. This transformation reveals the agency's evolving understanding of its consumer protection mandate, from protecting consumer choice to curbing the effects of unchecked corporate power. Likewise, more than reaffirming its role as "the nation's privacy agency,"<sup>17</sup> this shift enables the agency to position itself as a data governance authority, and to play a more comprehensive role in shaping the rules of the digital economy. I contend that both developments are particularly well-suited to the AI age, characterized by increasingly complex data infrastructures and concentrated corporate power.

Finally, Part VI faces our current realities. By examining recent actions taken by President Donald Trump against the FTC's authority and independence, I consider the prospects of the regulatory reframing outlined in this Article and explore how the agency's approach to the data economy can be sustained by other privacy regulators. This includes state attorneys general (AGs) as well as a future FTC, provided that political conditions shift again.

In mid-2025, former FTC Chair Lina Khan, along with Samuel A.A. Levine and Stephanie T. Nguyen—Khan's Director of Consumer Protection and Chief Technologist, respectively—published a *Stanford Law Review* article examining "the paradigm shift underlying the FTC's new approach to consumer protection in the digital age."<sup>18</sup> While the present Article similarly identifies a transformation in the FTC's regulatory priorities, it both builds on and critically challenges aspects of Khan and her co-authors' analysis, offering a broader and more nuanced perspective. First, it contests the view that this shift originated solely under the Biden Administration, offering evidence that the transformation began as early as 2019 under the leadership of Commissioner Rebecca Kelly Slaughter. Second, it brings to the fore additional dimensions of the shift—such as the adoption of a political economy framework and the strategic use of antitrust as a privacy

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17. Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51278 (Aug. 22, 2022).

18. Lina M. Khan et al., *After Notice and Choice: Reinvigorating "Unfairness" to Rein in Data Abuses*, 77 STAN. L. REV. 1375, 1375 (2025).

tool—while placing less emphasis on the disruptive character of the unfairness authority highlighted in their piece. Third, whereas Khan, Levine, and Nguyen focus largely on the application of the new approach in rulemaking, enforcement, and guidance, this Article centers on the normative commitments that underpin the agency’s evolving orientation. Finally, this Article not only deals with the transformation, but also with its broader implications for privacy law, consumer protection, and administrative law’s theories of institutional design.

A final note before proceeding: As advanced earlier, in light of the latest political developments, the ANPR on Commercial Surveillance and Data Security appears to be defunct and unlikely to result in a final trade regulation rule. This Article, however, is not about the ANPR per se. Rather, this rulemaking effort was merely the tip of the iceberg in a broader reframing of regulatory priorities that “the FTC applied . . . across its cases, rulemakings, policy guidance, and market studies.”<sup>19</sup> Accordingly, more than serving as the centerpiece of this analysis, the ANPR functions as a useful entry point to examine a deeper institutional transformation.

## I. DATA AND METHODOLOGY

This Part presents the design of the document analysis study<sup>20</sup> conducted for this project. As advanced in the Introduction, I reviewed 112 official documents published by the FTC between May 2018 and January 2025. The FTC documents include majority and dissenting statements, commissioners’ public speeches, congressional testimonies, guidance materials, press releases, transcripts from workshops, FTC 6(b) studies, and the ANPR on Commercial Surveillance and Data Security.

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19. *Id.* at 1407.

20. A document analysis study is a qualitative research method that involves systematically examining and interpreting organizational and institutional documents to gain understanding, uncover meaning, identify patterns or themes, track changes over time, and generate empirical knowledge about a particular topic or phenomenon. *See* Glenn A. Bowen, *Document Analysis as a Qualitative Research Method*, 9 *QUAL. RES. J.* 27, 27 (2009) (“Document analysis is a systematic procedure for reviewing or evaluating documents—both printed and electronic (computer-based and Internet-transmitted) material.”); LINDSAY PRIOR, *USING DOCUMENTS IN SOCIAL RESEARCH* (2003); Molefi Mogalakwe, *The Use of Documentary Research Methods in Social Research*, 10 *AFR. SOCIO. REV.* 221, 227 (2006) (“The ultimate purpose of examining documents is to arrive at an understanding of the meaning and significance of what the document contains.”) (citing JOHN SCOTT, *A MATTER OF RECORD: DOCUMENTARY SOURCES IN SOCIAL RESEARCH* 28 (1990)).

The authors of these documents are FTC commissioners and FTC staff members. The FTC is led by five Commissioners, including the Chair. Commissioners are appointed by the U.S. President and confirmed by the Senate.<sup>21</sup> Unless they decide to resign earlier or are removed by the President for “inefficiency, neglect of duty, or malfeasance in office,”<sup>22</sup> each Commissioner is supposed to serve a seven-year term, and they may continue to serve after their term expires through holdover provisions, until a successor is confirmed.<sup>23</sup> In order to ensure a degree of bipartisan oversight and limit partisan dominance of the agency, no more than three Commissioners may belong to the same political party.<sup>24</sup> When the FTC takes action, Commissioners often communicate through majority statements explaining the rationale for a decision, or concurring or dissenting statements outlining their individual positions.<sup>25</sup> Likewise, they engage in notice-and-comment rulemaking, issuing ANPRs, Notices for Proposed Rulemaking (NPRMs), and final rules, which may be accompanied by statements or dissents.<sup>26</sup> In addition, Commissioners frequently give keynote speeches, participate in public panels, and testify before congressional committees.<sup>27</sup>

FTC staff members, in turn, are mostly career civil servants—not presidential appointees—organized into bureaus<sup>28</sup> and offices.<sup>29</sup> As such,

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21. 15 U.S.C. § 41 (2024); *see also* *Commissioners and Staff*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff> [<https://perma.cc/Q9JG-7XCW>].

22. 15 U.S.C. § 41 (2024); *see also* *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 623 (1935) (quoting Fed. Trade Comm’n Act providing for removal only for “inefficiency, neglect of duty, or malfeasance in office”).

23. 15 U.S.C. § 41 (2024); *see also* Anthony Madonna & Ian Ostrander, *No Vacancy: Holdover Capacity and the Continued Staffing of Major Commissions*, 37 J. PUB. POL’Y 341, 350 (2017) (“[T]wo boards where members are allowed to serve until a successor replaces them (the Federal Trade Commission and the Federal Election Commission)”).

24. 15 U.S.C. § 41 (2024).

25. *See, e.g., Legal Library: Commissioner Statements*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/commissioner-statements> [<https://perma.cc/HG6X-YNBS>].

26. *Public Participation in the Rulemaking Process*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/rulemaking/public-participation-rulemaking-process> [<https://perma.cc/BJ8M-CW9W>].

27. *See News and Events*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events> [<https://perma.cc/BC7Y-N4WY>]; *Mission*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/mission> [<https://perma.cc/YJY2-LTB8>].

28. Bureau of Consumer Protection (BCP), Bureau of Competition (BC), and Bureau of Economics (BE). *Bureaus and Offices*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/bureaus-offices> [<https://perma.cc/7WK9-KEX5>].

they “are legally, culturally, and practically independent—and cannot be fired, demoted, or promoted based on political considerations.”<sup>30</sup> Yet, the FTC Chairs have significant discretion to appoint or replace bureau and office directors, according to their enforcement and policy priorities.<sup>31</sup> Working under the direction of the Commissioners—especially the Chair—staff members initiate and conduct investigations, draft complaints, negotiate settlements, analyze public comments on proposed rules, draft final rules that are presented to Commissioners who vote on whether to proceed, and prepare guidance documents.<sup>32</sup> These documents are informal communications that inform expectations, explain agency policies, highlight enforcement priorities, or provide educational content.<sup>33</sup> Additionally, staff members lead workshops and draft 6(b) studies.<sup>34</sup> Likewise, senior staff members frequently speak at conferences and before Congress.<sup>35</sup>

The reviewed materials were downloaded from the FTC’s Legal Library.<sup>36</sup> For their selection, I used purposive sampling, intentionally selecting documents based on their relation to privacy and commercial surveillance-related topics. After identifying a first body of initial key documents, I also relied on snowball sampling to expand the corpus by

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29. Office of Administrative Law Judges, Office of the Chief Privacy Officer, Office of Congressional Relations, Office of the Executive Director, Office of International Affairs, Office of Policy Planning, Office of the General Counsel, Office of Public Affairs, Office of the Secretary, Office of Technology, and Regional Offices. *Id.*

30. JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 60 (2017).

31. *See, e.g., FTC Chair Lina M. Khan Appoints Directors of Bureau of Competition and Bureau of Consumer Protection*, FED. TRADE COMM’N (Sept. 28, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-chair-lina-m-khan-appoints-directors-bureau-competition-bureau-consumer-protection> [<https://perma.cc/KVY3-3QZL>].

32. *See Enforcement*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement> [<https://perma.cc/VS9U-ARBS>]; *Competition and Consumer Protection Guidance Documents*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/competition-consumer-protection-guidance-documents> [<https://perma.cc/QU8H-L9ZE>].

33. *Competition and Consumer Protection Guidance Documents*, *supra* note 32.

34. *FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies*, FED. TRADE COMM’N (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies#:~:text=To%20conduct%20this%20inquiry%2C%20the,leases%2C%20and%20read%20our%20blog> [<https://perma.cc/KL7B-7TKP>]; *Events*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/events> [<https://perma.cc/9WY7-PLJP>].

35. *See, e.g., Legal Library: Testimony*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/testimony> [<https://perma.cc/Z8NB-8GGX>].

36. This made it straightforward to treat them as authentic.

following references to other official documents. Overall, 112 documents resulted from this sampling.

The selected timeframe—May 2018 through January 2025—was chosen to capture the trajectory of a newly reconstituted Commission following a period of several vacancies. In May 2018, Joseph J. Simons (Republican) was sworn in as Chairman of the FTC, alongside Commissioners Rohit Chopra (Democrat) and Rebecca Kelly Slaughter (Democrat).<sup>37</sup> They joined Commissioner Noah J. Phillips (Republican), who had taken office the previous month.<sup>38</sup> Commissioner Christine S. Wilson (Republican) followed, joining the agency on September 26, 2018.<sup>39</sup>

After a period of relative stability, Chair Simons resigned from the Commission on January 29, 2021, and shortly thereafter, on June 15, 2021, Commissioner Lina Khan (Democrat) joined the FTC and became its Chair. Commissioner Chopra stepped down from his position on October 12, 2021, to lead the Consumer Financial Protection Bureau.<sup>40</sup> Likewise, Commissioner Phillips resigned on October 14, 2022, and Commissioner Wilson resigned on March 31, 2023.<sup>41</sup> Commissioner Alvaro Bedoya (Democrat) was sworn in in May 2022, while Republican Commissioners Melissa Holyoak and Andrew Ferguson took office on March 25, 2024, and April 2, 2024, respectively.<sup>42</sup> In January 2025, Commissioner Ferguson was

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37. *Joseph J. Simons*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/joseph-j-simons> [<https://perma.cc/NHC5-2WE6>]; *Rohit Chopra*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/rohit-chopra> [<https://perma.cc/A4GU-B7KV>]; *Rebecca Kelly Slaughter*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/rebecca-kelly-slaughter> [<https://perma.cc/3JER-VMZS>].

38. *Noah Joshua Phillips*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/noah-joshua-phillips> [<https://perma.cc/Y72M-SU7F>]. At the time, Commissioner Terrell McSweeney (Democrat) was the sole remaining member of the FTC, but she stepped down in April 2018, clearing the way for a full slate of newly appointed commissioners. *FTC Commissioner Terrell McSweeney to Resign*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/news/press-releases/2018/04/ftc-commissioner-terrell-mcsweeney-resign> [<https://perma.cc/XJA7-DB6T>].

39. *Christine S. Wilson*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/christine-s-wilson> [<https://perma.cc/N4Z4-L94P>].

40. *Joseph J. Simons*, *supra* note 37; *Lina M. Khan*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/lina-m-khan> [<https://perma.cc/TD73-BQBM>]; *Rohit Chopra*, *supra* note 40.

41. *Noah Joshua Phillips*, *supra* note 38; *Christine S. Wilson*, *supra* note 39.

42. *Alvaro Bedoya*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/alvaro-bedoya> [<https://perma.cc/UA57-7T2R>]; *Melissa Holyoak*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/melissa-holyoak> [<https://perma.cc/W8RG->

chosen by President Donald Trump to chair the FTC, succeeding Chair Khan, who resigned on January 20, 2025.<sup>43</sup>

The documents were loaded into a standard qualitative methods analysis program (ATLAS.ti<sup>44</sup>) and coded following a Grounded Theory methodology.<sup>45</sup> As such, their analysis<sup>46</sup> was based on an inductive approach geared to identifying emerging topics, key terms, concepts, and regulatory framings related to privacy and commercial surveillance. Through iterative engagement with the data, I repeatedly examined and refined the initial codes, carefully comparing data segments with one another and with preliminary codes to identify patterns and organize emerging themes. These patterns were then grouped into broader thematic categories, which served as the foundation for the theory I develop in this Article.

I employed document analysis because it is particularly well-suited for “tracking change and development”<sup>47</sup> within organizations and institutions. As Glenn A. Bowen has emphasized, “documents may be the most effective means of gathering data when events can no longer be observed or when informants have forgotten the details.”<sup>48</sup> Given that the ANPR on Commercial Surveillance and Data Security was issued more than two years prior to the start of this research project, and that several bureaucrats

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AZ6E]; *Commissioners*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/commissioners-staff/commissioners> [<https://perma.cc/V3U7-M9SV>].

43. *Andrew N. Ferguson Takes Over as FTC Chairman*, FED. TRADE COMM’N (Jan. 22, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/andrew-n-ferguson-takes-over-ftc-chairman> [<https://perma.cc/D47K-ZNRE>]; *Lina M. Khan*, *supra* note 40.

44. *See* ATLAS.TI, <https://atlasti.com/> [<https://perma.cc/2NEU-39XC>].

45. “A grounded theory is one that is inductively derived from the study of the phenomenon it represents. That is, it is discovered, developed, and provisionally verified through systematic data collection and analysis of data pertaining to that phenomenon.” ANSELM STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES* 23 (1990).

46. “The analytic procedure entails finding, selecting, appraising (making sense of), and synthesising data contained in documents. Document analysis yields data—excerpts, quotations, or entire passages—that are then organised into major themes, categories, and case examples specifically through content analysis.” Bowen, *supra* note 20, at 28 (citing Adri Labuschagne, *Qualitative Research—Airy Fairy or Fundamental?*, 8 *QUALITATIVE REP.* 100 (2003)).

47. *Id.* at 30.

48. *Id.* at 31. This is what Molefi Mogalakwe calls “mediate or indirect access.” According to him, this type of access “becomes necessary if past behaviour must be inferred from its material traces, and documents are the visible signs of what happened at some previous time.” Mogalakwe, *supra* note 20, at 223.

participated in its development,<sup>49</sup> analyzing the official documents available online offered an efficient and cost-effective method for tracing both the lead-up to its publication and its subsequent evolution. Additionally, “documents serve to constitute the events of which they form a part. In that respect they deserve parity of esteem with talk and behaviour in the execution of the research process.”<sup>50</sup> Nevertheless, a key limitation of the document analysis method is that the findings are limited to what has been documented and preserved by the institution, and there is an inherent risk of researcher bias in interpreting the material.

Looking to mitigate this risk and guard the study against over-reliance on the FTC’s official documents, I validated—and when necessary, qualified—my findings by triangulating<sup>51</sup> this data with informal conversations with previous FTC employees. For the discussion below, however, I paraphrase, quote, and excerpt only from the body of reviewed documents.

## II. THE ANPR ON COMMERCIAL SURVEILLANCE AND DATA SECURITY

On August 11, 2022, the FTC announced that it would be “exploring rules to crack down on harmful commercial surveillance and lax data security.”<sup>52</sup> Eleven days later, the agency formally published an ANPR in the Federal Register, seeking public comment “on the prevalence of commercial surveillance and data security practices that harm consumers.”<sup>53</sup> In the published text, the FTC defined “commercial surveillance” as “the collection, aggregation, analysis, retention, transfer, or monetization of consumer data and the direct derivatives of that information.”<sup>54</sup>

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49. As Anya Bernstein and Cristina Rodríguez have aptly evidenced, agency action is characterized by “broad participation, multifarious input, and ongoing reason-giving characterized as much by negotiation as by supervision.” Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 *YALE L.J.* 1600, 1607 (2023).

50. PRIOR, *supra* note 20, at 91.

51. “Triangulation” involves using two or more research methods to develop a more complete understanding of the phenomenon under study. *See, e.g.*, JONATHAN GRIX, *DEMISTIFYING POSTGRADUATE RESEARCH* 84 (2001) (“Using more than one method in research is sometimes referred to as triangulation”).

52. Press Release, *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices*, FED. TRADE COMM’N (Aug. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices> [<https://perma.cc/VW6B-U6QN>].

53. Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51273 (Aug. 22, 2022).

54. *Id.* at 51277.

This initiative was taken pursuant to § 18 of the Federal Trade Commission Act (FTC Act)—amended by the Magnuson-Moss Warranty Act of 1975—which grants the Commission the authority to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of § 5(a)(1) of the FTC Act.<sup>55</sup> In order to propose one of these rules, the FTC has to show that the concerned acts or practices are *prevalent*.<sup>56</sup> Among other avenues, a determination about prevalence can be made when the agency has “any . . . information” that “indicates a *widespread pattern* of unfair or deceptive acts or practices.”<sup>57</sup>

Therefore, besides finding that an act or practice is unfair or deceptive,<sup>58</sup> the FTC has to provide evidence to support that it exists in a widespread pattern. For this purpose, the stated goal of the ANPR was to “generate a public record about *prevalent commercial surveillance practices or lax data security practices* that are unfair or deceptive, as well as about efficient, effective, and adaptive regulatory responses.”<sup>59</sup>

The ANPR relied on a total of 95 questions on which it sought public comment, divided under the following four guiding questions: (a) “To what extent do commercial surveillance practices or lax security measures *harm consumers?*”;<sup>60</sup> (b) “To what extent do commercial surveillance practices or lax data security measures *harm children, including teenagers?*”;<sup>61</sup> (c) “How should the Commission *balance costs and benefits?*”;<sup>62</sup> and (d) “*How, if at all, should the Commission regulate harmful commercial surveillance or data security practices that are prevalent?*”<sup>63</sup> However, if checked through the FTC’s website, the same list of questions were re-organized under the following ten “topic areas”: (1) harms to consumers; (2) harms to children; (3) costs and benefits; (4) regulations; (5) automated systems; (6)

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55. See 16 C.F.R. § 1.8(a).

56. See 16 C.F.R. § 1.14(a)(1)(i).

57. Commercial Surveillance and Data Security, 87 Fed. Reg. at 51278 (emphasis added).

58. “Generally, a practice is *unfair* under Section 5 if (1) it causes or is likely to cause substantial injury, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by benefits to consumers or competition. A representation, omission, or practice is *deceptive* under Section 5 if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers—that is, it would likely affect the consumer’s conduct or decision with regard to a product or service.” *Id.* at 51278 (emphasis added).

59. *Id.* at 51277 (emphasis added).

60. *Id.* at 51281 (emphasis added).

61. *Id.* (emphasis added).

62. *Id.* at 51282 (emphasis added).

63. *Id.* (emphasis added).

discrimination; (7) consumer consent; (8) notice, transparency, and disclosure; (9) remedies; and (10) obsolescence.<sup>64</sup>

Read cumulatively, the practices the ANPR focused on can be broadly categorized into two areas: on the consumers' side and on the companies' side. On the consumers' side, the FTC's attention revolved around how consumers today give a wide range of personal information about themselves to companies while *having little choice* but to accept the terms that firms offer, and *no control over* what happens to their information once companies collect it.<sup>65</sup> This, partly due to the fact that consumers *do not read* the products and services' privacy notices and *do not generally understand* the market for consumer data that operates behind them.<sup>66</sup> Thus, if they cannot make informed decisions about the costs and benefits of using these different products and services, their individual consent might be—according to the FTC—irrelevant.<sup>67</sup>

On the companies' side, the ANPR focused on a broader range of data practices.<sup>68</sup> In particular, the FTC showed concern about: (i) *personalization*: the use of consumers' personal information to target services, “namely, to set prices, curate newsfeeds, serve advertisements, and conduct research on people's behavior”;<sup>69</sup> (ii) *function creep*: companies who claim to collect consumer data for one stated purpose but then also use it for other purposes;<sup>70</sup> (iii) *data commercialization*: the act of selling or otherwise monetizing such information or compilations of it in the companies' dealings with advertisers, data brokers, and other third parties;<sup>71</sup> (iv) *dark patterns*: the use of consumers' information to manipulate them through user-interface design into providing personal information or prolonging online activity;<sup>72</sup> and (v) the employment of *automated decision-making systems* (“ADMSs”) in critical areas, such as housing, credit, and employment.<sup>73</sup> In addition, this ANPR not only included as part of the concept of “consumer” individuals who buy or exchange data for retail

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64. *Commercial Surveillance and Data Security Rulemaking*, FED. TRADE COMM'N (Aug. 11, 2022), <https://www.ftc.gov/legal-library/browse/federal-register-notices/commercial-surveillance-data-security-rulemaking> [<https://perma.cc/M7LK-9QPU>].

65. *Commercial Surveillance and Data Security*, 87 Fed. Reg. at 51287.

66. *Id.* at 51274.

67. *Id.* at 51275.

68. *Id.* at 51287.

69. *See id.* at 51274 (footnotes omitted).

70. *See id.* at 51283.

71. *See id.*

72. *See id.* at 51281–82.

73. *See id.* at 51283.

goods and services, but also businesses and workers.<sup>74</sup> Therefore, an additional data practice that the FTC showed concern about was *workplace surveillance*—how employers collect worker data for various reasons, including to evaluate productivity.<sup>75</sup>

When it comes to the consumer harms that—according to the ANPR—these data practices could eventually cause, the list is extensive but can be grouped into five broad categories: physical, economic, reputational, psychological, and equality harms.<sup>76</sup> Within economic harms, the ANPR frequently highlighted issues such as economic fraud, identity theft, and financial losses affecting consumers.<sup>77</sup> In the psychological domain, the ANPR emphasized the risks of depression, anxiety, eating disorders, cyberbullying, cyberstalking, and suicidal ideation, particularly among children and teenagers.<sup>78</sup> Finally, when it comes to equality harms, the main harm identified by the FTC was discrimination, which according to the agency can happen in the following three ways: (i) based on statutorily protected categories (including in critical areas such as housing, employment, and healthcare); (ii) based on unprotected consumer traits; and (iii) harms to other underserved groups that current law does not recognize as protected from discrimination (e.g., unhoused people or residents of rural communities).<sup>79</sup> In the FTC’s view, these harms “can be difficult if not impossible for any one person to avoid.”<sup>80</sup>

Finally, the ANPR “does not identify the full scope of potential approaches the Commission might ultimately undertake by rule or otherwise.”<sup>81</sup> Yet the ninety-five questions proposed by the Commission provide some insight into the regulatory alternatives under consideration.<sup>82</sup> Among others, these measures could include imposing clear limits on certain practices, irrespective of the data subjects’ consent; requiring businesses to implement administrative, technical, and physical data security measures; requiring firms to certify that their data practices and their reliance on ADMSs follow some given standards; requiring regular self-reporting, third-party audits or assessments, or self-administered impact

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74. *See id.* at 51277.

75. *Id.* at 51274.

76. *Id.* at 51281.

77. *Id.* at 51275.

78. *Id.*

79. *Id.* at 51275–76, 51284.

80. *Id.* at 51274.

81. *Id.* at 51281.

82. *See id.* at 51294.

assessments; requiring different consent, transparency, and disclosure standards; and specific forms of relief or damages such as algorithmic disgorgement.<sup>83</sup>

### III. A STRATEGIC REFRAMING OF THE FTC'S REGULATORY PRIORITIES

After the ANPR on Commercial Surveillance and Data Security was announced by the FTC, public opinion swiftly reacted.<sup>84</sup> Broadly speaking, most commentators read the ANPR as a *privacy* rulemaking. For example, Omer Tene and Gabe Maldoff, partners in Goodwin's Technology group and Data, Privacy & Cybersecurity practice, replaced the word "surveillance" with "privacy," framing the ANPR as an "Advanced Notice of Proposed Rulemaking *on Privacy and Data Security*."<sup>85</sup> Similarly, attorneys at Wiley Rein discussed the ANPR announcement in an article titled "FTC Launches *National Privacy Rulemaking*."<sup>86</sup> There, they stated that "[t]he ANPR is the first in a series of steps by the FTC that, if

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83. *Id.* at 51283–85.

84. According to a series of searches I conducted in October 2024 in Dow Jones Factiva, from the period just before the release of the ANPR through September 2024, the ANPR was covered in at least 556 op-eds and related media reports. The searches were done using the keywords "commercial surveillance" and "privacy rulemaking" over the period July 1, 2022, to September 20, 2024. An initial search was performed across "all publications," which in Factiva encompasses a large, curated database of thousands of licensed global news sources—including newspapers, newswires, magazines, and trade publications—drawn from tens of thousands of outlets worldwide. I then conducted five additional searches limited to the five highest-circulation U.S. daily newspapers as identified by Statista. *See Largest Daily Newspapers in the United States in the Six Months to September 2023, by Average Print Circulation*, STATISTA (Feb. 2024), <https://www.statista.com/statistics/272790/circulation-of-the-biggest-daily-newspapers-in-the-us/#:~:text=The%20newspaper%20with%20the%20highest,by%20The%20New%20York%20Post> [<https://perma.cc/RCT4-J6GE>]. All searches applied the same keyword strings, date range, and a filter restricting results to references to the "Federal Trade Commission."

85. Omer Tene & Gabe Maldoff, *FTC Announces Advanced Notice of Proposed Rulemaking on Privacy and Data Security*, GOODWIN (Aug. 12, 2022), <https://www.goodwinlaw.com/en/insights/blogs/2022/08/ftc-announces-advanced-notice-of-proposed-rulemaking-on-privacy-and-data-security> [<https://perma.cc/92PE-BBD6>] (emphasis added); see also Madeleine Findley & Xinyue Lu, *Client Alert: The Federal Trade Commission Intent on Regulating "Commercial Surveillance"*, JENNER & BLOCK (Aug. 15, 2022), <https://www.jenner.com/print/v2/content/46298/client-alert-the-federal-trade-commission-intent-on-regulating-commercial-surveillance.pdf> [<https://perma.cc/A57W-KXJZ>] (describing the ANPR as considering "privacy rules").

86. Megan L. Brown et al., *FTC Launches National Privacy Rulemaking*, WILEY LAW (Aug. 11, 2022), <https://www.wiley.law/alert-FTC-Launches-National-Privacy-Rulemaking> [<https://perma.cc/86GZ-PLNT>] (emphasis added).

completed, could culminate in the adoption of *the first nationwide, sweeping privacy regulation*.<sup>87</sup>

When it comes to the news media, several outlets also characterized the ANPR as an attempt to issue data privacy rules. For instance, when the ANPR was announced, the Wall Street Journal reported on this event under the headline “FTC Launches *Effort to Expand Online Privacy Protections*.”<sup>88</sup> Additionally, in June 2024 Cristiano Lima-Strong, a tech policy reporter at the Washington Post, referred to this ANPR as “the FTC’s *proposed rulemaking on privacy*.”<sup>89</sup>

Yet the use of the term “commercial surveillance” did not go completely unnoticed by everyone. Some commentators did critically reflect on what the specific use of that term could entail, highlighting how it carried a negative connotation, implying inherent harm in data processing practices that—according to many of them—are fundamental to the digital economy. For instance, Kirk J. Nahra and Arianna Evers, partners at WilmerHale, referred to the “*adversarial manner*” in which the FTC framed the ANPR’s questions, which “*seems to presume negative impacts* from specific kinds of data processing activities.”<sup>90</sup> In their view, “[e]ven the use of the term ‘commercial surveillance’ to discuss consumer data processing *generally suggests that there is something inherently bad about the practice*, despite the fact that it is at the very heart of our techno-centric economy and integral to our daily lives.”<sup>91</sup> Similarly, according to the news media, the ad industry considered the term “commercial surveillance” “pejorative” and biased.<sup>92</sup>

This apparent lack of neutrality of the term was also emphasized by certain Republican FTC Commissioners involved in the rulemaking

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87. *Id.* (emphasis added).

88. John D. McKinnon, *FTC Launches Effort to Expand Online Privacy Protections*, WALL ST. J., <https://www.wsj.com/articles/ftc-launches-effort-to-expand-online-privacy-protections-11660232848> (Aug. 11, 2022) (emphasis added).

89. Cristiano Lima-Strong, *Data Privacy Will Be on the Ballot in November Elections*, WASH. POST (June 13, 2024), <https://www.washingtonpost.com/politics/2024/06/13/data-privacy-is-ballot-this-election/> (emphasis added).

90. Kirk J. Nahra & Arianna Evers, *FTC Issues Long-Awaited Privacy Focused Advance Notice of Proposed Rulemaking*, WILMERHALE (Aug. 15, 2022), <https://www.wilmerhale.com/en/insights/client-alerts/20220815-ftc-issues-long-awaited-privacy-focused-advanced-notice-of-proposed-rulemaking> [<https://perma.cc/SJF3-B484>] (emphasis added).

91. *Id.* (emphasis added).

92. Wendy Davis, *Ad Industry Prepares to Fight Potential FTC Privacy Rules*, MEDIAPOST (Aug. 11, 2022), <https://www.mediapost.com/publications/article/376608/ad-industry-prepares-to-fight-potential-ftc-privac.html> [<https://perma.cc/GS8R-BZY7>].

proceedings. When the ANPR was announced, Commissioner Noah Joshua Phillips published a dissent statement where, among other things, he pointed out how the concept “commercial surveillance” evoked a sense of “*foreboding*.”<sup>93</sup> Moreover, in a footnote of his statement Commissioner Phillips went on to state: “In adopting this *academic pejorative*, the ANPR trades a serious attempt to understand business practices it would regulate *for the chance to liken untold companies large and small to J. Edgar Hoover’s COINTELPRO*.”<sup>94</sup> In addition, Commissioner Melissa Holyoak, who joined the FTC on March 25, 2024, has since then also commented on the negative connotations of the term.<sup>95</sup>

Even the most suspicious and critical commentators, however, failed to recognize—or conveniently chose to overlook and downplay—the

93. Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51293–94 (Aug. 22, 2022) (emphasis added); Fed. Trade Comm’n, Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking 4 (Aug. 11, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%208112022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%208112022.pdf) [<https://perma.cc/6D2R-TE5P>].

94. *Id.* at 51294 n.15 (emphasis added). J. Edgar Hoover’s COINTELPRO was a covert surveillance initiative conducted by the FBI—and led by J. Edgar Hoover—between 1956 and 1971 against various political and civil rights organizations in the United States. Kristin Hoerl & Erin Ortiz, *Organizational Secrecy and the FBI’s COINTELPRO—Black Nationalist Hate Groups Program, 1967–1971*, 29 MGMT. COMM’N Q. 590, 594 (2015).

95. According to Commissioner Holyoak:

The term “surveillance” *conjures nefarious action and actors*—the inescapable watchful eye of Big Brother (or stealth network of Brothers) *motivated by corporate greed*. Perhaps this re-branding is just silly—an attempt to boost press appeal, pander to the likeminded, score some political points—and basically harmless. But I fear that the silliness belies something more troubling: *a glossing over—and perhaps even a degree of prejudgment—of difficult issues*.

Melissa Holyoak, Comm’r, Fed. Trade Comm’n, A Path Forward on Privacy, Advertising, and AI: Remarks at National Advertising Division Keynote 2024 at 5 (Sept. 17, 2024) (emphasis added). As a result, in at least three different pieces Commissioner Holyoak has highlighted the importance of using “*neutral terminology* that does not suggest any *prejudgment* of difficult issues.” *Id.* at 5 n.19 (emphasis added); *see also* Fed. Trade Comm’n, Concurring Statement of Commissioner Melissa Holyoak, Surveillance Pricing Intermediaries, FTC Matter No. P246202 (July 23, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/holyoak-concurring-statement-re-surveillance-pricing.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-concurring-statement-re-surveillance-pricing.pdf) [<https://perma.cc/T73Y-EYYE>]; Fed. Trade Comm’n, Concurring and Dissenting Statement of Commissioner Melissa Holyoak on the Social Media and Video Streaming Services Staff Report 15 n.105 (Sept. 19, 2024), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/concurring-dissenting-statement-commissioner-melissa-holyoak-regarding-social-media-video-streaming> [<https://perma.cc/T7JZ-92RU>].

significance of the language used in the FTC’s ANPR. The omission of “privacy” from its title was not incidental, but rather marked a decisive break from the FTC’s long-standing regulatory paradigm. As will be discussed later, that paradigm rested on conventional privacy harms and on the notice and consent framework, which assumes that providing consumers with information and obtaining their consent is sufficient to safeguard consumer interests. In contrast, adopting the term “commercial surveillance” was a deliberate effort to reshape the narrative and advance a novel and more ambitious policy agenda around the structural power dynamics of the data economy.

In this sense, the FTC’s precise language was a rhetorical tool carefully selected to make a point. In particular, when viewed in conjunction with the statements issued by the FTC Commissioners on August 11, 2022, the title and content of the ANPR signal, at least, three newly embraced *normative commitments*.

First, *a clear shift towards addressing broadly conceived data-driven harms*. Since Timothy J. Muris’s tenure as FTC Chair (2001-2004), the agency embraced a narrow approach to privacy harms.<sup>96</sup> According to Muris and his Director of the Consumer Protection Bureau, Howard Beales III, “the Commission should restrict its enforcement actions to cases that involve real, objective harms.”<sup>97</sup> In practice, this translated into protecting consumers from concrete consequences of information use and misuse, namely, physical harms (e.g., “as when stalkers obtain information about their victims or child predators seek information online”), economic harms (e.g., “as when one’s identity is stolen or when credit or insurance is denied based on incomplete or inaccurate information”), and unwarranted

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96. This approach is referred to as the “harms-based” model of privacy enforcement. *See, e.g.,* Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 149 (2015); Khan et al., *supra* note 18, at 1392. It is likely that this approach was influenced by the FTC’s 1980 *Unfairness Policy Statement*, which also sought to limit the types of harms the FTC would aim to address. Letter from the Fed. Trade Comm’n, to the Honorable Wendell H. Ford, Chairman, Comm. on Com., Sci., and Transp., and the Honorable John C. Danforth, Ranking Minority Member, S. Comm. on Com., Sci., and Transp. (Dec. 17, 1980), *reprinted in* Final Order, Opinion, Etc. at 1070–76, *In re International Harvester Co.*, 104 F.T.C. 949 (1984) (No. 9147).

97. J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2204 (2015).

intrusions into consumers' daily lives (e.g., "such as the telemarketing call that disrupts the dinner hour or the spam that clogs our inboxes").<sup>98</sup>

After receiving criticisms "for failing to recognize a wider range of privacy-related concerns, including reputational harm or the fear of being monitored,"<sup>99</sup> in a 2012 Report the FTC agreed with commentators, recognizing that "a privacy framework should address practices that unexpectedly reveal previously private information even absent physical or financial harm, or unwarranted intrusions."<sup>100</sup> According to the agency, "[t]hese harms may include the unexpected revelation of previously private information, including both sensitive information (e.g., health information, precise geolocation information) and less sensitive information (e.g., purchase history, employment history) to unauthorized third parties."<sup>101</sup>

In the 2022 ANPR on commercial surveillance and data security, however, the agency went even further. While the advanced notice continued to acknowledge privacy harms conventionally recognized by the agency (e.g., economic fraud, identity theft, and security breaches), it placed notable emphasis on systemic issues like discrimination and harms to children and teens' mental health, including anxiety and depression.<sup>102</sup>

A second normative commitment reflected in the ANPR is *a pivot toward examining the data economy through a political economy*<sup>103</sup> lens.

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98. J. Howard Beales III & Timothy J. Muris, *Choice or Consequences: Protecting Privacy in Commercial Information*, 75 U. CHI. L. REV. 109, 118 (2008).

99. FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 2 (2012), <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policy-makers> [<https://perma.cc/LUM8-6DY6>].

100. *Id.* at 8.

101. *Id.*

102. *See* Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51275 (Aug. 22, 2022). In her statement in support of the ANPR, Commissioner Rebecca Kelly Slaughter broadened this list even more, mentioning "[d]ata abuses such as surreptitious biometric or location tracking . . ." Fed. Trade Comm'n, Statement of Commissioner Rebecca Kelly Slaughter Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking 2 (Aug. 11, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/RKS%20ANPR%20Statement%2008112022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/RKS%20ANPR%20Statement%2008112022.pdf) [<https://perma.cc/FM2F-N6MX>].

Likely in response to this broader range of harms, in his dissenting statement Commissioner Noah Phillips criticized the ANPR for going "far afield from traditional data privacy and security." Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51294 (Aug. 22, 2022). According to him, "the most shocking aspect of this ANPR is not what it contains, but what it leaves out: privacy." *Id.* at 51297.

103. Understood as the field that "investigates the relation of politics to the economy, understanding that the economy is always already political in both its origins and its consequences," political economy poses questions concerning justice, power, and inequality,

According to Chair Lina Khan and her co-authors, one of the distinguishing features of President Joe Biden’s administration’s approach to privacy was its focus on upstream data practices rather than on downstream harms.<sup>104</sup> Yet, what the ANPR did is arguably more sophisticated than this characterization suggests.

More than orderly outlining a list of specific data practices, the ANPR highlighted various business-side practices—personalization, function creep, data commercialization, dark patterns, automated decision-making, and workplace surveillance—that, put together, illustrate the contours of an extractive economy designed to monetize human behavior.<sup>105</sup> In other words, the ANPR sought to highlight how these different practices operate together as a system, to enable the expansive tracking and exploitation that underpin the data economy.<sup>106</sup> Additionally, the ANPR’s emphasis on the interplay between business practices and consumer responses looked to underscore the “information [and therefore power] asymmetry between companies and consumer.”<sup>107</sup>

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asking how political and economic forces shape technological development, access, and control. Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784, 1792 (2020).

104. See Khan et al., *supra* note 18, at 1396 (“Focusing on upstream actors’ information-sharing practices became a key focus during Lina M. Khan’s tenure as Chair of the FTC, and it showed results.”).

105. See Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51273–74 (Aug. 22, 2022). In her statement in support of the ANPR, Commissioner Rebecca Kelly Slaughter clearly observed that “[t]he ANPR allows us to look at harms systematically and address the root of that unlawful activity.” Fed. Trade Comm’n, *supra* note 102, at 6. In her view, this was an opportunity for the Commission “to think deeply about people’s experiences in this market and about how to ensure that the benefits of progress are not built on an exploitative foundation. Clear rules have the potential for making the data economy more fair and more equitable for consumers, workers, businesses, and potential competitors alike.” *Id.* at 9.

106. An example of how FTC leadership viewed one of these practices as one piece of a larger and more complex puzzle appears in a recent law review article by Lina Khan, Samuel Levine, and Stephanie Nguyen. Discussing dark patterns, they write: “*Dark patterns are both a cause and effect of unchecked surveillance—they become increasingly effective as firms amass more user data, and they can be deployed to harvest more data still.*” Khan et al., *supra* note 18, at 1429 (emphasis added) (footnote omitted).

107. Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51275 (Aug. 22, 2022). In her statement in support of the ANPR, Chair Lina Khan pointed out: “The data practices of today’s surveillance economy *can create and exacerbate deep asymmetries of information—exacerbating, in turn, imbalances of power.*” Fed. Trade Comm’n, Statement of Chair Lina Khan Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking 2 (Aug. 11, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf) [<https://perma.cc/HBZ5-8APX>] (emphasis added).

Finally, the third normative commitment that the ANPR makes evident is *a pledge to meaningfully constrain corporate power*. As outlined in Part I, the Commission’s list of potential approaches in the ANPR goes far beyond merely upholding consumer consent, instead proposing a broad range of systemic market measures aimed at curbing corporate dominance and addressing the structural conditions that enable data-driven harms.

#### IV. TRACING THE ORIGINS OF THIS TRANSFORMATION

According to Alicia Solow-Niederman, “the FTC’s enforcement actions do not occur in a rigidly fixed domain. To the contrary, they unfold within a dynamic space [which she refers to as the FTC’s Overton Window of Enforcement Possibility] that can change over time, subject to forces both inside the agency and external to it.”<sup>108</sup> In particular:

Evolution of the Overton Window of Enforcement Possibility is a process, with one force—such as *a shift in internal institutional norms*, or *a shift in social norms* that might afford space for the FTC to expand its own enforcement scope—intersecting with another force—such as *a reactive shift by Congress or by the courts*.<sup>109</sup>

In this Article, I build upon Solow-Niederman’s framework, extending the Overton Window concept to encompass the FTC’s rulemaking actions. Although enforcement and rulemaking are both administrative functions, they have different legal controls associated with each of them. As such, the forces that can constrain and enable their action possibilities can also vary. For example, whereas most enforcement constraints tend to be reactive, many rulemaking constraints are *proactive*, involving ex ante procedural limits (e.g., notice-and-comment rulemaking procedures under the Administrative Procedure Act,<sup>110</sup> and Magnuson-Moss rulemaking procedures<sup>111</sup>). Additionally, an Overton Window of *Rulemaking* Possibility also has to account for the specific judicial doctrines (e.g., major questions doctrine, nondelegation doctrine, arbitrary & capricious standard) that directly shape the “window” for legitimate agency rulemaking authority. Finally, in comparison to enforcement, the rulemaking framework has to

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108. Solow-Niederman, *supra* note 16, at 1012.

109. *Id.* at 1034 (emphasis added).

110. 5 U.S.C. § 553.

111. 15 U.S.C. § 57a.

explicitly incorporate congressional threats (e.g., funding cuts, legislative overrides) and executive oversight as key boundary setters for the rulemaking window.

Based on these adjustments to the framework, I argue that despite potential congressional<sup>112</sup> and judicial review threats,<sup>113</sup> the space—the Overton Window of Rulemaking Possibility—for the FTC to reframe its regulatory priorities around information privacy was created by (A) a shift in internal institutional norms within the Commission<sup>114</sup> and (B) a shift in societal norms.<sup>115</sup> Thus, while the conceptual and policy transformation outlined here became evident in the text of the 2022 ANPR,<sup>116</sup> it actually began at least three years prior to the ANPR’s announcement, and its

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112. After the ANPR was published, Republican Senators Cynthia Lummis, Kevin Cramer, and Marco Rubio sent a letter to FTC Chair Lina Khan arguing that data privacy standards should be determined by Congress, not the FTC, and warning the agency against overstepping its authority. Letter from Cynthia Lummis, Kevin Cramer & Marco Rubio, Senators, to Lina Khan, Chair, Fed. Trade Comm’n (Nov. 3, 2022), <https://senatorkevincramer.app.box.com/s/e35b6picvfivkhxzmchh2omuxqavx56> [<https://perma.cc/NUQ9-8LH8>]; See also Wendy Davis, *GOP Senators Urge FTC To Scrap Privacy Rulemaking*, MEDIAPOST (Nov. 7, 2022), <https://www.mediapost.com/publications/article/379534/gop-senators-urge-ftc-to-scrap-privacy-rulemaking.html> [<https://perma.cc/2KPK-2ERZ>].

113. When the FTC announced the ANPR, many observers anticipated that its fate would be determined by judicial review. Critics invoked the major questions doctrine, arguing that the FTC lacked clear congressional authorization to issue sweeping, economy-shaping rules on privacy and surveillance. See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 723–24 (2022) (holding that agencies must have clear congressional authorization when asserting powers of vast economic and political significance). However, since the FTC has not yet issued a final rule—and likely will not, given recent political developments—no such rule has been formally challenged on major questions doctrine grounds. See, e.g., Letter from Jordan Crenshaw, Vice President, Chamber Tech. Engagement Ctr., U.S. Chamber of Com., to Fed. Trade Comm’n (Nov. 22, 2022), <https://www.uschamber.com/security/comment-letter-to-the-federal-trade-commission-ftc-regarding-the-trade-regulation-rule-on-commercial-surveillance-and-data-security-proposed-rule> [<https://perma.cc/D9ZA-W5DM>]; Kevin Frazier, *Return of the National Nanny or Restoration of the Cop on the Beat: The FTC’s Impending Proposed Rule on Commercial Surveillance*, FEDSOC BLOG (May 15, 2024), <https://fedsoc.org/commentary/fedsoc-blog/return-of-the-national-nanny-or-restoration-of-the-cop-on-the-beat-the-ftc-s-impending-proposed-rule-on-commercial-surveillance> [<https://perma.cc/B7RF-RZUN>].

114. “[T]he FTC’s internal institutional norms” can be understood as “the agency’s own perception of which actions are (not) in range for practical reasons, ideological reasons, or both.” Solow-Niederman, *supra* note 16, at 1015.

115. “[A] social norm may reflect the opinions of policy elites, the trade press, legal academics, or the bar, and not the population writ large. . . . [A]mplify thick social consensus (even from an ‘undemocratic’ sampling of the population) might provide support for distinct ideological stances within the agency.” *Id.* at 1030.

116. See *Commercial Surveillance and Data Security*, 87 Fed. Reg. 51273 (Aug. 22, 2022).

origins can be traced to both institutional dynamics within the FTC and broader societal influences.

Finally, as will be explored in Part VI, the eventual narrowing or demise of this expanded window may be, at least in part, attributable to pressures arising from executive oversight, despite the FTC's formal status as an independent agency.<sup>117</sup>

Before turning to the two forces that may have influenced the shift in regulatory priorities described here, it is important to make a preliminary observation. As will be seen, this Part implicitly challenges administrative law's tendency to treat agencies as black boxes or unitary entities. It exposes how internal agency dynamics within multimember commissions can play a decisive role in shaping policy outcomes.<sup>118</sup> In doing so, it also questions administrative law scholarship's focus on judicial review and legal doctrine as the principal determinants of administrative developments. As now-Associate Justice of the Supreme Court Elena Kagan eloquently observed in her scholarship back in 2001,

much of what is important in administration occurs outside the courthouse doors. It occurs as new views emerge of the appropriate goals and optimal strategies of regulatory programs. . . . [I]t occurs as bureaucratic institutions, the constituencies with which they deal, and the political environment in which they operate change over time.<sup>119</sup>

#### *A. A Shift in Internal Institutional Norms at the FTC*

Given Chairwoman Lina Khan's widely recognized role in radically reshaping the FTC's policy trajectory,<sup>120</sup> one might reasonably speculate

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117. See Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 461 (2021) (explaining that the FTC was intended to be an independent agency designed to gather industry information, promote deliberation in Congress and within the agency about proper business conduct, and enforce resulting standards, insulated from short-term politics and corporate capture, and structured to reflect a commitment to expertise and bipartisan governance).

118. More than in specific pieces, the idea that administrative agencies operate as monolithic institutions whose internal dynamics are opaque or irrelevant has been implicitly present in much of traditional administrative law scholarship focused on judicial review and delegation.

119. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383 (2001).

120. See, e.g., Brian Fung & Catherine Thorbecke, *Lina Khan's Rise Was Heralded as an Antitrust Revolution. Now She Has to Pull It Off*, CNN (Oct. 17, 2023), <https://www.cnn.com/2023/10/16/tech/lina-khan-risk-takers/index.html> [<https://perma.cc/365Q-BSSY>].

that she was the mastermind behind the transformation described in this Article. The document analysis conducted for this project, however, sheds light on the fact that the three normative commitments embodied in the ANPR find most of their roots in Democratic Commissioner Rebecca Kelly Slaughter’s willingness to alter certain internal institutional norms.<sup>121</sup>

Before Lina Khan joined the FTC on June 15, 2021, Commissioner Slaughter had already served there for three years, having been nominated by President Donald Trump in March of 2018 and sworn in as an FTC Commissioner on May 2, 2018.<sup>122</sup> In fact, Slaughter served as Acting Chair from January 21 until June 15, 2021, when Lina Khan was appointed as Chair.<sup>123</sup>

Since April of 2019—when the FTC was still being chaired by Republican Commissioner Joseph J. Simons—Slaughter began to identify the following three *reform needs* in the agency’s approach to data privacy, which she actively sought to address throughout her tenure.<sup>124</sup> While Chair Simons did not publicly engage with or counter Slaughter’s relatively politically contentious stances over the course of his chairmanship, her calls were later supported and promoted by incoming Democratic commissioners and some FTC staff members, including succeeding Chair Lina Khan.<sup>125</sup>

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121. As Commissioner Alvaro Bedoya would clearly recognize in his remarks presented in February of 2023 at the Future of Privacy Forum’s 13th Annual Privacy Papers for Policymakers Event, “we owe the idea for the current commercial surveillance ANPR to Commissioner Slaughter. This is an idea taken up and embraced by Chair Khan and elaborated and worked on by Professor Olivier Sylvain and by the brilliant staff of the Division of Privacy and Identity Protection.” See Alvaro M. Bedoya, Comm’r, Fed. Trade Comm’n, Prepared Remarks of Commissioner Alvaro M. Bedoya at the Future of Privacy Forum’s 13th Annual Privacy Papers for Policymakers Event 4 (Feb. 16, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023.02.16-bedoya-future-of-privacy-forum-remarks.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023.02.16-bedoya-future-of-privacy-forum-remarks.pdf) [<https://perma.cc/K6SJ-8NUY>]; see also Alvaro M. Bedoya, Comm’r, Fed. Trade Comm’n, Statement Regarding the Commercial Surveillance Data Security Advance Notice of Proposed Rulemaking (Aug. 11, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-bedoya-regarding-commercial-surveillance-data-security-advance-notice> [<https://perma.cc/AXF6-QJUR>].

122. *Rebecca Kelly Slaughter*, *supra* note 37.

123. *Id.*; *Lina M. Khan*, *supra* note 40.

124. See *FTC Hearing #12: The FTC’s Approach to Consumer Privacy*, FED. TRADE COMM’N (Apr. 9, 2019), <https://www.ftc.gov/news-events/events/2019/04/ftc-hearing-12-ftcs-approach-consumer-privacy> [<https://perma.cc/8R2G-KK7F>].

125. *FTC Releases Summary of Key Accomplishments*, FED. TRADE COMM’N (Jan 19, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-releases-summary-key-accomplishments> [<https://perma.cc/DE2H-ZR3N>] (celebrating measures aimed at curtailing consumer surveillance).

### 1. A Need To “Tweak the Framing” From Privacy Harms to Data Abuses

On September 6, 2019—over a year after being sworn in—Commissioner Slaughter attended an event hosted by Silicon Flatirons and the University of Colorado Law School. In her keynote address, titled “The Near Future of U.S. Privacy Law,” she introduced what would become one of her key initiatives: to change the framing around privacy harms.<sup>126</sup> Over time, this need would become the foundation for the FTC’s first newly adopted normative commitment outlined above, i.e., a clear shift towards addressing broadly conceived data-driven harms.

According to Slaughter,

I want to take my time today to share a little bit about how I believe the agency should meet this moment. . . . I know that we are here to discuss the near future of US privacy law, but my first observation is *that I think we need to tweak the framing a little bit. Rather than simply thinking narrowly about data privacy, I want us to be thinking in terms of data abuses more broadly.*

Privacy generally refers to limits on the collection or sharing of data that an individual would prefer to keep private. But we cannot and should not separate problems involving collecting data about individuals from problems involving the targeting of information to individuals or other decisions made for individuals (often based on the collected data).<sup>127</sup>

Thus, in Commissioner Slaughter’s view, unlike “privacy,” a “data abuses” framing would allow the FTC to move beyond data collection harms, and address data practices that do not “fall squarely in the traditional orbit of ‘privacy’ but [are] closely related and must be considered in tandem,”<sup>128</sup> such as, “[t]he targeting of manipulative content to individuals—whether it is political or commercial. . . .”<sup>129</sup> Moreover, this reframing would enable the agency to tackle harms deriving from the use of

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126. Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, Remarks at The Near Future of U.S. Privacy Law Event Hosted by Silicon Flatirons and the University of Colorado Law School 1 (Sept. 6, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1543396/slaughter\\_silicon\\_flatirons\\_remarks\\_9-6-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf) [<https://perma.cc/MMV8-HB38>].

127. *Id.* at 1–2 (emphasis added); see also Rebecca Kelly Slaughter et al., *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission*, 23 YALE J.L. & TECH. SPECIAL ISSUE 1, 54 n.170 (2021).

128. Slaughter, *supra* note 126, at 2.

129. *Id.*

data, including those associated with the proliferation of algorithmic decision-making systems and AI models, collectively referred to by her as “algorithmic harms.”<sup>130</sup>

Similarly, on October 1, 2021, following Chair Khan’s appointment to the FTC, Commissioner Slaughter further elaborated on her vision, providing a more detailed list of the specific harms encompassed within the broader “data abuses” framework. When delivering a keynote at a National Advertising Division’s event, Slaughter stated:

The first assumption I would like to challenge is the idea that “privacy” is the only concern for consumers in digital markets. Of course, privacy is critically important—I share the view that it is a fundamental right. But it is not the only important concept either as a matter of law or as a matter of values when it comes to the data economy. I worry that, when we focus exclusively or even primarily on “privacy,” we can—either intentionally or unintentionally — exclude from our gaze other critical issues people face in digital markets.

I may sound like a broken record on this point; I’ve been beating the “not just privacy” drum for several years. And, indeed, our work at the FTC has already moved past narrow traditional “privacy” problems like dishonest terms of service for data use. We’ve issued guidance on *algorithmic bias*, explored “*dark patterns*” in *user-interface design*, and gone after *companies that have sold sensitive information* such as Social Security numbers to *other companies that had no legitimate business need for the information*.

I’m concerned about the harmful effects of a market based around leveraging massive amounts of people’s data. I’m especially concerned about *harms to civil rights and equal opportunity, the proliferation of misinformation, harms to competition, and increasing labor exploitation, including through worker surveillance*. These concerns go far beyond traditional “privacy” issues, and they merit investigation as unfair practices that might violate the FTC Act.

But they cannot be separated from the traditional privacy problems entirely; all stem from the same indiscriminate data collection. I implore us to think about these problems collectively as “data

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130. Slaughter et al., *supra* note 127, at 54.

abuses” rather than force all these issues under the privacy umbrella.<sup>131</sup>

Importantly, this new framing was also embraced by various FTC members at the time. For example, Samuel Levine, Director of the FTC’s Bureau of Consumer Protection, was also very vocal about this framing shift.<sup>132</sup> On May 19, 2022, at Cleveland-Marshall College of Law’s Cybersecurity and Privacy Protection Conference, Director Levine stated:

In talking about privacy in 2022, we need to expand our perspective. Privacy means more than “I have nothing to hide.” Rather, it is crucial we recognize that the surveillance economy imposes very real costs on individuals – including consumers, workers, and young people – as well as on our society in general, including around our critical infrastructure, our political and religious liberties, and our social cohesion.<sup>133</sup>

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131. Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *Disputing the Dogmas of Surveillance Advertising: National Advertising Division Keynote 2021 2* (Oct. 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1597050/commissioner\\_slaughters\\_national\\_advertising\\_division\\_10-1-2021\\_keynote\\_address.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597050/commissioner_slaughters_national_advertising_division_10-1-2021_keynote_address.pdf) [https://perma.cc/U6V7-YW7X] [hereinafter Slaughter, *Disputing the Dogmas of Surveillance Advertising*] (emphasis added). Other occasions in which commissioner Slaughter has stated her desire to adopt a “data abuses” framing instead of privacy include: Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *FTC Data Privacy Enforcement: A Time of Change: Cybersecurity and Data Privacy Conference Program on Corporate Compliance and Enforcement at New York University School of Law 4* (Oct. 16, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1581786/slaughter\\_-\\_remarks\\_on\\_ftc\\_data\\_privacy\\_enforcement\\_-\\_a\\_time\\_of\\_change.pdf](https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf) [https://perma.cc/8TLJ-VCUK] [hereinafter Slaughter, *A Time of Change*]; Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *Wait But Why? Rethinking Assumptions About Surveillance Advertising. IAPP Privacy Security Risk Closing Keynote 2021 3* (Oct. 22, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1597998/iapp\\_psr\\_2021\\_102221\\_final2.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597998/iapp_psr_2021_102221_final2.pdf) [https://perma.cc/6YGK-E3S5] [hereinafter Slaughter, *Wait But Why?*]; Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *NTIA Listening Session on Privacy, Equity, and Civil Rights 1* (Dec 14, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1599831/slaughter-ntia-keynote.pdf](https://www.ftc.gov/system/files/documents/public_statements/1599831/slaughter-ntia-keynote.pdf) [https://perma.cc/S9YC-J7GW] [hereinafter Slaughter, *NTIA Listening Session on Privacy, Equity, and Civil Rights*].

132. See, e.g., Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm’n, *Surveillance in the Shadows – Third-Party Data Aggregation and the Threat to our Liberties: Consumer Data Industry Association Law & Industry Conference 9* (Sept. 21, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/cdia-sam-levine-9-21-2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/cdia-sam-levine-9-21-2023.pdf) [https://perma.cc/GD6Y-CWJL].

133. Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm’n, *Remarks at the Cleveland-Marshall College of Law Cybersecurity and Privacy Protection Conference 2* (May 19, 2022), <https://www.ftc.gov/news-events/news/speeches/remarks-samuel-levine-cleveland->

Remarks from two other FTC employees during the 2022 PrivacyCon online event, held on November 1, 2022, are also noteworthy. During this event, Stephanie Nguyen, then the FTC’s Chief Technologist, shared an intervention where she raised concerns about how the term consumer privacy could be *inadequate* to describe people’s lived experiences, leaving outside other frames such as consumer surveillance discriminatory ADMSs.<sup>134</sup> In a similar fashion, during PrivacyCon 2022, Amba Kak, Senior Advisor on AI at the FTC, also questioned the adequacy of the term “privacy” in capturing the full scope of issues discussed at the event, instead emphasizing the advantages of the broader concept of “consumer surveillance.”<sup>135</sup>

Notably, the alternative terms proposed in these statements—such as “data abuses” or “consumer surveillance”—were the very frameworks that many within the agency initially appeared to associate with the forthcoming ANPR on Commercial Surveillance and Data Security. For example, in her 2021 statement regarding the FTC’s report to Congress on the agency’s efforts to protect Americans’ privacy and data security, Commissioner Slaughter described the future ANPR as “a rulemaking proceeding to address *widespread data harms and abuses*.”<sup>136</sup> Likewise, at a listening

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marshall-college-law-cybersecurity-privacy-protection-conference [https://perma.cc/QUX9-Z8D3].

134. Fed. Trade Comm’n, PrivacyCon 2022 Virtual Workshop 2–3 (Nov. 1, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/privacycon-2022-transcript.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/privacycon-2022-transcript.pdf) [https://perma.cc/JWR4-GCDX] (“In this work, the term consumer privacy is often an *inadequate term* to describe people’s lived experiences. Even looking at our agenda today, PrivacyCon expands on and *uses other frames to bring out a broader set of concerns*. For example, we’re talking about not just indecipherable consent popup windows, but *consumer surveillance enabling information and power asymmetries*; not just data security, but *automated decision-making systems which can bring discriminatory outcomes*.”) (emphases added).

135. According to Kak,

We use the term consumer surveillance today in its most expanded sense to include workers, of course, and also to leverage surveillance as a frame that creates space for concerns beyond traditional privacy and data security. . . . including the power and information asymmetries that shape these particular contexts, as well as discuss how the research presented today reveals the limitations of dominant approaches, whether that’s consent or transparency, or indeed, privacy.

*Id.* at 3–4.

136. Fed. Trade Comm’n, Statement of Commissioner Rebecca Kelly Slaughter Regarding the Report to Congress on Privacy and Security 1 (Oct. 1, 2021) (emphasis added), [https://www.ftc.gov/system/files/documents/public\\_statements/1597012/rks\\_statement\\_on\\_privacy\\_report\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597012/rks_statement_on_privacy_report_final.pdf) [https://perma.cc/F4MP-QWRV].

session on “Privacy, Equity, and Civil Rights” organized by the National Telecommunications and Information Administration (NTIA), Commissioner Slaughter would express: “I believe it is past time for the FTC to begin *a section 18 rulemaking process on data abuses*.”<sup>137</sup> And, importantly, a similar perspective was reflected in the FTC’s Statement of Regulatory Priorities published in December 2021, which emphasized:

Among the many pressing issues consumers confront in the modern economy, the abuses stemming from surveillance-based business models are particularly alarming. The Commission is considering whether rulemaking in this area would be effective in curbing lax security practices, limiting intrusive surveillance, and ensuring that algorithmic decision-making does not result in unlawful discrimination.<sup>138</sup>

Finally, in her statement in support of the ANPR, Chair Lina Khan also used the expression “evolving forms of data abuses.”<sup>139</sup>

Hence, during the years preceding the ANPR, several actors within the FTC started to shift their focus beyond customary privacy harms such as identity theft, unconsented data collection, and deceptive terms of service.<sup>140</sup> As such, the agency was increasingly interested in addressing broader harms generated by the data-driven economy, including algorithmic bias and discrimination, manipulative design practices such as dark patterns, harms to children and teens’ mental health, the spread of misinformation, worker exploitation through surveillance, and the erosion of equal access to key economic opportunities.<sup>141</sup>

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137. Slaughter, *NTIA Listening Session on Privacy, Equity, and Civil Rights*, *supra* note 131, at 3 (emphasis added).

138. Fed. Trade Comm’n, Statement of Regulatory Priorities 2 (Dec. 10, 2021), [https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement\\_3084\\_FTC.pdf](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf) [<https://perma.cc/U3TR-KZTL>].

139. Fed. Trade Comm’n, Statement of Chair Lina M. Khan Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking Commission File No. R111004 1–2 (Aug. 11, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf) [<https://perma.cc/NE2A-9GH9>].

140. *See id.*

141. *See id.* at 2–4; *FTC Staff Report Finds Large Social Media and Video Streaming Companies Have Engaged in Vast Surveillance of Users with Lax Privacy Controls and Inadequate Safeguards for Kids and Teens*, FED. TRADE. COMM’N (Sept. 19, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-staff-report-finds-large-social-media-video-streaming-companies-have-engaged-vast-surveillance> [<https://perma.cc/C3KJ-ZXCP>].

## 2. A Need to Scrutinize the Surveillance-Based Business Models and the Data Surveillance Ecosystem

Yet the previously described dynamics within the FTC suggested more than just an interest in acknowledging additional harms. Rather, they responded to another reform need that would be at the base of the second normative commitment earlier outlined, namely, the pivot toward examining the data economy through a political economy lens.

When explaining the relevance of shifting the framing at the 2021 International Association of Privacy Professionals' (IAPP) Privacy Security Risk event in October 2021, Commissioner Slaughter observed:

I am particular about using the right framing *because appropriate identification of a problem is key to effective tailoring of solutions*. If we are concerned only about privacy—the sharing of personal information without knowledge or consent—we *may narrowly focus on solutions that address only that knowledge and consent*, such as burdensome opt-in or opt-out frameworks, and *not look at the economy and society-wide implications of unfettered data collection used to fuel surveillance advertising*. Instead, I'm interested in *seeing us squarely target the business practices that I think are the source of so much harm*.<sup>142</sup>

Therefore, beyond enabling the FTC to address a broader range of harms, shifting away from a privacy-centric framework would, according to Slaughter, provide the agency an opportunity to scrutinize the “surveillance-based business models”<sup>143</sup> that fuel the data economy violations, in which—according to her own words in a previous intervention—“consumers become data commodities themselves.”<sup>144</sup> In this same line, Chair Lina Khan would also later frame these business models as the actual problem of

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142. Slaughter, *Wait But Why?*, *supra* note 131, at 4 (emphasis added).

143. Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm'n, Keynote Remarks of FTC Acting Chairwoman Rebecca Kelly Slaughter at the Consumer Federation of America's Virtual Consumer Assembly 7 (May 4, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughte-cfa-virtual-consumer-assembly.pdf](https://www.ftc.gov/system/files/documents/public_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughte-cfa-virtual-consumer-assembly.pdf) [<https://perma.cc/KY7L-HJHU>].

144. Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Prepared Remarks of Commissioner Rebecca Kelly Slaughter Hearings on Competition and Consumer Protection in the 21st Century 2 (Sept. 21, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1412049/commissioner\\_slaughter\\_opening\\_remarks\\_for\\_ftc\\_competition\\_and\\_consumer\\_protection\\_hearings\\_sept21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1412049/commissioner_slaughter_opening_remarks_for_ftc_competition_and_consumer_protection_hearings_sept21.pdf) [<https://perma.cc/ZKR8-924G>]; *see also* Levine, *supra* note 133, at 2 (“These technologies and the business models that employ them to constantly commodify and monetize our personal information have created a ‘surveillance economy’ . . .”).

the digital economy.<sup>145</sup> According to her, the business model where firms “provide services for zero dollars while *monetizing personal information* . . . seems to *incentivize endless tracking and vacuuming up of users’ data*.”<sup>146</sup>

Consequently, during the years leading up to the ANPR, the FTC put a special emphasis on two dominant business models that—in the commission’s view—have fueled the surveillance economy: behavioral advertising<sup>147</sup> and, more recently, AI models training. Speaking at the 2024 FTC Tech Summit, Chair Khan highlighted the role of these models in shaping the digital economy, stating: “we are squarely focused on how business models drive incentives. Just as we’ve seen *behavioral advertising* fuel the endless collection of user data, *model training* is emerging as another feature that could further incentivize surveillance.”<sup>148</sup>

145. This understanding resonates closely with what Computer Science Professor Arvind Narayanan appears to have realized since 2018, when he titled a CITP Blog “When the business model *\*is\** the privacy violation.” See Arvind Narayanan, *When the Business Model \*Is\* the Privacy Violation*, CITP BLOG (Apr. 12, 2018), <https://blog.citp.princeton.edu/2018/04/12/when-the-business-model-is-the-privacy-violation/> [<https://perma.cc/YE2C-GBAY>]. A similar appreciation has also been offered by Daniel Susser. See Daniel Susser, *From Procedural Rights to Political Economy: New Horizons for Regulating Online Privacy*, in THE ROUTLEDGE HANDBOOK OF PRIVACY AND SOCIAL MEDIA 281, 286 (Sabine Trepte & Philipp K. Masur eds., 2023).

146. Lina M. Khan, Chair, Fed. Trade Comm’n, Remarks of Chair Lina M. Khan at IAPP Global Privacy Summit 2022, at 3 (Apr. 11, 2022) (emphasis added), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20IAPP%20Global%20Privacy%20Summit%202022%20-%20Final%20Version.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks%20of%20Chair%20Lina%20M.%20Khan%20at%20IAPP%20Global%20Privacy%20Summit%202022%20-%20Final%20Version.pdf) [<https://perma.cc/3HCN-TCCZ>].

147. Fed. Trade Comm’n, Statement of Chair Lina M. Khan Regarding the Social Media and Video Streaming Service Providers Privacy Report Commission File No. P205402, at 2 (Sept. 19, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/statement-chair-khan-social-media-6b.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/statement-chair-khan-social-media-6b.pdf) [<https://perma.cc/E6VA-HFMH>] (“The advent of behavioral advertising marked an inflection point in the evolution of the advertising business. Marketers have always sought to reach their desired audience, but digitization enabled an unprecedented degree of behavioral targeting. Whereas contextual advertising let marketers tailor ads based on the content of a webpage, behavioral advertising let marketers tailor ads based on the characteristics and past behavior of any given individual. This newfound ability to monetize people’s behavior, activity, and characteristics helped drive the creation of a multi-billion dollar industry specializing in tracking and collecting vast amounts of Americans’ personal data. The behavioral ad-based business model seems to be a key driver of the platforms’ data practices.”)

148. Lina M. Khan, Chair, Fed. Trade Comm’n, Remarks of Chair Lina M. Khan at the FTC Tech Summit 3 (Jan. 25, 2024) (emphasis added), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2024.01.25-chair-khan-remarks-at-ot-tech-summit.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2024.01.25-chair-khan-remarks-at-ot-tech-summit.pdf) [<https://perma.cc/UT2M-PETA>].

However, concerns about AI's role in expanding commercial surveillance are not new. Since at least 2022, the FTC was already flagging AI as a potential driver of increased data collection. In a June 2022 press release—right before the ANPR was announced—the agency warned: “AI tools can *incentivize and enable invasive commercial surveillance and data extraction practices* because these technologies require vast amounts of data to be developed, trained, and used. Moreover, improving AI tools accuracy and performance can lead to more invasive forms of surveillance.”<sup>149</sup>

In the Commissioners' view, adopting “a market-wide approach”<sup>150</sup> that is aware of these business models would not only enable the agency to examine the “widespread tracking, surveillance, and expansive use of data across contexts [that] have become increasingly common practices across the broader economy,”<sup>151</sup> but also “the data surveillance ecosystem”<sup>152</sup> that has developed as a result.

As explained by Kristin Cohen, then Acting Associate Director of the FTC's Division of Privacy & Identity Protection, in a Business Blog published on July 11, 2022,

After it's collected from a consumer, data enters a vast and intricate sales floor frequented by *numerous buyers, sellers, and*

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149. *FTC Report Warns About Using Artificial Intelligence to Combat Online Problems*, FED. TRADE COMM'N (June 16, 2022) (emphasis added), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-report-warns-about-using-artificial-intelligence-combat-online-problems> [<https://perma.cc/MN4K-AQOK>]; see also Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, *The National Advertising Division Annual Conference. A Progress Report on Key Priorities, and a Warning on AI Self-Regulation* 11 (Sept. 19, 2023).

150. Fed. Trade Comm'n, *Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security Commission File No. P065401*, at 4 (Oct. 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1597024/statement\\_of\\_chair\\_lina\\_m\\_khan\\_regarding\\_the\\_report\\_to\\_congress\\_on\\_privacy\\_and\\_security\\_-\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597024/statement_of_chair_lina_m_khan_regarding_the_report_to_congress_on_privacy_and_security_-_final.pdf) [<https://perma.cc/K4UN-QK9T>].

151. Fed. Trade Comm'n, *Statement of Chair Lina M. Khan Regarding Policy Statement on Education Technology and the Children's Online Privacy Protection Act Comm'n File No. P155401*, at 4 (May 19, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P155401KhanStatementCOPPA.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P155401KhanStatementCOPPA.pdf) [<https://perma.cc/N6JW-55MB>].

152. Slaughter, *Wait But Why?*, *supra* note 131, at 1; see also Fed. Trade Comm'n, *supra* note 151, at 1 (“The ability of businesses to monetize user information has created a *vast ecosystem of companies whose business model incentivizes the vast tracking and collection of personal data . . .*” (emphasis added)); FED. TRADE COMM'N, *A LOOK BEHIND THE SCREENS: EXAMINING THE DATA PRACTICES OF SOCIAL MEDIA AND VIDEO STREAMING SERVICES* ii (Sept. 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Social-Media-6b-Report-9-11-2024.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Social-Media-6b-Report-9-11-2024.pdf) [<https://perma.cc/N4B8-YVDG>] (“America's hands-off approach has produced an *enormous ecosystem of data extraction and targeting* that takes place largely out of view to consumers.” (emphasis added)).

*sharers*. There are the mobile operating systems that provide the mechanisms for collecting the data. Then there are app publishers and software development kit (SDK) developers that embed tools in mobile apps to collect location information and provide the data to third parties. The next stop in the *murky marketplace* may be data aggregators and brokers—companies that collect information from multiple sources and then sell access to it (or analyses derived from it) to marketers, researchers, and even government agencies.<sup>153</sup>

In fact, the FTC’s interest in these “murky but flourishing marketplaces where . . . information is combined, shared, and monetized”<sup>154</sup> led it to issue in 2019 and 2020, respectively, Orders to File Special Reports under § 6(b) of the FTC Act to seven Internet Service Providers (ISPs) as well as to a cross-section of nine Social Media and Video Streaming Services (SMVSSs) companies in the United States, requesting detailed information to better understand the data practices of several of the actors involved in this ecosystem.<sup>155</sup> After analyzing the information provided, the agency released two market studies<sup>156</sup> highlighting what it described as these industries’ “data surveillance and privacy practices.”<sup>157</sup> According to

153. Kristen Cohen, *White House Press Release—Location, Health, and Other Sensitive Information: FTC Committed to Fully Enforcing the Law Against Illegal Use and Sharing of Highly Sensitive Data*, AM. PRESIDENCY PROJECT (July 12, 2022) (emphasis added), <https://www.presidency.ucsb.edu/documents/white-house-press-release-location-health-and-other-sensitive-information-ftc-committed> [<https://perma.cc/FU4B-XTYZ>]; see also Levine, *supra* note 132.

154. *FTC Seeks Public Comment on Commercial Surveillance of Consumers*, TIMES-JOURNAL (Aug. 26, 2022), [https://times-journal.com/news/article\\_0556abf6-23d1-11ed-a120-b7824ece1b9d.html/](https://times-journal.com/news/article_0556abf6-23d1-11ed-a120-b7824ece1b9d.html/) [<https://perma.cc/74NL-EC65>].

155. *FTC Seeks to Examine the Privacy Practices of Broadband Providers*, FED. TRADE COMM’N (Mar. 26, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers> [<https://perma.cc/K4P2-KHRT>]; *FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information*, FED. TRADE COMM’N (Dec. 14, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services-seeking-data-about-how-they-collect-use> [<https://perma.cc/Y969-3S92>].

156. FED. TRADE COMM’N, A LOOK AT WHAT ISPS KNOW ABOUT YOU: EXAMINING THE PRIVACY PRACTICES OF SIX MAJOR INTERNET SERVICE PROVIDERS (Oct. 21, 2021), [https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402\\_isp\\_6b\\_staff\\_report.pdf](https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf) [<https://perma.cc/69GJ-EXN3>]; FED. TRADE COMM’N, *supra* note 152.

157. FED. TRADE COMM’N, A LOOK AT WHAT ISPS KNOW ABOUT YOU, *supra* note 156, at ii.

Samuel Levine, Director of the FTC’s Bureau of Consumer Protection, “[t]he report [on SMVSSs] leaves no doubt that without significant action, *the commercial surveillance ecosystem* will only get worse.”<sup>158</sup>

Thus, rather than focusing solely on the data abuses, the FTC has lately been concerned with the web of actors, business models, and power dynamics that enable them.<sup>159</sup> Or, as Chair Lina Khan would call it, with “the new political economy of how Americans’ data is tracked, gathered, and used.”<sup>160</sup> For the agency, this emerging political economy is the root cause of most of the data-driven harms our society is concerned about today.

### 3. A Need to Prohibit Data Practices at the Heart of the Companies’ Business Models and Intervene the Dominant Market Position Currently Held by Many of These Companies

Finally, the third normative commitment that the ANPR made evident—a pledge to meaningfully constrain corporate power—also stemmed from a reform need identified by the FTC a few years before the ANPR. On October 1, 2021, Commissioner Slaughter talked before Congress about the FTC’s efforts to protect Americans’ privacy and data security, its priority areas for improving the agency’s effectiveness, and the areas in need of increased resources. In her testimony, she referenced a powerful metaphor from the novel *A Girl is a Body of Water*, by Jennifer Nansubuga Makumbi:

“If your roof leaks, what do you do?”

“Find the hole, plug it, and then mop.”

“Those women . . . have started with mopping.”

Let us not be an agency content with mopping when it is past time to try and fix the roof.<sup>161</sup>

In practical terms, “fixing the roof” came to mean moving away from information privacy’s hallmark—notice and consent—by pursuing two core strategies that the agency began advancing in the years leading up to the ANPR: (1) imposing substantive norms and prohibitions on specific exploitative data practices and (2) intervening the relatively dominant

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158. FED. TRADE COMM’N, *supra* note 152, at ii (emphasis added).

159. *See* Khan, *supra* note 146, at 4–5.

160. *Id.* at 2.

161. Fed. Trade Comm’n, *supra* note 136, at 2.

market position currently held by many of the companies driving the data economy.<sup>162</sup>

*a. Moving Away from Notice and Consent*

As Daniel Susser explains, “[r]ather than directly regulating information practices, notice-and-consent simply requires that individuals be notified and grant their permission before information about them is collected and used.”<sup>163</sup> As such, this model has historically reflected and privileged a free-market approach to privacy.<sup>164</sup> The assumption behind this method is that “if consumers can better understand privacy notices and are given more opportunities to make informed choices about sharing information, their interests will be adequately safeguarded.”<sup>165</sup>

Yet, as early as April 2019, Commissioner Rebecca Slaughter raised the limitations of this approach for the realities of modern data practices.<sup>166</sup> In Slaughter’s view, today, both notice and consent are meaningless. “Notice and choice will not address the broader surveillance practices upon which the current digital advertising economy is built,”<sup>167</sup> she would say. “A data regime built entirely on notice and consent will perpetuate this unfairness

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162. *See id.* at 1.

163. Daniel Susser, *Notice After Notice-and-Consent: Why Privacy Disclosures Are Valuable Even If Consent Frameworks Aren’t*, 9 J. INFO. POL’Y 1, 1 (2019).

164. *Id.* at 5.

165. James P. Nehf, *The FTC’s Proposed Framework for Privacy Protection Online: A Move Toward Substantive Controls or Just More Notice and Choice?*, 37 WM. MITCHELL L. REV. 1727, 1733 (2011).

166. Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *The FTC’s Approach to Consumer Privacy 1–2* (Apr. 10, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1513009/slaughter\\_remarks\\_at\\_ftc\\_approach\\_to\\_consumer\\_privacy\\_hearing\\_4-10-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1513009/slaughter_remarks_at_ftc_approach_to_consumer_privacy_hearing_4-10-19.pdf) [<https://perma.cc/HNS3-JT8D>]; *see also* Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *Statement of Commissioner Rebecca Kelly Slaughter Before the Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce 2* (May 8, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1519261/statement\\_of\\_commissioner\\_rebecca\\_kelly\\_slaughter\\_before\\_the\\_committee\\_on\\_energy\\_and\\_commerce\\_5\\_8.pdf](https://www.ftc.gov/system/files/documents/public_statements/1519261/statement_of_commissioner_rebecca_kelly_slaughter_before_the_committee_on_energy_and_commerce_5_8.pdf) [<https://perma.cc/9R3N-F6YU>]; Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *Remarks of Commissioner Rebecca Kelly Slaughter at 2019 CDIA Law & Industry Conference 5* (June 5, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1525705/slaughter\\_remarks\\_at\\_2019\\_cdia\\_law\\_industry\\_conference\\_6-5-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1525705/slaughter_remarks_at_2019_cdia_law_industry_conference_6-5-19.pdf) [<https://perma.cc/4BUF-UAF6>]; Fed. Trade Comm’n, *supra* note 136, at 2–3.

167. Slaughter, *Disputing the Dogmas of Surveillance Advertising*, *supra* note 131, at 3; *see also* Slaughter, *Wait But Why?*, *supra* note 131, at 5.

because it accepts as a baseline the idea that companies are entitled to collect vast amounts of user data as long as they are honest about it.”<sup>168</sup>

Once in office, Chair Khan reinforced this premise on several occasions.<sup>169</sup> Talking in early 2022 to the IAPP, for example, Khan stated:

I am concerned that *present market realities may render the “notice and consent” paradigm outdated and insufficient*. Many have noted the ways that this framework seems to fall short, given both the overwhelming nature of privacy policies—and the fact that they may very well be beside the point. When faced with technologies that are increasingly critical for navigating modern life, *users often lack a real set of alternatives and cannot reasonably forego using these tools*.<sup>170</sup>

Likewise, this stance was consistently reaffirmed on multiple instances by Samuel Levine, then Director of the FTC’s Bureau of Consumer Protection.<sup>171</sup> In his view,

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168. Slaughter, *Disputing the Dogmas of Surveillance Advertising*, *supra* note 131, at 6 (emphasis added). Interestingly, this framing implicitly recognizes the failure of the policy implemented by the FTC over the past twenty-one years. In other words, this acknowledgement “recast[s] the problems of the technology’s failure as problems of law’s failure.” Salomé Viljoen, *The Promise and Limits of Lawfulness: Inequality, Law, and the Techlash*, 2 J. Soc. COMPUTING 284, 292 (2021).

169. *See, e.g.*, Fed. Trade Comm’n, *supra* note 150, at 3; Lina M. Khan, Chair, Fed. Trade Comm’n, Remarks of Chair Lina M. Khan Regarding the 6(b) Study on the Privacy Practices of Six Major Internet Service Providers Commission File No. P195402, at 1 (Oct. 21, 2021) [hereinafter *Remarks of Chair Khan on the ISPs Report*], [https://www.ftc.gov/system/files/documents/public\\_statements/1597790/20211021\\_isp\\_privacy\\_6b\\_statement\\_of\\_chair\\_khan\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597790/20211021_isp_privacy_6b_statement_of_chair_khan_final.pdf) [<https://perma.cc/M5PT-7Y3F>]; Fed. Trade Comm’n, *supra* note 151 at 1–2; Fed. Trade Comm’n, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter in the Matter of Twitter, Inc. Commission File No. 2023062, at 1 (May 25, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023062TwitterChairStatement\\_0.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023062TwitterChairStatement_0.pdf) [<https://perma.cc/A4LK-6JUD>]; Lina M. Khan, Chair, Fed. Trade Comm’n, Remarks of Chair Khan at the May Open Commission Meeting 1–2 (May 18, 2023) [hereinafter *Remarks of Chair Khan at the 2023 Open Commission Meeting*], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/may-open-commission-remarks-khan.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/may-open-commission-remarks-khan.pdf) [<https://perma.cc/DT2U-JHQV>].

170. Khan, *supra* note 146, at 6 (emphasis added).

171. *See, e.g.*, Levine, *supra* note 133, at 2; Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm’n, To Empower, Not to Weaken: Rethinking Consumer Protection in the Digital Age 5–7 (Sept. 27, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/S.LevineBEUCspeech9272022FINAL.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/S.LevineBEUCspeech9272022FINAL.pdf) [<https://perma.cc/7UDJ-U6MH>]; *see also* Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm’n, Believing in the FTC. Beyond the FTC: The Future of Privacy Enforcement 5 (Apr. 1, 2023) [hereinafter Levine, *Believing in the FTC*], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Remarks-to-JOLT-4-1-2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-to-JOLT-4-1-2023.pdf) [<https://perma.cc/J7L3-GTPM>]; Levine, *supra* note 132, at 1–3; Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm’n, Toward a Safer, Freer, and Fairer Digital Economy. How

I think it's clear that the notice and choice framework that has guided us for decades *is no match for the realities of contemporary surveillance*. We can no longer persist with *the fiction* that consumers can read thousands of pages of legalistic privacy notices, especially when businesses may change these notices at will. Nor should we accept *the falsehood* that consumers have a real choice when it comes to accessing digital tools and services. Simply put, in an economy increasingly fueled by mass commercial surveillance, *it is no longer viable to count on consumers alone to protect themselves*. That's why *it's critical that we—as well as legislators and policymakers across state and federal governments—develop a new approach*.<sup>172</sup>

To be sure, the intention to move away from the notice and consent framework was not unprecedented in the history of the FTC. In the early 2000s, FTC Chairman Timothy J. Muris had already rejected this framework.<sup>173</sup> Similarly, during the Obama administration, Jon Leibowitz, FTC Chairman, and David Vladeck, Director of the Agency's Bureau of Consumer Protection, raised the limitations of this approach, signaling their intent to explore other avenues.<sup>174</sup> In fact, in the 2012 Report, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers*, the FTC acknowledged that commentators had criticized this framework for producing “long, incomprehensible

Proactive Consumer Protection Can Make the Internet Less Terrible 2–3 (Apr. 17, 2024) [hereinafter Levine, *Toward a Safer, Freer, and Fairer Digital Economy*], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/20240417-Reidenberg-Lecture-final-for-publication-Remarks-Sam-Levine.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/20240417-Reidenberg-Lecture-final-for-publication-Remarks-Sam-Levine.pdf) [<https://perma.cc/RB92-ZFNM>].

172. Levine, *supra* note 133, at 7 (emphasis added).

173. In a law review article published shortly after he left the FTC, Muris and his co-author J. Howard Beales III, who had served as Director of the Bureau of Consumer Protection during Muris's tenure, stated: “A privacy regime that gives consumers a choice—except when it doesn't—is not a basis for a sound legal approach at all.” Beales III & Muris, *supra* note 98, at 117. Additionally, they said: “The Fair Information Practices [and notice and choice, in particular, as their foundational principles], the basis of much analysis about privacy and privacy regulation, are inadequate guides for sound public policy.” *Id.* at 135. *See also* Beales III & Muris, *supra* note 97, at 2205 (“Although theoretically tempting, notice and choice pose serious practical problems. In particular, they ignore the costs of obtaining information and using it to make a decision.”).

174. *See* Stephanie Clifford, *F.T.C.: Has Internet Gone Beyond Privacy Policies?*, N.Y. TIMES: MEDIA DECODER (Jan. 11, 2010), <https://archive.nytimes.com/mediadecoder.blogs.nytimes.com/2010/01/11/ftc-has-internet-gone-beyond-privacy-policies/>. Ultimately, in its 2012 report, this administration ended up proposing a new privacy framework built around three core best practices: privacy by design, simplified consumer choice, and increased transparency. FED. TRADE COMM'N, *supra* note 99, at 2–3.

privacy policies that consumers typically do not read, let alone understand.”<sup>175</sup> What was relatively novel, however, was the move to actually replace this long-standing framework with the two additional strategies discussed below.

*b. Imposing Substantive Norms and Prohibitions*

Rather than placing the burden on consumers to protect their own privacy, the FTC sought to meaningfully constrain corporate power by addressing the structural mechanisms that enable unlawful business practices.<sup>176</sup> According to Chair Lina Khan, “the *general lack of legal limits on what types of information can be monetized* has yielded a booming economy built around the buying and selling of this data.”<sup>177</sup> Consequently, a first strategy adopted by the agency was to strengthen the regulatory guardrails around data collection and processing, by imposing explicit substantive norms and prohibitions on specific data practices.<sup>178</sup>

According to Lina Khan, Samuel Levine, and Stephanie Nguyen in their *Stanford Law Review* article: “Commission leadership *identified in 2022* the importance of establishing substantive limits, rather than procedural rules, for increasing the efficacy of its privacy enforcement.”<sup>179</sup> Yet, the truth is that this approach’s roots can be traced back to at least early 2020.<sup>180</sup> Speaking at an event organized by UCLA School of Law in January 2020, Commissioner Slaughter commented:

I also think we need to give serious consideration to whether there are applications of AI that pose such serious risk to justice that a ban or a moratorium might be appropriate and necessary. The EU, for example, is currently considering a five-year moratorium on the use of facial recognition technology in public areas. Considering bans on particular applications of technology is not something we should take lightly. Strong measures like outright prohibitions necessarily involve tradeoffs; we might be sacrificing innovation potential and even some potential improvements in the

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175. FED. TRADE COMM’N, *supra* note 99, at 2.

176. *See* Khan et al., *supra* note 18, at 1406–07.

177. Khan, *supra* note 146, at 3 (emphasis added).

178. Khan et al., *supra* note 18, at 1409–10.

179. *Id.* at 1410 (emphasis added).

180. To be fair, Khan and her co-authors later clarify that “[m]oving from procedural check-the-box disclosures to substantive limits was *not a new concept, but these efforts collectively illustrate how the FTC’s work helped translate the idea into an operative governing framework for policy and enforcement.*” *Id.* at 1416 (emphasis added).

distribution of justice in order to protect against injustice. That can be the right thing to do.<sup>181</sup>

With these words, Commissioner Slaughter opened the door to considering the formulation of specific prohibitions on certain technological uses or applications that cause injustices so severe they should never be permitted.

It is important to note, however, that when it comes to data collection and processing, Slaughter's initial approach was especially focused on what she would refer to as "data minimization": "bright-line purpose and use restrictions that minimize the data that can be collected and how it can be deployed. This data minimization approach would turn off the data pump and deprive the surveillance-economy engine the fuel it needs to run."<sup>182</sup> Framed this narrowly, however, Commissioner Slaughter's approach appears less disruptive, simply aligning with the data minimization principle outlined in Article 5(1)(c) of the European Union's General Data Protection Regulation (GDPR).<sup>183</sup> In other words, it permits companies to collect only the data strictly necessary to fulfill their specified purpose.

Yet, when picked up by Chair Lina Khan, the norms-and-prohibitions approach was developed in a more far-reaching form.<sup>184</sup> Early in her tenure, Commissioner Khan expressed: "Going forward, I believe the Commission should approach data privacy and security protections by *considering substantive limits rather than just procedural protections*, which tend to create process requirements while sidestepping *more fundamental questions about whether certain types of data collection and processing should be permitted in the first place*."<sup>185</sup> With this call, repeated in other subsequent interventions,<sup>186</sup> Chair Khan marked a significant shift, signaling the FTC's readiness to move beyond procedural safeguards and toward categorical prohibitions of specific harmful data practices.

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181. Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Algorithms and Economic Justice 17 (Jan. 24, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1564883/remarks\\_of\\_commissioner\\_rebecca\\_kelly\\_slaughter\\_on\\_algorithmic\\_and\\_economic\\_justice\\_01-24-2020.pdf](https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf) [<https://perma.cc/22R8-SEFX>].

182. Slaughter, *Disputing the Dogmas of Surveillance Advertising*, *supra* note 131, at 6; *see also* Slaughter, *Wait But Why?*, *supra* note 131, at 6.

183. *See* Council Regulation (EU) 2016/679, art. 5(1)(c), 2016 O.J. (L 119) 1, 35.

184. *See* Fed. Trade Comm'n, *supra* note 150, at 3–4.

185. *Id.* (emphasis added).

186. *See also* *Remarks of Chair Khan on the ISPs Report*, *supra* note 169, at 1 ("A new paradigm that moves beyond procedural requirements and instead considers substantive limits increasingly seems worth considering."); Khan, *supra* note 146, at 4–6.

As with the other measures, this new approach was later endorsed by Director Levine, who stated in September 2023:

[t]hat notice and choice has been a failure is no surprise to many observers. But more than ever before, leadership of the FTC is stating that plainly. And that pivot isn't only rhetorical. The view that *Americans need substantive safeguards for their data—rather than more disclosures*—has been at the heart of the agency's approach to our privacy work over the last two years. We are using *new tools and new strategies* to deliver real protections for Americans' data.<sup>187</sup>

Among these tools and strategies, the ANPR under review—and its ultimate goal of establishing trade regulation rules that specifically define unfair or deceptive acts or practices—appeared to play a key role. Yet, parallel to these efforts, the FTC also relied on its enforcement activities to establish substantive prohibitions.<sup>188</sup> For example, instead of seeking to secure better disclosures, in a series of cases, the Agency looked to impose orders banning the sharing of specific types of consumers' sensitive data.<sup>189</sup> In *US v. GoodRx Holdings, Inc.*, for instance, the stipulated order for permanent injunction banned the disclosure of *health information* for advertising purposes.<sup>190</sup> Similarly, in *In re InMarket Media, LLC*, the

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187. Levine, *supra* note 132, at 3 (emphasis added).

188. See Levine, *Believing in the FTC*, *supra* note 171, at 5 (“It should be apparent that rulemaking is a key plank of our overall strategy. But I want to draw your attention to our recent enforcement actions in this space. . . . The actions we’ve filed over the last eighteen months demonstrate significant progress in *moving the market in another direction, one with actual restrictions on how consumer information is handled.*” (emphasis added)).

189. According to Khan et al., during Chair Khan’s tenure “the Commission would bring twelve actions challenging the unfair use or sharing of sensitive data. And in each of these cases that reached final judgment, the resulting order placed bright-line limits on future uses of such data.” Khan et al., *supra* note 18, at 1419.

190. Stipulated Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief at 7, *United States v. GoodRx Holdings, Inc.* No. 23-cv-460 (N.D. Cal. Feb. 2, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/goodrx\\_stipulated\\_order\\_for\\_permanent\\_injunction\\_civil\\_penalty\\_judgment\\_and\\_other\\_relief.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/goodrx_stipulated_order_for_permanent_injunction_civil_penalty_judgment_and_other_relief.pdf) [<https://perma.cc/N9DS-GUFN>]. For similar cases, see Joint Stipulation for Order for Permanent Injunction, Monetary Judgment, Civil Penalty Judgment, and Other Relief Against Defendant Cerebral, Inc., *United States v. Cerebral, Inc.*, No. 24-cv-21376 (S.D. Fla. Apr. 15, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/cerebral\\_joint\\_stipulation\\_order\\_permanent\\_injunction.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/cerebral_joint_stipulation_order_permanent_injunction.pdf) [<https://perma.cc/D24X-PDLC>]; [Proposed] Stipulated Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief, *United States v. Monument, Inc.*, No. 24-cv-01034 (D.D.C. Apr. 11, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/MonumentOrderFiled.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/MonumentOrderFiled.pdf) [<https://perma.cc/THR6-PHDB>]; Decision and Order, *In re BetterHelp, Inc.*, F.T.C. Dkt. No. C-4796, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023169betterhelpfinalorder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023169betterhelpfinalorder.pdf)

proposed settlement prohibited InMarket Media from selling or licensing any precise *geolocation data*.<sup>191</sup> Finally, in *In re Avast Limited*, the FTC secured its first-ever ban on the sharing of *browsing data* for advertising purposes.<sup>192</sup> In addition, in other cases the Agency imposed orders expressly banning the indefinite retention of data,<sup>193</sup> the use of dark patterns to obtain user consent,<sup>194</sup> and the marketing or offering of anonymous messaging apps to teens.<sup>195</sup>

Interestingly, in order to advance these enforcement actions, the FTC increasingly relied on the unfairness prong of the FTC Act.<sup>196</sup> As clearly explained by Khan, Levine, & Nguyen,

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[<https://perma.cc/RU5G-PQWB>]; Stipulated Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief, *United States v. Easy Healthcare Corp.*, No. 23-cv-03107 (N.D. Ill. June 22, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023.06.22\\_easy\\_healthcare\\_signed\\_order\\_2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023.06.22_easy_healthcare_signed_order_2023.pdf) [<https://perma.cc/E6T5-W7H8>].

191. Decision and Order, *In re InMarket Media, LLC*, F.T.C. Dkt. No. C-4803, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/InMarketMedia-DecisionandOrder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/InMarketMedia-DecisionandOrder.pdf) [<https://perma.cc/JUY4-CG59>]. For a similar case, see Decision and Order, *In re X-Mode Social, Inc.*, F.T.C. Dkt. No. C-4802, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/X-ModeSocialDecisionandOrder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/X-ModeSocialDecisionandOrder.pdf) [<https://perma.cc/G72Y-LY8H>].

192. *See Avast*, FED. TRADE COMM'N: CASES AND PROCEEDINGS (Feb. 24, 2025), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023033-avast> [<https://perma.cc/T24C-HWJC>].

193. *See, e.g.*, Complaint ¶¶ 29–31, *In re Blackbaud, Inc.*, F.T.C., Dkt. No. C-4804 (May 17, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023181\\_blackbaud\\_final\\_consent\\_package.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023181_blackbaud_final_consent_package.pdf) [<https://perma.cc/S89S-HAQR>]; Order, *United States v. Amazon.com, Inc.*, No. 23-cv-00811-TL (W.D. Wash. June 19, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/1923128amazonalexaorderfiled.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/1923128amazonalexaorderfiled.pdf) [<https://perma.cc/8UZV-SFXZ>].

194. *See, e.g.*, Order at 7, *In re BetterHelp, Inc.*, F.T.C., Dkt. No. C-4796 (July 7, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023169betterhelpfinalorder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023169betterhelpfinalorder.pdf) [<https://perma.cc/F4DV-CGV6>]. Later on, through a final “click-to-cancel” rule, the FTC would also use its rulemaking authority to formally prohibit companies from obtaining consumer consent through the use of dark patterns. Press Release, Fed. Trade Comm'n, Federal Trade Commission Announces Final “Click-to-Cancel” Rule Making It Easier for Consumers to End Recurring Subscriptions and Memberships (Oct. 16, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/10/federal-trade-commission-announces-final-click-cancel-rule-making-it-easier-consumers-end-recurring> [<https://perma.cc/K8F5-E7KX>].

195. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Order Will Ban NGL Labs and Its Founders from Offering Anonymous Messaging Apps to Kids Under 18 and Halt Deceptive Claims Around AI Content Moderation (July 9, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-order-will-ban-ngl-labs-its-founders-offering-anonymous-messaging-apps-kids-under-18-halt> [<https://perma.cc/4AWV-C5Q5>].

196. Levine, *supra* note 133, at 9 (“You can expect that the Commission’s unfairness authority will be a key tool as we work to curb harmful commercial surveillance practices.”); *See also* Levine, *Toward a Safer, Freer, and Fairer Digital Economy*, *supra* note 171, at 11.

Although they involve some overlap, unfairness is distinct from deception. *The FTC Act's deception prohibition* bars acts or practices, such as false advertising, that are likely to mislead consumers acting reasonably under the circumstances. *It does not require a showing of injury. Unfairness, in contrast, is focused on injury*—specifically, whether an act or practice (i) causes or is likely to cause substantial injury (ii) that is not reasonably avoidable and (iii) is not outweighed by countervailing benefits to consumers or competition.<sup>197</sup>

According to these authors—who are former officials from the Biden FTC—the reliance on the unfairness doctrine in these cases was part of a broader revival of the agency's unfairness authority undertaken during the Biden administration.<sup>198</sup> This characterization, however, requires some qualification. Following the FTC's 1980 *Unfairness Policy Statement* and Congress's subsequent codification of its three-part test in 1994, the agency did curtail its use of the unfairness authority, shifting its primary focus toward deception-based enforcement.<sup>199</sup> For example, when the FTC first engaged with internet privacy in the early 1990s, then-Chair Robert Pitofsky was notably hesitant to invoke the agency's unfairness authority, perceiving it as politically risky.<sup>200</sup> Over the years, however, the Commission increasingly relied on unfairness, not only in the context of data security but also in privacy enforcement (and not exclusively in cases involving the installation of software without consumers' consent).<sup>201</sup> Thus,

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197. Khan et al., *supra* note 18, at 1400 (emphasis added).

198. *See id.* at 1417.

199. *See generally* Herrine, *supra* note 117 (discussing how the FTC redefined the notion of unfairness, limiting its application to deceptive practices); Cobun Keegan & Calli Schroeder, *Unpacking Unfairness: The FTC's Evolving Measures of Privacy Harms*, 15 J.L. ECON. POL'Y 19, 19 (2019). *See also* Dennis D. Hirsch, *That's Unfair! Or Is It? Big Data, Discrimination and The FTC's Unfairness Authority*, 103 KY. L.J. 345, 353 (2014); Andrew D. Selbst & Solon Barocas, *Unfair Artificial Intelligence: How FTC Intervention Can Overcome the Limitations of Discrimination Law*, 171 U. PA. L. REV. 1023, 1050 (2023).

200. HOOFNAGLE, *supra* note 7, at 75–76.

201. *See, e.g., In re Gateway Learning Corp.*, 138 F.T.C. 443 (2004); *Vision I Properties, LLC*, 139 F.T.C. 296 (2005); Complaint, *In re Facebook, Inc.*, No. C-4365 (July 27, 2012); Complaint, *In re Upromise, Inc.*, No. C-4351 (Mar. 27, 2012); *In re Compete, Inc.*, 155 F.T.C. 264 (Feb. 20, 2013); *In re DesignerWare, LLC*, 155 F.T.C. 421 (Apr. 11, 2013); Complaint, *FTC v. Sitesearch Corp., dba LeapLab*, No. 2:14-cv-02750-NVW (D. Ariz. Dec. 22, 2014); Complaint, *FTC v. Bayview Sols., LLC*, No. 1:14-cv-01830-RC (D.D.C. Oct. 31, 2014); Complaint, *In re Craig Brittain*, No. C-4564 (Dec. 28, 2015); *see also* Alexander Reicher & Yan Fang, *FTC Privacy and Data Security Enforcement and Guidance Under Section 5*, 25 No. 2 COMPETITION, J. ANTITRUST, UCL & PRIV. SECTION OF THE STATE BAR OF CAL. 89, 89–90 (2016).

as FTC Commissioner Maureen K. Ohlhausen would point out in 2015: “the agency has over time shifted from an initial reliance on deception to a greater focus on harms-based unfairness theories.”<sup>202</sup>

Hence, more than the revival of the unfairness authority, what is particularly distinctive about these more recent cases is that when the agency invoked unfairness—whether alongside or in place of deception—it did not merely issue orders prohibiting companies from misrepresenting their data practices. Instead, it directly banned certain data practices altogether, even if users consented to them.<sup>203</sup>

As early as October 2020, Commissioner Slaughter had suggested:

I believe we should be pleading unfairness in every case where we see such conduct, because it sends a unique and important signal to the market separate from a deception count: Failure to take proper care of consumer data is illegal even if you do not lie about it.

It can be more challenging to prove unfairness. . . . Proving that a company made a promise and broke it is obviously more straightforward. *But the only way for the Commission to develop jurisprudence that defines what I think most consumers would agree are plainly unfair practices is for us to try.*<sup>204</sup>

And, after two years in office, Chair Lina Khan confirmed the implementation of this approach, stating:

Premom, BetterHelp, and GoodRx build on last year’s policy statement—showing how *the Commission is moving past notice and choice, and instead, using our unfairness authority*. In each of the health cases discussed today, we alleged that the companies’ conduct was not only deceptive, but also that their collection, use, and disclosure of consumer health information for advertising purposes was an unfair practice. *Our use of unfairness authority in*

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202. Ohlhausen & Okuliar, *supra* note 96, at 147.

203. In fact, Khan et al. make this point in their *Stanford Law Review* article, saying:

When practices are deceptive, the typical remedy requires providing clear and accurate information to consumers. . . . If the company’s data collection or dissemination practices causes unavoidable injury that is not outweighed by countervailing benefits—the statutory test—then *the FTC can seek remedies that go beyond better disclosure and instead actually restrict the offending practice.*

Khan et al., *supra* note 18, at 1400 (emphasis added).

204. Slaughter, *A Time of Change*, *supra* note 131, at 5 (emphasis added).

*each of these cases makes companies aware that, regardless of what they disclose, they cannot engage in certain practices—period.*<sup>205</sup>

Thus, by invoking the “U” in its Unfair or Deceptive Acts or Practices (UDAP) authority, the FTC not only redefined the reach and scope of its unfairness authority,<sup>206</sup> but also began to signal to companies that certain data practices were inherently unlawful.<sup>207</sup>

*c. Intervening Dominant Market Positions*

The FTC realized, however, that in order to address the structural mechanisms that enable unlawful business practices, strengthening the regulatory guardrails around data collection and processing was not enough. Besides the massive collection and processing of personal information, the commercial surveillance business models identified by the FTC also rely on the network effect of their products and services, that is, on the fact that their value increases as more people use them.<sup>208</sup> Therefore, in order to maintain that use, these business models have relied on market concentration strategies.<sup>209</sup> Being aware of that, in the last few years the FTC has also looked to strengthen information privacy indirectly by seeking to crack these companies’ dominant market positions.<sup>210</sup>

In the commission’s view, unchecked data collection and processing can “entrench the dominance of firms with the greatest access to, and control over, personal information and the ability to attract and monetize consumer

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205. *Remarks of Chair Khan at the 2023 Open Commission Meeting*, *supra* note 169, at 1–2 (emphasis added).

206. I do not elaborate on this point, as it falls outside the central focus of this Article. For present purposes, however, it suffices to note that the very proponents of this renewed approach to the unfairness authority have later described it as “a more capacious conception of unfairness, one that can keep pace with the nature of consumer injuries suffered online.” Khan et al., *supra* note 18, at 1436.

207. According to Chris Jay Hoofnagle, “[h]istorically, the FTC has first entered new areas using its deception power and then selectively employed its unfairness authority. This transition is important because *it signals where the FTC recognizes there is an inherent wrong in a business behavior.*” HOOFNAGLE, *supra* note 7, at 347 (emphasis added).

208. See Spencer W. Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1787 (2012).

209. See generally Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization*, 11 INT’L ECON. & ECON. POL’Y 49 (2014) (analyzing leading internet platforms in search, auctions, and social networking and whether these platforms have durable market power requiring regulation beyond general competition law); NICK SRNICEK, *PLATFORM CAPITALISM* 50 (2017).

210. See Susser, *supra* note 145, at 284.

attention.”<sup>211</sup> For this reason, although Big Tech companies could potentially compete by offering stronger privacy protections, it’s more likely they will actually compete to collect, use, share, and monetize users’ personal data.<sup>212</sup> At the same time, the Agency has also considered that “the aggregation of market power, . . . [can] enabl[e] firms to violate consumer protection laws.”<sup>213</sup> How so? Through a diverse array of anticompetitive behaviors, “from pressuring smaller websites to embed their tracking technologies, to leveraging their massive collection efforts to identify and prevent newcomers who want to enter the market, to creating vast ‘walled gardens’ that do much to depress competition and little to protect consumers’ data.”<sup>214</sup>

In February of 2021, Acting Chair Rebecca Slaughter began showing signs of these concerns by highlighting the importance of combining the FTC’s work on privacy and antitrust.<sup>215</sup> According to her,

I think we need to think carefully about the overlap between our work in data privacy and in competition. Many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data. The FTC has a structural advantage over our counterparts in other jurisdictions that focus exclusively on antitrust or on data protection. Our dual missions can and should be complementary, and we need to make sure we are looking with both privacy and competition lenses at problems that arise in digital markets.<sup>216</sup>

After taking office, Chair Lina Khan consistently supported this initiative.<sup>217</sup> According to her, “concentrated control over data has enabled

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211. Levine, *supra* note 133, at 2.

212. See Waller, *supra* note 208, at 1784.

213. Khan, *supra* note 148.

214. FED. TRADE COMM’N, *supra* note 152, at ii.

215. In line with this position, and seeking to “address persistent and recurrent practices that inhibit competition,” in July 2021, President Joseph R. Biden issued an Executive Order encouraging the Chair of the FTC to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority in relation to “unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy.” Exec. Order No. 14036, 86 Fed. Reg. 36987, 36992 (July 9, 2021).

216. Rebecca Kelly Slaughter, Chairwoman, Fed. Trade Comm’n, Protecting Consumer Privacy in a Time of Crisis: Remarks of Acting Chairwoman Rebecca Kelly Slaughter as Prepared for Delivery at the Future of Privacy Forum 3 (Feb. 10, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1587283/fpf\\_opening\\_remarks\\_210\\_.pdf](https://www.ftc.gov/system/files/documents/public_statements/1587283/fpf_opening_remarks_210_.pdf) [<https://perma.cc/GFF5-AWZF>].

217. See, e.g., Fed. Trade Comm’n, *supra* note 150; Khan, *supra* note 146.

dominant firms to capture markets and erect entry barriers, while commercial surveillance has allowed firms to identify and thwart emerging competitive threats. Monopoly power, in turn, can enable firms to degrade privacy without ramifications . . . .”<sup>218</sup>

Therefore, the second strategy adopted by the FTC involved reframing antitrust law as an additional privacy tool. During her tenure as an FTC Commissioner from 2003 to 2009, Pamela Jones Harbour had similarly “championed the idea that information privacy concerns should be considered in antitrust matters, and thus tried to expand privacy into the realm of the Agency’s Bureau of Competition.”<sup>219</sup> However, in a law review article published in 2015, FTC Commissioner Maureen K. Ohlhausen and Attorney Advisor to Commissioner Ohlhausen, Alexander P. Okuliar, pushed back on this proposal, arguing that “trying to expand competition law as some have proposed better reflects legal thinking in 1915, not 2015. Although privacy can be (and is today) a dimension of competition, the more direct route to protecting privacy as a norm lies in the consumer protection laws.”<sup>220</sup>

As a result, in 2016 Chris Hoofnagle would point out how, at the FTC, “[i]nformation privacy has rarely been invoked as a competition issue.”<sup>221</sup> Similarly, in a 2020 article, Spencer W. Waller noted that, in contrast to the European Union, “the United States has shown caution in enforcement and

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218. Fed. Trade Comm’n, *supra* note 150, at 2.

219. HOOFNAGLE, *supra* note 7, at 78; *see also* Fed. Trade Comm’n, Dissenting Statement of Commissioner Pamela Jones Harbour In the matter of Google/DoubleClick F.T.C. File No. 071-0170 (Dec. 20, 2007), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-matter-google/doubleclick/071220harbour\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf) [<https://perma.cc/XYP6-6RHV>]; Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 773–74 (2010).

220. Ohlhausen & Okuliar, *supra* note 96, at 156. More recently, other commentators have also pushed against this integration, noting how greater competition does not necessarily lead to stronger privacy protections. *See, e.g.*, Maurice E. Stucke, *AI, Antitrust & Privacy: When More Competition Makes Things Worse*, INST. FOR NEW ECON. THINKING: BLOG (July 7, 2025), <https://www.ineteconomics.org/perspectives/blog/ai-antitrust-privacy-when-more-competition-makes-things-worse> [<https://perma.cc/C2TL-6YBV>] (“[C]ompetition and privacy can be complementary (i.e., more competition yields better privacy) when the market participants’ incentives are aligned with our interests. But when the core business model is based on surveillance and manipulation, data is collected about us, but not for our benefit. Rivals are rewarded with better surveilling, profiling, and manipulating behavior. In this environment, more rivals mean more firms racing to the bottom.”).

221. HOOFNAGLE, *supra* note 7, at 92.

lack of interest in the big data field as a separate policy matter. Most mergers in data driven markets have been approved without conditions.”<sup>222</sup>

In contrast, through its antitrust endeavors, Lina Khan’s FTC did begin to take concrete steps to “*move away from seeing our work in consumer protection and competition siloes*, and instead apply an integrated approach to our cases, rules, research, and other policy tools.”<sup>223</sup> For example, in its amended complaint against Facebook (now Meta Platforms, Inc.) for monopolization, filed on August 19, 2021 in the U.S. District Court for the District of Columbia, the FTC contended that Facebook’s acquisition of WhatsApp deprived consumers of a more privacy-protective alternative.<sup>224</sup> Furthermore, the Agency also asserted that Facebook’s dominance in the personal social networking market—gained through the acquisition of Instagram and WhatsApp—allowed the company to deliberately reduce privacy protections for users without fear of losing substantial engagement to competitors.<sup>225</sup>

In that way, the Commission turned recurrent conversations on the matter into an operational reality.

### B. A Shift in Social Norms

As seen, although the FTC’s conceptual and policy transformation became evident in the ANPR, it had long been rooted in the agency’s internal institutional norms—primarily driven by Commissioner Rebecca Kelly Slaughter and later embraced by Chair Lina Khan. Yet, any account of the strategic shift here described would be incomplete without considering a broader shift in social norms that unfolded in the years

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222. Spencer W. Waller, *The Omega Man or the Isolation of U.S. Antitrust Law*, 52 CONN. L. REV. 123, 193 (2020).

223. Memorandum from Lina M. Khan, Chair, Fed. Trade Comm’n, to Comm’n Staff and Comm’rs 3 (Sept. 22, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1596664/agency\\_priorities\\_memo\\_from\\_chair\\_lina\\_m\\_khan\\_9-22-21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf) [<https://perma.cc/NM5E-F8UK>] (emphasis added); This need for integration, notably, had already been articulated by Chairman Robert Pitofsky during his tenure (1995–2001), although his focus did not extend specifically to consumer protection issues related to privacy. See Tim Muris, *More than Enforcement: The FTC’s Many Tools – A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 780–81 (2005) (interviewing Robert Pitofsky on why it was beneficial to combine consumer protection and competition missions in a single agency).

224. Amended Complaint ¶ 127, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Aug. 19, 2021), [https://www.ftc.gov/system/files/documents/cases/ecf\\_75-1\\_ftc\\_v\\_facebook\\_public\\_redacted\\_fac.pdf](https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf) [<https://perma.cc/7X38-65SF>].

225. *Id.* ¶ 206.

leading up to the ANPR and which may have also shaped the FTC's newly developed approach to the data economy.

A quick review of petitions submitted to the FTC in recent years by civil society organizations, consumer groups, and others—available in the FTC's legal library—reveals that, since at least 2020, there were growing societal calls for a rulemaking akin to the one ultimately crystallized in the ANPR reviewed here.<sup>226</sup> Similar demands were also voiced by President Biden<sup>227</sup> and several Democratic senators.<sup>228</sup> Yet, as this Section highlights, beyond these formal petitions for rulemaking, in the last few years the normative commitments and reform needs underlying the FTC's strategic reframing of its regulatory priorities have been increasingly articulated across various sectors of society.<sup>229</sup>

Rather than serving as direct causes of the Commission's actions reviewed here, the following societal dynamics should be understood as social forces that coexisted, intertwined, and interacted with the FTC's efforts to reframe its approach to information privacy.

### 1. Society's Growing Focus on Data-Driven Harms

First, the FTC's recent shift from a narrow focus on traditional privacy concerns to a broader emphasis on the harms of the data economy mirrors parallel shifts taking place across various sectors of society.

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226. *See, e.g.*, Petition for Rulemaking Concerning Use of Artificial Intelligence in Commerce (Fed. Trade Comm'n Feb. 3, 2020), <https://epic.org/wp-content/uploads/privacy/ftc/ai/EPIC-FTC-AI-Petition.pdf> [<https://perma.cc/KUF6-TY98>]; Petition for Rulemaking to Prohibit Surveillance Advertising (Fed. Trade Comm'n Dec. 3, 2021), <https://accountabletech.org/wp-content/uploads/Rulemaking-Petition-to-Prohibit-Surveillance-Advertising.pdf> [<https://perma.cc/GHZ3-39K3>]; Letter from Free Press, to Lina M. Khan, Chair, Fed. Trade Comm'n (May 12, 2022), [https://act.freepress.net/sign/protect\\_privacy\\_civil\\_rights](https://act.freepress.net/sign/protect_privacy_civil_rights) [<https://perma.cc/H6LQ-EW8P>] (“We urge the FTC to stand against these data abuses and initiate a privacy-rulemaking proceeding to set standards to protect everyone.”); Petition for Rulemaking to Prohibit the Use on Children of Design Features that Maximize for Engagement (Fed. Trade Comm'n Nov. 17, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/R307000\\_RULE\\_MAKING\\_PETITION\\_TO\\_PROHIBIT\\_THE%20\\_USE\\_ON\\_CHILDREN\\_OF\\_DESIGN\\_FEATURES.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/R307000_RULE_MAKING_PETITION_TO_PROHIBIT_THE%20_USE_ON_CHILDREN_OF_DESIGN_FEATURES.pdf) [<https://perma.cc/ULS5-JVSS>].

227. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021), <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy> [<https://perma.cc/FN59-WDNS>].

228. Letter from Sens. Richard Blumenthal et al. to Lina Khan, Chair, Fed. Trade Comm'n (Sept. 20, 2021), <https://www.blumenthal.senate.gov/imo/media/doc/2021.09.20%20-%20FTC%20-%20Privacy%20Rulemaking.pdf> [<https://perma.cc/ECE4-W6DS>].

229. *Id.*

In the article *Privacy's Algorithmic Turn*, I documented how, between 2010 and 2020, American privacy law scholarship broadened the concept of information privacy to encompass, among other things, a new set of privacy harms. “In the last ten years,” I maintain, “a number of American privacy law scholars have more and more focused on and called attention to data-driven harms such as *algorithmic discrimination (unfairness)*, *online manipulation*, *procedural injustices*, and *subordination*.”<sup>230</sup> As a consequence, the resulting post-algorithmic right to privacy proposed by scholars has ended up encompassing interests additional to those of privacy, such as equality and due process.<sup>231</sup>

Academia, however, has not been the only domain where this shift has occurred. In the sphere of civil society, Laura Moy has documented how the American community of public interest advocacy organizations focused on data and privacy has also undergone a significant transformation over the past decade, which she describes as “*privacy's third wave*.”<sup>232</sup> According to Moy, some of these organizations have started to focus on issues at the intersection of data and racial injustice.<sup>233</sup> This shift was catalyzed by the racial justice awakening that unfolded in the American public generally and in technology policy specifically between 2013 and 2016.<sup>234</sup> As a result—and similar to the FTC's transformation here reviewed—several of these privacy-focused organizations have broadened their agendas to spotlight a wider array of harms, increasingly incorporating data-driven harms that disproportionately impact communities of color.<sup>235</sup>

Relatedly, a parallel segment of civil society—civil rights and racial justice organizations—have, in recent years, challenged the narrow framing of privacy “as primarily consumer issues.”<sup>236</sup> More specifically, these

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230. María P. Angel, *Privacy's Algorithmic Turn*, 30 B.U. J. SCI. & TECH. L. 1, 20–21 (2024) (emphasis added).

231. Scholars' recent overemphasis on discrimination and harms to equality has also been highlighted by Jessica Silbey, who discusses it within the framework of what she terms “a fourth-generation of privacy scholarship.” Jessica Silbey, *Four Privacy Stories and Two Hard Cases*, 37 CONST. COMMENT. 221, 222 (2022).

232. Laura Moy, *The Mysterious Case of Missing Laws: Solving the U.S. Privacy Puzzle* (unpublished manuscript) (on file with author).

233. *Id.*

234. *Id.*

235. See, e.g., Becky Chao et al., *Centering Civil Rights in the Privacy Debate*, NEW AMERICA, <https://www.newamerica.org/oti/reports/centering-civil-rights-privacy-debate/> (Aug. 14, 2019) [<https://perma.cc/4JQX-QLVM>].

236. *Civil Rights Coalition Releases Core Principles on Civil Rights and Privacy Online*, COLOR OF CHANGE (Feb. 27, 2014), [https://colorofchange.org/blog/internal\\_press/civil-rights-coalition-releases-core-principles-ci/](https://colorofchange.org/blog/internal_press/civil-rights-coalition-releases-core-principles-ci/) [<https://perma.cc/33JN-L22X>].

organizations have sought to reframe privacy to include surveillance, racial equity, and structural justice, looking to move the discussion from consumer privacy to racial justice.<sup>237</sup> Notably, this proposed reframing resonates with at least part of the reasons given by Commissioner Slaughter to “tweak the framing” from privacy harms to data abuses.<sup>238</sup>

## 2. A Broader Societal Interest in the Power Dynamics Behind the Tech Industry

In the last several years, political economy analysis—focuses on how power is distributed and exercised through technological infrastructures, corporate structures, and regulatory frameworks—has gained considerable purchase among scholars and practitioners working around digital technologies. As Daniel Susser aptly observes, “discussions about strengthening digital privacy are focusing more and more on regulating the surveillance economy.”<sup>239</sup> Thus, when it comes to identifying and addressing the risks of emerging technologies, “the frame for conceptualizing these problems has expanded from a *predominantly rights-based model* to one that includes *an important political economy perspective*.”<sup>240</sup> From this viewpoint, “[i]t is the drive to expand and profit, not the technology, that will cause large-scale harm.”<sup>241</sup>

One of the most prominent contemporary articulations of this perspective comes from Harvard Professor Shoshana Zuboff in her book *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*.<sup>242</sup> Another relevant account was proposed by privacy

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237. See, e.g., *The Black Tech Agenda*, COLOR OF CHANGE 6–7, [https://colorofchange.org/wp-content/uploads/2022/09/22-09\\_BLACKTECHAGENDA.pdf](https://colorofchange.org/wp-content/uploads/2022/09/22-09_BLACKTECHAGENDA.pdf) [https://perma.cc/937Y-Y5YG].

238. Slaughter, *supra* note 127.

239. Susser, *supra* note 145, at 285.

240. *Id.* at 282 (emphasis added).

241. Chinmayi Arun, *The Silicon Valley Effect*, 61 STAN. J. INT’L L. 55, 73 (2025) (emphasis added).

242. In Zuboff’s view, the large Internet-based firms, particularly Google and Facebook, extract and profit from personal data. Thus, by commodifying the human experience itself, transforming it into behavioral data, and claiming it as behavioral surplus, surveillance capitalism shifts power away from individuals and toward corporations. These firms leverage these “human natural” resources to either predict behavior for sale in behavioral futures markets related to real-world services or to shape behavior at the source through manipulation. As a result, this emergent logic of accumulation erodes autonomy, democracy, and the public sphere. SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

scholar Julie Cohen in her book *Between Truth and Power: The Legal Constructions of Information Capitalism*.<sup>243</sup> Although their emphases differ, both scholars critique the digital economy by underscoring not only the extraction, commodification, and prediction of human behavior at the core of data-driven technologies, but also the concentration of power in the hands of dominant tech firms and their profound threat to democracy.

Yet concerns about exploitation, power, and the anti-democratic effects of Big Tech companies did not originate in academia. Rather, they have been present since at least 2016, when the so-called societal “techlash” began to take shape in society. Defined as “[t]he growing public animosity towards large Silicon Valley platform technology companies and their Chinese equivalents,” this backlash against Big Tech gained significant momentum in 2018, when even the Financial Times declared it as the word of the year.<sup>244</sup> Thanks to media revelations of Facebook’s influence in both the 2016 election of Donald Trump as President of the United States and the Brexit referendum, “the collective conversation about platform power and social media’s societal impact started to drastically shift.”<sup>245</sup> In particular, “[t]ech companies whose business model is based on surveillance *ceased to be perceived as good guys* in hoodies who offered services to make our lives better. They were instead *data predators jeopardizing, not only users’ privacy and security, but also democracy itself.*”<sup>246</sup>

243. Cohen’s main argument is that legal frameworks have actively shaped and facilitated the emergence of what Zuboff terms “surveillance capitalism,” which she refers to as “information capitalism.” According to her, “[t]he continuing orientation toward capitalist production, surplus extraction, and accumulation points toward a second, related transformation, which concerns *the ideological framework that serves to legitimate and facilitate economic activity.*” JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATION CAPITALISM* 6–7 (2019) (emphasis added). In her view, this ideological framework is neoliberalism, which has brought with it the institutional transformation of the law. *Id.* at 7. As a consequence, law and legal institutions have slowly and surely become an integral part of enabling the dominance of platform capitalism, data extraction, and surveillance-based business models, often at the expense of democratic values and individual autonomy. *Id.* at 9. Other relevant accounts include, for example, Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460 (2020); NICK COULDREY & ULISES A. MEJIAS, *THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM* (2019); *SURVEILLANCE CAPITALISM IN AMERICA* (Josh Lauer & Kenneth Lipartito eds., 2021).

244. Rana Foroohar, Opinion, *Year in a Word: Techlash*, FIN. TIMES (Dec. 16, 2018), <https://www.ft.com/content/76578fba-fca1-11e8-ac00-57a2a826423e>.

245. Tero Karppi & David B. Nieborg, *Facebook Confessions: Corporate Abdication and Silicon Valley Dystopianism*, 23 NEW MEDIA & SOC’Y 2634, 2637 (2021).

246. Carissa Véliz, *Privacy and Digital Ethics After the Pandemic*, 4 NATURE ELECS. 10, 10 (2021) (emphasis added).

As a result of this crisis of legitimacy, the general public began scrutinizing the practices of Big Tech companies more intensely. Specifically, experts, legislators, and activists were increasingly concerned about the tech industry's unchecked economic and political power, particularly in the face of rising awareness about its influence on democracy, the market, and individual privacy. As described by 'Eve Smith,' alleged founder of the consulting firm Invisible Hand Strategies, LLC, in a spoof confidential email to some of the Big Tech companies' CEOs published by *The Economist* in January 2018, "[y]ou are thought to be too big, anti-competitive, addictive and destructive to democracy."<sup>247</sup> Upon closer review, this message highlights several key issues that the FTC's new framing also sought to bring to the forefront, such as the massive data collection practices of Big Tech and their close connection to these companies' dominant market positions.<sup>248</sup> As Professor Philip Schlesinger points out,

Back in 2018, 'Eve Smith's' memo already included a revival of *anti-trust thinking regarding monopoly market power* in the United States, challenges to unpoliced content on platforms, and efforts to remedy corporate avoidance of fair taxation in the EU. It also registered widespread *concern about attempts to undermine democratic electoral processes*, as well as a *desire to ensure consumer welfare*.<sup>249</sup>

To be sure, this growing focus on Big Tech's power and its inequitable consequences is distinct from the newly digital civil rights agenda pursued by civil society organizations, which was discussed in the previous subsection.<sup>250</sup> As Salomé Viljoen clearly explains,

This strain of digital advocacy emphasized protecting individuals' online freedom but did not typically focus on other forms of injustice, such as the wealth accumulation that motivated corporate advertising-based surveillance practices or on the

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247. *The Techlash Against Amazon, Facebook and Google—and What They Can Do*, *ECONOMIST* (Jan. 20, 2018), <https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do>.

248. *Id.* ("The value of your mountains of data is becoming obvious, especially as you continue to push into new areas that collect more information about consumers while binding them closer to you . . . All three of your firms have used insights from the data you gather to spot incipient rivals and buy them up.")

249. Philip Schlesinger, *After the Post-Public Sphere*, 42 *MEDIA CULTURE & SOC'Y* 1545, 1548 (2020) (emphasis added).

250. *See supra* Section IV.B.1.

distributive or relational effects of the digital economy writ large. In short, while there is a long history of concern over surveillance online, this tradition of digital activism did not historically focus on the social problems of inequality that arise because of surveillance-based economic activity.<sup>251</sup>

Thus, what was novel during the “techlash” was precisely what the FTC also sought to highlight with its reframing of regulatory priorities: the need to not only address a wide variety of harms to consumers’ rights but also intervene in the power dynamics at the base of the digital economy.

### 3. Widespread Societal Disillusionment with Consent and Growing Demands for Substantive Norms

As with the political economy approach adopted by the FTC, the need to move beyond notice and consent, and towards substantive norms and prohibitions is not revolutionary either. As documented by Daryl J. Levinson & David E. Pozen, the figure of consent, on which liberal orders have been built, has lately suffered a systemic crisis in several fields of society.<sup>252</sup>

Consequently, a recurrent alternative to this approach has been the turn toward substantive norms and outright prohibitions. As I documented in a previously cited article, the second feature of the algorithmic turn in American privacy law scholarship is precisely a transformation of the tools proposed by scholars to protect privacy, to include, among other instruments, “calls to replace procedural requirements with substantive rules.”<sup>253</sup> Professor Daniel Susser has also highlighted this development. As he pointed out back in 2019, “privacy scholars argue that we ought to move away from strictly procedural privacy regulations and toward more substantive controls.”<sup>254</sup>

But once again, this shift has not been limited to academia. In Congress, Democratic senators have explicitly suggested to the FTC the establishment of prohibitions on certain practices, including the exploitative targeting of

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251. Viljoen, *supra* note 168, at 285.

252. See generally Daryl J. Levinson & David E. Pozen, *Disconsents*, 126 COLUM. L. REV. 1 (2026).

253. Angel, *supra* note 230, at 28.

254. Susser, *supra* note 163, at 8.

children and teens.<sup>255</sup> In civil society, in turn, Accountable Tech, the Center for Digital Democracy, Common Sense, Fairplay, and others asked the FTC to prohibit the practice of “surveillance advertising;”<sup>256</sup> Consumer Reports (“CR”) and the Electronic Privacy Information Center (“EPIC”) requested it to ban, with limited exceptions, all secondary data uses;<sup>257</sup> and the Center for Digital Democracy and others asked the agency to prohibit the use of certain types of engagement-optimizing design practices on minors.<sup>258</sup>

#### 4. A Global Shift Toward Privacy-Antitrust Integration

Finally, the FTC’s initiative to intervene the relatively dominant market positions held by many of these companies as a means of protecting privacy reflects an approach that was already recognizable within broader societal and regulatory discourse. In the last couple of years, the trend of merging privacy with antitrust (competition) has been gaining traction in multiple jurisdictions.<sup>259</sup> Several regulators worldwide are increasingly recognizing

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255. See Letter from Sens. Richard Blumenthal et al. to Lina Khan, Chair, Fed. Trade Comm’n, *supra* note 228.

256. See Accountable Tech, Petition for Rulemaking to Prohibit Surveillance Advertising (Dec. 3, 2021), [https://www.ftc.gov/system/files/attachments/other-applications-petitions-requests/r207005\\_-\\_petition\\_for\\_rule\\_to\\_prohibit\\_surveillance\\_advertising\\_0.pdf](https://www.ftc.gov/system/files/attachments/other-applications-petitions-requests/r207005_-_petition_for_rule_to_prohibit_surveillance_advertising_0.pdf) [<https://perma.cc/7T7B-LSH2>]; Ctr. for Digit. Democracy et al., Comment on Petition for Rulemaking by Accountable Tech (Jan. 26, 2022), <https://democraticmedia.org/filings/call-for-an-end-to-manipulation-exploitation-and-discrimination-of-children-and-teens-via-surveillance-advertising> [<https://perma.cc/Z3W9-KMKP>]; Fight for the Future, Notice and Request for Comment Regarding the FTC’s Inquiry of Surveillance Advertising (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0070-0011> [<https://perma.cc/7VE3-XLVG>]; Pub. Citizen, Comment Letter in Support of Accountable Tech’s Petition to Ban Surveillance Advertising (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0070-0018> [<https://perma.cc/M68C-M48E>]; Ranking Digit. Rts., Comment in Support of Accountable Tech’s Rulemaking Petition to Ban Surveillance Advertising (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0070-0019> [<https://perma.cc/4N8L-FMAP>].

257. CONSUMER REPS. & ELEC. PRIV. INFO. CTR., HOW THE FTC CAN MANDATE DATA MINIMIZATION THROUGH A SECTION 5 UNFAIRNESS RULEMAKING (Jan. 26, 2022), [https://epic.org/wp-content/uploads/2022/01/CR\\_Epic\\_FTCDDataMinimization\\_012522\\_VF.pdf](https://epic.org/wp-content/uploads/2022/01/CR_Epic_FTCDDataMinimization_012522_VF.pdf) [<https://perma.cc/Y4VV-E5LL>].

258. Ctr. for Digit. Democracy et al., Petition for Rulemaking to Prohibit the Use on Children of Design Features that Maximize for Engagement (Nov. 17, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/R307000\\_RULE\\_MAKING\\_PETITION\\_TO\\_PROHIBIT\\_THE%20USE\\_ON\\_CHILDREN\\_OF\\_DESIGN\\_FEATURES.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/R307000_RULE_MAKING_PETITION_TO_PROHIBIT_THE%20USE_ON_CHILDREN_OF_DESIGN_FEATURES.pdf) [<https://perma.cc/5ZCX-5DPR>].

259. See ERIKA M. DOUGLAS, DIGITAL CROSSROADS: THE INTERSECTION OF COMPETITION LAW AND DATA PRIVACY (2021) (identifying the interactions between antitrust and data privacy law around the world); see also Melanie Drayton & Brent Homan, *Regulating The Digital*

how data privacy and market power intersect, particularly in digital markets dominated by major technology firms.

In the European Union (“EU”), for example, the main objective of the Digital Markets Act (“DMA”) was to prevent anti-competitive behavior.<sup>260</sup> Through this Act, which entered into force on November 1, 2022 and became applicable on May 2, 2023, the EU looked to ensure that the large online platforms with a strong economic position cannot behave as “gatekeepers.”<sup>261</sup> As a result, in order to ensure fair access to data and prevent practices such as self-preferencing, the Regulation imposes obligations regarding data access,<sup>262</sup> data portability<sup>263</sup> and interoperability.<sup>264</sup>

Relatedly, the European Commission (“EC”) has increasingly treated data accumulation and privacy concerns as competition issues, particularly in investigations against Big Tech companies. In June 2017, for instance, the EC fined Google €2.42 billion for abusing its market dominance as a search engine by promoting its own comparison-shopping service “Google Shopping” in its search results, and demoting those of competitors. In order to determine Google’s dominant position in the national markets for general search services, the EC, among other factors, considered that “[t]he greater the volume of data a general search service possesses for rare tail queries, the more users will perceive it as providing more relevant results for all types of queries.”<sup>265</sup> Likewise, in July 2019, the Commission opened a formal investigation against Amazon, for distorting fair competition on its

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*Economy – Why Privacy and Competition Authorities Should Talk To Each Other*, COMPETITION POL’Y INT’L 1, 2 (Apr. 2022), <https://globalprivacyassembly.com/wp-content/uploads/2023/03/Annexe-2-DCCWG-2022-AR-Regulating-the-Digital-Economy-Competition-authorities-should-talk-to-each-other-Melanie-Drayton-Brent-Homan-3.pdf> [<https://perma.cc/XUZ4-S5L4>] (“[C]ollaboration between competition agencies and privacy agencies is becoming an imperative for any jurisdiction that seeks to achieve cohesive digital regulation.”).

260. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1.

261. *Id.* at recital (3).

262. *Id.* at art. 6(10).

263. *Id.* at art. 6(9).

264. *Id.* at art. 7(8).

265. Case AT.39740—Google Search (Shopping), Comm’n Decision (June 27, 2017) (summary at 2018 O.J. (C 9) 8), [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf) [<https://perma.cc/MSN5-XBMD>].

platform by using non-public data from third-party sellers regarding listings and transactions to benefit its own retail business.<sup>266</sup>

At the states level, European countries have also looked to address the interplay between privacy and antitrust. In *Meta (Facebook) vs. German Bundeskartellamt*, for example, the Bundeskartellamt—Germany’s antitrust authority—ruled that Meta abused its market power by collecting and combining personal data across its different services (Facebook, Instagram, and WhatsApp) without a valid legal basis.<sup>267</sup> In other words, it found that Meta had abused its dominant position on the market for social media on the basis of a violation of the GDPR. As a result, Meta was required to establish consent processes to give German users a genuine choice as to the combination of data.<sup>268</sup> Later on, in the *Meta Platforms, Inc. v. Bundeskartellamt* case, the European Court of Justice (“ECJ”) confirmed the legality of using data protection violations in a competition case.<sup>269</sup>

Another jurisdiction where these interactions have attracted the attention of regulators is Australia. In December 2017, the Australian Competition and Consumer Commission (“ACCC”) was directed to initiate a Digital Platforms Inquiry, to investigate whether the online search engines, social media, and digital content aggregators were using data as a market advantage. In its final report, published in July of 2019, the ACCC concluded that “[t]he breadth and depth of user data collected by the incumbent digital platforms provides them with a strong competitive advantage, creating barriers to rivals entering and expanding in relevant markets, and allowing the incumbent digital platforms to expand into adjacent markets.”<sup>270</sup>

Thus, rather than representing an entirely new approach, the FTC’s efforts to challenge firms’ dominant market positions as a privacy protection measure aligns with recent efforts by other data protection and competition authorities to address the intersection of privacy and antitrust.

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266. Cases AT.40462—Amazon Marketplace & AT.40702—Amazon Buy Box, Comm’n Decision (Dec. 12, 2022) (summary at 2023 O.J. (C 87) 5), [https://ec.europa.eu/competition/antitrust/cases1/202310/AT\\_40462\\_8990760\\_8322\\_4.pdf](https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40462_8990760_8322_4.pdf) [<https://perma.cc/T8SE-2Y7Y>].

267. Bundeskartellamt [BKartA] [Federal Cartel Office] Feb. 6, 2019, B6-22/16, [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=1) [<https://perma.cc/7WWV-DBNE>].

268. *Id.*

269. Case C-252/21, *Meta Platforms, Inc. v. Bundeskartellamt*, ECLI:EU:C:2023:537, ¶ 155 (July 4, 2023).

270. AUSTRALIAN COMPETITION AND CONSUMER COMM’N, DIGITAL PLATFORMS INQUIRY – FINAL REPORT 11 (2019).

## V. POSSIBLE IMPLICATIONS OF THIS TRANSFORMATION

So far, this Article has argued that the FTC's choice of language in its ANPR on Commercial Surveillance and Data Security is far from mere semantics. Rather, it reflects a deliberate reframing of the agency's regulatory priorities: a shift away from traditional data privacy frameworks—focused on customary, individual privacy harms and notice and consent—toward a more systemic approach to the data economy—one that seeks to confront the underlying power dynamics driving the data-driven harms. As Part IV sought to evidence, this reframing has been unfolding over the past few years and can be traced to both internal institutional dynamics and broader societal forces.

This Part explores the possible implications of this transformation. As will be seen, the FTC's reframing of its regulatory priorities was timely and necessary in the age of AI, because it more adequately aligns the FTC's consumer protection mandate and institutional role with the realities of the contemporary data ecosystem. As a bonus, this shift also marks a decisive response to the overextension of privacy as a regulatory concept.

A. *A New Understanding of the FTC's Consumer Protection Mandate*

Initially created by Congress in 1914 as an antitrust authority,<sup>271</sup> “[t]he FTC did not formally have a consumer protection mission until the passage of the Wheeler-Lea Amendments in 1938.”<sup>272</sup> Through these Amendments, which stretched the scope of § 5 of the FTC Act, the Agency was empowered to not only prevent “unfair methods of competition” but also “unfair or deceptive acts or practices.”<sup>273</sup> Over the years, the FTC has leveraged the broad scope of its unfair and deceptive trade acts and practices authority to “expand its *consumer protective wings*.”<sup>274</sup>

Under this open-ended consumer protection umbrella, the Agency started working on Internet privacy around 1995.<sup>275</sup> At first, it would pursue cases

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271. See Herrine, *supra* note 117, at 454–55.

272. HOOFNAGLE, *supra* note 7, at 3.

273. Fed. Trade Comm'n Act, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1)).

274. Herrine, *supra* note 117, at 463 (emphasis added); Solove & Hartzog, *supra* note 6, at 606 (“Over the past fifteen years, *the FTC has gradually accumulated territory and power*. It developed a body of doctrines one by one in a form that most legal academics do not pay much attention to.” (emphasis added)).

275. See HOOFNAGLE, *supra* note 7, at 38 (“The flexible approach adopted in Section 5 enabled the Agency to take up privacy in the 1990s without an internet privacy statute”); *see*

against websites who had failed to abide by their own published privacy policies as “deceptive” trade practices.<sup>276</sup> Afterwards, in identifying these deceptive practices, it began considering “the entirety of a company’s dealings with the consumer, not just the specific promises made in the company’s privacy policy.”<sup>277</sup> As a result, “any statement that [was] part of the consumer experience [could] become the basis of a deceptive practice.”<sup>278</sup> Likewise, it also started applying both the “deception” and “unfairness” prongs to file complaints against organizations that had suffered data security breaches as a result of careless data security practices.<sup>279</sup> More recently, the FTC has more broadly relied on industry norms and consumer expectations to develop “distinct theories of what constitutes an unfair trade practice,”<sup>280</sup> including things such as “retroactive policy changes” and “unfair design.”<sup>281</sup>

Against this backdrop, the FTC’s move outlined in this Article could simply be characterized as a new attempt by the Agency to assert its authority over another realm in consumer protection, moving from the Internet to the broader data economy. Yet there is more to this story. The FTC’s recently-adopted normative commitments reflect the agency’s evolving understanding of its consumer protection mandate, shifting from a focus on protecting consumer choice to addressing the effects of unchecked corporate power.

In the last few years, administrative law scholars and policymakers have been exploring ways to restructure administrative power to serve more

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also Hetcher, *De Facto Federal Privacy Commission*, *supra* note 14, at 121; Solove & Hartzog, *supra* note 6, at 598; FED. TRADE COMM’N, *PRIVACY ONLINE: A REPORT TO CONGRESS 2* (June 1998); FED. TRADE COMM’N, *PROTECTING CONSUMERS ONLINE: A FEDERAL TRADE COMMISSION REPORT ON THE FIRST FIVE YEARS OF ITS INTERNET LAW ENFORCEMENT PROGRAM* (Dec. 1999).

276. See generally Hetcher, *FTC As Internet Privacy Norm Entrepreneur*, *supra* note 14; Hetcher, *De Facto Federal Privacy Commission*, *supra* note 14; Solove & Hartzog, *supra* note 6; Hartzog & Solove, *supra* note 14, at 2293–94.

277. Solove & Hartzog, *supra* note 6, at 628.

278. HOOFNAGLE, *supra* note 7, at 163.

279. See Michael D. Scott, *The FTC, The Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?* 60 ADMIN. L. REV. 127 (2008); Hirsch, *supra* note 199, at 358; Sarah Sargent, *Fight or Comply: The Federal Trade Commission’s Power to Hold Companies Liable for Data Security Breaches*, 41 J. CORP. L. 529 (2015).

280. Solove & Hartzog, *supra* note 6, at 640–42; see also HOOFNAGLE, *supra* note 7, at 145.

281. HOOFNAGLE, *supra* note 7, at 160–62.

egalitarian and democratic purposes.<sup>282</sup> This movement—usually referred to as the anti-domination approach—seeks to reclaim and reconstruct a more progressive vision of the modern administrative state, one capable of countering the unconstrained concentration of power in both government agencies and corporate actors. For K. Sabeel Rahman, for example, the affirmative project of anti-domination maintains that “state authorities must be built, empowered, and made more effective in *imposing limits on the various forms of private domination and private power: for example, in limiting the exploitative potential of private power in the marketplace, or in mitigating social inequities.*”<sup>283</sup>

Seen through this lens, the FTC’s recent commitments to critically examine the Big Tech companies’ business models and power dynamics, impose explicit limits and prohibitions on their data practices, and challenge their monopoly market power clearly speaks to a broader commitment to an anti-domination framework. In fact, Luke Herrine has already argued that, in the last few years the FTC’s consumer mandate has experienced a paradigm shift from a “consumer sovereignty” model to an “antidomination framework.”<sup>284</sup> According to the former consumer sovereignty model, “if consumers know what they want and know what is available, and if firms are forced to compete for consumers’ business, then *consumer choice on the free market will produce the mix of goods and services* (and, indeed, social conditions more broadly) *that best furthers consumers’ interests.*”<sup>285</sup> In contrast, the antidomination framework is focused on “the many ways that

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282. See generally K. SABELL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016); K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 CONTEMP. POL. THEORY 41 (2017); K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through Governance of Basic Necessities*, 118 COLUM. L. REV. 2447 (2018); JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* (2022); Daniel Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022); Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763 (2023); Luke Herrine, *What Is Consumer Protection For?*, 34 LOY. CONSUMER L. REV. 222 (2023); Luke Herrine, *At the Nexus of Antitrust & Consumer Protection*, 2023 UTAH L. REV. 849, 865–66 (2023); Blake Emerson, *Vindicating Public Rights*, 26 U. PA. J. CONST. L. 1424 (2024); Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647 (2024); Karen M. Tani, *Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1 (2024); Luke Herrine, *Unfairness, Reconstructed*, 42 YALE J. ON REG. 95 (2025); K. Sabeel Rahman, *Anti-Domination and Administration*, NYU L. REV. (forthcoming 2026).

283. *Anti-Domination and Administration*, *supra* note 282, at 33 (emphasis added).

284. See generally *Unfairness, Reconstructed*, *supra* note 282.

285. *Id.* at 99 (emphasis added).

*market structure can create problematic power imbalances between sellers and consumers.*<sup>286</sup>

The anti-domination perspective is particularly valuable in the privacy sphere, because it offers the FTC a concrete alternative to the ideal of fully informed consumer consent. Widely recognized by privacy scholars as a fiction,<sup>287</sup> this unattainable ideal has long obstructed meaningful protection of privacy and related rights,<sup>288</sup> a challenge that is especially pronounced in the context of AI.

Today, AI systems operate within an ecosystem composed of a complex network of actors that constantly collect, share, and monetize personal information.<sup>289</sup> Nowadays, data flows seamlessly across platforms, data brokers, advertisers, and AI developers.<sup>290</sup> Moreover, it is used not only to profile consumers and infer sensitive attributes—such as religion or political preferences—or cognitive vulnerabilities—to influence what they buy or even how they vote—but also to train AI models.<sup>291</sup> These models, in turn, are built on proprietary algorithms that are often opaque, not just to the public but, in many cases, even to their own developers.<sup>292</sup> Finally, this entire ecosystem is dominated by a small number of firms that control the data, models, and computational and storage infrastructure on which much of society now depends.<sup>293</sup>

In such a complex system, it is virtually impossible for consumers to fully comprehend or meaningfully consent to how their data is collected and shared among that complex network of actors, or to how it is processed and monetized by sophisticated and sometimes opaque AI models.<sup>294</sup> Accordingly, the FTC's recent shift away from a consent-based framework toward an emphasis on structural power and corporate domination offers a

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286. *Id.* at 101 (emphasis added).

287. *See, e.g.,* Daniel J. Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, 104 B.U. L. REV. 593 (2024).

288. *See, e.g.,* IGNACIO COFONE, *THE PRIVACY FALLACY: HARM AND POWER IN THE INFORMATION ECONOMY* 54–59 (2023).

289. *See, e.g.,* Elijah Greisz, *Transparency Without Teeth: An Empirical Understanding of Data Broker Regulation*, 92 U. CHI. L. REV. 1077, 1085–87 (2025).

290. *Id.*

291. *See, e.g.,* ZUBOFF, *supra* note 242.

292. *See generally* FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015).

293. *See generally* Tejas N. Narechania & Ganesh Sitaraman, *An Antimonopoly Approach to Governing Artificial Intelligence*, 43 YALE L. & POL'Y REV. 95 (2024).

294. *Id.*

more realistic and effective approach to protecting consumers in the AI age.<sup>295</sup>

*B. The Rise of the FTC as a Data Governance Authority*

Beyond offering the FTC an alternative to the informed choice paradigm, the anti-domination framework naturally leads the agency to adopt a more holistic approach to consumer data, here referred to as a “data governance” approach.<sup>296</sup>

Unlike traditional data privacy, data governance recognizes that the data ecosystem previously described—and the AI systems dependent on it—constitutes a complex sociotechnical governance challenge requiring an integrated approach.<sup>297</sup> As such, it emphasizes broader and more comprehensive frameworks for the regulation of data, which seek to address its entire lifecycle as well as its implications not only for consumers, but for businesses, the economy, and society at large.<sup>298</sup> Likewise, it reflects a more nuanced understanding of the digital market, in which data-related practices implicate not just privacy, but also fairness and market competition.<sup>299</sup> Thus, besides the maintenance of privacy protections, data governance is also interested in data security; safe and ethical AI systems; competition; and data access, sharing, and sovereignty.<sup>300</sup>

An example of a data governance approach can be seen in the European Union’s digital agenda.<sup>301</sup> While the EU has historically led global efforts in data protection, the GDPR and the ePrivacy Directive have recently been integrated into a *broader data governance strategy*.<sup>302</sup> In particular, in the last few years the EU’s approach has been evolving towards balancing protection, access, innovation, ethical considerations, and competition.<sup>303</sup> As a result, the EU has looked to not only protect personal data but also facilitate data-sharing across sectors (e.g., Data Governance Act), ensure

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295. See Lina M. Khan et al., *supra* note 18, at 1380.

296. See Felix Volz et al., *From Data Jungle to Data Governance in Digital Ecosystems: Empirical Evidence from a Multiple Holistic Case Study*, 201 J. BUS. RSCH. 115747 (2025).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. MATTEO CIUCCI ET AL., EUR. PARLIAMENT, DIGITAL AGENDA FOR EUROPE (2025), [https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU\\_2.3.3.pdf](https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_2.3.3.pdf) [<https://perma.cc/G2S4-N98Y>].

302. *Id.*

303. *Id.*

transparency and accountability from online platforms and digital services (e.g., Digital Services Act), prevent anti-competitive behavior (e.g., Digital Markets Act), enhance cybersecurity frameworks (e.g., Cybersecurity Act), and mitigate risks posed by AI systems (e.g., AI Act).<sup>304</sup>

However, unlike the statutory provisions passed in the EU, the FTC’s “flexible authority allows it to be nimble and adjust to new developments and changing circumstances.”<sup>305</sup> As Andrew D. Selbst & Solon Barocas have aptly explained, “[t]his is why the FTC has always been a central regulator of new technological development and has become the de facto data protection regulator in the United States—the Commission reacts and fills the gaps in existing law.”<sup>306</sup> Therefore, through a data governance approach, the FTC could aim to fill the void in even more issues surrounding emerging digital technologies that Congress and state legislators have not been able to address.

For example, this flexibility would give the FTC the opportunity to identify and eventually promote what Salomé Viljoen has referred to as “socially beneficial forms of data production.”<sup>307</sup> Relying on its broader mandate, the agency could eventually “expand on existing practices of data production for the public interest, undertaken with strong forms of public accountability, purpose limitations, and confidentiality standards.”<sup>308</sup> These practices—which Julie Cohen has termed “*prosocial surveillance*”<sup>309</sup>—represent “*necessary surveillance floors*”<sup>310</sup> that should also be accounted for in a democratic society that strives for human flourishing. As a data governance authority, therefore, the FTC could play a key role in ensuring that this “*right*” kind of surveillance is not only permitted but actively supported, provided it meets certain constraints.<sup>311</sup>

To be sure, while this flexibility may serve the agency’s reimagined consumer protection mandate well, it also raises legitimate concerns about

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304. *Id.*

305. Selbst & Barocas, *supra* note 199, at 1026.

306. *Id.*

307. Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 633 (2021).

308. *Id.* at 644.

309. Julie Cohen, *Doughnut Privacy: A Preliminary Thought Experiment*, in BEING HUMAN IN THE DIGITAL WORLD 5 (Beate Rossler & Valerie Steeves, eds., 2025) (emphasis added).

310. *Id.* at 3 (emphasis added).

311. Cohen, for example, proposes the following five constraints: sectoral fidelity, data parsimony, equity, openness to revision, and design for countervailing power. *See id.* at 10 (emphasis added).

the potentially antidemocratic nature of the FTC’s policymaking.<sup>312</sup> In particular, the prospect of “an unencumbered federal administrative juggernaut”<sup>313</sup> can understandably provoke alarm. Yet, it is important to note that the institutional design of the FTC provides many of the structures and scaffolds that, according to Anya Bernstein & Cristina Rodríguez, contribute to bureaucratic accountability.<sup>314</sup>

As described in Part I, the FTC is composed of a combination of political appointees and career civil servants.<sup>315</sup> As Bernstein & Rodríguez point out, political officials “spread broad presidential values or orientations through the administration in a way that complements the work of career civil servants, the usually longer-lasting colleagues who populate the state.”<sup>316</sup> In this way, the presence of political appointees ensures political control over the agency’s actions, by introducing a type of decision-making that is attuned to the demands and needs of constituencies.<sup>317</sup>

Additionally, any type of rulemaking or enforcement decision that comes out of the Agency will almost always have to go through a process of reasoned deliberation and multinodal negotiation among differing viewpoints and institutional positions, including FTC commissioners having to justify their positions to one another, as well as having to persuade career staff to move their ideas forward.<sup>318</sup> Finally, as it occurred with the

312. “A popular challenge to the administrative state paints it as undemocratic—in the most sinister formulation, a ‘deep’ state that threatens our freedoms.” Bernstein & Rodríguez, *supra* note 49, at 1607.

313. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530 (2015).

314. According to Bernstein & Rodríguez,

We identify three mutually supporting aspects of agency practice as particularly important to ensuring accountability: (1) diffuse, rather than concentrated, forms of political control; (2) nonhierarchical organizational structures of negotiation and deliberation among numerous actors and groups; and (3) practices that keep agencies attuned to affected publics and events in the regulated world.

Bernstein & Rodríguez, *supra* note 49, at 1605–06.

315. See discussion, *supra* Part I.

316. Bernstein & Rodríguez, *supra* note 49, at 1616.

317. See *id.* at 1615–16.

318. As Bernstein & Rodríguez point out:

Agency decision-making can look from the outside like a clean, sequential vector moving from a Notice of Proposed Rulemaking (NPRM) to a final rule. But inside the agency, the process is usually complex by design, with overlapping steps, iterative considerations, and multilateral negotiations

advanced notice of proposed rulemaking reviewed here, any agency policymaking will have to go through notice-and-comment processes as well as more informal types of perspective gathering,<sup>319</sup> which will ensure that the data governance approaches taken by the agency include the perspectives of impacted communities and are responsive not only to outside interests, but to empirical and operational realities.

Similar to Bernstein & Rodríguez, Jon D. Michaels has also highlighted how “the most durable, consistent checks on agency heads do not necessarily come from ‘above.’ Instead, the durable, consistent checks operate on the ground,”<sup>320</sup> referring specifically to the professional, politically insulated civil service and to civil society.<sup>321</sup> According to Michaels, “[t]hese two counterweights, when placed alongside agency leaders, constitute a secondary, administrative system of checks and balances. It is a system that, once again, in many ways carries forward and

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among teams of officials with diverse roles and levels of seniority. Internally, the process can look less like a vector and more like the web our interviewee invoked. This image encapsulates how agency officials sit in relation to one another—not so much in a linear hierarchy but in concentric circles and on different rings. The policymaking process, in turn, involves complex collaboration across many different strands, each feeding into and also dependent upon the others.

*Id.* at 1640.

319. “We heard examples of agencies seeking industry assistance in the development of rules; embedding personnel within regulated systems to better understand how they operated; and holding wide-ranging meetings with groups likely to be affected by agency action when shaping a policy idea.” Bernstein & Rodríguez, *supra* note 49, at 1656–57.

320. Michaels, *supra* note 313, at 533.

321. According to Michaels,

modern public administrative power has long been divided among three sets of rivals: *presidentially appointed agency heads* who direct the administrative agenda, *politically insulated civil servants* who carry out most of the agency’s day-to-day responsibilities, and *the general public* authorized and empowered to participate broadly and meaningfully in the development and implementation of agency policies and programs.

Michaels, *supra* note 30, at 59 (emphasis added). Other administrative law scholars who have also put together their own packages of institutional constraints on administrative power, include, for example: Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

breathes new life into the Framers’ normative, constitutional, and functional commitment to limited, encumbered government.”<sup>322</sup>

As the story of the shift in regulatory priorities here outlined demonstrates, both civil servants and civil society play an active role in shaping the FTC’s policy actions.<sup>323</sup> For pushing forward their novel policy agenda, Democrat FTC commissioners “necessarily rel[ie]d on lower-level government officials to research, design, promulgate, implement, and enforce”<sup>324</sup> what I have looked to outline here. For example, FTC civil servants conducted the § 6(b) market studies aimed at better understanding the data practices of several of the actors involved in the data surveillance ecosystem.<sup>325</sup> Moreover, they published blog posts on the matter<sup>326</sup> and put together PrivacyCon 2022, a virtual workshop organized by the FTC a few months after the ANPR on Commercial Surveillance and Data Security was announced.<sup>327</sup> Similarly, in this case members of the public acted “as constructive participants, helping set the administrative agenda.”<sup>328</sup> As seen earlier, civil society organizations proactively requested the FTC to conduct rulemakings akin to the one ultimately crystalized in the ANPR on Commercial Surveillance and Data Security.<sup>329</sup> Additionally, during the ANPR’s open comment period, more than 11,000 public comments were received.<sup>330</sup> In this sense, it is reasonable to expect that the new data governance approach will likewise be shaped and constrained by this same “subconstitutional regime of institutional counterweights.”<sup>331</sup>

Does this mean, though, that we should feel comfortable watching the FTC consolidate as a “norm entrepreneur” in this novel data governance path? The answer to this question really depends on how the term “norm entrepreneur” is understood. In 1996, Cass Sunstein proposed this concept

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322. Michaels, *supra* note 313, at 534.

323. Michaels, *supra* note 30, at 58.

324. *Id.* at 60.

325. *Id.*

326. *See, e.g.*, Cohen, *supra* note 153.

327. According to the workshop’s transcripts, this event was co-organized by Jamie Hine, an attorney in the Division of Privacy and Identity Protection, along with Lerone Banks, technologist in the Division. Fed. Trade Comm’n, *supra* note 134, at 1.

328. Michaels, *supra* note 30, at 62.

329. *See* Letter from Free Press to Lina M. Khan, *supra* note 226.

330. Fed. Trade Comm’n, *Testimony of Chair Lina M. Khan Before the House Comm. on Energy & Com., Subcomm. on Innovation, Data & Com.* (July 9, 2024), [<https://perma.cc/ZP9X-HY3Y>].

331. Michaels, *supra* note 313, at 540.

to refer to “people interested in *changing* social norms.”<sup>332</sup> Building on Sunstein’s concept, in 2000 Steve Hetcher described the FTC as a “website privacy ‘norm entrepreneur.’”<sup>333</sup> In his view, the FTC’s successful attempt to foster an industry-wide practice of establishing website privacy policies made it “an individual or entity that seeks to *promote or change* a norm.”<sup>334</sup> In contrast, writing in 2015, Woodrow Hartzog and Daniel Solove looked to reject this characterization. In their view, “[s]o far, the FTC has served as ‘*more of a standard codifier than a standard maker*. Instead of blazing a trail by creating new norms and standards, *the FTC has waited until norms and standards have developed and then begun enforcement*.”<sup>335</sup> In fact, they cautioned the FTC against arbitrarily introducing *new* social norms.<sup>336</sup> Thus, while according to Hetcher the massive adoption of privacy policies by the industry could be described as “shifts in social norms, *brought about through law*,”<sup>337</sup> according to Hartzog & Solove, the FTC’s promotion of good data security practices should be interpreted as the simple codification of previously existing industry standards and consumer expectations of privacy.<sup>338</sup>

As seen in Part IV.B, the reframing of the FTC’s regulatory priorities outlined here reflected a broader trend in already changing social norms.<sup>339</sup> Therefore, far from a power grab from Commissioners Slaughter and Khan, this shift grew out of an overlapping set of efforts by different stakeholders to change the approach to information privacy in America.<sup>340</sup> In that sense, as long as the FTC’s future actions in data governance keep reacting to society’s calls, its efforts should not be read as the agency’s intent to impose new standards, but rather as legitimate attempts to embrace norms with a fair degree of social consensus.<sup>341</sup>

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332. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (emphasis added).

333. Hetcher, *FTC As Internet Privacy Norm Entrepreneur*, *supra* note 14, at 2046.

334. *Id.* at 2046 n.18 (emphasis added).

335. Hartzog & Solove, *supra* note 14, at 2293–94 (emphasis added).

336. *Id.* at 2289, 2293.

337. Sunstein, *supra* note 332, at 908 (emphasis added).

338. Hartzog & Solove, *supra* note 14, at 2293–94.

339. *See* discussion *supra* Section IV.B.

340. *Id.*

341. In my view, this responsiveness to public demands helps mitigate the countermajoritarian difficulty as it applies to administrative agencies.

### C. A Halt to Privacy's Overloading

Beyond its practical implications for the FTC's consumer protection mandate and institutional role, the agency's reframing of its regulatory priorities also carries interesting theoretical implications for the concept of information privacy. For some years now, several scholars—including myself—have been criticizing the limitless expansion of this concept.<sup>342</sup> Ryan Calo, for example, has repeatedly argued that the abuse of the term risks “its diffusion into a meaningless catchall”<sup>343</sup> term. Relatedly, Eric Goldman has warned that privacy's ever-growing scope is “devouring” all aspects of internet law, resulting in both a lack of adequate expertise and a Trojan horse for advancing illegitimate policy objectives.<sup>344</sup> Similarly, Omer Tene and Jules Polonetsky have denounced how, in the sphere of AI governance, privacy risks becoming “the law of everything.”<sup>345</sup> For Tene, when “your only tool is a hammer, you treat everything as a nail.”<sup>346</sup> Yet, since “AI raises issues far and wide beyond privacy,”<sup>347</sup> privacy policymakers should not—he argues—jump ahead of the pack. On a more theoretical level, Salomé Viljoen recently contended that the internal expansiveness of privacy has prevented legal scholarship at large from fully benefiting from the valuable methodological insights the field of privacy has developed for analyzing the digital society.<sup>348</sup>

As a result, many of us have been offering different solutions to establish clearer boundaries on the concept of privacy. As early as 2011, Ryan Calo emphasized the need for both a “limiting principle” and a “rule of

342. Salomé Viljoen refers to this phenomenon as “the trend of privacy expansion,” describing it as “the tendency over the past several years in privacy scholarship and advocacy to include a growing set of social factors when considering the legal effects and normative stakes we count within the concept of a ‘privacy harm.’” Salomé Viljoen, *The Broader Lessons of Privacy Law*, 104 B.U. L. REV. 1131, 1133 (2024).

343. M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1137 (2011).

344. Eric Goldman, *Privacy Law Is Devouring Internet Law (and Other Doctrines)...To Everyone's Detriment*, TECH. & MKTG. L. BLOG (May 9, 2023), <https://blog.ericgoldman.org/archives/2023/05/privacy-law-is-devouring-internet-law-and-other-doctrines-to-everyones-detriment.htm> [<https://perma.cc/X6KV-UXFK>].

345. Omer Tene, LINKEDIN, <https://www.linkedin.com/feed/update/urn:li:activity:7182465377509998593/> [<https://perma.cc/WZ7A-WPDC>].

346. Omer Tene, LINKEDIN, [https://www.linkedin.com/posts/omer-tene-a86b363\\_is-ai-policy-a-privacy-issue-in-short-no-activity-7061006548659003392-AHrv/](https://www.linkedin.com/posts/omer-tene-a86b363_is-ai-policy-a-privacy-issue-in-short-no-activity-7061006548659003392-AHrv/) [<https://perma.cc/4ZJ6-PYYP>].

347. Omer Tene, LINKEDIN, [https://www.linkedin.com/posts/omer-tene-a86b363\\_webinar-is-ai-policy-a-privacy-issue-activity-7067695038062809088-KKiW/](https://www.linkedin.com/posts/omer-tene-a86b363_webinar-is-ai-policy-a-privacy-issue-activity-7067695038062809088-KKiW/) [<https://perma.cc/FJ3C-33TS>].

348. See generally Viljoen, *supra* note 342.

recognition”—a framework to determine when another value takes precedence over privacy and to identify genuine privacy harms when no other harm is immediately evident.<sup>349</sup> In 2016, in turn, David Pozen introduced the phenomenon of “privacy-privacy tradeoffs,” where “enhancing or preserving privacy along a certain axis may entail compromising privacy along another axis.”<sup>350</sup> Although not criticizing this phenomenon *per se*, Pozen did raise the fact that, a pluralistic approach to the concept of privacy—which rejects efforts to identify privacy’s essence or its core characteristics and settles for an umbrella term—would necessarily result in an exacerbation of the privacy-privacy tradeoffs dilemma.<sup>351</sup> Therefore, he recommended privacy theorists to work on “normative frameworks” for evaluating and balancing competing privacy interests when difficult decisions arise.<sup>352</sup>

More recently, Ryan Calo and I urged the privacy field to engage in a deeper discussion about what function the concept of privacy serves in a complex information environment and why certain societal issues merit examination through a privacy framework.<sup>353</sup> In our view, “[f]or privacy scholarship to remain relevant, the field needs to move beyond the comfortable habit of labeling whatever information-based harm the right people are talking about as a ‘privacy problem.’”<sup>354</sup> Others have gone even further (maybe too far), urging society to simply abandon the fight for privacy (“abolish privacy”) and embrace instead the concept of collectivized data.<sup>355</sup>

In this context, Commissioner Rebecca Slaughter’s attempt to “tweak the framing” from data privacy to data abuses is particularly significant. More than *another* call to move away from the concept of privacy to talk about the broader concept of data-driven harms, her statements on this matter represent the first official effort to curb privacy’s “overloading.”<sup>356</sup> In other words, her call for not only privacy is a clear authoritative invitation to address challenges such as harms to civil rights and equal opportunity,

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349. Calo, *supra* note 343, at 1135–39.

350. David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 222 (2016).

351. *Id.* at 227.

352. *Id.* at 243.

353. María P. Angel & Ryan Calo, *Distinguishing Privacy Law: A Critique of Privacy as Social Taxonomy*, 124 COLUM. L. REV. 507 (2024).

354. *Id.* at 560.

355. Elisha Lim et al., *Abolish Privacy*, 30 FIRST MONDAY (2025).

356. I take this expression from Salomé Viljoen’s work. *See* Viljoen, *supra* note 342, at 1137-40.

misinformation, and labor exploitation without the “notoriously slippery, baggage-laden, and limiting concept of ‘privacy.’”<sup>357</sup> This can not only prevent the term from diluting its analytical usefulness but, more importantly, enable policymakers to develop more precise frameworks tailored to specific harms.<sup>358</sup> This, in turn, can foster clearer problem identification, better governance design, and, hopefully, more effective legal responses for the AI age.

## VI. FACING CURRENT REALITIES

### A. Recent Political Developments

Back in 2021, Luke Herrine observed: “Nobody knows what will come next, but a new coalition does seem to be developing [at the FTC,] *with the will, the power, and the vision to rebuild the state capacity to democratize control over business conduct.*”<sup>359</sup> That coalition did, indeed, take the reins of the agency, leveraging the ANPR on Commercial Surveillance and Data Security—among other measures—to intervene in the digital economy and start to lay the groundwork for a data governance approach. That momentum, however, has recently dissipated.<sup>360</sup>

Since President Donald Trump assumed office in January 2025, the FTC has undergone significant leadership changes. After the President’s inauguration, Republican Commissioner Andrew Ferguson took over as the agency’s new Chairman.<sup>361</sup> That same month, former Chair Lina Khan and Director of the FTC’s Bureau of Consumer Protection, Samuel Levine, resigned.<sup>362</sup> In March, Democratic Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya were dismissed from their roles by President Trump, who claimed that their service was inconsistent with his administration’s

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357. Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1087 (2006).

358. *Id.*

359. Herrine, *supra* note 117, at 528 (emphasis added).

360. See *Andrew N. Ferguson Takes Over as FTC Chairman*, *supra* note 43.

361. *Id.*

362. Jody Godoy, *Biden’s US FTC Chair to Resign Commission in Coming Weeks*, *Memo Says*, REUTERS (Jan. 20, 2025), <https://www.reuters.com/world/us/biden-ftc-chair-khan-resign-commission-coming-weeks-2025-01-20/>; Fed. Trade Comm’n, *Farewell Remarks as Prepared for Delivery by Samuel Levine* (Jan. 16, 2025), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf) [<https://perma.cc/R5YT-ZEA8>].

priorities.<sup>363</sup> As a result, none of the key architects behind the shift in internal institutional norms described here remain at the FTC, which is now composed only of Republicans.<sup>364</sup>

In addition, on February 18, 2025, President Trump issued the Executive Order (EO) 14215 *Ensuring Accountability for All Agencies*,<sup>365</sup> which weakens the independence historically enjoyed by the FTC.<sup>366</sup> Among other changes, this executive order, which amends EO 12866 issued by President Bill Clinton in 1993,<sup>367</sup> established that any proposed and final significant regulatory actions taken by “all executive departments and agencies, including so-called independent agencies”<sup>368</sup>—such as the FTC—must now be submitted to the Office of Information and Regulatory Affairs (OIRA) within the Executive Office of the President for pre-publication review.<sup>369</sup>

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363. Leila Fadel & Obed Manuel, *The Federal Trade Commission Keeps Tabs on Big Business. Trump Fired 2 of Its Members*, NPR (Mar. 20, 2025), <https://www.npr.org/2025/03/20/nx-s1-5333640/ftc-trump-firings-democrats> [https://perma.cc/9R6V-H7XA].

364. On April 10, 2025, Rebecca Kelly Slaughter and Alvaro Bedoya filed suit in federal court challenging Donald Trump’s decision, alleging it violated Supreme Court precedent from *Humphrey’s Executor v. United States*, which held that President Franklin D. Roosevelt could have only removed FTC commissioner William E. Humphrey for “inefficiency, neglect of duty, or malfeasance in office.” 295 U.S. 602, 623 (1935); Andrea Hsu, *How Trump’s Firings Could Upend a 90-year-old Supreme Court Ruling Limiting His Power*, NPR (Mar. 21, 2025), <https://www.npr.org/2025/03/21/nx-s1-5333325/ftc-trump-firings-supreme-court> [https://perma.cc/8EXM-7U7T]. Nevertheless, on June 9, 2025, Commissioner Bedoya officially resigned from his position to be able to accept other employment in the private sector. Alfred Ng, *Fired FTC Commissioner Formally Resigns*, POLITICO PRO (June 9, 2025), <https://subscriber.politicopro.com/article/2025/06/fired-ftc-commissioner-formally-resigns-00394242> [https://perma.cc/V3RK-7K3S]. On July 17, 2025, a federal judge from the U.S. District Court for the District of Columbia reinstated Commissioner Slaughter, holding that *Humphrey’s Executor* remains binding. Heidi Arcieri & Rob Tricchinelli, *Judge Reinstates FTC Commissioner Whom Trump Sought to Fire (2)*, BLOOMBERG L. (July 17, 2025), <https://news.bloomberglaw.com/antitrust/judge-reinstates-ftc-commissioner-whom-trump-sought-to-fire>. However, the Trump administration immediately filed a notice of appeal, and the reinstatement order was stayed as the case proceeds. Isabela Gibson, *Trump v. Slaughter and the Potential Impact on Agency Independence (US)*, SQUIRE PATTON BOGGS (Jan. 6, 2026), <https://www.employmentlawworldview.com/trump-v-slaughter-and-the-potential-impact-on-agency-independence-us/>. As a result, as of January 2026, Commissioner Slaughter has not returned to her position. *Id.*

365. Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 24, 2025).

366. See Herrine, *supra* note 117, at 461.

367. Unlike EO 14215, EO 12866 only required *executive*—not independent—agencies to submit significant regulatory actions to the Office of Information and Regulatory Affairs (OIRA) for pre-publication review. Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

368. See Exec. Order No. 14215, 90 Fed. Reg. at 10447 (emphasis added).

369. See *id.* at 10447.

Given the current administration's strong deregulatory stance<sup>370</sup>—particularly its stated goal of minimizing regulatory barriers to technological innovation,<sup>371</sup> especially in the field of AI<sup>372</sup>—this effort to assert greater presidential control over the rulemaking process echoes the approaches of Presidents Ronald Reagan and George H. W. Bush.<sup>373</sup> Like Reagan and Bush, President Trump appears to be using increased rulemaking oversight to limit the scope of agency actions. In the FTC's case, one of the tangible outcomes of these OIRA reviews might probably be the rollback of the ANPR on Commercial Surveillance and Data Security.<sup>374</sup>

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370. Exec. Order No. 14192, 90 Fed. Reg. 9065 (Feb. 6, 2025).

371. Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 25, 2025).

372. Exec. Order No. 14179, 90 Fed. Reg. 8741 (Jan. 31, 2025). As a result of this EO, on July 10, 2025, the Trump administration released *Winning the Race: America's AI Action Plan*. Among its recommended policy actions, the plan directed the FTC to “[r]eview all . . . investigations commenced under the previous administration to ensure that they do not advance theories of liability that unduly burden AI innovation. Furthermore, review all FTC final orders, consent decrees, and injunctions, and, where appropriate, seek to modify or set-aside any that unduly burden AI innovation.” EXEC. OFF. OF THE PRESIDENT, OFF. OF SCI. & TECH. POLICY, WINNING THE RACE: AMERICA'S AI ACTION PLAN 3-4 (July 10, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf> [<https://perma.cc/2DLT-ZZAR>].

373. See generally Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986). According to Elena Kagan, Reagan and Bush's efforts stand in contrast to President Clinton's model of “presidential administration,” which aimed to steer, rather than constrain, regulatory policy. See Kagan, *supra* note 119, at 2248-49.

374. See, e.g., Joe Duball, *Trump Taps Andrew Ferguson to Chair FTC, Nominates Mark Meador Commissioner*, IAPP (Dec. 11, 2024), <https://iapp.org/news/a/trump-taps-andrew-ferguson-to-chair-ftc-nominates-mark-meador-commissioner> [<https://perma.cc/4ZAN-2F5X>] (“Goodwin Procter Partner and IAPP Westin Emeritus Fellow Omer Tene expects Ferguson's priorities to be the tip of the iceberg for a ‘starkly different’ FTC. In addition to redefining privacy enforcement, Tene expects the incoming FTC to ‘no doubt roll back’ the proposed rulemaking on commercial surveillance and lax data security. Providence Group co-founder and Executive Chairman Dan Caprio, who served as chief of staff to former FTC Commissioner Orson Swindle, also characterized the privacy rulemaking as ‘dead’ under Ferguson, alluding to the chair-designate's intentions to remove perceived regulatory uncertainty businesses faced in recent years. ‘Ferguson pledged to end more novel and legally dubious consumer protection cases and said that businesses should not fear that the FTC will punish them for honest conduct,’ Caprio.”) (emphasis added); see also Janis Kestenbaum et al., *How the FTC's Approach to Privacy, Security, and AI Enforcement May Change*, PERKINS COIE (Dec. 4, 2024), <https://perkinscoie.com/insights/blog/how-ftcs-approach-privacy-security-and-ai-enforcement->

To be clear, “it appears unlikely that the FTC will return to an entirely hands-off approach to consumer protection in the digital age.”<sup>375</sup> As several commentators have pointed out, even under this new administration the FTC is expected to “remain active on privacy, data security, AI, and other technology issues.”<sup>376</sup> However, in the years ahead, the Republican majority currently leading the agency is also expected to adjust its substantive priorities in each of these areas.<sup>377</sup>

A clear example of this shift in priorities is the FTC’s evolving approach to data-driven harms affecting children and teens. Before the end of the Biden administration, the FTC had planned to hold a workshop titled “The Attention Economy: Monopolizing Kids’ Time Online.”<sup>378</sup> As pointed out by The Washington Post, “[t]he title was a nod to the FTC’s focus on the links between the market power of Big Tech platforms and the alleged harms that flowed from their outsize role in young people’s digital lives.”<sup>379</sup> On June 4, 2025, the Trump administration proceeded with the event, but with a significantly different focus. Renamed “The Attention Economy: How Big Tech Firms Exploit Children and Hurt Families,” the workshop looked “to discuss how Big Tech companies impose addictive design features, erode parental authority, and fail to protect children from exposure to harmful content. Experts [would] also discuss concrete solutions to protect kids online, including age verification and parental consent requirements.”<sup>380</sup> In this way, although the emphasis on children’s rights remained unchanged, the event’s focus was reframed to remove the antitrust lens and instead align with “a conservative internet policy agenda centered on ‘family values.’”<sup>381</sup>

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may-change [<https://perma.cc/5Q5J-ZJTM>]; Khan et al., *supra* note 18, at 1459 (arguing that “the agency’s more aggressive efforts to rein in harmful data abuses—especially rule-writing—is likely to slow down considerably”).

375. Khan et al., *supra* note 18, at 1458.

376. Kestenbaum et al., *supra* note 374.

377. *Id.*

378. *FTC Announces Virtual Workshop on the Attention Economy: Monopolizing Kids’ Time Online*, FED. TRADE COMM’N (Sept. 26, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-virtual-workshop-attention-economy-monopolizing-kids-time-online> [<https://perma.cc/N3CF-KJ7D>].

379. Will Oremus & Andrea Jiménez, *Trump’s FTC Takes a ‘Family Values’ Approach to Internet Regulation*, WASH. POST (June 10, 2025), <https://www.washingtonpost.com/politics/2025/06/10/ftc-kids-online-safety-event-ferguson/>.

380. *The Attention Economy: How Big Tech Firms Exploit Children and Hurt Families*, FED. TRADE COMM’N: EVENTS (June 4, 2025), <https://www.ftc.gov/news-events/events/2025/06/attention-economy-tech-firms-exploit-children> [<https://perma.cc/K4Z6-ESUZ>].

381. Oremus & Jiménez, *supra* note 379.

Similarly, as Perkins Coie has noted, “[t]echnology, including privacy and data security, will likely remain a priority of the agency—but with a focus on issues with across-the-aisle interest and *likely without the current FTC’s pejorative terminology like ‘commercial surveillance.’*”<sup>382</sup> As this Article has looked to evidence, the FTC’s wording choices in the 2022 ANPR were more than mere linguistics and constituted a strategy to gesture new regulatory priorities and philosophy. In much the same way, the abandonment of the term “commercial surveillance” by the new Administration will likely go beyond a mere change in vocabulary, signaling a potential retreat from many of the normative commitments reconstructed here.<sup>383</sup>

### B. Sustaining the FTC’s Approach to the Data Economy

Given the *institutional* and *political* forces described in the previous Section, the FTC’s Overton Window of Rulemaking Possibility appears narrower today. Nevertheless, this does not rule out the possibility that other U.S. privacy regulators could assume the FTC’s three normative commitments. As noted in Section IV.B, the *social forces* that helped drive this reframing remain largely intact.<sup>384</sup> Accordingly, the normative commitments here described could continue to be pursued and realized at the state level, particularly through the state AGs.<sup>385</sup>

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382. Kestenbaum et al., *supra* note 374 (emphasis added).

383. A notable exception might be the FTC’s continued antitrust enforcement actions against Big Tech. Recent actions by the agency and developments within the Trump administration suggest that these efforts are likely to endure. *See, e.g.*, David McCabe, *What to Know About Trump’s Antitrust Efforts Against Tech Giants*, N.Y. TIMES (Apr. 13, 2025), <https://www.nytimes.com/2025/04/13/technology/trump-tech-antitrust-cases.html> (explaining how “[t]he Trump administration is continuing an aggressive effort to rein in the power of the biggest tech companies”); Sagar Kar, *US Vice President JD Vance’s Antitrust Push Against Big Tech Gains Momentum*, REPUBLIC (Apr. 15, 2025), <https://www.republicworld.com/world-news/us-vice-president-jd-vances-antitrust-push-against-big-tech-gains-momentum> [<https://perma.cc/SW7J-V8F6>] (highlighting how several allies of Vice President J.D. Vance have been appointed to key roles within the Trump administration, where they will be able to advance Vance’s aggressive antitrust policies, with a focus on breaking up dominant tech companies).

384. *See* discussion *supra* Section IV.B.

385. Every state has its own version of the FTC Act, which is enforced by the respective AG. Thanks to Felix Wu for bringing this idea to my attention during the 2025 Internet Law Works in Progress Conference. *See* Charles A. Byrd, *A 50-State Survey of Consumer Protection Acts and Their Connections to the Federal Trade Commission Act*, PRO TE:SOLUTIO (Mar. 13,

As Chris Jay Hoofnagle has observed, “[s]tates tend to adopt enforcement innovations developed by the FTC.”<sup>386</sup> Likewise, writing in 2017 about the AG’s privacy policymaking activities, Danielle Keats Citron emphasized how “[a]ttorneys general would serve as a crucial fail-safe in the event that the FTC was forced to slow down its privacy and security work.”<sup>387</sup> Given the current political landscape, this moment appears particularly well-suited for state AGs to step into that role.

Historically, state AGs have influenced privacy policy within their jurisdictions through the endorsement of state legislation, persuasion campaigns—such as taskforces, best practices guides, and workshops—and enforcement actions, particularly when coordinated in multistate coalitions.<sup>388</sup> At this critical juncture, both the National Association of Attorneys General or the Consortium of Privacy Regulators<sup>389</sup> could strategically leverage the FTC’s three normative commitments as policy goals guiding actions across these three avenues. By doing so, state AGs can help curb the effects of unchecked corporate power within their states,<sup>390</sup> sustaining the momentum of the FTC’s reframing of regulatory priorities until a future commission is positioned to resume leadership.

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2019), <https://protesolutio.com/2019/03/13/a-50-state-survey-of-consumer-protection-acts-and-their-connections-to-the-federal-trade-commission-act/> [<https://perma.cc/X6WB-CEUG>].

386. HOOFNAGLE, *supra* note 7, at 140.

387. Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 800 (2016).

388. *Id.* at 759.

389. This bipartisan effort was announced in April 2025 by California Attorney General Rob Bonta. Its members include the state AGs from California, Colorado, Connecticut, Delaware, Indiana, New Jersey, and Oregon, and the California Privacy Protection Agency (CPPA). *See State Regulators Form Bipartisan Consortium to Collaborate on Privacy Issues*, CAL. PRIV. PROT. AGENCY (Apr. 16, 2025), <https://cppa.ca.gov/announcements/2025/20250416.html#:~:text=SACRAMENTO%2C%20CA%20%E2%80%93%20Eight%20state%20regulators,the%20California%20Privacy%20Protection%20Agency> [<https://perma.cc/L9NG-ZX9V>].

390. Importantly, this proposal envisions state AGs construing their existing UDAP statutes in light of these policy goals (for instance, by interpreting certain AI-driven harms as “unfair” or “deceptive” practices). As such, this approach would generally fall within their already established enforcement authority. Moreover, to avoid conflicts with the Dormant Commerce Clause, AGs’ enforcement actions should focus on in-state conduct or effects, such as data collection from state residents or algorithmic impacts on local consumers. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (invalidating a state law which had the practical effect of impermissibly regulating out-of-state commerce); *cf. Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 373–75 (2023) (reaffirming that state laws with legitimate in-state justifications are not invalid merely because they have upstream effects beyond state borders). In addition, coordination among AGs—through multistate coalitions or the Consortium of Privacy

## VII. CONCLUSION

As this Article has sought to demonstrate, a reframing of the FTC's regulatory priorities occurred in recent years, crystalizing in the *ANPR* on Commercial Surveillance and Data Security.<sup>391</sup> Since at least 2019, the agency began to explore the possibility of moving beyond traditional data privacy frameworks and toward a more systemic approach to the data economy and its underlying, structural power dynamics. This shift was both timely and necessary in the age of AI, adequately aligning the FTC's consumer protection mandate and institutional role with the realities of the contemporary data ecosystem.

It remains unclear whether commentators who responded to the *ANPR* underestimated the significance of the FTC's move or, fully aware of its implications, sought to downplay it by avoiding the newly introduced terminology. Yet, what should be clear by now, is that the FTC's objective was not merely to establish a new vocabulary but to leverage it as a vehicle for articulating its evolving approach. As masterly posed by Spencer W. Waller, "[r]hetoric, discourse, and language are important tools to channel conversation, close off paths for discussions, categorize contending points of view as beyond the pale, and define the shape of disciplines. They can be both tools of reaction and revolution."<sup>392</sup>

The future of this transformation at the FTC is now uncertain, with significant political and institutional design challenges on the horizon. Ongoing policy changes under the new Republican-led FTC may shift the agency's emphasis and likely result in a rollback of the contemplated rulemaking. However, the durability of this transformation does not depend solely on the current agency's leadership. The three normative commitments outlined here should find continued life through the work of other privacy regulators. After all, the social forces that helped propel this reframing remain deeply embedded in society and will continue to shape the evolution of U.S. information privacy debates for years to come.

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Regulators—could further reduce the risk of conflicting or overlapping standards that might otherwise trigger Dormant Commerce Clause concerns.

391. Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022).

392. Waller, *supra* note 222, at 206–07.