Unfairness, Reconstructed

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A paradigm shift is afoot at major federal consumer protection agencies. For four decades, a bipartisan bloc of bureaucrats has seen the purpose of consumer protection as promoting informed consumer choice or "consumer sovereignty." The idea was that informed consumers in competitive markets would protect themselves by choosing among sellers. Ensuring access to information would then shore up markets' self-correcting tendencies without requiring moral judgment. In the past few years, by contrast, regulators have prioritized sector-wide regulation, enforcement sweeps, and strategic cases against market leaders. They have justified their actions not (exclusively) in terms of informed choice or efficiency but in terms of values like protecting the vulnerable, preventing harassment, preserving privacy, and correcting for unjust inequalities.

Focusing doctrinally on uses of the unfair-practices authority shared by several agencies, this Article situates the shift both historically and theoretically. Historically, it argues that consumer sovereignty lost ground after the global financial crisis of 2007 and controversies over Big Tech. Theoretically, it argues that the consumer sovereignty framework relied on a too-simple model of markets as deviations from "perfect competition" that needed only better information to get back in line and that the paradigm emerging in its place is properly committed to correcting for power asymmetries in irredeemably imperfect markets. I call the new paradigm an "antidomination framework" and defend it.

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Introduction

Consumer protection laws vary on two dimensions. On one axis are the different *interests* implicated by consumer markets: safety, quality, informed choice, accommodation of different abilities, and so on. On the other are the different *techniques* through which law protects these interests: standards of quality, standards of conduct, public options, and so on. We can protect an interest in, say, safety through premarket review,[1] through audits,[2] through adjustment of tort liability,[3] through public ownership with direct standard setting,[4] through investment in research.[5] We can protect an interest in correcting for invidious discrimination through public accommodation laws and common carrier rules,[6] through statutes prohibiting discrimination against particular classes with respect to particular decisions,[7] through quotas,[8] through reparations programs.[9] Conversely, any given technique of protection can implicate different interests: a public option in healthcare, say, might be designed to promote universality of access, relative equality of treatment, lower prices, minimal quality standards, and so on.

The ban on "unfair or deceptive acts or practices"[10]—affectionally referred to as "UDAP" (and pronounced "you-dap") among consumer protection cognoscenti—is our most general form of one of the most prominent techniques of consumer protection: conduct regulation for consumer-

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1. *See generally* 21 U.S.C. § 355 (2018) (laying out a premarket approval program for new drugs); 21 C.F.R. pt. 814 (2024) (doing the same for medical devices).

2. *See generally* 12 U.S.C. §§ 5514-5515 (2018) (creating a reporting and auditing scheme for banks and other lenders).

3. *See generally* RESTATEMENT (THIRD) TORTS: PRODS. LIAB. (AM. L. INST. 1998) (describing the law of products liability).

4. *See generally* 39 U.S.C. § 3001(n) (2018) (excluding "hazardous material[s]" from the mails); 15 U.S.C. § 2506 (2018) (directing the Secretary of Energy to set performance standards for hybrid and electric vehicles).

5. Investment can be spurred in a number of ways: providing direct funding, encouraging private investment through credit enhancements, protecting intellectual property rights, and so on.

6. *See generally* 42 U.S.C. § 2000a (2018) (prohibiting places of public accommodation from discriminating "on the ground of race, color, religion, or national origin"); *id.* § 12182 (prohibiting disability discrimination by places of public accommodation).

7. *Cf.* 15 U.S.C. §§ 1691-1691f (2018) (prohibiting discrimination "on the basis of race, color, religion, national origin, sex or marital status, or age" in credit lending).

8. This approach may run into constitutional objections, of course. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that racial quotas in public university admission programs violate the Equal Protection Clause of the Fourteenth Amendment).

9. *See generally* WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY (2d ed. 2022) (proposing a strategy for reparations to address the racial wealth gap in the United States); OLÚFẸ́MI O. TÁÍWÒ, RECONSIDERING REPARATIONS (2022) (advancing a case for reparations as a path to a more equitable social order).

10. *E,g.*, Federal Trade Commission (FTC) Act § 5(a), 15 U.S.C. § 45(a) (2018).

facing businesses.[11] It is general in two senses. One is that it applies to nearly every consumer-facing business. Wherever in U.S. jurisdiction there is an entity that does business with consumers, there is almost certainly at least one regulatory body tasked with monitoring it for UDAPs. The original ban on "unfair or deceptive acts or practices" was created in 1938 for the Federal Trade Commission (FTC), which has broad authority over most industries.[12] It has also been bestowed upon the Department of Transportation[13] (DOT) and multiple banking regulators—now guided by the Consumer Financial Protection Bureau (CFPB) and its authority over "unfair, deceptive, or *abusive* acts or practices" (UDAAP).[14] Most states also have some variation of a UDAP statute, many with private rights of action.[15]

More importantly, UDAP describes at the most abstract level what consumer-protective conduct regulation aims to prevent. If one were looking for a concise set of adjectives to describe what the Fair Debt Collection Practices Act,[16] the tort of negligent misrepresentation,[17] restrictions on prescription drug advertisements,[18] bans on bait-and-switch advertising,[19] and price gouging laws[20] have in common, one might say they prohibit

11. *See* Rory Van Loo, *The Public Stakes of Consumer Law: The Environment, the Economy, Health, Disinformation, and Beyond*, 107 MINN. L. REV. 2039, 2041 (2023) ("The core of consumer law is often seen as synonymous with the Federal Trade Commission's (FTC) mission to halt unfair [or] deceptive acts [or] practices . . . ."). Prohibitions on unfair or deceptive acts or practices (UDAP) are framed as what we might call "negative" conduct regulations—they prohibit wrongful conduct rather than requiring rightful conduct. This distinction can occasionally have some legal bite, *see* Katharine Gibbs School (Inc.) v. FTC, 612 F.2d 658 (2d Cir. 1979), though it should not be overemphasized.

12. Wheeler-Lea Act, ch. 49, sec. 3, § 5(a), 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a)).

13. 49 U.S.C. § 41712 (2018).

14. 12 U.S.C. § 5531(b) (2018) (emphasis added); *accord id.* § 5531(a). The U.S. Department of Agriculture (USDA) has a predecessor authority, which I will not discuss further here. *See* Packers and Stockyards Act, ch. 64, § 202(a), 42 Stat. 159, 161 (1921) (codified as amended at 7 U.S.C. §§ 192(a)) (prohibiting "any unfair, unjustly discriminatory, or deceptive practice or device"); § 312(a), 42 Stat. at 167 (codified as amended at 7 U.S.C. § 213(a)) (same).

15. *See* Carolyn Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NAT'L CONSUMER L. CTR. app. C (Mar. 1, 2018), https://www.nclc.org/wp-content/uploads/2022/08/udap-appC-1.pdf [https://perma.cc/V7W8-263N].

16. 15 U.S.C. §§ 1692-1692p (2018).

17. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 552-552B (AM. L. INST. 1977) (describing the law of negligent misrepresentation).

18. *See, e.g.*, 21 C.F.R. § 202.1 (2024).

19. *See, e.g.*, CONN. AGENCIES REGS. § 42-110b-20 (2015); COLO. REV. STAT. ANN. § 6-1-105(1)(n) (2024).

20. *See generally* ALA. CODE § 8-31-1 to -6 (2024) (prohibiting unconscionable prices during declared states of emergency); N.Y. GEN. BUS. LAW § 396-r (McKinney 2024) (prohibiting unconscionable pricing of vital goods during market disruptions); Letter from Seventeen Senators to Joseph J. Simons, Chair, Fed. Trade Comm'n (Mar. 27, 2020), https://www.warren.senate.gov/imo/media/doc/2020.03.24%20Letter%20to%20FTC%20re%20Price%20Gouging%20Consumer%20Health%20Products%20during%20COVID-19%20Outbreak.pdf [https://perma.cc/6UAK-RMJZ] (urging FTC "to use the

practices that are unfair, deceptive, or abusive. Seen in this way, when Congress (or another legislature) passes particular conduct regulations, it declares certain types of conduct inherently (or at least presumptively) unfair, deceptive, or abusive. And when it passes a wholesale ban on UDAPs, it delegates authority to hunt down other examples.

Tracking how agencies have used their UDAP authority is thus a good way to track the direction of consumer protection—its preoccupations, its politics, its principles—at least as it is understood by the implementing agencies.

When we do so, we find that there has been a paradigm shift in recent years.

The status quo, starting around 1980—during the "neoliberal era," for those who recognize such a thing[21]—was to make sense of UDAP in terms of *consumer sovereignty*.[22] Consumer sovereignty is a hypothetical condition in which consumers incidentally discipline the conduct of firms simply by shopping. The basic notion is that 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. So long as other areas of law are oriented toward ensuring that markets are competitive, consumer protection can focus on ensuring that consumers are making informed and rational decisions, and consumer sovereignty can be achieved.[23]

This general way of thinking was paired with a presumption that markets are generally self-correcting (even when imperfect) and that regulation that does anything other than reinforce those self-correcting dynamics is generally unwise. The practical result was an FTC that focused primarily on policing for *deceptive* practices, and that used the unfair-practices authority primarily as a supplement to get at not-quite-deceptive information asymmetries or, occasionally, to prevent overtly harmful conduct (such as harassment) that was not clearly informational. With either authority, the Commission proceeded with caution, preferring industry self-policing to government intervention, case-by-case enforcement to regulation (or even strategic enforcement "sweeps"), and disclosures to bans or mandates. The

full extent of its authority to prevent abusive price gouging on consumer health products" necessary to protect against the spread of COVID-19).

21. *See generally* Philip Mirowski, *The Political Movement that Dared Not Speak Its Own Name: The Neoliberal Thought Collective Under Erasure* (Inst. for New Econ. Thinking, Working Paper No. 23, 2014), https://www.ineteconomics.org/uploads/papers/WP23-Mirowski.pdf [https://perma.cc/S5GD-KVBU] (examining and criticizing the dismissal of neoliberalism as a concept among historians).

22. *See* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 491-522 (2021); Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323 343-51 (2008).

23. For further discussion, see Luke Herrine, *What Is Consumer Protection For?*, 34 LOY. CONSUMER L. REV. 242, 250-61 (2022).

hope was always to do the least possible to nudge the market back into its self-corrective baseline and to avoid making any overt "policy" decisions.[24]

As late as 2008, this way of thinking about consumer protection seemed to have no serious rival. Yet today it is on the back foot. It suffered its first major blow in the aftermath of the global financial crisis of 2007. The suddenly vivid connection between unpoliced predatory practices in the mortgage industry and the stability of the entire global economy made an absurdity of market self-correction.[25] Congress created CFPB with an added "abusive practices" authority explicitly designed to overcome the shortcomings of the underutilized unfair-practices authority.[26] The Bureau was aggressive from the beginning, combining regulation with enforcement to target power asymmetries that could not be attributed to informational problems (such as avoiding usury prohibitions and taking advantage of consumers' limited options). Precrisis efforts to incorporate behavioral economics into policy suddenly had a much easier time gaining an audience.[27]

A more decisive blow came with the Biden administration. As he did in several other areas of economic regulation, President Biden appointed younger progressive bureaucrats who had been disillusioned by the post-crisis response of the Obama administration and saw the need for a break with (at least some) neoliberal policies.[28] Many of these appointees were also driven by a dissatisfaction with the evident failures of the notice-and-consent approach to disciplining the growing power of Big Tech firms.[29]

There has consequently been a flurry of regulatory activity at the FTC and CFPB using the unfair-practices authority since President Biden took office.[30] Through enforcement actions and sector-wide regulations, these agencies have used the unfair-practices authority to police unequal treatment, to set baseline standards for quality, and to prevent firms from taking advantage of consumers' vulnerabilities. A case-by-case approach to pick

24. *Infra* Part I.

25. *Infra* Section III.B.

26. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1011-1018, 1031(a), 124 Stat. 1376, 1964-79, 2005 (2010) (codified as amended at 12 U.S.C. §§ 5491-5499, 5531(a)); Herrine, *supra* note 22, at 432-35.

27. *Infra* Section III.B.1.

28. *See, e.g.*, Eric Levitz, *The Biden Administration Just Declared the Death of Neoliberalism*, N.Y. MAG. (May 3, 2023), https://nymag.com/intelligencer/2023/05/biden-just-declared-the-death-of-neoliberalism.html [https://perma.cc/AV8T-RRKE]; Matthew Duss & Ganesh Sitaraman, *The Era of Neoliberal U.S. Foreign Policy Is Over*, FOREIGN POL'Y (May 18, 2023, 8:05 AM), https://foreignpolicy.com/2023/05/18/neoliberal-foreign-policy-biden-sullivan [https://perma.cc/G95S-P3P8]. *But see* Amy Kapczynski, *What's Beyond "Beyond Neoliberalism"?*, L. & POL. ECON. PROJECT (Jan. 9, 2023), https://lpeproject.org/blog/whats-beyond-beyond-neoliberalism [https://perma.cc/EL47-SSYN]; Interview by Rafael Khachaturian with Martijn Konings, Assoc. Professor of Pol. Econ., Univ. of Sydney (Apr. 5, 2022), https://jacobin.com/2022/04/neoliberalism-biden-trump-keynesianism-bailouts-capitalism-democracy [https://perma.cc/8W5Q-HG6M].

29. *Infra* Section III.C.

30. *Infra* Part II.

off "bad apples" has given way to campaigns against particular types of conduct—imposing hidden fees, using negative option contracts, selling data that can be used to track people to "sensitive locations"—that use specific enforcement actions to build groundwork for sector-wide rulemakings. Disclosure remedies have largely been scrapped in favor of prohibitions and mandates, including banning several repeat offenders from doing further business in the industry. In several contexts, the unfair-practices authority has been used to protect the interests of disempowered purchasers who are not the end users of goods and services, such as gig workers and small business borrowers.[31]

This is not just the predictable uptick in regulatory action that one expects when a Republican administration is swapped out for a Democratic one. It represents a qualitative change in how consumer protection regulators (or at least liberal and progressive ones) go and think about their task. In particular, the new generation of regulators has been critical of models that overestimate consumers' capacities to discipline sellers merely through shopping behavior—models that have caused regulators to underestimate the work that consumer protection must do to prevent sellers from dominating consumers.[32] Drawing on a variety of social science research, they have sought to trace and respond to the many ways that sellers can exert power over consumers and the way that consumers are differentially empowered.

The first task of this Article is to describe this paradigm shift and to situate it in historical context. The second is to reconstruct its theoretical premises and argue for their superiority over the consumer sovereignty framework. Because the new framework is focused on the many ways that market structure can create problematic power imbalances between sellers and consumers, I refer to it as the *antidomination* framework.[33]

The antidomination framework draws out both practical and normative conclusions from its skepticism about the power of informed consumer choice. Rather than trying to arrange markets so that competition and consumer choice do all the work, it builds inductive models about how those forces work in different contexts. The goal is to design rules that channel these dynamics in more beneficial ways, with special attention on protecting consumers most vulnerable to their effects.[34] Rather than relying on actual or imagined payment decisions as all-things-considered value trade-

31. *Infra* Part II.

32 *Infra* Section IV.A.

33. In previous work, and even in earlier drafts of this work, I have used the term "moral economy framework" to refer to similar theoretical moves. That term emphasized the coordination that is always at play even in competitive markets and the unavoidability of substantive moral deliberation in determining how to coordinate. It also points toward a tradition of thinking about economic ordering from below. I have found that this terminology is confusing to some readers—in part because it has been used in a variety of contexts for different purposes—and I have adopted "antidomination" in an effort to clarify. The reasoning for this term is discussed below.

34. *Infra* Section V.A.

offs, it recognizes the distortions that resource inequalities create. And it aims to correct for those distortions by sympathetically interpreting consumers' *interests* in a given context[35]—saving enough for retirement, for instance, or not being harassed by stalkers with access to location data, or understanding how to choose a mortgage. Then one can detect what amounts to a "market failure" relative to those interests, rather than relative to an ideal in which free competition and "rational" consumer choices govern all outcomes.

The result of this change in perspective is a more open-textured and flexible unfair-practices authority—one that envisions a larger role for administrative agencies in shaping the processes and outcomes of consumer markets, and one that invites more contestation about which and whose interests such markets should further. If these changes seem to raise the specter of bureaucratic overreach and hubris, we have several reasons not to let that deter us. For one thing, facilitating consumer choice is still a central value of consumer protection agencies, even if they think about how to accomplish that task differently and allow room for other values. For another, establishing an unfair practice is not simply a matter of declaring it so: an agency must still put forward evidence of consumer injury and evidence that intervention is not going to make things worse (even if what is "worse" is contestable). Perhaps most importantly, the risk of regulatory overreach should be balanced against the very real risk of regulatory *under*reach: the potentially explosive effects of which were in evidence in the financial crisis that inspired the present reconsideration.

In the remainder of this Article, I explain this conception of unfair-practices authority at greater length, as well as how it fits into doctrine. Part I introduces UDAP and explains how the consumer sovereignty framework came to dominate its interpretation. Part II explains how the consumer sovereignty framework lost its dominance, focusing on the financial crisis and the concerns about Big Tech. Part III describes how this has tipped over into a new approach in the Biden administration. Part IV outlines the antidomination framework as a way to make sense of this new approach. And Part V reinterprets the unfair-practices doctrine in light of this new understanding, with a particular focus on mitigating worries about paternalism.

I. UDAP and Consumer Sovereignty

A. Doctrine

Our doctrinal focus is the prohibition on "unfair acts or practices" contained in several federal statutes and most state codes.[36] This

35. *Infra* Section V.B.
36. *See* sources cited *supra* notes 12-15.

prohibition is usually paired with a prohibition on "deceptive acts or practices" (creating UDAP authority) and sometimes—most notably in the Consumer Financial Protection Act (CFPA)—with a prohibition on "abusive acts or practices" (creating UDAAP authority). But unfairness is the broadest concept. Deceptive and abusive practices are ipso facto unfair, but a practice can be unfair without being deceptive or abusive.[37] Tracking the use of the unfair-practices authority thus allows for a broad lens on how agencies that regulate consumer-facing conduct are thinking about their mission.

UDAP authority was originally given to the FTC in 1938,[38] and others with UDAP authority generally look to the FTC as their first guide to its meaning. From early on, it has been agreed that UDAP, and the unfair-practices authority in particular, was meant to give the FTC the capacity to determine which practices undermine consumers' legitimate interests in a *flexible* way—to keep up with business innovation—and in an *evolving* way—to keep up with changes in how consumers' interests are defined and

37. *See* Int'l Harvester Co., 104 F.T.C. 949, 1060 (1984) ("[U]nfairness is the set of general principles of which deception is a particularly well-established and streamlined subset."); J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MKTG. 192, 196 (2003) ("Although in the past [deception and unfairness] ha[ve] sometimes been viewed as mutually exclusive legal theor[ies], commission precedent incorporated in [a] statutory codification makes clear that deception is properly viewed as a subset of unfairness . . . . [T]he primary difference between full-blown unfairness analysis and deception analysis is that deception does not ask about offsetting benefits."); *see also* FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 245 n.4 (3d Cir. 2015) (noting that "[t]he FTC has on occasion described deception as a subset of unfairness" and collecting sources).

38. Wheeler-Lea Act, ch. 49, sec. 3, § 5(a), 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a)). The original FTC Act prohibited only "unfair methods of competition." *See* FTC Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45). The FTC first proposed amending section 5 to add a prohibition on unfair practices (with no mention of deceptive practices) in 1919. *See High Cost of Living as Affected by Trust and Monopolies: Hearing Before the H. Comm. on the Judiciary*, 66th Cong. 25-26 (1919) (statement of Victor Murdock, Comm'r, Fed. Trade Comm'n). But it was not then concerned with consumer protection; rather, it wanted to clarify that it could police the relationship between firms at different levels of supply chains. *See id.* at 9-12 (statement of Murdock) (explaining the difficulties in challenging anticompetitive conduct when the firms involved are "on different planes" and thus "might not be, in the strictest legal parlance, competitors"). In 1921, the Packers and Stockyards Act took up this suggestion in regulating the meatpacking industry, although the authority was ultimately given to USDA rather than the FTC. *See* Packers and Stockyards Act, ch. 64, §§ 201-205, 42 Stat. 159, 160-63 (1921) (codified as amended at 7 U.S.C. §§ 191-198b); *see also* Wheeler-Lea Act § 5(a) (excluding "persons, partnerships, or corporations subject to the Packers and Stockyards Act" from the FTC's jurisdiction). The issue became salient for consumer protection after *FTC v. Raladam Co.*, 283 U.S. 643 (1931), in which the Supreme Court held that the "unfair methods of competition" authority could only apply to conduct harmful to consumers if the Commission could produce evidence of harm to a competitor. *Id.* at 646-48; H.R. REP. NO. 75-1613, at 1-3 (1937) (discussing congressional desire to overrule *Raladam*); 83 CONG. REC. 3255 (1938) (statement of Sen. Burton Wheeler) (discussing desire to "make[] the consumer . . . of equal concern before the law with the merchant"). It became a serious suggestion when Congress began to consider regulating drug advertising, and the Commission decided to take advantage of the legislative momentum. *See also* INGER L. STOLE, ADVERTISING ON TRIAL: CONSUMER ACTIVISM AND CORPORATE PUBLIC RELATIONS IN THE 1930S 145-46 (2006).

which are deemed worthy of protection.[39] As Learned Hand put it in a potent quotable, the FTC must "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[40] Reviewing courts have consistently affirmed that the FTC may, in the words of the leading case, act "like a court of equity" in "measuring a practice against the elusive, but congressionally mandated standard of fairness."[41] Even though the scope of unfairness is nominally a question of law for courts to decide, courts have (after initial hostility) been deferential—reviewing the FTC's unfairness determinations primarily for internal consistency and substantial evidence.[42]

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39. S. REP. NO. 74-1705, at 2 (1936) (discussing impossibility of enumerating practices to be condemned). This notion of "unfair" grew out of flexibility of the earlier notion in "unfair methods of competition." FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 240 (1972) (observing that Congress "explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase . . . by enumerating the particular practices to which it was intended to apply" (first citing S. REP. NO. 63-596, at 13 (1914); and then citing H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.))); *see also* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 967 (D.C. Cir. 1985) ("Congress has not at any time withdrawn the broad discretionary authority originally granted the Commission in 1974 to define unfair practices on a flexible, incremental basis.").

40. FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd in part on other grounds*, 302 U.S. 112 (1937). This was an interpretation of the "unfair methods of competition" authority, before Wheeler-Lea, but UDAP is an extension of that authority, and unfair-methods cases have often been used to guide courts' interpretation of the meaning of unfair practices. *See* cases cited *infra* note 42; *see also* FTC v. Bunte Bros., 312 U.S. 349, 353 (1941) (referring to "unfair methods of competition" as a "flexible concept with evolving content").

41. *Sperry & Hutchinson*, 405 U.S. at 244; *see* FTC v. Accusearch Inc., 570 F.3d 1187, 1194-95 (10th Cir. 2009) ("[T]he [FTC Act] enables the FTC to take action against unfair practices that have not yet been contemplated by more specific laws."); *Wyndham*, 799 F.3d at 245-46; FTC v. Neovi, Inc., 604 F.3d 1150, 1156-57 (9th Cir. 2010); Pa. Funeral Dirs. Ass'n, Inc. v. FTC, 41 F.3d 81, 86-92 (3d Cir. 1994); *Am. Fin. Servs.*, 767 F.2d at 979 n.27; Harry & Bryant Co. v. FTC, 726 F.2d 993, 999-1001 (4th Cir. 1984).

42. The only Supreme Court case to interpret the unfair-practices authority, *Sperry & Hutchinson*, was not really a consumer protection case and discussed the scope of the authority only in dictum. It nonetheless laid out a highly deferential role for the courts in reviewing exercises of the unfair-practices authority. In that case, the Commission had deemed certain of Sperry & Hutchinson's business policies "unfair acts or practices" and ordered their cessation, on the ground that they were anticompetitive. 405 U.S. at 235; Sperry & Hutchinson Co., 73 F.T.C. 1099, 1148 (1968). The Fifth Circuit reversed the Commission's order, concluding that the challenged practices were not anticompetitive—which the Fifth Circuit thought precluded a section 5 violation. *Sperry & Hutchinson*, 405 U.S. at 235. At the Supreme Court, the Commission did not challenge the Fifth Circuit's competition holding but instead argued that the unfair-practices authority empowered it to invalidate practices that harm consumers whether or not they are also anticompetitive. *Id.* at 239. The Supreme Court emphatically agreed, emphasizing the FTC's vast discretion to "consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws" in exercising its unfair-practices authority. *Id.* at 244. It nonetheless ruled against the Commission because the only grounds articulated in its order concerned the practices' asserted anticompetitive effects, rather than their immediate impacts on consumers. *Id.* at 245-50. *See generally* SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

Other Supreme Court cases sometimes cited in court of appeals cases interpreting the unfair-practices authority actually interpret the FTC's "unfair methods of competition" authority. But in any case, they are invariably cited for their statements about how broad that authority is (and how deferential courts should be). *See, e.g.*, LabMD, Inc. v. FTC, 894 F.3d 1221, 1227, 1233 n.35 (11th Cir. 2018) (citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986)); Orkin

While the Supreme Court's increasingly skeptical attitude toward the administrative state may well change things (on which more below),[43] this deference has meant that the meaning of unfair practices is primarily up to the Commission itself, with Congress chiming in occasionally.

In 1964, the FTC issued its first sector-wide unfairness regulation, on cigarette labels, and articulated three nonexclusive factors it would consider in determining whether an act or practice is "unfair":

> (1) "whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness";
>
> (2) "whether [the practice] is immoral, unethical, oppressive, or unscrupulous"; and
>
> (3) "whether [the practice] causes substantial injury to consumers (or competitors or other businessmen)."[44]

After the Supreme Court cited these factors approvingly in its 1972 decision *Sperry & Hutchinson Co. v. FTC*,[45] states that enacted their own "mini-FTC Acts" began to treat them as a multifactor test, which soon became known as the Cigarette Rule.[46] Many states still use the Cigarette Rule, but the FTC never treated these factors as a test.

At the federal level, these three factors have been superseded by what is sometimes called the three-part test, and other times the substantial-injury test. This test, which elaborates on the third factor in the Cigarette Rule, asks whether an act or practice is "[1] likely to cause substantial injury to consumers which is [2] not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition."[47] Congress added this substantial injury test to the Federal Trade Commission Act in 1994.[48] But it was first articulated over a

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Exterminating Co. v. FTC, 849 F.2d 1354, 1364 1367-68 (11th Cir. 1988) (citing *Ind. Fed'n of Dentists*, 476 U.S. at 454-55). For examples of cases that have ruled against the FTC's application, see *Sperry & Hutchinson*, 405 U.S. at 245-50 , which set aside an FTC order because it was unsupported by the grounds originally articulated for it; *LabMD*, 894 F.3d at 1236-37, which set aside an FTC order for insufficient evidence; and *Katharine Gibbs School (Inc.) v. FTC*, 612 F.2d 658, 670 (2d Cir. 1979), which set aside an FTC rule for failing to articulate what was unfair about the condemned practices.

43. *See infra* Section V.B.

44. Cigarette Rule, 29 Fed. Reg. 8324, 8355 (July 2, 1964).

45. 405 U.S. 233.

46. Herrine, *supra* note 22, at 475-77.

47. 15 U.S.C. § 45(n) (2018).

48. Federal Trade Commission Act Amendments of 1994, sec. 9, § 5(n), Pub. L. No. 103-312, 108 Stat. 1691, 1695 (codified as amended at 15 U.S.C. § 45(n)).

decade earlier in an FTC policy statement.[49] That policy statement was issued in the waning days of the Carter administration in response to threats from powerful members of Congress to eliminate the unfair-practices authority altogether.[50] As codified, this new test—in addition to eliminating the use of open-ended terms like "immoral, unethical, oppressive, or unscrupulous"[51]—limits the relevance of public policy: "the Commission may consider established public policies as evidence to be considered with all other evidence,"[52] but "[s]uch public policy considerations may not serve as a primary basis for such determination."[53] Both changes were made in the name of quelling legislators' stated concerns about bureaucratic overreach.

For many years, the substantial-injury test has been understood to enshrine a consumer sovereignty norm—one that requires the FTC generally to let the market correct itself, intervening only in situations in which informational market failures clearly prevent consumers from understanding the choices in front of them and in which improving information will clearly do more good than harm. As I have previously argued, this interpretation relies on a revisionist history promoted by the Reaganites who took control of the FTC *after* the release of the policy statement.[54] Before President Reagan took office, many of these reformers were helping to drive the backlash against the more aggressive FTC of the 1970s.[55] Timothy J. Muris, who began his career participating in that backlash[56] and has since been both Director of the Bureau of Consumer Protection and Chair of the FTC,[57] put it succinctly: "There really was a Reagan Revolution in antitrust and consumer protection. As I like to say, my side won."[58]

The post-1980 change in regulators' understanding of the unfair-practices authority cannot simply be read off of the substantial-injury test.

49. Letter from the Commissioners of the Fed. Trade Comm'n to Wendell H. Ford, Chairman, Consumer Subcomm. of the Senate Comm. on Com., Sci. & Transp., and John C. Danforth, Ranking Minority Member, Consumer Subcomm. of the Senate Comm. on Com., Sci. & Transp. (Dec. 17, 1980), *reprinted in* Int'l Harvester Co., 104 F.T.C. 949 app. (1984) [hereinafter 1980 Policy Statement]. The policy statement provided, "To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." *Id.* app. at 1073.

50. Herrine, *supra* note 22, at 509-14.

51. Cigarette Rule, 29 Fed. Reg. 8324, 8355 (July 2, 1964).

52. 15 U.S.C. § 45(n) (2018).

53. *Id.*

54. Herrine, *supra* note 22, at 514-18.

55. *Id.* at 515.

56. *Id.*; Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 395 (1997).

57. *Timothy J. Muris*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/commissioners-staff/timothy-j-muris [https://perma.cc/96R8-FT2P].

58. Interview by John Villafranco with Timothy J. Muris, Chairman, Fed. Trade Comm'n (May 17, 2004), *in* 18 ANTITRUST 9, 10 (2004).

Rather, it is a result of a gloss put on that test by administrators following a common way of thinking: the consumer sovereignty framework.

B. The Trauma of KidVid and Avoidance of Regulation

The first aspect of the consumer sovereignty framework has been a hesitancy to use the unfair-practices authority in any way that might be even the least bit controversial. This hesitancy is in part an institutional avoidance response that developed out of the trauma of 1979 and 1980, during which Congress—pressured by a newly unified business lobby—reacted furiously to the FTC's expanded consumer protection agenda of the 1970s.

Those events revolved around the KidVid rulemaking that began in 1978. As initially proposed, KidVid contemplated a three-tier set of regulations on television advertising: (1) a ban on all advertisements (no matter the subject) targeted at children younger than eight; (2) a ban on advertisements targeted at older children (ages eight to eleven or so) for sugared foods shown to cause tooth decay; and (3) disclosure or counter-advertising requirements for all other sugared-food advertisements targeted at older children.[59] Congress had initially encouraged the FTC to undertake this rulemaking,[60] and President Carter had appointed Michael Pertschuk as FTC Chair in part because regulating children's advertising was at the top of Pertschuk's priority list.[61] From the perspective of 1978, Pertschuk's appointment looked like the next step in a decade-long campaign by the Naderite consumerist movement to create a more muscular consumer

59. *See* Susan Bartlett Foote & Robert H. Mnookin, *The "Kid Vid" Crusade*, PUB. INT., Fall 1980, at 90, 92-93; Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 79-80 (2006); ELLIS M. RATNER, RANDELL C. OGG, JOHN F. HELLEGERS, SANDRA ADAIR, GRACE POLK STERN & LAWRENCE ZACHARIAS, FED. TRADE COMM'N, FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 10-12 (1978); *see* Children's Advertising, 43 Fed. Reg. 17967, 17969 (Apr. 27, 1978). The proposed regulation made clear that this was only an initial proposal. In the hearings and deliberations that followed, the FTC made clear that it was open to other possibilities.

60. *See* MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 79 (1982) ("[T]he [FTC's] initiative on children's advertising was directly responsive to persistent congressional prodding dating back to 1974."); RICK PERLSTEIN, REAGANLAND: AMERICA'S RIGHT TURN, 1976–1980, at 245 (2020) (discussing expressions of congressional support for children's-advertising regulation, including statements that additional FTC funding should be made available if necessary); Molly Niesen, *From Gray Panther to National Nanny: The Kidvid Crusade and the Eclipse of the U.S. Federal Trade Commission, 1977–1980*, 8 COMMC'N, CULTURE & CRITIQUE 576, 582 (2015) (explaining that "even some of the most conservative Republican members of Congress expressed support for the kidvid proposal").

61. *See, e.g.*, Molly Niesen, Crisis of Consumerism: Advertising, Activism, and the Battle over the U.S. Federal Trade Commission, 1969–1980, at 190 (2013) (Ph.D. dissertation, University of Illinois Urbana–Champaign), https://www.ideals.illinois.edu/items/46622 [https://perma.cc/Q8KL-VCAP] (noting that President Carter, during his initial meeting with Michael Pertschuk, asked "probing" questions about "what [Pertschuk's] priorities would be" as FTC Chair and "was very supportive" of Pertschuk's response that his priorities "were consumer protection focused, on exploitation of the poor and of children").

protection practice at the Commission.[62] With its budget expanded and staff professionalized, it gained new rulemaking authorities,[63] opened a separate Bureau of Consumer Protection,[64] created branch offices around the country,[65] and expanded its use of UDAP authority to set standards for business conduct across whole sectors.[66] By the time it published its KidVid proposal, the Commission was in the middle of seventeen rulemakings and many more enforcement efforts, invoking both unfair- and deceptive-practices authorities.[67]

The Commission and its actions were generally popular, KidVid included.[68] But the regulations—especially KidVid—struck fear and anger into the hearts of the most powerful businesses in the country, including (in advertising) an industry full of specialists in mass communications.[69] These businesses just happened to have been in the process of developing

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62. *See* Herrine, *supra* note 22, at 480-84; *cf.* DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 148-49 (1989); PERTSCHUK, *supra* note 60, at 5-45.

63. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, sec. 202(a), § 18(a)(1), 88 Stat. 2183, 2193 (1975) (codified as amended at 15 U.S.C. § 57a(a)(1)); H.R. REP. NO. 93-1606, at 31 (1974) (Conf. Rep.) (explaining that the 1975 amendments are intended in part to "codify the Commission's authority to make substantive rules for unfair or deceptive acts or practices"); Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 HARV. L. & POL'Y REV. 519, 531 (2022).

64. ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 113 (1980). "The Bureau of Restraint of Trade became the Bureau of Competition, and the Bureau of Deceptive Practices was retitled the Bureau of Consumer Protection" as part of the 1970 reorganization prodded by the Nader Report. *Id.* The two previous Bureaus had been created as part of a previous reorganization in 1961 after the Landis Report. *Id.*

65. *See* Herrine, supra note 22, at 482.

66. Herrine, *supra* note 22, at 482-84. Many of the regulations of the 1970s involved disclosures in the name of simplifying consumer choice and so could be characterized as consistent with a broad notion of consumer sovereignty. *E.g.*, Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 23998 (June 2, 1978) (codified as amended at 16 C.F.R. pt. 456) (requiring eyeglass prescribers to release the prescription without request in order to facilitate shopping); Used Motor Vehicle Trade Regulation Rule, 49 Fed. Reg. 45725 (Nov. 19, 1984) (codified as amended at 16 C.F.R. pt. 455) (regulating disclosures in used car sales). The relationship between Naderism and consumer sovereignty (and, indeed, picking apart the different elements in the consumer sovereignty framework—case-by-case regulation versus a focus on consumer choice, for example) is beyond our scope here. For now, the point is just that the FTC was more aggressive with consumer protection in the 1970s than it had been previously and that the validity of this aggression was a major political issue that shaped the future of the Agency.

67. *See* Recommendation No. 79-1 of the Administrative Conference of the United States Concerning Hybrid Rulemaking Procedures of the Federal Trade Commission, 44 Fed. Reg. 38817, 38819-20 (July 3, 1979).

68. PERLSTEIN, *supra* note 60, at 341; Herrine, *supra* note 22, at 485-87.

69. Westen, *supra* note 59, at 87 ("[W]e were opposed by the cereal industry, the sugar industry, the candy industry, the toy industry and the broadcast industry. The farmers were against us because they were raising wheat that was being used in sugared cereals. We even had the cigarette industry against us."); Niesen, *supra* note 60, at 583 ("'[I]t wasn't just food or toy advertisers[;] it was everyone who advertised, looking at it as a threat to their freedom' . . . ." (quoting a personal communication with Michael Pertschuk)); Niesen, *supra* note 60, at 583 (recounting that a publisher of a trade magazine for toy manufacturers "issued a letter urging 'every industry affected by a potential ban on TV advertising of its products to marshal its men and money—and document the disaster which would follow a ban'").

the modern lobbying industry.[70] When KidVid came around they were ready to test their strength. They fired up a "Stop KidVid" campaign.[71] This campaign succeeded beyond anybody's expectations—flipping the direction of political energy on a dime. In a dramatic reversal of its previous egging on of the FTC, *The Washington Post* (which was itself concerned about advertising revenues)[72] published a now-infamous editorial accusing the FTC of aspiring to be the "national nanny."[73] Inside the Beltway, at least,[74] it became a bipartisan (though far from universal) opinion that the FTC was too beholden to scolds seeking to tell people how to live their lives and needed reining in.

In the ensuing battle, Congress—which had only the year before been asking why the FTC wasn't moving faster—briefly cut off the FTC's funding altogether,[75] restructured the FTC's rulemaking process,[76] and added a two-house legislative veto (which was struck down).[77] And more was threatened: "By June [of 1980], almost 150 anti-FTC bills had been introduced. By Labor Day, the *Chicago Tribune* recorded, the agency was 'fighting for its life.'"[78] Although the KidVid rulemaking contemplated using both unfair- and deceptive-practices authorities,[79] the campaign against the FTC focused on the unboundedness of the unfair-practices authority

70. *See* Herrine, *supra* note 22, at 491-92; LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE (2015); BENJAMIN C. WATERHOUSE, LOBBYING AMERICA: THE POLITICS OF BUSINESS FROM NIXON TO NAFTA 87-100 (2014).

71. *See id.* at 502-09; Niesen, *supra* note 61, at 216-20.

72. Niesen, *supra* note 61, at 200-07.

73. Editorial, *The FTC as National Nanny*, WASH. POST (Feb. 28, 1978, 7:00 PM EST), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b [https://perma.cc/H2AG-VELM]; PERTSCHUK, *supra* note 60, at 69-70.

74. The midterm elections saw the defeat or retirement of prominent liberals, as well.

75. A.O. Sulzberger Jr., *After Brief Shutdown, F.T.C. Gets More Funds*, N.Y. TIMES, May 2, 1980, at D1, D9, https://timesmachine.nytimes.com/timesmachine/1980/05/02/111236354.pdf.

76. Earl. W. Kintner, Christopher Smith & David B. Goldston, *The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC's Rulemaking and Enforcement Authority*, 58 WASH. U. L.Q. 847, 853-55 (1980).

77. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21, 94 Stat. 374, 393-96, *invalidated by* Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd mem. sub nom.* Process Gas Consumers Grp. v. Consumer Energy Council of Am., 463 U.S. 1216 (1983); *cf.* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (invalidating a single-house veto provision).

78. PERLSTEIN, *supra* note 60, at 601.

79. Children's Advertising, 43 Fed. Reg. 17967, 17969 (Apr. 27, 1978) (explaining "that the televised advertising of any product directed to young children who are too young to understand the selling purpose of, or otherwise comprehend or evaluate, commercials may be unfair and deceptive within the meaning of Section 5 of the Federal Trade Commission Act, requiring appropriate remedy"); *id.* at 17970 (posing the question whether, for First Amendment commercial-speech purposes, "advertising to young children [is] deception solely because they are unable to appreciate the commercial nature of such messages").

in particular, arguing that it gave license for bureaucratic paternalism.[80] Among other things, the Federal Trade Commission Improvements Act of 1980 temporarily prohibited the FTC from using its unfair-practices authority in any rulemaking; and it permanently prohibited it from using that authority in KidVid[81] (which the FTC ultimately chose to terminate).[82] The unfair-practices authority was nearly eliminated altogether.[83] It was to defend against this outcome that Pertschuk's FTC issued a policy statement that clarified the scope of its powers by reinterpreting the Cigarette Rule that it had been disclaiming as a test for years.[84]

After this ordeal, Congress did not reauthorize the FTC until the 1994 amendments that codified the three-part test.[85] Congressional hostility would itself have been enough to reduce enforcement and regulatory actions. But it was also accompanied by a change in attitude within the Commission. When President Reagan took office, he appointed leadership who had just been attacking the FTC as out of control.[86] James C. Miller III, the first Reagan-era Chair, dramatically reduced the number of enforcement actions and throttled ongoing regulations.[87] On the heels of designing cost-benefit analysis at the Office of Information and Regulatory Affairs

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80. Herrine, *supra* note 22, at 507-08 (explaining that "[t]he vagueness of the term 'unfair' and the power it gave the FTC became a central talking point" during the anti-KidVid campaign); *id.* at 505-06 (discussing contemporaneous essays that "were largely critical of increased FTC enforcement and included negative assessments of the vagueness of the unfairness authority and the purported incoherence of the agency's approach in terms of an attempt to maximize 'consumer welfare'"); *id.* at 508 n.452 (collecting contemporaneous "articles and statements from legal academics on the absurdity of having an agency determine what is 'fair' without clear guidelines"); Foote & Mnookin, *supra* note 59, at 91 ("Under the cover of its unfairness theory, the FTC exaggerated its proper role with respect to child rearing and tried to impose its own notions of what is 'good' for children on all American families—despite the lack of social consensus with respect to either the nature or extent of the underlying problems with commercial television.").

81. *See* Kintner, Smith & Goldston, *supra* note 76, at 855-56.

82. Michael Decourcy Hinds, *F.T.C. Drops Consideration of Rule on Children's TV Ads*, N.Y. TIMES (Oct. 1, 1981), https://www.nytimes.com/1981/10/01/arts/ftc-drops-consideration-of-rule-on-children-s-tv-ads.html [https://perma.cc/35MQ-RMAH]. *See generally* FED. TRADE COMM'N, FINAL STAFF REPORT AND RECOMMENDATION: IN THE MATTER OF CHILDREN'S ADVERTISING (1981) (recommending that the FTC end the KidVid rulemaking efforts).

83. *See, e.g.*, *Oversight of the Federal Trade Commission: Hearings Before the Subcomm. for Consumers of the S. Comm. on Com., Sci. & Transp.*, 96th Cong. *passim* (1979); Herrine, *supra* note 22, at 509.

84. *See* 1980 Policy Statement, *supra* note 49.

85. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, sec. 9, § 5(n), 108 Stat. 1691, 1695 (1994); Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1955 (2000); *see* Herrine, *supra* note 22, at 440-41, 518-19.

86. Herrine, *supra* note 22, at 514; CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 68-73 (2016).

87. *See* Budnitz, *supra* note 56, at 394-95; RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES 187-205 (2d ed. 1996).

(OIRA),[88] he brought in new staff who agreed with his critiques of the overly moralistic and insufficiently economic FTC that preceded him.[89]

This restructuring-cum-reorientation was never seriously challenged. Indeed, the next Democratic Chair, Robert Pitofsky, who was a Commissioner during the KidVid ordeal, was if anything more worried about using unfair-practices authority than his Republican predecessors.[90] And so, for decades now, FTC staff and political appointees have warned each other of the horrors that can result when one does anything that approximates the actions of the 1970s. Using the unfair-practices authority, especially in a way that seems to reveal a policy preference rather than reinforcing consumer choices, is at the top of that list.[91]

Although the scaled-back approach of this era was justified using a more or less consistent (if not ultimately justifiable) intellectual framework, an inchoate fear of overstepping—of doing "too much" or being "paternalistic" in some vague sense—has exerted an influence that cannot fully be made sense of in analytical terms. Even as late as 2014, when I interned at the still-new CFPB, I recall veteran consumer protection bureaucrats talking vaguely about how an otherwise justifiable enforcement action might be unwise because of something called "KidVid" that happened long ago.

C. The Consumer Sovereignty Framework

Still, there was a shared language of justification—a common internal perspective among consumer protection regulators in these years. That perspective is the consumer sovereignty framework proper. Consumer sovereignty refers to the idea that, if social ordering is left to market competition, consumers' choices will guide outcomes.[92] It comes in both neoclassical and Hayekian versions, which are usually mashed up by the neoliberals who took over the FTC in 1981. On a neoclassical vision of markets, consumer sovereignty is desirable because and to the extent that consumers

88. *See* HARRIS & MILKIS, *supra* note 87, at 187; RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY : HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 24-26 (2008).

89. JAMES C. MILLER III, THE ECONOMIST AS REFORMER: REVAMPING THE FTC, 1981-1985, at 97-98 (1989); Budnitz, *supra* note 87, at 394-95; HARRIS & MILKIS, supra note 87, at 187-205.

90. *See* HOOFNAGLE, *supra* note 86, at 75-76 ("Pitofsky believed that the Agency's unfairness power, which was used to justify actions such as the KidVid rule-making, was politically dangerous and he was reluctant to employ it.").

91. *See* Telephone Interview with Peggy Twohig, U.S. Dep't of the Treasury (Apr. 4, 2021); Anonymous Interview No. 3, Consumer Fin. Prot. Bureau (Aug. 2, 2023); Telephone Interview with Lesley Fair, *supra* note 90.

92. *See* Maxime Desmarais-Tremblay, *W.H. Hutt and the Conceptualization of Consumers' Sovereignty*, 72 OXFORD ECON. PAPERS 1050, 1051, 1057-59 (2020); NIKLAS OLSEN, THE SOVEREIGN CONSUMER: A NEW INTELLECTUAL HISTORY OF NEOLIBERALISM 25-26 (2019); Tibor Scitovsky, *On the Principle of Consumers' Sovereignty*, 52 AM. ECON. REV. 262, 262, 264-68 (1962).

are best positioned to know what furthers their own welfare[93] (their choices "reveal preferences").[94] In a "perfectly competitive" market, consumers will be able both to choose the best option for themselves in the short term and to guide the direction of business innovation toward even better options in the longer term. Such a market will continuously produce "efficient" outcomes in the sense that it will produce the outcomes for which there is the most total willingness to pay.[95]

Neoclassical economists tend to describe actually existing markets in terms of how they deviate from this ideal. From this perspective, the purpose of market regulation is to make actually existing markets work more like the perfectly competitive ideal by eliminating or correcting for "frictions" and "market failures" so that consumers can better optimize. Each area of law has its own market failures to focus on, and consumer protection is usually understood as focusing on those that interfere with consumer decision-making—especially information asymmetries, switching costs, and bounded rationality.[96]

This way of thinking was (and is) usually supplemented by a Hayekian[97] skepticism that regulation can correct for market failures better than can the dispersed wisdom of the market. That way of thinking motivated designing regulation to prod markets to better self-correct rather than to override the "market mechanism."[98]

As mentioned, advocates of the consumer sovereignty view have often argued that their view is legally grounded in the 1980 policy statement

93. *See* Abba P. Lerner, *The Economics and Politics of Consumer Sovereignty*, 62 AM. ECON. REV. 258, 258 (1972).

94. *See generally* P.A. Samuelson, *A Note on the Pure Theory of Consumer's Behavior*, 5 ECONOMICA 61 (1938) (introducing what would come to be known as revealed preference theory).

95. For ease of exposition, I am simply adopting the most commonly used definition of efficiency in applied policy analysis and law and economics: Kaldor-Hicks efficiency. Mark Glick & Gabriel A. Lozada, *The Erroneous Foundations of Law and Economics* 1, 34-36 (INST. FOR NEW ECON. THINKING, Working Paper No. 149, 2021). In fact, the "pure theory" of welfare economics that would be used to describe such a perfect-competition model would be more likely to use the concept of Pareto efficiency, which defines efficiency in terms of being unable to change states without making somebody worse off. *Id.* at 1. This concept is easier to defend (though still ultimately a failed criterion, in my view), but much less practically applicable. And it is rarely invoked in any of the analyses we are concerned with here. *Id.*

96. *See* Herrine, *supra* note 23, at 250-56 (defining the "consumer sovereignty framework" as a regulation model grounded in law and economics that strives to make the real market resemble the ideal free market).

97. It should be noted that F.A. Hayek was not neoclassical. Indeed, he mocked neoclassical theory's assumptions, particularly the information possessed by market actors. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, *passim* (1945). On the effect of Hayek's thought on mainstream economics, despite the contradictions, see PHILIP MIROWSKI & EDWARD NIK-KHAH, THE KNOWLEDGE WE HAVE LOST IN INFORMATION: THE HISTORY OF INFORMATION IN MODERN ECONOMICS 66-101 (2017).

98. *See* MILLER, *supra* note 89, at 7-18 (explaining, as former Chair of the FTC, that the Reagan administration saw promoting competition as the best way to protect consumers).

and the substantial-injury test it created.[99] On this interpretation, the FTC should let consumer choice drive markets and only intervene where rational consumer choice has been demonstrably foiled by some market failure—and even then only when doing so is cost-benefit justified. The "reasonably avoidable" prong requires the Commission to act only when there is an identifiable market failure preventing the normal process by which consumer choice disciplines firm conduct. The "countervailing benefits" prong requires the Commission to think about tradeoffs in the way that consumers do: by deciding how much people are willing to pay for different benefits. The policy statement itself contains language that encourages this reading, with talk of "[n]ormally . . . expect[ing] the marketplace to be self-correcting" and "rely[ing] on consumer choice . . . to govern the market."[100] It underscores that Commission actions are not meant "to second-guess the wisdom of particular consumer decisions" but to protect the "essential precondition[s] to a free and informed consumer transaction, and, in turn, to a well-functioning market."[101] It also talks about unfairness determinations' (at least for "relatively clear-cut injuries") being "based, in large part, on objective economic analysis."[102]

D. Consumer Sovereignty as Deregulation

Under the influence of these views, unfair-practices enforcement dramatically scaled back. Once the Commission of the 1980s completed the rulemaking efforts of the 1970s,[103] it initiated only two more trade-practice rules that invoked a standalone unfair-practices theory.[104] Both of those rules sought to reinforce consumer choice. From 1993 until the Biden administration, the Commission had not (as far as I can tell) initiated any

99. This includes Neil W. Averitt, whose work on the FTC's 1980 policy statement has been referred to as "roughly the same as the tasks of an official ALI Reporter." Email from Richard Craswell, Professor of L., Emeritus, Stanford L. Sch., to author (July 17, 2020, 7:15 PM) (on file with author). *See generally* Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981) (arguing that the 1980 policy statement articulated a concept of consumer sovereignty).

100. 1980 Policy Statement, *supra* note 49, app. at 1074.

101. *Id.*

102. *Id.* app. at 1075.

103. Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985) (upholding FTC rules governing credit practices); Harry & Bryant Co. v. FTC, 726 F.2d 993 (4th Cir. 1984) (upholding FTC rules governing funeral practices). The Commission of the 1980s also dragged out these rulemaking proceedings, largely because of disagreements and attempts at sabotage. This gave rise to another mythic ghost that haunts the modern Commission: the idea that using the Magnuson-Moss Act to initiate consumer protection rulemakings is not worth it, because it means setting out on a burdensome endeavor. *See* Walters, *supra* note 63, at 522.

104. Mail or Telephone Order Merchandise Rule, 58 Fed. Reg. 49096 (Sept. 21, 1993) (codified as amended at 16 U.S.C. pt. 435); Ophthalmic Practice Rules, 54 Fed. Reg. 10285 (Mar. 13, 1989) (codified as amended at 16 C.F.R. pt. 456).

rulemakings invoking a standalone unfair-practices theory.[105] It also ramped down its individual enforcement actions that involved standalone unfair-practices theories (while also ramping down enforcement overall), with almost no such cases occurring during the 1990s.[106] By the 2000s, the Commission found itself in some cases stretching the deceptive-practices concept to argue that implicit promises or representations were made when the true problem was harm.[107] Former FTC staffers Cobun Keegan and Calli Schroeder refer to this phenomenon as "deception-creep."[108] If deception could not be stretched, the Commission waited for Congress to create a new statute to address a relatively narrow problem rather than attempt to try out new territory itself.[109]

As recently as 2008, the consumer sovereignty framework seemed nigh incontestable. That year, Matthew A. Edwards wrote an article considering the possibility that a new wave of data from behavioral economics on the limits on consumers' ability to parse the information necessary to make optimal purchasing decisions would lead the Commission to rethink its reflexive deference to consumer choice and market self-correction.[110] His answer was: likely not.[111] At least beyond "situations where we can safely assume a consumer goal of wealth-maximization[] and where there is little empirical dispute over the disutility of a particular consumer choice," he argued, "the Commission is likely to be [more] comfortable deferring to congressional policymaking . . . than attempting rulemaking proceedings on its own."[112] He was right, at least in the short term.

105. The Commission did issue rules that invoked the unfair-practices authority, but only paired with the deceptive-practices authority to deal with deception-adjacent conduct. *See, e.g.*, Business Opportunity Rule, 76 Fed. Reg. 76816 (Dec. 8, 2011) (codified at 16 C.F.R. pt. 437).

106. *See* Beales, *supra* note 37, at 195 (explaining that the FTC "showed extreme reluctance to asserts its unfairness authority" after the 1994 reauthorization); Calkins, *supra* note 85, at 1990 (explaining that the FTC "shies away from filing consumer unfairness cases"). *But see* Edwards, *supra* note 22, at 349 (explaining that the FTC's aversion to the unfairness power began to soften "in the late 1990s, as [it] began to show a willingness to plead unfairness in cases where reliance on deception theories alone might have been insufficient or inappropriate"). In fact, most of the cases Matthew A. Edwards cites are from the early 2000s and involve new internet-enabled practices, which will be discussed *infra* Section III.A.1.

107. *See* Beales, *supra* note 37, at 195 n.12 (discussing efforts among FTC staff "to devise a deception theory that was based on an implied representation that clicking the 'x' in the corner box of the Internet window would close the browser"); *cf.* Beales, *supra* note 37, at 195 ("[T]he commission avoided pleading unfairness, sometimes twisting deception theories to get at clearly injurious acts that called for commission action."); Cobun Keegan & Calli Schroeder, *Unpacking Unfairness: The FTC's Evolving Measures of Privacy Harms*, 15 J.L. ECON. & POL'Y 19, 28-30 (2019) (discussing FTC enforcement actions asserting that inadequate privacy disclosures constitute deception).

108. Keegan & Schroeder, *supra* note 107, at 19.

109. Edwards, *supra* note 22, at 350 ("[M]ost recent FTC rulemakings have responded to specific congressional mandates rather than to the Commission's unfairness authority." (footnote omitted)).

110. *Id. passim*.

111. *Id.* at 369-70.

112. *Id.* at 370.

II. UDAP After Consumer Sovereignty

How different things look today. During the Biden administration, the FTC has been explicit about repudiating the consumer sovereignty framework and about the impracticality of relying on notice and disclosure (to facilitate informed consumer choice) as an effective governor of consumer markets. It has been aggressive in using its unfair-practices authority—in enforcement actions, in regulations, in guidance documents. And it has been joined in these endeavors by other agencies with unfair-practices authority, most notably the (relatively new) CFPB.

A. The Repudiation of the Consumer Sovereignty Framework

In a 2022 speech, Samuel Levine, the Director of the FTC's Bureau of Consumer Protection, declared that it was "time to reexamine" the "core assumptions" of the 1980 policy statement, namely that "marketplaces can essentially self-regulate and . . . that consumers themselves are in the best position to avoid harm by evaluating products and service on their own."[113] To cast doubt on markets' propensity to self-correct, Levine pointed out the way that deregulation of the financial markets led first to a savings and loan crisis and then to the global financial crisis.[114] When discussing the shortcomings of consumer choice, Levine turned to the inadequacies of notice and consent given recent developments in the digital economy.[115] Levine has repeated and elaborated these views in multiple settings, hammering especially hard on the "failure of notice and choice" and on the need to be proactive rather than reactive in shaping market outcomes.[116]

113. Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, To Empower, Not to Weaken: Rethinking Consumer Protection in the Digital Age, Remarks as Prepared for Delivery to the European Consumer Organisation 2-3 (Sept. 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/S.LevineBEUCspeech9272022FINAL.pdf [https://perma.cc/5GD9-TU88].

114. *Id.* at 3.

115. *Id.* at 6.

116. Samuel Levine, Dir., Bureau Of Consumer Prot., Fed. Trade Comm'n, Toward a Safer, Freer, and Fairer Digital Economy: How Proactive Consumer Protection Can Make the Internet Less Terrible, Fourth Annual Reidenberg Lecture at Fordham Law School 9 (Apr. 17, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/20240417-Reidenberg-Lecture-final-for-publication-Remarks-Sam-Levine.pdf [https://perma.cc/K43R-V2UG]; Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, A Progress Report on Key Priorities, and a Warning on AI Self-Regulation, Remarks at the National Advertising Division Annual Conference 8-12 (Sept. 19, 2023) [hereinafter Progress Report], https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-of-samuel-levine-at-nad-2023.pdf [https://perma.cc/YK3Q-SPEV]; 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, Remarks at the 2023 Consumer Data Industry Association Law & Industry Conference 1-3 (Sept. 21, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/cdia-sam-levine-9-21-2023.pdf [https://perma.cc/HS4B-G4QC]; Samuel Levine, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n, Believing in the FTC, Remarks at Beyond the FTC: The Future of Privacy Enforcement 4-5 (Apr. 1, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-to-JOLT-4-1-2023.pdf [https://perma.cc/YB79-JVF5].

And Levine has been backed up by the Democratic Commissioners who have guided the Commission during the Biden years.[117] All have expressed skepticism about notice and consent[118] and the ability of markets to self-correct. And they have issued statements in support of incorporating antidiscrimination values into UDAP enforcement,[119] of using UDAP

117. Until 2023, these commissioners formed a majority. When the Republican commissioners retired in protest of the paradigm shifts, they governed on their own. *See* Josh Sisco, *Republican FTC Commissioner Noah Phillips to Step Down*, POLITICO (Aug. 8, 2022, 10:00 AM EDT), https://www.politico.com/news/2022/08/08/ftc-commissioner-noah-phillips-step-down-00050293 [https://perma.cc/J8SU-GU27]; Christine Wilson, Opinion, *Why I'm Resigning as an FTC Commissioner*, WALL ST. J. (Feb. 14, 2023, 12:08 PM ET), https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d [https://perma.cc/J5SZ-UUQB]. Now, after the appointments of Republican Commissioners Melissa Holyoak and Andrew Ferguson, the Democratic Commissioners once again form a majority.

118. *See Statement of Chair Lina M. Khan Joined by Commissioner Alvaro M. Bedoya & Commissioner Rebecca Kelly Slaughter: In the Matter of Mobilewalla, Inc., Commission File No. 2023196*, FED. TRADE COMM'N 4 (Dec. 3, 2024) [hereinafter *Khan Statement on Mobilewalla*], https://www.ftc.gov/system/files/ftc_gov/pdf/statement-khan-bedoya-slaughter-mobilewalla.pdf [https://perma.cc/Z4HZ-M5SP]; Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at FTC Hearing No. 12: The FTC's Approach to Consumer Privacy, Hearings on Competition and Consumer Protection in the 21st Century 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://perma.cc/P8RA-XAKB]; *Statement of Chair Lina M. Khan Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking, Commission File No. R111004*, FED. TRADE COMM'N 3-4 (Aug. 11, 2022) [hereinafter *Khan Statement on Commercial Surveillance and Data Security*], https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20on%20Commercial%20Surveillance%20ANPR%2008112022.pdf [https://perma.cc/26JP-A4LC]; Interview by Justin Hendrix with Alvaro Bedoya, Comm'r, Fed. Trade Comm'n (Feb. 18, 2024), https://www.techpolicy.press/ftc-commissioner-alvaro-bedoya-on-algorithmic-fairness-voice-cloning-and-the-future [https://perma.cc/5TA2-VMBB].

119. *See generally* Rebecca Kelly Slaughter with Janice Kopec & Mohamad Batal, *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 (2021), https://law.yale.edu/sites/default/files/area/center/isp/documents/algorithms_and_economic_justice_master_final.pdf [https://perma.cc/JBF9-RD45] (arguing that the FTC Act reaches algorithmic discrimination); *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter: In the Matter of Napleton Automotive Group, Commission File No. 2023195*, FED. TRADE COMM'N 3-4 (Mar. 31, 2022) [hereinafter *Khan Statement on Napleton*], https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf [https://perma.cc/BQD9-MDJ7] (explaining how the FTC should apply its unfair-practices authority to claims based on disparate treatment or disparate impact); *Statement of Commissioner Alvaro M. Bedoya Regarding the Commercial Surveillance Data Security Advance Notice of Proposed Rulemaking*, FED. TRADE COMM'N 2-3 (Aug. 11, 2022) [hereinafter *Bedoya Statement on Commercial Surveillance and Data Security*], https://www.ftc.gov/system/files/ftc_gov/pdf/Bedoya%20ANPR%20Statement%2008112022.pdf [https://perma.cc/S5PY-67PY] (explaining that the "unfairness authority is a powerful tool for combatting discrimination"); *Statement of Commissioner Rohit Chopra: In the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda, Commission File No. 1623238*, FED. TRADE COMM'N 1-2 (May 27, 2020) [hereinafter *Chopra Statement on Liberty Chevrolet*], https://www.ftc.gov/system/files/documents/public_statements/1576002/bronx_honda_final_rchopra_bronx_honda_statement.pdf [https://perma.cc/HV82-YL7E] (asserting that practices with disparate impacts violate the prohibition on unfair practices).

to set substantive standards for privacy,[120] and of using UDAP to preserve mental health online.[121] Commissioner Alvaro M. Bedoya has spoken in favor of replacing efficiency with fairness as one of the Commission's guiding principles.[122] Republican Commissioners have also expressed qualified support for some aspects of this shift, including, for instance, the focus on upholding substantive privacy standards in the shadow of the Fourth Amendment.[123]

Further, in her opening memorandum to staff on her "[v]ision and [p]riorities," Chair Lina M. Khan emphasized the need to "[b]roaden[the FTC's] frame" by "[f]ocusing on power asymmetries" and "tackling the most significant harms across markets, including those directed at marginalized communities."[124] Rather than a "whack-a-mole approach" that waits

120. *See Khan Statement on Commercial Surveillance and Data Security*, *supra* note 118, *passim*; *Statement of Commissioner Rebecca Kelly Slaughter Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking*, FED. TRADE COMM'N *passim* (Aug. 11, 2022) [hereinafter *Slaughter Statement on Commercial Surveillance and Data Security*], https://www.ftc.gov/system/files/ftc_gov/pdf/RKS%20ANPR%20Statement%2008112022.pdf [https://perma.cc/8HQD-DUP9]; *Bedoya Statement on Commercial Surveillance and Data Security*, *supra* note 119, *passim*.

121. *See* Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, Prepared Remarks at the Meeting of the National Academies of Sciences, Engineering & Medicine Committee on the Impact of Social Media on the Health and Wellbeing of Children & Adolescents (Feb. 7, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/national-academies-speech-bedoya.pdf [https://perma.cc/V7RT-7RAU]; *Statement of Chair Lina M. Khan Regarding the Social Media and Video Streaming Service Providers Privacy Report, Commission File No. P205402*, FED. TRADE COMM'N (Sept. 19, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-chair-khan-social-media-6b.pdf [https://perma.cc/7CY8-TCPX].

122. Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, "Returning to Fairness," Prepared Remarks at the Midwest Forum on Fair Markets (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf [https://perma.cc/JSG9-HFD8]. Although this speech focuses on the FTC's antitrust jurisdiction, the basic point carries over to consumer protection, as practice has demonstrated.

123. *See Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson, In re Gravy Analytics, Inc. & In re Mobilewalla, Inc., Matter Numbers 2123035 & 2023196*, FED. TRADE COMM'N (Dec. 3, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/gravy_-mobilewalla-ferguson-concurrence.pdf [https://perma.cc/YYC4-U6E9]; *Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in Full and Commissioner Melissa Holyoak in Part I, In the Matter of Gravy Analytics, Inc. & Venntel, Inc.*, FED. TRADE COMM'N (Dec. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/bedoya-gravy-statement.pdf [https://perma.cc/UGD3-B7AL]. Republican Commissioners' expressed disagreements also provide evidence of the shift, since they criticize the FTC for going beyond recent precedents and focusing on more than fraud. *E.g.*, *Dissenting and Concurring Statement of Commissioner Melissa Holyoak, Coulter Motor Company, LCC; FTC No. 2223033*, FED. TRADE COMM'N (Aug. 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-re-coulter-8-15-24.pdf [https://perma.cc/E8MU-U97Z] (disagreeing with unfair discrimination theory); *Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking*, FED. TRADE COMM'N (Aug. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf [https://perma.cc/YZN2-TTH4] (expressing multiple concerns about the FTC's enacting substantive privacy rules).

124. Memorandum from Lina M. Khan, Chair, Fed. Trade Comm'n, to the Staff and Commissioners of the Fed. Trade Comm'n 1-2 (Sept. 22, 2021),

for harms to become clearly established, Khan committed to a holistic enforcement strategy that combines enforcement and regulatory actions to "target[] root causes" and, ideally, to do so "before they become widely adopted."[125]

CFPB, which was created in 2010, has joined the FTC in this repudiation of the consumer sovereignty framework. Director Chopra (who was previously a Commissioner at the FTC) has stated that one of the reasons for CFPB's creation, and the addition of an abusive-practices authority to its UDAAP statute, was to respond to decades of "misguided enforcement policies and interpretations by FTC Commissioners [that] had, over time, undermined [UDAP's] effectiveness."[126] In that same speech, Chopra invoked an older "American tradition" of consumer protection that tasked agencies with articulating "standards of fair dealing" based on "market reality, rather than theoretical economic models."[127] UDAP, he noted, has been a central part of that history—even if "ideological assumptions" about markets, and the "misguided enforcement policies" they spawned, had "undermined [its] effectiveness."[128] Reading between the lines, Chopra seemed to be suggesting that the abusive-practices authority should be read as an invitation to revisit and expand upon forms of consumer protection that have long been considered verboten because of KidVid and its aftermath.

B. Practical Implications of the Repudiation

As a consequence of this repudiation, the FTC has been, for the first time in decades, comfortable using the unfair-practices authority as a standalone. It has done so not just in enforcement actions but in multiple ongoing major rulemakings.[129] And it has not just been to supplement

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/76E7-NKRY].

125. *Id.* at 2; *see also* Progress Report, *supra* note 116, at 8-13 (discussing the FTC's proactive approach in protecting consumers from unfair and deceptive practices relating to artificial intelligence).

126. Rohit Chopra, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks at the University of California Irvine Law School (Apr. 3, 2023), https://www.consumerfinance.gov/about-us/newsroom/director-chopra-remarks-at-the-university-of-california-irvine-law-school [https://perma.cc/3TMJ-CX3X].

127. *Id.*

128. *Id.*

129. Negative Option Rule, 89 Fed. Reg. 90476 (Nov. 15, 2024) (to be codified at 16 C.F.R. pt. 425); Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 89 Fed. Reg. 68034 (Aug. 22, 2024) (to be codified at 16 C.F.R. pt. 465); Trade Regulation Rule on Impersonation of Government and Business, 89 Fed. Reg. 15017 (Mar. 1, 2024) (to be codified at 16 C.F.R. pt. 461); Combatting Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. 590 (Jan. 4, 2024) (to be codified at 16 C.F.R. pt. 463); Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (proposed Nov. 9, 2023) (to be codified at 16 C.F.R. pt 464); Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022). The Agency has also amended numerous preexisting rules to create more

deception or to go after egregious wrongdoing by small players, but to attempt to reshape business practices in entire industries—strategically combining investigations, hearings, guidance documents, enforcement actions, and rulemakings with particular goals in mind.

As part of the effort to move the unfair-practices authority out from the shadow of the deceptive-practices authority, many of these actions have paired unfair-practices claims with claims based on more specific (but not deception-based) consumer protection statutes, like the Equal Credit Opportunity Act[130] (ECOA), the Children's Online Privacy Protection Act[131] (COPPA), and the Restore Online Shoppers' Confidence Act.[132]

Some of this destigmatization had already been happening at CFPB, but the FTC has not merely been following. Indeed, regulatory efforts are now frequently coordinated across agencies[133] (even involving agencies like the Department of Housing and Urban Development,[134] the Federal Communications Commission,[135] the National Labor Relations Board[136] (NLRB), and DOT[137] that go beyond our consideration here).

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stringent requirements and make it easier for consumers to assert their rights. *E.g.*, Ophthalmic Practices Rule (Eyeglasses Rule), 89 Fed. Reg. 60742 (July 26, 2024) (to be codified at 16 C.F.R. pt. 456); Disclosure Requirements and Prohibitions Concerning Franchising, 89 Fed. Reg. 57077 (July 12, 2024) (to be codified at 16 C.F.R. pt. 436); Health Breach Notification Rule, 89 Fed. Reg. 47028 (May 30, 2024) (to be codified at 16 C.F.R. pt. 318).

130. 15 U.S.C. §§ 1691-1691f (2018).

131. *Id.* §§ 6501-6506.

132. *Id.* §§ 8401-8405.

133. The "junk fee" initiative in particular has been a "whole-of-government effort," directed by the White House. *See* Brian Deese, Neale Mahoney & Tim Wu, *The President's Initiative on Junk Fees and Related Pricing Practices*, WHITE HOUSE (Oct. 26, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices [https://perma.cc/EMK7-JXUT].

134. David Dayen, *The Junk Fee Fight Spreads to Rental Housing*, AM. PROSPECT (July 25, 2023), https://prospect.org/economy/2023-07-25-junk-fee-fight-spreads-to-rental-housing [https://perma.cc/CKP2-6M5T] (discussing newly proposed and enacted state laws "build[ing] on efforts the Department of Housing and Urban Development has taken to encourage crackdowns on rental housing junk fees"); David Dayen, *HUD Steps Forward on Junk Fees in Rental Housing*, AM. PROSPECT (Mar. 22, 2023), https://prospect.org/infrastructure/housing/2023-03-22-hud-junk-fees-rental-housing [https://perma.cc/QT2N-BU2Z].

135. *See* All-In Pricing for Cable and Satellite Television Service, 89 Fed. Reg. 28660 (Apr. 19, 2024) (to be codified at 47 C.F.R. pt. 76).

136. *Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, FED. TRADE COMM'N & NAT'L LAB. RELS. BD. (July 19, 2022) [hereinafter *Memorandum of Understanding*], https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf [https://perma.cc/U9LM-C5QK] (implementing certain cross-agency coordination measures to facilitate enforcement).

137. Press Release, Dep't of Transp., USDOT Unveils Dashboard, Highlights Progress to Help Parents Avoid Family Seating Junk Fees (Mar. 6, 2023), https://www.transportation.gov/briefing-room/usdot-unveils-dashboard-highlights-progress-help-parents-avoid-family-seating-junk [https://perma.cc/PX73-TUG6] (unveiling a "family seating dashboard that highlights the airlines that guarantee fee-free family seating" in order to "mak[e] it easier for parents to avoid paying junk fees to sit with their children when they fly").

The resulting pattern of practice is usefully viewed as a series of coordinated campaigns using multiple administrative modalities to stamp out whole categories of conduct. A summary of five such campaigns will give a sense of this pattern.

1. Dark Patterns

First, the FTC and CFPB have each targeted "dark patterns," that is, user interfaces that manipulate consumers into making decisions that they would not reflectively endorse.[138] The Commission has

- convened a workshop of experts in spring 2021[139] and released a staff report in fall 2022;[140]
- brought a group of enforcement actions on deceptive practices in online review manipulation, including against companies marketing artificial intelligence (AI) for use in creating false reviews, which also motivated a rulemaking that set standards for online reviews and testimonials;[141]

138. David Ingram, *'Dark Patterns': Regulators Eye Tech Tricks that Hurt Consumers*, NBC NEWS (Nov. 6, 2021, 6:01 AM EDT), https://www.nbcnews.com/news/dark-patterns-regulators-eye-tech-tricks-hurt-consumers-rcna4365 [https://perma.cc/3JWU-FQXU]; *see also* Harry Brignull, *Dark Patterns: Deception vs. Honesty in UI Design*, LIST APART (Nov. 1, 2011), https://alistapart.com/article/dark-patterns-deception-vs.-honesty-in-ui-design [https://perma.cc/7XBV-LYSX] (coining the term "dark patterns").

139. *Bringing Dark Patterns to Light: An FTC Workshop*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/events/2021/04/bringing-dark-patterns-light-ftc-workshop [https://perma.cc/365M-YNUB].

140. BUREAU OF CONSUMER PROT., FED. TRADE COMM'N, BRINGING DARK PATTERNS TO LIGHT (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf [https://perma.cc/BVG4-ES9X].

141. *See* Press Release, Fed. Trade Comm'n, FTC Puts Hundreds of Companies on Notice About Fake Reviews and Other Misleading Endorsements (Oct. 13, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements [https://perma.cc/3K9A-GE6L]; Press Release, Fed. Trade Comm'n, FTC Announces Refund Claims Process for Fashion Nova Customers Affected by Deceptive Review Practices (May 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-announces-refund-claims-process-fashion-nova-customers-affected-deceptive-review-practices [https://perma.cc/PR72-S4SB]; Sitejabber; Analysis of Proposed Consent Order to Aid Public Comment, 89 Fed. Reg. 90691 (Nov. 18, 2024); Rytr LLC; Analysis of Proposed Consent Order to Aid Public Comment, 89 Fed. Reg. 80565 (Oct. 3, 2024); Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 89 Fed. Reg. 68034 (Aug. 22, 2024) (to be codified at 16 C.F.R. pt. 465); *see also Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, In the Matter of Rytr LLC, Matter Number 2323052*, FED. TRADE COMM'N (Sept. 24, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-rytr-statement.pdf [https://perma.cc/SK6L-FQ9H]; *Dissenting Statement of Commissioner Melissa Holyoak Joined by Commissioner Andrew N. Ferguson, In re Rytr, LLC; Matter No. 2323052*, FED. TRADE COMM'N (Sept. 25, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-rytr-statement.pdf [https://perma.cc/B4FG-2GFQ].

- initiated an enforcement action focused on default privacy settings that made children vulnerable to online harassment and unintentional payments;[142]
- written a policy statement, and then finalized a regulation requiring firms to make it possible for a consumer to cancel a subscription the same way they took it out;[143] and
- brought a major lawsuit against Amazon and three executives for designing a user interface that makes it easy to sign up for recurring charges mistakenly and confusing to cancel them.[144]

The Bureau has similarly used its deceptive-practices authority to bring enforcement actions against firms that trick users into signing up for paid services and then make it difficult to opt out,[145] and it has used unfair- and deceptive-practices authorities to issue warnings about negative option marketing and the manipulation of user reviews.[146]

142. Complaint for Permanent Injunction, Civil Penalties, and Other Relief, United States v. Epic Games, Inc., No. 22-CV-00518 (E.D.N.C. Dec. 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesComplaint.pdf [https://perma.cc/BL8U-H93H]; Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *Epic Games*, No. 22-CV-00518 (W.D.N.C. Dec. 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesSettlement.pdf [https://perma.cc/ES4T-6T89]; Agreement Containing Consent Order, Epic Games, Inc., File No. 192 3203 (F.T.C. Dec. 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/1923203EpicGamesACCO.pdf [https://perma.cc/WX69-VJZ6].

143. Negative Option Rule, 89 Fed. Reg. 90476 (Nov. 15, 2024) (to be codified at 16 C.F.R. pt. 425); Enforcement Policy Statement Regarding Negative Option Marketing, 86 Fed. Reg. 60822 (Nov. 4, 2021). This enforcement statement combines UDAP authority with authority under the Restore Online Shoppers' Confidence Act, 15 U.S.C. §§ 8401-8405 (2018). *See* Enforcement Policy Statement Regarding Negative Option Marketing, 86 Fed. Reg. at 60823, 60826-27.

144. Complaint for Permanent Injunction, Civil Penalties, Monetary Relief, and Other Equitable Relief, FTC v. Amazon.com, Inc., No. 23-CV-00932 (W.D. Wash. June 21, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/amazon-rosca-public-redacted-complaint-to_be_filed.pdf [https://perma.cc/Q9HE-GA2K]; Amended Complaint for Permanent Injunction, Civil Penalties, Monetary Relief, and Other Equitable Relief, *Amazon.com*, No. 23-CV-00932 (Sept. 20, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023-09-20-067-AmendedComplaint%28redacted%29.pdf [https://perma.cc/TG8F-VJSM]; Press Release, Fed. Trade Comm'n, FTC Adds Senior Executives Who Played Key Roles in Prime Enrollment Scheme to Case Against Amazon (Sept. 20, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-adds-senior-executives-who-played-key-roles-prime-enrollment-scheme-case-against-amazon [https://perma.cc/ZV9P-3PQT].

145. Press Release, Consumer Fin. Prot. Bureau, CFPB Charges TransUnion and Senior Executive John Danaher with Violating Law Enforcement Order (Apr. 12, 2022) [hereinafter TransUnion Press Release], https://www.consumerfinance.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order [https://perma.cc/2PU7-Q5RX]; Press Release, Consumer Fin. Prot. Bureau, CFPB Sues Payment Platform Used by YMCA Camps and Charity Race Organizers for Illegally Cramming Consumers with Junk Membership Fees (Oct. 18, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-payment-platform-used-by-ymca-camps-race-organizers-for-junk-fee [https://perma.cc/A3RP-R24E].

146. Consumer Financial Protection Circular 2023-01: Unlawful Negative Option Marketing Practices, 88 Fed. Reg. 5727 (Jan. 30, 2023); Bulletin 2022-05: Unfair and Deceptive Acts or Practices that Impede Consumer Reviews, 87 Fed. Reg. 17143 (Mar. 28, 2022).

2. Junk Fees

Another example is the effort, coordinated by the White House, to eliminate so-called junk fees: add-on charges that provide little to no value in exchange.[147] Here, the Bureau initially took the lead.[148] It has, relying largely on unfair-practices authority, released guidance on which charges constitute "junk" across various consumer financial transactions: fees to provide customers information about their account,[149] surprise overdraft fees,[150] bounced-check fees that are not responsive to the reasons a check has bounced,[151] and debt collectors' fees to perform the routine feat of processing debtors' payments.[152] It has initiated (and settled) enforcement actions alleging related behavior.[153] It has completed a rulemaking to lower and restrict late fees for credit cards.[154] And it has begun a rulemaking to lower overdraft fees charged by large financial institutions dramatically.[155]

The Commission caught up quickly, initiating several enforcement actions and proposing two rules. Its initial focus was auto dealers' add-on fees,[156] and it used those actions to inform a rulemaking on auto-dealer

147. *See* Stacy Cowley, *The Federal Consumer Bureau Wants to Stamp Out What It Calls 'Junk Fees,'* N.Y. TIMES (Jan. 26, 2022), https://www.nytimes.com/2022/01/26/business/cfpb-junk-fees.html [https://perma.cc/DLS8-4JXY]. The term "junk fee" seems to have been coined by current Director of the Consumer Financial Protection Bureau (CFPB), and former FTC Commissioner, Rohit Chopra. Hassan Ali Kanu, *Loaded Up with Junk*, AM. PROSPECT (June 6, 2024), https://prospect.org/economy/2024-06-06-loaded-up-with-junk [https://perma.cc/YMT8-TF83]; *Chopra Resists Requests to Define 'Junk Fees' with Specificity*, ABA BANKING J. (Apr. 27, 2022), https://bankingjournal.aba.com/2022/04/chopra-resists-requests-to-define-junk-fees-with-specificity [https://perma.cc/TT3U-X8C6].

148. *See* Rohit Chopra, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks on a Press Call on Junk Fees (Oct. 11, 2023), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-a-press-call-on-junk-fees [https://perma.cc/B2F8-UFP4].

149. Consumer Information Requests to Large Banks and Credit Unions, 88 Fed. Reg. 71279 (Oct. 16, 2023).

150. Consumer Financial Protection Circular 2022-06: Unanticipated Overdraft Fee Assessment Practices, 87 Fed. Reg. 66935 (Nov. 7, 2022).

151. Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices, 87 Fed Reg. 66940 (Nov. 7, 2022).

152. Debt Collection Practices (Regulation F); Pay-to-Pay Fees, 87 Fed. Reg. 39733 (July 5, 2022).

153. *See, e.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB Orders Navy Federal Credit Union to Pay More than $95 Million for Illegal Surprise Overdraft Fees (Nov. 7, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-navy-federal-credit-union-to-pay-more-than-95-million-for-illegal-surprise-overdraft-fees [https://perma.cc/FFP3-7QGW]; Consent Order, Regions Bank, CFPB No. 2022-CFPB-0008 (Sept. 28, 2022) [hereinafter 2022 Regions Bank Consent Order], https://files.consumerfinance.gov/f/documents/cfpb_Regions_Bank-_Consent-Order_2022-09.pdf [https://perma.cc/7XMX-H3KL].

154. Credit Card Penalty Fees (Regulation Z), 89 Fed. Reg. 19128 (Mar. 15, 2024) (to be codified at 12 C.F.R. pt. 1026).

155. Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13852 (proposed Feb. 23, 2024) (to be codified at 12 C.F.R. pts. 1005, 1026).

156. Stipulated Order for Permanent Injunction and Other Equitable Relief, FTC v. Liberty Chevrolet, Inc., No. 20-CV-03945 (S.D.N.Y. May 22, 2020), https://www.ftc.gov/system/files/documents/cases/bronx_honda_stipulated_final_order_liberty_chevrolet.pdf

practices.[157] It has also brought deceptiveness actions, including against Intuit for advertising that its TurboTax software is free when most users are ineligible for free service.[158] More recently, it settled with Invitation Homes for, among other things, advertising rental rates that did not include fees "that could total more than $1,700 yearly."[159] And in October 2023 it proposed a more general rule that would require a Truth in Lending Act–like all-in, up-front price disclosure and would prevent misleading representations about the purpose of fees.[160]

3. Discrimination

Both agencies have also taken up recommendations from academics and advocates to use the unfair-practices authority to expand legal condemnation of discrimination beyond the circumscribed domains in which antidiscrimination statutes apply.[161] At the Commission, the main targets of these actions so far have been auto dealers that allow frontline employees discretion in setting add-on fees and credit charges—a discretion that these employees often use to set higher fees for Black and Latine customers.[162] It has also banned Rite Aid from using facial recognition technology

[https://perma.cc/SZ7M-UY4C]; Stipulated Order for Permanent Injunction, Monetary Judgement, and Other Relief, FTC v. N. Am. Auto. Servs., Inc., No. 22-CV-01690 (N.D. Ill. Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/6-1%20Stipulated%20Order.pdf [https://perma.cc/N3VW-PNU6]; Stipulated Order for Permanent Injunction, Monetary Judgment, and Other Relief, FTC v. Passport Auto. Grp., Inc., No.22-CV-02670 (D. Md. Oct. 18, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Order%20As%20Filed.pdf [https://perma.cc/VJB2-X9GL]; Stipulated Order for Permanent Injunction, Monetary Judgment, and Other Relief as to Defendants Rhinelander Auto Group LLC, Rhinelander Import Group LLC, and Daniel Towne, FTC v. Rhinelander Auto Ctr., Inc., No. 23-CV-00737 (W.D. Wisc. Oct. 24, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/5-2-ProposedCurrentOwnersSettlementAgreement.pdf [https://perma.cc/896Y-5BF8].

157. Combatting Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. 590 (Jan. 4, 2024) (to be codified at 16 C.F.R. pt. 463); Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42012 (proposed July 13, 2022) (to be codified at 16 C.F.R. pt. 463).

158. Complaint, Intuit Inc., No. 9408 (F.T.C. Mar. 30, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09408IntuitP3Complaint.pdf [https://perma.cc/Q2LB-A3H5]; *see also* H&R Block; Analysis of Proposed Consent Order to Aid Public Comment, 89 Fed. Reg. 90290 (Nov. 15, 2024) (prohibiting similar bait-and-switch-type conduct from H&R Block).

159. Press Release, Fed. Trade Comm'n, FTC Takes Action Against Invitation Homes for Deceiving Renters, Charging Junk Fees, Withholding Security Deposits, and Employing Unfair Eviction Practices (Sept. 24, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-takes-action-against-invitation-homes-deceiving-renters-charging-junk-fees-withholding-security [https://perma.cc/NGX5-62JU]. Some of the other legal theories in the settlement—notably unfair eviction—are innovative in different ways. Never before has an enforcement action been brought relating to landlords and tenants, to this author's knowledge. Discussing the potential implications goes beyond the scope of this article, unfortunately.

160. Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066 (Jan. 10, 2025) (to be codified at 16 C.F.R pt. 464).

161. *See infra* Section III.D.

162. *See, e.g.*, *Khan Statement on Napleton*, *supra* note 119, at 1, 3-4; *Chopra Statement on Liberty Chevrolet*, *supra* note 119, *passim*. This type of negligent-supervision claim has been endorsed by courts applying antidiscrimination statutes. *See, e.g.*, Ramirez v. GreenPoint Mortg. Funding, Inc., 633 F. Supp. 2d 922 (N.D. Cal. 2008) (endorsing such a theory in the home-mortgage context).

to detect shoplifting due to its failure to create safeguards against false positives and discriminatory impact.[163] And it has taken a few enforcement actions against AI and facial recognition companies for making misleading claims about offering unbiased products.[164] The majority Commissioners' statements[165] and an interagency joint statement "against discrimination and bias in automated systems"[166] strongly signal an intent to expand this effort more systematically and may well lay the groundwork for future enforcement.

For its part, the Bureau has invoked its unfair-practices authority to update its manual for bank examiners, instructing examiners to look for evidence of discriminatory practices even if those practices do not violate the letter of existing antidiscrimination law.[167] It has done so alongside other expansions of antidiscrimination enforcement, such as making explicit that ECOA prohibits sexual-orientation and gender-identity discrimination and convincing a Seventh Circuit panel that discouragement of

163. *Statement of Commissioner Alvaro M. Bedoya on* FTC v. Rite Aid Corporation & Rite Aid Headquarters Corporation*, Commission File No. 202-3190*, FED. TRADE COMM'N 1-5 (Dec. 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023190_commissioner_bedoya_riteaid_statement.pdf [https://perma.cc/X727-BZ6T].

164. Press Release, Fed. Trade Comm'n, FTC Takes Action Against IntelliVision Technologies for Deceptive Claims About Its Facial Recognition Software (Dec. 3, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-takes-action-against-intellivision-technologies-deceptive-claims-about-its-facial-recognition [https://perma.cc/B97A-XCC9]; *see* Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, FED. TRADE COMM'N (Apr. 19, 2021), https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai [https://perma.cc/U7DZ-72SF].

165. *Khan Statement on Commercial Surveillance and Data Security*, *supra* note 118, at 4; *Slaughter Statement on Commercial Surveillance and Data Security*, *supra* note 120, at 8; *Bedoya Statement on Commercial Surveillance and Data Security*, *supra* note 119, at 2-3, 2 n.12.

166. Rohit Chopra, Kristen Clarke, Charlotte A. Burrows & Lina M. Khan, Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems (Apr. 25, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf [https://perma.cc/AJ5T-42VR]. The advance notice of proposed rulemaking on commercial surveillance, which, as discussed below, never even reached the proposed rulemaking stage, also raised the possibility of creating regulatory standards for discrimination based on these cases. *See* Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022) (to be codified at 16 C.F.R. ch. I).

167. Press Release, Consumer Fin. Prot. Bureau, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance [https://perma.cc/T9RB-KS3U]; *CFPB Supervision and Examination Manual*, CONSUMER FIN. PROT. BUREAU 1759-62, 1765-66 (Mar. 16, 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf [https://perma.cc/EMN5-CMC7]. This change was vacated by a Texas district court in September 2023, *see* Chamber of Com. of the U.S. v. CFPB, 691 F. Supp. 3d 730 (E.D. Tex. 2023), *appeal docketed*, No. 23-40650 (5th Cir. Nov. 8, 2023), and CFPB has since removed the updated material from its manual, Alan S. Kaplinsky, John L. Culhane, Jr., Richard J. Andreano, Jr. & Michael Gordon, *CFPB Removes Changes Regarding Discrimination as an Unfair Practice from UDAAP Exam Manual but Appeals from District Court Order Vacating Changes*, CONSUMER FIN. MONITOR (Nov. 13, 2023), https://www.consumerfinancemonitor.com/2023/11/13/cfpb-removes-changes-regarding-discrimination-as-an-unfair-practice-from-udaap-exam-manual-but-appeals-from-district-court-order-vacating-changes [https://perma.cc/79EW-B72J].

prospective applicants can be discriminatory.[168] CFPB's UDAAP-based antidiscrimination initiatives have been called into doubt by the Eastern District of Texas, which struck down CFPB's modifications to its examination manual.[169] As of this writing, it remains to be seen whether this decision will be upheld.[170] Section V.B.2 below discusses and critiques its reasoning.

4. Data Governance

A fourth effort has been the elaboration of standards for data privacy and for other aspects of data governance. The FTC's August 2022 advance notice of proposed rulemaking on commercial surveillance has hung over the whole field.[171] In the notice, the Commission invited comment on nearly all aspects of "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."[172] It has received more than a thousand comments but has not yet proposed a rule[173]—and, given the change in administration, it likely never will.

Still, a series of enforcement actions and guidance documents have filled some of the gap. In addition to the already-discussed efforts with respect to algorithmic discrimination and dark patterns, the FTC has brought several high-profile actions that focus on invasions of children's privacy (often combining COPPA with UDAP allegations),[174] failure to take

168. Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity, 86 Fed. Reg. 14363 (Mar. 16, 2021); CFPB v. Townstone Fin., Inc., 107 F.4th 768 (7th Cir. 2024).

169. *Chamber of Com.*, 691 F. Supp. 3d 730.

170. In the interest of full disclosure, I should note that I have coauthored an amicus brief in support of the Bureau.

171. Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022) (to be codified at 16 C.F.R. ch. I).

172. *Id.* at 51273.

173. *FTC Seek Comments on Trade Regulation Rule on Commercial Surveillance and Data Security, R111004*, REGULATIONS.GOV, https://www.regulations.gov/docket/FTC-2022-0053 [https://perma.cc/83CG-MVHJ]; Russell Newman, Nick Couldry, Velislava Hillman, Mitzi László & Gregory Narr, *The US Government Should Be Bold in Regulating AI and Data Collection*, JACOBIN (Sept. 18, 2023), https://jacobin.com/2023/09/federal-trade-commission-ai-data-collection-privacy-anprm-commercial-surveillance [https://perma.cc/DG3U-32KH] (summarizing the contents of the comments).

174. Complaint for Permanent Injunction, Civil Penalties, and Other Relief, *supra* note 142; Press Release, Fed. Trade Comm'n, FTC Proposes Blanket Prohibition Preventing Facebook from Monetizing Youth Data (May 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-proposes-blanket-prohibition-preventing-facebook-monetizing-youth-data [https://perma.cc/H69D-UWH5]; Stipulated Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief, United States v. Amazon.com, Inc., No. 23-CV-00811 (W.D. Wash. July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1923128amazonalexaorderfiled.pdf [https://perma.cc/XZ7W-VU6L]; Stipulated Order for Permanent Injunction and Civil Penalty Judgment, United States v. Edmodo, LLC, No. 23-CV-2495 (N.D. Cal. June 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Edmodo-Dkt15%28Order%20Signed%20by%20the%20Court%29.pdf [https://perma.cc/M4YE-RMC5]; Stipulated

special caution with sensitive health data,[175] and software that can be used to spy on unsuspecting users,[176] while continuing to enforce against lax data-security practices.[177] It has issued a policy statement declaring that companies should take extra care in collecting, storing, using, and distributing biometric information.[178] More generally, its enforcement actions have demonstrated a pattern of particular care for "sensitive data" such as those concerning religious observance, health, sexual proclivities, political leanings, and financial information[179] and for particularly vulnerable consumers—children, in particular.[180] Many of these actions have resulted in settlements with injunctions and large penalties, often holding individual executives liable.[181]

Although less active in the area, the Bureau has set out its own standards for data security as it relates to sensitive consumer information.[182] It has also finalized a rule that would facilitate the portability of consumer data while giving consumers somewhat more control over who can access

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Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief, United States v. Microsoft Corp., No. 23-CV-00836 (W.D. Wash. June 9, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/ordered_entered_6.09.2023.pdf [https://perma.cc/H92L-6T6D].

175. *E.g.*, Press Release, Fed. Trade Comm'n, Ovulation Tracking App Premom Will Be Barred from Sharing Health Data for Advertising Under Proposed FTC Order (May 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ovulation-tracking-app-premom-will-be-barred-sharing-health-data-advertising-under-proposed-ftc [https://perma.cc/BG46-3K2U]; Decision and Order, BetterHelp, Inc., No. C-4796 (F.T.C. July 7, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023169betterhelpfinalorder.pdf [https://perma.cc/3FCH-MQ3H]; Decision and Order, 1Health.io Inc., No. C-4798 (F.T.C. Sept. 6, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1Health-DecisionandOrder.pdf [https://perma.cc/724Z-A4QL].

176. *E.g.*, Decision and Order, Support King, LLC, No. C-4756 (F.T.C. Dec. 20, 2021), https://www.ftc.gov/system/files/documents/cases/1923003c4756spyfoneorder.pdf [https://perma.cc/55CA-VKB4].

177. *E.g.*, Marriott International, Inc.; Analysis of Proposed Consent Order to Aid Public Comment, 89 Fed. Reg. 82609 (Oct. 11, 2024); Press Release, Fed. Trade Comm'n, FTC Says Ring Employees Illegally Surveilled Customers, Failed to Stop Hackers from Taking Control of Users' Cameras (May 31, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-says-ring-employees-illegally-surveilled-customers-failed-stop-hackers-taking-control-users [https://perma.cc/J552-89K5]; Decision and Order, Drizly, LLC, No. C-4780 (F.T.C. Jan. 9, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023185-drizly-combined-consent.pdf [https://perma.cc/KX3B-CYL5].

178. FED. TRADE COMM'N, POLICY STATEMENT ON BIOMETRIC INFORMATION AND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p225402biometricpolicystatement.pdf [https://perma.cc/S8PK-7L77].

179. *E.g.*, *Khan Statement on Mobilewalla*, *supra* note 118, *passim*; Press Release, Fed. Trade Comm'n, *supra* note 175; Avast Limited Et Al.; Analysis of Proposed Consent Order to Aid Public Comment, 89 Fed. Reg. 14839, 14840-42 (Feb. 29, 2024); FTC v. Kochava, Inc., 715 F. Supp. 3d 1319 (D. Idaho 2024).

180. *See* sources cited *supra* note 174; Avast Limited Et Al., 89 Fed Reg. 14839.

181. *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/3Y5J-N7G6].

182. Consumer Financial Protection Circular 2022-04: Insufficient Data Protection or Security for Sensitive Consumer Information, 87 Fed. Reg. 54346 (Sept. 6, 2022).

them.[183] The idea is "open banking": reducing the market power that comes with control over consumer data, which would make it easier for consumers to switch banks without surrendering their privacy entirely.[184] It has proposed a rule to create security standards for data brokers and limit their ability to share data about consumers without "clear" consent—although it remains to be seen whether these rules will be finalized and how high their standards will be.[185]

5. Worker and Small Business Protection

Fifth, UDAP has been applied beyond household use, the traditional domain of consumer protection per se.[186] The FTC has begun to use its unfair-practices authority to remedy exploitative conduct against workers and small businesses when they function as consumers of upstream firms' services—as when Uber or Lyft provides its drivers the "service" of their ride-matching apps or when an employer charges for training.[187] The

183. Required Rulemaking on Personal Financial Data Rights, 89 Fed. Reg. 90838 (Nov. 18, 2024) (to be codified at 12 C.F.R. pts. 1001, 1033); *see also* Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197, 80197 (proposed Nov. 17, 2023) (to be codified at 12 C.F.R. pt. 1090) (extending CFPB's supervisory authority over larger participants in the "market for general-use digital consumer payment applications").

184. *See* Rohit Chopra, *Laying the Foundation for Open Banking in the United States*, CONSUMER FIN. PROT. BUREAU (June 12, 2023), https://www.consumerfinance.gov/about-us/blog/laying-the-foundation-for-open-banking-in-the-united-states [https://perma.cc/QP76-5P57]; *see also* Katanga Johnson & Hannah Lang, *US "Open Banking" Rule Bogged Down by Privacy Concerns – Sources*, REUTERS (May 4, 2022, 5:56 PM EDT), https://www.reuters.com/business/finance/exclusive-us-open-banking-rule-bogged-down-by-privacy-concerns-sources-2022-05-04 [https://perma.cc/XL6W-SBWU] (describing CFPB's open banking rule and why it has been delayed).

185. Protecting Americans from Harmful Data Broker Practices (Regulation V), 89 Fed. Reg. 101402 (proposed Dec. 13, 2024) (to be codified at 12 C.F.R. pt. 1022).

186. *Cf.* Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. CHI. L. REV. 623, 642-46 (2023) (discussing the manner that some state laws restrict consumer protection law in this way).

187. *See* Press Release, Fed. Trade Comm'n, FTC Takes Action to Stop Lyft from Deceiving Drivers with Misleading Earnings Claims (Oct. 25, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-takes-action-stop-lyft-deceiving-drivers-misleading-earnings-claims [https://perma.cc/FT7U-CXG9] (describing a settlement DOJ entered into with Lyft for misrepresenting a guaranteed minimum amount of earnings that drivers could make on referral of the FTC); DoNotPay, Inc.; Analysis of Proposed Consent Order to Aid Public Comment, 89 Fed. Reg. 79594 (Sept. 30, 2024) (declaring that a company's claiming that AI could help small businesses avoid legal liability without having to pay for a lawyer was deceptive and unfair); FED. TRADE COMM'N, POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf [https://perma.cc/TL6F-X4VP]; Christa Bieker & Christopher Leach, *The FTC Thinks B2B 'Customers' are 'Consumers*,*'* BLOOMBERG L. (Oct. 3, 2022, 4:00 AM EDT), https://news.bloomberglaw.com/us-law-week/the-ftc-thinks-b2b-customers-are-consumers [https://perma.cc/EC93-WYTE].

Commission has also signed a memorandum of understanding with NLRB to coordinate regulation of employee surveillance tools.[188]

CFPB has expanded its efforts to protect small business lenders, including by beginning to collect data on discriminatory practices.[189] It has begun to explore the possibility of using its powers more extensively in situations that "[l]eave [w]orkers [i]ndebted to [e]mployers" beginning with a study on the increase in employer-driven debt and the harms it can cause.[190] It brought an enforcement action against a coding boot camp for representing that an "'income share' agreement" was not a loan despite its carrying a finance charge.[191] And it proposed an interpretive rule that would make a variety of employer-based loans against future wages (including advance pay) subject to Truth in Lending Act disclosures.[192] Though all of these efforts use authorities other than unfair practices, they indicate the initiation of a field of enforcement that will likely call upon UDAAP in the future.

6. Analyzing, Synthesizing

This enlistment of a standalone unfair-practices authority in coordinated campaigns of enforcement-cum-regulation reveals a rejection not just of the case-by-case, whack-a-mole approach but also of the consumer sovereignty framework that justified it. Several initiatives—to eliminate practices that result in unfair treatment of vulnerable groups or protected classes; to determine which fees are junk and ban them; to set standards for data collection, storage, and sharing—are efforts to *eliminate* options in the name of improving the overall option set rather than attempting to

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188. *Memorandum of Understanding*, *supra* note 136. For discussion of the overlap between consumer protection and antitrust regulation at the current FTC, see generally Luke Herrine, *At the Nexus of Antitrust & Consumer Protection*, 2023 UTAH L. REV. 849.

189. Small Business Lending Under the Equal Credit Opportunity Act (Regulation B), 88 Fed. Reg. 35150 (May 31, 2023) (to be codified at 12 C.F.R. pt. 1002); *see Matched-Pair Testing in Small Business Lending Markets*, CONSUMER FIN. PROT. BUREAU (Nov. 2024), https://files.consumerfinance.gov/f/documents/cfpb_matched-pair-testing-report_2024-11.pdf [https://perma.cc/4LH6-FS5L].

190. Press Release, Consumer Fin. Prot. Bureau, CFPB Launches Inquiry into Practices that Leave Workers Indebted to Employers (June 9, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-into-practices-that-leave-workers-indebted-to-employers [https://perma.cc/686P-5MVE]; Off. for Consumer Populations, *Consumer Risks Posed by Employer-Driven Debt*, CONSUMER FIN. PROT. BUREAU (July 20, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report [https://perma.cc/7PBC-872B].

191. Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action Against Coding Boot Camp BloomTech and CEO Austen Allred for Deceiving Students and Hiding Loan Costs (Apr. 17, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-coding-boot-camp-bloomtech-and-ceo-austen-allred-for-deceiving-students-and-hiding-loan-costs [https://perma.cc/AU2W-E6G9].

192. Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work, 89 Fed. Reg. 61358 (proposed July 31, 2024) (to be codified at 12 C.F.R. pt. 1026).

make consumers better at choosing from existing options.[193] Even those initiatives that are focused on making it easier for consumers to sort out their options do not do so by making information more available or clearer. Both the dark-pattern and the junk-fee crackdowns aim to prevent firms from manipulating consumers who are presumed to have limited time and bandwidth, channeling competition toward higher-value options rather than burdening consumers.[194] Disclosures and disclosure remedies have also become disfavored: where once an unauthorized sharing of consumer data would have been remedied with a warning to consumers, now companies find themselves ordered to delete those data, prohibited from collecting further data of that sort, and under an obligation to track down shared data and have others delete them.[195] Repeat offenders and their principals have sometimes found themselves prohibited from doing further business in an industry.[196]

Additionally, many of these efforts embrace goals other than—or in active tension with—maximizing consumers' net willingness to pay. For one thing, some interventions have focused on improving the treatment of workers and small business owners.[197] Better conditions for producers may well improve outcomes for end users (an Uber driver with more rest and an empty bladder may be a safer driver), but they can also do the opposite (higher hourly pay and limited hours may reduce the supply and increase the cost of Uber rides). The Commission has not attempted to sort between the two—treating the welfare of workers and small businesses as worthy of

193. *Cf.* Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883, 21886 (Apr. 12, 2023) (discussing the need to eliminate "financial products and services that [are] 'set up to fail,'" which allow lenders to benefit from consumer harm and can also lead to harm to third parties).

194. *See id.* at 21885 (discussing dark patterns); *id.* at 21888-89 (discussing the problem of limited options and lock-in); Deese, Mahoney & Wu, *supra* note 133.

195. *Compare* Decision and Order, Flo Health, Inc., No. C-4747 (F.T.C. June 17, 2021), https://www.ftc.gov/system/files/documents/cases/192_3133_flo_health_decision_and_order.pdf [https://perma.cc/XTM3-DNE9] (requiring a fertility-tracking app that shared user data without users' consent to disclose situations in which it will share data), *with* Stipulated Order for Permanent Injunction, Civil Penalty Judgment, and Other Relief, United States v. GoodRx Holdings, Inc., No. 23-CV-460 (N.D. Cal. Feb. 17, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/goodrxfinalstipulatedorder.pdf [https://perma.cc/V7KC-LNSC] (requiring a healthcare company to delete certain sensitive patient data and prohibiting that company from disclosing those data in a variety of contexts). For purposes of this comparison, I am just focusing injunctive relief, setting aside the matter of monetary compensation and penalties.

196. *E.g.*, Press Release, Fed. Trade Comm'n, *supra* note 181 (banning founders of a teen-focused messaging app from offering similar apps to persons under eighteen); Press Release, Fed. Trade Comm'n, *supra* note 144 (impleading senior executives involved in the design of an allegedly deceptive Amazon Prime enrollment program); TransUnion Press Release, *supra* note 145 (suing TransUnion executive individually for deceptive enrollment practices); *see also* FTC v. Vyera Pharms., LLC, No. 20-CV-00706, 2022 WL 1081563, at *3 (S.D.N.Y. Feb. 4, 2022) (enjoining, on the FTC's motion, the CEO of Vyera Pharmaceuticals from ever participating in the pharmaceutical industry again due to his role in orchestrating pervasive violations of antitrust laws), *aff'd sub nom.* FTC v. Shkreli, No. 22-728, 2024 WL 1026010 (Jan. 23, 2024), *cert. denied*, No. 23-1338, 2024 WL 4426684 (U.S. Oct. 7, 2024).

197. *E.g.*, Bieker & Leach, *supra* note 187; Press Release, Fed. Trade Comm'n, *supra* note 190; *see* Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 28-35 (2024).

separate consideration. This bespeaks an overall interest in limiting the power asymmetry between buyers and sellers, regardless of whether the buyers are end users. But even when focusing on consumers' interests qua end users, several efforts prioritize the needs of disadvantaged consumers, who tend to be less able or less willing to pay, and others aim to advance substantive values like privacy and bodily autonomy.[198]

III. Explaining the Change

The first question to ask about this dramatic change is how it came about. The answer is: at first gradually and then rapidly. At the turn of the twentieth century, the notice-and-consent paradigm began to tear at the seams in the regulation of internet user data collection and storage. Meanwhile, academics developed theories of behavioral law and economics that highlighted the limits of consumer choice. But the major rip was the enormous delegitimizing effects of the global financial crisis. The legitimacy crisis surrounding Big Tech and its data collection practices followed quickly. A younger group of academics and policy advocates, convinced of the need to rethink the role of economic regulation, began to gain a foothold, largely in the networks surrounding Senators Elizabeth Warren and Bernie Sanders. President Biden's efforts to bring that wing of the Democratic Party into his administration led to reformist appointments at the relevant agencies.

A. Doubts About Consumer Choice Before the Global Financial Crisis

The big pivot was the global financial crisis, but some groundwork was laid earlier. Inside the FTC, the rise of big pools of data—without any comprehensive congressional action or other standards for security—gave rise to a common law of data privacy that largely used unfair-practices authority to set standards of reasonableness. Outside the FTC, the rise of behavioral economics provided new ways to talk about the shortcomings of relying on consumer choice. Yet neither developed into a full critique and each remained separate from the other.

1. Inside the FTC: Data Security

Ironically, it was under Timothy Muris—who, the reader may recall, was a Reagan revolutionary—that the FTC took the first step away from

198. *E.g.*, Slaughter et al., *supra* note 119, *passim*; Elisa Jillson, *Protecting the Privacy of Health Information: A Baker's Dozen Takeaways from FTC Cases*, FED. TRADE COMM'N (July 25, 2023), https://www.ftc.gov/business-guidance/blog/2023/07/protecting-privacy-health-information-bakers-dozen-takeaways-ftc-cases [https://perma.cc/NA35-VM9E]. On incorporating a broader set of values into the application of UDAP, see generally Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349 (1988).

pure consumer sovereignty in the early 2000s.[199] During the Clinton administration, the FTC had become the de facto data regulator; and its approach had largely been to encourage self-regulation, to police especially deceptive practices, and to ask Congress to do more.[200] That changed under the Bush administration. Through a series of consent agreements, the Commission started to hold technology firms not just to their terms of service but also to express and implicit representations (in advertisements, in website design, and in communications with users) about the security of their websites and data practices.[201] It did so using both deception and unfairness theories.[202] Even more notably, the Commission began to use this process to hold firms to *others'* standards for data management (drawing on industry best practices, the Health Insurance Portability and Accountability Act, the Family Educational Rights and Privacy Act, and the like), treating these standards as tort-like duties of care, usually by invoking the unfair-practices authority.[203] These settlements waxed and waned under different Chairs, but overall they went from scattered experiments to a routine part of the Commission's practice during the first two decades of the twenty-first century.[204]

This "[n]ew [c]ommon [l]aw of [p]rivacy"[205] put light pressure on some key aspects of the consumer sovereignty framework. It made use of unfair-practices authority as something more than an intensifier of the

199. *Cf.* Timothy J. Muris, Chairman, Fed. Trade Comm'n, Protecting Consumers' Privacy: 2002 and Beyond, Remarks at the Privacy 2001 Conference (Oct. 4, 2001), https://www.ftc.gov/news-events/news/speeches/protecting-consumers-privacy-2002-beyond [https://perma.cc/A6Y8-EJD2] (outlining plans to increase the FTC's commitment to protecting consumers' privacy).

200. *Cf.* Press Release, Fed. Trade Comm'n, Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case (Aug. 13, 1998), http://www.ftc.gov/news-events/press-releases/1998/08/internet-site-agrees-settle-ftc-charges-deceptively-collecting [https://perma.cc/RSJ8-XBA3] (detailing the FTC's action against GeoCities for deceptively collecting personal data); Robert Pitofsky, Chairman, Fed. Trade Comm'n, Consumer Privacy on the World Wide Web, Prepared Statement Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce (July 21, 1998), http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-consumer-privacy-world-wide-web/privac98.pdf [https://perma.cc/84SF-LBTJ] (proposing legislation to provide privacy protection for consumers visiting U.S. commercial websites).

201. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 599 (2014); HOOFNAGLE, *supra* note 86, at 119.

202. Solove & Hartzog, *supra* note 201, at 599; HOOFNAGLE, *supra* note 86, at 119.

203. Solove & Hartzog, *supra* note 201, at 627-66; HOOFNAGLE, *supra* note 86, at 126-30.

204. *Cf. Commission Statement Marking the FTC's 50th Data Security Settlement*, FED. TRADE COMM'N 1 (Jan. 31, 2014), http://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf [https://perma.cc/QQ7S-6ARR] (explaining reasonableness as the Commission's approach to data security). *See generally* FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf [https://perma.cc/D8MF-32PR] (describing the Commission's approach to consumer privacy to businesses and policymakers).

205. Solove & Hartzog, *supra* note 201, at 627.

deceptive-practices authority. And it did so with a purpose of raising the overall standard for data security across industries, declaring conduct unlawful that had not previously been considered so.[206] Though the effort was mostly oriented toward making notice and consent more user-friendly, it also aimed to raise the baseline of options available to consumers.[207]

Nevertheless, the data security cases did not mark anything like a decisive break. For one thing, these were deviations from the rest of the Commission's consumer protection practice, which remained focused on facilitating rational consumer choice.[208] When the Commission felt compelled to develop more wide-ranging substantive standards, it continued to lobby Congress to pass specific statutes—as it notably did to develop the much-touted (opt-in) Do Not Call Registry in 2003.[209] But even when addressing data security, the Commission remained committed to a quiet case-by-case approach, with foundational principles being established in unreported settlements containing minimal legal reasoning.[210] And though the Commission's efforts aimed to raise the floor for security, they did so mostly as a way to facilitate self-regulation—enforcing standards adopted by self-regulatory bodies—and mostly by separating data security from more controversial issues about how companies were tracking consumers, sharing that information with security agencies and companies, and developing business models to manipulate consumer behavior. This harm-based approach allowed for deviation from notice and consent only when the harm was relatively easy to define and uncontroversial: stolen data leading to stolen identity and stolen money. It avoided situations in which the harm to consumers was not as morally simple.[211]

206. One example from after the global financial crisis is *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015)—a case that the FTC litigated to judgment—in which the FTC had to defend its position that failure to maintain reasonable and appropriate data security is unfair.

207. Dennis D. Hirsch, *From Individual Control to Social Protection: New Paradigms for Privacy Law in the Age of Predictive Analytics*, 79 MD. L. REV. 439, 451-53 (2020).

208. *See generally* Edwards, *supra* note 22, at 343-51.

209. *See* Do-Not-Call Implementation Act, Pub. L. No. 108-82, 117 Stat. 1006 (2003) (codified at 15 U.S.C. § 6151); HOOFNAGLE, *supra* note 86, at 253-58; *cf.* 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, 2162 (2015) (describing the Do Not Call Registry as "one of the most popular government initiatives in history"). This is not to trivialize the effort that went into developing the Do Not Call Registry. By all accounts (and here I'm referring to informal conversations I have had with various observers and employees of the FTC), Timothy J. Muris and J. Howard Beales III were fully committed to the cause and endured criticism from their usual ideological allies to achieve the outcome.

210. Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2232-33, 2235-65 (2015).

211. *See* HOOFNAGLE, *supra* note 86, at 119; Telephone Interview with Peggy Twohig, *supra* note 91.

2. Outside the FTC: Behavioral Economics

During this same time period, behavioral economics became the most widely used framework to analyze consumer markets in the legal academy. Behavioral economics had developed as a subfield in economics departments starting in the 1970s, when neoclassical economists began to digest social psychology studies that directly contradicted core assumptions of the rational-actor model.[212] It had become a bourgeoning field by the 1990s—with multiple labs devoted to cataloguing the foibles of human reasoning and multiple models demonstrating how such foibles could produce market failures relative to perfect competition. Legal scholars occasionally drew on this research in the 1980s and 1990s,[213] but it was not until the turn of the millennium that behavioral law and economics came into its own as a distinctive line of inquiry.[214] Consumer markets were central foci from the beginning.[215]

In its most influential form, behavioral law and economics kept the basic theoretical and normative framework of neoclassical law and economics in place while introducing a series of ways that even informed consumer choice between competitive sellers could result in suboptimal outcomes for consumers. These "behavioral market failures"[216]—which stemmed from "bounded rationality"[217] and "heuristics and biases"[218]—

212. *See generally* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (describing heuristics employed when making judgments under uncertainty); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980) (proposing Amos Tversky and Daniel Kahneman's prospect theory as an explanation for consumers' acting inconsistently with economic theory). Earlier efforts to grapple with the implausibility of the rational actor had not been incorporated into the mainstream of theory. *See generally* Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955) (formulating "definitions of 'approximate' rationality" to describe human decision-making more accurately); Arthur Allen Leff, Commentary, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (critiquing a purely economic analysis of the law); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (arguing that "generating a complete system of private law rules by application of the criterion of efficiency is incoherent").

213. *See, e.g.*, Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989) (arguing that law and economics scholars "should increasingly look to psychology and sociology in order to enrich the explanatory power and normative punch of economic analysis"); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995) (arguing that various contract-law doctrines limiting the enforcement of otherwise valid contracts can best be "explained on the basis of the limits of cognition").

214. Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115, 115 (1999) ("The last decade has seen an outpouring of work in 'behavioral law and economics;' in the last few years, the outpouring has become a flood.").

215. *See generally* EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS 19-138 (2018) (collecting sources); Thaler, *supra* note 212 (offering a behavioral theory of consumer decision-making).

216. Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1842-52 (2013).

217. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78 (1998).

218. Tversky & Kahneman, *supra* note 212, at 1130.

provided new reasons to be skeptical about consumer markets' ability to self-correct and new reasons for regulators to intervene. Here was a new terminology for consumer advocates to express worries about businesses' predatory practices in the lingua franca of acceptable policy discourse.[219] Here was a new hot topic of research for ambitious young econometricians (and social psychologists). Here was a new scholarly push to reconsider regulation of consumer markets.

The behavioral revolution was a complication for the consumer sovereignty framework, but not one that challenged its hegemony. For one thing, behavioral economics did not have much influence on the FTC or other consumer law policymakers in the decades before the financial crisis.[220] Information asymmetries and outright scams were still the main market failures being considered. More importantly, most behavioralists did not actually seek to challenge the basic consumer sovereignty model. At the theoretical level, treating evidence about how consumers decide as evidence of discrete market failures that, if corrected, would restore perfect competition reinforces the basic consumer sovereignty approach to modeling consumer markets.[221] At the practical level, behavioral economics in this era tended to "trim [its] sails" (as Ryan Bubb and Richard H. Pildes have argued) in the name of finding political middle ground.[222] Under the rubric of "asymmetric paternalism,"[223] "libertarian paternalism,"[224] or "regulation for conservatives,"[225] behavioralists sought out discrete market failures to correct, hoping to "preserve choice"[226] via informational

219. *See, e.g.*, Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012). I do not mean to suggest that behavioral market failures were the only market failures considered; others were as well. *See, e.g.*, Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REGUL. 121 (2004) (discussing network externalities in banking and transaction costs as barriers to expanded lending to poor people).

220. *See* Edwards, *supra* note 22, at 353 (discussing one 2007 Bureau of Economics conference on behavioral economics as the only example of the FTC's explicitly considering the subject as of 2008).

221. *See* Herrine, *supra* note 23, at 250-61.

222. Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1610 (2014); *see also* Nick Chater & George Loewenstein, *The I-Frame and the S-Frame: How Focusing on Individual Level Solutions Has Led Behavioral Public Policy Astray*, 46 BEHAV. & BRAIN SCIS. art. no. e147 (2023) (criticizing the tendency of the behavioral economics and decision science literature to focus on flaws in individuals and policies that would improve individual decisions rather than the way policy shapes the option set for different individuals).

223. Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism,'* 151 U. PA. L. REV. 1211 (2003).

224. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

225. Camerer et al., *supra* note 223.

226. Bubb & Pildes, *supra* note 222, at 1606.

remedies or "nudges"[227] as a first resort and only considering more market-shaping regulations as a second or third resort.[228]

B. The Impact of the Global Financial Crisis

Then came the global financial crisis. The crisis was a delegitimating event for basically every institution with power in 2007, playing a major role in bringing about the political instability (and, as we will see, much of the political possibility) of the present.[229] Since predatory lending in mortgage markets precipitated the crisis, it should not be surprising that the regulation of consumer markets was swept up in this delegitimating wave.[230] This delegitimation has been constructive. Most directly, the crisis forced a reconsideration of whether consumer financial markets were in need of heavier supervision—leading to the creation of CFPB and its expanded UDAAP authority. More distally, it undermined simple narratives about market self-correction, motivated political movements that sought more transformational changes, and provided a trauma of underenforcement to countervail KidVid's trauma of (alleged) overenforcement.

1. Immediate Impact: CFPB

In the months immediately following the global financial crisis, reporters and researchers uncovered story after previously overlooked story of predatory practices in mortgage markets.[231] Portions of the market were outright fraudulent—lying about borrowers, encouraging borrowers to lie about themselves, forging signatures.[232] Even when credit checks were done and documents were signed (setting aside chain-of-title issues),[233] competitive pressure to issue and securitize as many mortgages as possible loosened underwriting standards and made it convenient to structure loans in ways that made them difficult to understand and to pay after an initial

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227. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

228. *See* Camerer et al., *supra* note 223, at 1224-50.

229. *See generally* ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD (2018).

230. *See generally* Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991 (2014) (book review).

231. The predation in mortgage markets was well known to the small group of academics and advocates who paid them critical attention, even before the bubble took off. *See* Engel & McCoy, *supra* note 219, at 1271-72 (noting that it was recognized as early as 1981 that higher interest rates attract loan applicants with higher risks of default). Similar predation was likewise recognized by specialists in other markets. *See generally* CHRISTOPHER L. PETERSON, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET (2004).

232. DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD 31 (2016); JENNIFER TAUB, OTHER PEOPLE'S HOUSES: HOW DECADES OF BAILOUTS, CAPTIVE REGULATORS, AND TOXIC BANKERS MADE HOME MORTGAGES A THRILLING BUSINESS 149-50, 159-162 (2014); TOOZE, *supra* note 229, at 64.

233. *See generally* DAYEN, *supra* note 232, *passim*.

teaser period.[234] A disproportionate share of such subprime loans were issued to Black and Latine households and in predominantly Black and Latine neighborhoods.[235] For several originators—most notoriously Wells Fargo—evidence of intentional racial discrimination was discovered.[236]

This flood of revelations opened up new conversations, curiosity, and political will around how power and inequality shape mortgage and consumer markets, as well as society more generally. Advocates of stronger consumer protection, a relatively small group of specialists who had long been marginalized in policy and academic circles,[237] suddenly found an audience.[238] Behavioral economics, which had become increasingly popular in academic circles,[239] found more purchase in policy circles.[240] In an era of marginalization, these advocates and scholars had mostly been focused on rearguard actions and minor reforms, but, luckily enough, then–law professor Elizabeth Warren had just put forward a more transformative proposal: a new agency that would focus exclusively on consumer financial protection.[241] She argued that creating such an agency would address two problems with the precrisis regime: the dispersal of consumer financial protection powers across multiple agencies—with the major rulemaking powers (including over UDAP) given to banking regulators that did not care about consumer protection—and the misplaced faith in informed consumer choice to police business behavior.[242] Warren's proposal was the basis for CFPB, which was the "Consumer Protection" half of the Dodd-

234. ADAM J. LEVITIN & SUSAN M. WACHTER, THE GREAT AMERICAN HOUSING BUBBLE: WHAT WENT WRONG AND HOW WE CAN PROTECT OURSELVES IN THE FUTURE 104-09 (2020); Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, 88 IND. L.J. 213, 225-32 (2013).

235. *Cf.* Rakesh Kochhar, Richard Fry & Paul Taylor, *Wealth Gaps Rise to Record Highs Between Whites, Blacks, and Hispanics*, PEW RSCH. CTR. 1-6 (July 26, 2011), https://www.pewresearch.org/wp-content/uploads/sites/3/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf [https://perma.cc/67SW-KBNR] (discussing the disparate racial impacts of the financial crisis).

236. Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES (June 6, 2009), https://www.nytimes.com/2009/06/07/us/07baltimore.html [https://perma.cc/RE8C-2BZ2]. *See generally* Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165 (2010) (arguing that predatory lenders intentionally target communities of color).

237. *See* Van Loo, *supra* note 11, at 2073-96.

238. *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 78-80 (2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [https://perma.cc/H8ZT-5WL3].

239. *See* Sunstein, *supra* note 214, at 115 ("The last decade has seen an outpouring of work in 'behavioral law and economics;' in the last few years, the outpouring has become a flood.").

240. Edwards, *supra* note 22, at 353 (discussing a 2007 "conference entitled 'Behavioral Economics and Consumer Policy'" hosted by the FTC's Bureau of Economics).

241. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. (Summer 2007), https://democracyjournal.org/magazine/5/unsafe-at-any-rate [https://perma.cc/7XMK-E4KT]; Bar-Gill & Warren, *supra* note 219, at 98-100.

242. Leonard J. Kennedy, Patricia A. McCoy & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1144-49, 1145 n.14 (2012).

Frank Wall Street Reform and Consumer Protection Act[243]—Congress's major response to the global financial crisis.

The Consumer Financial Protection Act,[244] part of the Dodd-Frank Act, included several important innovations—both procedural[245] and substantive.[246] For our purposes, the most salient was the addition of the "abusive" authority, making UDAP into UDAAP.[247] It was added to encourage the new Agency to go beyond then-current interpretations of the unfair-practices authority.[248] As with the deceptive-practices authority, Congress used the abusive-practices authority to identify a group of practices that an agency should view as presumptively unfair.[249]

In particular, Dodd-Frank gave CFPB authority to declare a practice "abusive" when the practice

> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
>
> (2) takes unreasonable advantage of—
>
> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
>
> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

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243. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

244. Pub. L. No. 111-203, 124 Stat. 1955 (2010).

245. Some of these are under legal attack, partially successful so far. *See* Seila L. LLC v. CFPB, 591 U.S. 197 (2020) (striking down the Consumer Financial Protection Act's (CFPA) removal limitations); Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616 (5th Cir. 2022) (striking down CFPB's funding scheme), *rev'd*, 601 U.S. 416 (2024). Others, such as the creation of a student loan ombudsman, *see* 12 U.S.C. § 5535 (2018), have proved enormously influential. The current CFPB Director, Rohit Chopra, was formerly an ombudsman. *Rohit Chopra, Director*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/about-director [https://perma.cc/AG8V-62XE]. His successor, Seth Frotman (who is now back at CFPB as general counsel), started an organization called the Student Borrower Protection Center, which has contributed to a growing reconsideration of student debt and its administration. *See* Brian Slagle, *Former CFPB Student Loan Ombudsman Creates Student Loan Advocacy Group*, CONSUMER FIN. MONITOR (Dec. 5, 2018), https://www.consumerfinancemonitor.com/2018/12/05/former-cfpb-student-loan-ombudsman-creates-student-loan-advocacy-group [https://perma.cc/NYZ7-N5W8].

246. *See, e.g.*, 12 U.S.C. § 5518 (2018) (giving the Bureau authority to determine whether to prohibit predispute arbitration clauses). *See generally* Arbitration Agreements, 82 Fed. Reg. 55500 (2017) (announcing the repeal of an arbitration prohibition that was overturned under the Congressional Review Act).

247. 12 U.S.C. § 5531(a), (d) (2018).

248. *See* Herrine, *supra* note 22, at 434-35. Since I published that article, I have also talked with Treasury officials involved in the drafting of the CFPA who have confirmed this account.

249. Here I agree with Beales. J. Howard Beales III, *What Does It All Mean? "Abusive" Acts or Practices and the CFPB*, CONSUMER FIN. PROT. BUREAU 7 (June 21, 2019), https://files.consumerfinance.gov/f/documents/cfpb_beales-written-statement_symposium-abusive.pdf [https://perma.cc/7MQY-NP5C] ("Unfairness, after all, comes first in the list of practices the Bureau is authorized to stop. It is reasonable to construe unfair practices as the general category, with deceptive and abusive practices as (possibly overlapping) subsets of the general category.").

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[250]

Each of these four categories of abusiveness was designed to address a category of wrongful conduct in mortgage markets that the FTC had (mistakenly, in my view) thought out of the reach of the unfair-practices authority.[251] The first and second categories addressed situations in which firms pointed to reams of boilerplate to argue that their misconduct was "reasonably avoidable" to anybody reading their contracts—for instance, lenders' tacking on useless services and insurance features only detectable by consumers willing and able to do complex math, or debt relief companies' making consumers pay even when they failed to provide any debt relief.[252] The third category was primarily inspired by the high-pressure sales tactics of mortgage originators and the aggressive marketing techniques of credit card companies.[253] The fourth category was inspired by the conflicts of interests and near-fiduciary relationships in the mortgage market—in which realtors, nominally representing consumers' interests, recommend an appraiser or mortgage lender with which they have a business relationship, for example.[254]

But, of course, the abusive-practices authority was not meant to be limited to those specific practices. And its categories have proven flexible. In its first decade, the Bureau has used abusive-practices authority to prohibit regulated entities from using the internet or tribal territory to avoid state usury laws;[255] from steering consumers to more expensive financial

250. 12 U.S.C. § 5531(d) (2018). As Adam J. Levitin points out in his casebook, these elements do not strictly speaking constitute a *definition* of "abusive"—they simply speak in terms of the limits of the Bureau's authority. ADAM J. LEVITIN, CONSUMER FINANCE: MARKETS AND REGULATION 193 (2d ed. 2023). In principle, that would seem to leave open the possibility that states with the authority to enforce the CFPA could target conduct that goes beyond these factors. (And, of course, it makes it easier to differentiate this abusive authority from those in other statutes, such as the Home Ownership and Equity Protection Act, *see* 15 U.S.C. § 1639(p)(2)(B), and the Telemarketing Consumer Fraud and Abuse Prevention Act, *id.* § 6102(a), (d)(1)(A).)

251. Telephone Interview with Peggy Twohig, *supra* note 91.

252. *Id.*

253. *Id. See generally* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004) (describing some of the dangerous market dynamics and marketing techniques in the credit card industry); Interview by Public Broadcasting Service with Elizabeth Warren, Professor, Harvard L. Sch. (Sept. 20, 2004) https://www.pbs.org/wgbh/pages/frontline/shows/credit/interviews/warren.html [https://perma.cc/EH5A-2DJV] (describing the prevalence and dangerousness of companies' marketing debt, such as in the credit card industry).

254. Telephone Interview with Peggy Twohig, *supra* note 91; Chopra, *supra* note 126.

255. The leading case is *CFPB v. CashCall, Inc.*, No. 15-7522, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016). For a discussion of the case's procedural history since the 2016 decision—throughout which CFPB has survived all challenges and received its requested remedy—see *CFPB v. CashCall, Inc.*, No. 15-7522, 2023 WL 2009938, at *1-2 (C.D. Cal. Feb. 10, 2023), *aff'd*, No. 23-55259, 2025 WL 22135 (Jan. 3, 2025). *See also* First Amended Complaint at 40-41, CFPB v. Think Fin., LLC, No. 17-CV-00127 (D. Mont. Mar. 28, 2018), https://files.consumerfinance.gov/f/documents/cfpb_think-finance_amended-complaint_032018.pdf [https://perma.cc/8UGW-4YCH] (asserting that avoidance of usury laws is an abusive act or practice); Complaint for Permanent Injunction and Other Relief at 25, CFPB v. Golden Valley Lending, Inc., No. 17-CV-3155 (N.D. Ill.

services;[256] from taking advantage of consumers' limited (or total lack of) alternatives;[257] from knowingly providing services that will not benefit consumers;[258] from designing employee compensation in a way that encourages employees to steer consumers to inferior options;[259] and from

Apr. 27, 2017), https://files.consumerfinance.gov/f/documents/201704_cfpb_Golden-Valley_Silver-Cloud_Majestic-Lake_complaint.pdf [https://perma.cc/GF7Q-WGCU] (same); Complaint for Violations of the Consumer Financial Protection Act of 2010 at 10-11, CFPB v. D & D Mktg., Inc., No. 15-CV-9692 (C.D. Cal. Dec. 17, 2015), https://files.consumerfinance.gov/f/201512_cfpb_complaint-v-d-and-d-marketing-inc-et-al.pdf [https://perma.cc/N4DW-7WEW] (same); Consent Order at 5-6, Zero Parallel, LLC, CFPB No. 2017-CFPB-0017 (Sept. 6, 2017), https://files.consumerfinance.gov/f/documents/201709_cfpb_zero-parallel-llc_consent-order.pdf [https://perma.cc/548W-P9LS] (using abusive-practices authority to prohibit the avoidance of usury laws); Consent Order, Colfax Cap. Corp., CFPB No. 2014-CFPB-0009 (July 29, 2014), https://files.consumerfinance.gov/f/201407_cfpb_consent-order_rome-finance.pdf [https://perma.cc/3PXH-FRMS] (using the unfair-, deceptive-, and abusive-practices authorities to prohibit the avoidance of usury laws); Press Release, Consumer Fin. Prot. Bureau, CFPB and 13 State Attorneys General Obtain About $92 Million in Debt Relief for Servicemembers Harmed by Predatory Lending Scheme (July 29, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-13-state-attorneys-general-obtain-about-92-million-in-debt-relief-for-servicemembers-harmed-by-predatory-lending-scheme [https://perma.cc/8C32-8JKG] (discussing the *Colfax* settlement). *But see* Steve Vockrodt, *CFPB Drops Kansas Payday Lending Case, Stoking Fears Trump Is Backing Off the Industry*, KAN. CITY STAR (Jan. 19, 2018), https://www.kansascity.com/news/politics-government/article195623824.html [https://perma.cc/V3RL-Y78V] (describing CFPB's backing away from scrutiny of the payday lending industry).

256. The leading case is *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 885-90, 918-21 (S.D. Ind. 2015). *See also* Complaint at 12-14, CFPB v. Populus Fin. Grp., Inc., No. 22-CV-01494 (N.D. Tex. July 12, 2022) [hereinafter *Populus* Complaint], https://files.consumerfinance.gov/f/documents/cfpb_populus-dba-ace_complaint_2022-07.pdf [https://perma.cc/GG5T-PVR5] (enjoining and penalizing company that concealed free repayment plans from customers); Press Release, Consumer Fin. Prot. Bureau, CFPB and Navajo Nation Take Action to Stop an Illegal Tax-Refund Scheme (Apr. 14, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-navajo-nation-take-action-to-stop-an-illegal-tax-refund-scheme [https://perma.cc/Y4YS-7AF5] (describing a CFPB enforcement action against defendants that operated "tax-preparation franchises steering low-income consumers . . . toward high-cost tax-refund-anticipation loans").

257. *ITT Educ. Servs.*, 219 F. Supp. 3d at 918-21; Consent Order at 15-16, JPay, LLC, CFPB No. 2021-CFPB-0006 (Oct. 19, 2021), https://files.consumerfinance.gov/f/documents/cfpb_jpay-llc_consent-order_2021-10.pdf [https://perma.cc/X3J5-EY5Q]; Complaint at 27-29, CFPB v. MoneyLion Techs. Inc., No. 22-CV-8308 (S.D.N.Y. Sept. 29, 2022) [hereinafter *MoneyLion* Complaint], https://files.consumerfinance.gov/f/documents/cfpb_moneylion_complaint_2022-09.pdf [https://perma.cc/3D3L-SFHZ]; Complaint at 32-34, CFPB v. Nexus Servs., Inc., No. 21-CV-00016 (W.D. Va. Feb. 22, 2021), https://files.consumerfinance.gov/f/documents/cfpb_nexus-services-inc-et-al_complaint_2021-02.pdf [https://perma.cc/AN7K-MGY3]; *see also* CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218 (5th Cir. 2022) (affirming CFPB's authority to bring enforcement actions in light of *Seila Law* and challenges to its funding).

258. Stipulated Final Judgment and Order at 8-9, CFPB v. Am. Debt Settlement Sols., Inc., No. 13-CV-80458 (S.D. Fla. June 7, 2013), https://files.consumerfinance.gov/f/201306_cfpb_finalorder_adss_signed-judgment.pdf [https://perma.cc/L66Q-NWML].

259. Complaint at 25, CFPB v. Credit Acceptance Corp., 23-CV-0038 (S.D.N.Y. Jan. 4, 2023) [hereinafter *Credit Acceptance* Complaint], https://files.consumerfinance.gov/f/documents/cfpb_credit-acceptance-corporation_complaint_2023-01.pdf [https://perma.cc/BSC5-ABV4]; Complaint at 2-3, CFPB v. Aequitas Cap. Mgmt., Inc., No. 17-1278 (D. Or. Aug. 17, 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_aequitas-complaint.pdf [https://perma.cc/AUT4-6S8D]; Stipulated Final Judgment and Order at 2, CFPB v. Aequitas Cap. Mgmt., Inc., No. 17-CV-1278 (D. Or. Sept. 1, 2017), https://files.consumerfinance.gov/f/documents/201709_cfpb_aequitas-stipulated-final-judgment-and-order.pdf [https://perma.cc/2GBE-7GUH]; Amended Complaint at 5, CFPB v. Fifth Third Bank, Nat'l Assoc., No. 21-CV-262 (S.D.

obscuring the cost of financial services through nonobvious pricing structures,[260] among other practices.

The Bureau has often paired the abusive-practices authority with the unfair-practices authority.[261] Adding another A to UDAAP has thus also expanded the application of U.

In these and other ways, CFPB began to move away from the consumer sovereignty paradigm, but it has still occupied a liminal space (and that's not even considering the efforts to dismantle it).[262] It was built out of the ideas that were best developed at the time, which included several specific critiques of the preexisting regime (dispersion of regulatory power, predispute arbitration clauses, specific abuses in the mortgage market) and one or another variety of behavioral economics—the limitations of which we have just discussed.[263] And many of its early staff came over from the FTC, bringing with them KidVid trauma and relatedly regulatory norms.[264]

2. Distal Impact: The Culture of Consumer Protection

But CFPB was not the only result of the global financial crisis. That "Crisis of Neoliberalism"[265] inspired a deeper reconsideration of the political and intellectual settlements that had prevailed during the previous half

Ohio June 16, 2021), https://files.consumerfinance.gov/f/documents/cfpb_fifth-third-bank-national-association_amended-complaint_2021-08.pdf [https://perma.cc/KBE9-ZLXK]; *see also* Consent Order at 8-10, Cash Express, LLC, CFPB No. 2018-CFPB-0007 (Oct. 24, 2018), https://files.consumerfinance.gov/f/documents/bcfp_cash-express-llc_consent-order_2018-10.pdf [https://perma.cc/QG9A-4TFH] (instructing employees to prevaricate about set-off and disciplining those who failed to do so).

260. Consent Order at 1, Regions Bank, CFPB No. 2015-CFPB-0009 (Apr. 28, 2015), https://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf [https://perma.cc/8X6H-VYL9]; 2022 Regions Bank Consent Order, *supra* note 153, at 8-13; Consent Order at 20-25, TD Bank, N.A., CFPB No. 2020-CFPB-0007 (Aug. 20, 2020), https://files.consumerfinance.gov/f/documents/cfpb_td-bank-na_consent-order_2020-08.pdf [https://perma.cc/A69B-B3ZG]; Consent Order at 7, Fort Knox Nat'l Co., CFPB No. 2015-CFPB-0008 (Apr. 20, 2015), https://files.consumerfinance.gov/f/201504_cfpb_regulation-fort-knox-mac-settlement.pdf [https://perma.cc/XV2Z-8DVL]; *Credit Acceptance* Complaint, *supra* note 259, at 4; *MoneyLion* Complaint, *supra* note 257, at 21-24; *ITT Educ. Servs.*, 219 F. Supp. 3d at 918-21.

261. *E.g.*, *MoneyLion* Complaint, *supra* note 257, at 25-29; 2022 Regions Bank Consent Order, *supra* note 153, at 11-13; *Populus* Complaint, *supra* note 256, at 11-15.

262. *Cf.* Jeff Sovern, *Mick Mulvaney Turned the CFPB from a Forceful Consumer Watchdog into a Do-Nothing Government Cog*, CONVERSATION (June 29, 2018, 6:35 AM EDT), https://theconversation.com/mick-mulvaney-turned-the-cfpb-from-a-forceful-consumer-watchdog-into-a-do-nothing-government-cog-98842 [https://perma.cc/J6PL-9A56] (discussing then-ongoing challenges to statutory limitations on the President's power to remove CFPB's Director); Seila L. LLC v. CFPB, 591 U.S. 197 (2020) (striking down those limitations).

263. *See* Ronald J. Mann, *After the Great Recession: Regulating the Financial Services for Low- and Middle-Income Communities*, 69 WASH. & LEE L. REV. 729, 733-36 (2012) (discussing the role of behavioral economics in the early Bureau).

264. Anonymous Interview No. 3, *supra* note 91. I am also drawing on some personal experience here: I interned at the early CFPB as a law student in 2014.

265. GÉRARD DUMÉNIL & DOMINIQUE LÉVY, THE CRISIS OF NEOLIBERALISM 1-3 (2011). *See generally* PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN (2013) (arguing that neoliberal ideas at once caused and were used to solve the financial crisis).

century, especially among the younger generation then coming of age. It was this younger generation that propelled Barack Obama's campaign, and it was they who took to Zuccotti Park to "Occupy Wall Street" to protest President Obama's failure to hold bankers responsible or address the inequality that enabled their irresponsibility.[266] Occupy's focus on inequality generated broader interest in that topic, revitalizing academic interest and policy discussions.[267] Occupy's energy and the networks it created helped revitalize union organizing, debtor organizing, and, at least indirectly, a new wave of racial justice organizing.[268] Each of these efforts itself seeded new (or revitalized) academic and policy conversations that eventually fed back into the discussion of how to reorganize consumer law.[269] Surrounding fields like antitrust, regulated industries, financial regulation, and work law (and tech, as we will discuss) have been subjected to their complementary reconsiderations, which have also fed back into the reconsiderations of consumer law.[270]

Perhaps this shared experience also helps explain the broader skepticism of neoliberal approaches to analyzing market governance that has been in evidence since 2008. The libertarian-paternalist approach to applying behavioral economics has been at least partially displaced by the "market manipulation" analytic originally suggested by Jon D. Hanson and

266. Todd Gitlin, *Was Occupy Wall Street the 'Beginning of the Beginning'?*, N.Y. TIMES (Sept. 18, 2021), https://www.nytimes.com/2021/09/18/books/review/generation-occupy-michael-levitin.html [https://perma.cc/6A6G-P259].

267. S*ee* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 626 (2014) (reviewing PIKETTY, *supra*) (noting that "[t]he reading public's appetite for [Piketty's] economic treatise seems motivated by a growing unease about economic inequality and an anxiety that the 'Great Recession,' which followed the financial crisis of 2008, defines a new economic normal"); J. Bradford DeLong, Heather Boushey & Marshall Steinbaum, Capital in the Twenty-First Century*, Three Years Later*, *in* AFTER PIKETTY: THE AGENDA FOR ECONOMICS AND INEQUALITY 1, 1 (Heather Boushey, J. Bradford DeLong & Marshall Steinbaum eds., 2017).

268. *Cf.* Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, 7:39 PM EDT), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact [https://perma.cc/NVC8-VPWW] (detailing racial justice movements in the United Kingdom, New Zealand, France, Colombia, and the United States); *Our History and Victories*, DEBT COLLECTIVE, https://debtcollective.org/about-us/history-and-victories [https://perma.cc/J2RS-2G36].

269. *See generally* Vijay Raghavan, *Shifting Burdens at the Fringe*, 102 B.U. L. REV. 1301 (2022) (building largely on post-financial-crisis scholarship to argue for a shift toward distributive ends in consumer law); Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019) (challenging the traditional account of "credit as social provision for the working poor"); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211 (2019) (challenging existing understandings of consumer law as limited to "microeconomic and siloed contexts" and advancing the case "for making macroeconomic distribution an explicit goal of consumer law").

270. *See generally* Harris, *supra* note 197 (arguing that work law should draw on "consumer law to more adequately counter worker exploitation"); Raúl Carrillo, *Platform Money*, 41 YALE J. ON REGUL. 894 (2024) (arguing that CFPB can fill in gaps in banking and data-governance law through use of UDAAP authority).

Douglas A. Kysar in the early days of behavioral law and economics.[271] An accumulation of evidence on the shortcomings of limited interventions hasn't hurt. It has become increasingly widely accepted that consumers almost never read—let alone understand—any of the fine print (or even much of the large print) that governs their transactions;[272] that they reason via shortcuts and rules of thumb that sophisticated firms can often predict and exploit;[273] that firms can shape preferences;[274] and, crucially, that informational remedies—via disclosures, nudges, or financial literacy education—rarely work.[275] The rise of digital markets—discussed further below—has made all of this even clearer.[276]

In addition to shaping the general environment in which the politics and policy of consumer protection play out, the financial crisis shaped the people now in charge of implementing consumer protection at the relevant agencies. Rohit Chopra was in business school, studying with housing market expert Susan M. Wachter, during the crisis; he observed the failures of regulators firsthand and brought those lessons with him starting with his

271. *See generally* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999) [hereinafter Hanson & Kysar, *The Problem of Market Manipulation*] (rejecting an understanding of "cognitive anomalies as "relatively fixed and independent influences on individual decisionmaking" and exploring the possibility that firms can, "consciously or not, utilize non-rational consumer tendencies to influence consumer preferences and perceptions for gain"); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) [hereinafter Hanson & Kysar, *Some Evidence of Market Manipulation*]; Bubb & Pildes, *supra* note 222, *passim* (examining recurring limitations of behavioral law and economics); Chater & Loewenstein, *supra* note 222 (rejecting the idea "that many of society's most pressing problems can be addressed cheaply and effectively at the level of the individual, without modifying the system in which the individual operates," and arguing instead "that the most important way in which behavioral scientists can contribute to public policy is by employing their skills to develop and implement value-creating system-level change").

272. *See* Yaneis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contract*s, 43 J. LEGAL STUD. 1 (2014) (finding "that only one or two of every 1,000 retail software shoppers access the license agreement and that most of those who do access it read no more than a small portion"); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546-48 (2014).

273. *See* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1317-21 (2015); Tversky & Kahneman, *supra* note 212, *passim*.

274. *See generally* Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 271 (arguing that firms can exploit consumer nonrationality for gain); Hanson & Kysar, *Some Evidence of Market Manipulation*, *supra* note 271 (presenting evidence of this phenomenon).

275. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 33-54 (2014); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 19-32 (2013); Maximilian Maier, František Bartoš, T.D. Stanley, David R. Shanks, Adam J.L. Harris & Eric-Jan Wagenmakers, *No Evidence for Nudging After Adjusting for Publication Bias*, 119 PNAS art. no. e2200300119, at 1-2 (2022).

276. *See generally* Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014) ("updat[ing]" John D. Hanson and Douglas A. Kysar's market-manipulation framework "to account for the realities of a marketplace that is mediated by technology"); Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115 (2020) (examining how digital consumer interfaces both "render[] the leading methods of proving misleading or deceptive business practices obsolete" and "evade[] the legal apparatus intended to enjoin, punish, and deter" such practices).

first regulatory job as Ombudsman at CFPB.[277] Lina Khan was in college during the crisis, followed it closely, and was also motivated by the failures of regulators.[278] Samuel Levine helped run an eviction-defense clinic as a law student and began his career working on mortgage-settlement and student-debt cases in the Illinois Attorney General's office.[279] All were shaped by the inadequacy of the Obama administration's response to the financial crisis and by the distance between the narrative of market self-correction and the reality of massive dislocation and distress.[280]

Among other things, the financial meltdown's crisis of underregulation blotted out the third-hand memory of KidVid's purported crisis of overregulation.

C. Techlash

Meanwhile, the notice-and-consent approach to data governance looked increasingly ineffective to increasingly many.[281] As internet commerce expanded, tracking people's every move and storing, selling, and sharing the resulting data became enormously profitable.[282] So did using those data to shape consumers' decisions; to customize the products, services, and even the informational ecosystems that different people experienced; and to make an increasing amount of business decisions.[283] More and more of life moved into spaces created by networked computers, and networked computers shaped more and more of life in meatspace—often disrupting whole industries. The firms that developed the most successful models—Google, Amazon, Facebook—became behemoths, providing basic infrastructure for multiple domains of life.[284] It became impossible to portray the internet as a special place of emergent self-governance that

277. Anonymous Interviews Nos. 1, 2, 3, Fed. Trade Comm'n.

278. *Id.*

279. *Id.*

280. *Id.*

281. *See* Ari Ezra Waldman, *Privacy Law's False Promise*, 97 WASH. U. L. REV. 773, 796 (2020) ("Under the traditional notice-and-consent regime, data collectors can escape liability as long as they post their data use practices in a privacy policy."). *See generally* Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461 (2019) (discussing the shortcomings of consent in the digital context).

282. *See* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 199-329 (2019); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 75-89 (2019).

283. ZUBOFF, *supra* note 282, at 98-127; Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1467-72 (2020) (book review).

284. Elettra Bietti, *A Genealogy of Digital Platform Regulation*, 7 GEO. L. TECH. REV. 1, 22-28 (2023).

transcended the power dynamics of the old industrial order.[285] The era of Big Tech had arrived.[286]

A critical literature quickly grew, inside and outside the legal academy, raising concerns about privacy, about bias and discrimination, about manipulation of consumers' choices, about creating information environments that drove people toward conspiracy theories.[287] Some of this literature was in conversation with research on tech monopolies, social media moderation, speech norms, and other reconsiderations of the new institutional reality.[288] With respect to the emergent field of data governance in particular, scholars and advocates began to call for more decisive action from the FTC.[289] The Commission had at that point become slightly more willing to use its unfair-practices authority to set standards for data *security*; but it continued to ignore most privacy issues, to proceed on a case-by-case basis, and to focus primarily on notice and consent.[290] Those calling for more saw their case strengthen after a series of escalating scandals that made clear to the public the extent of the commercial surveillance infrastructure (after the extent of government surveillance had been revealed

285. Salomé Viljoen, *The Promise and Limits of Lawfulness: Inequality, Law, and the Techlash*, 2 J. SOC. COMPUTING 284, 284-86 (2021).

286. *See generally* Kean Birch & Kelly Bronson, *Big Tech*, 31 SCI. AS CULTURE 1 (2022) (examining the dominance, practices, and social implications of Big Tech).

287. These literatures are enormous, but just to cite a few notable and varied examples, see ZUBOFF, *supra* note 282; Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019); SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018); CATHY O'NEILL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016); Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race, Equity, and Online Data-Protection Reform*, 131 YALE L.J. F. 907 (2022); Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2019); and DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008).

288. *See, e.g.*, COHEN, *supra* note 282, at 75-89. *See generally* Kapczynski, *supra* note 283 (arguing that several legal developments, including in the law of takings, commercial speech, and trade, have enabled the accumulation of private power among tech firms); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019) (arguing for the use of structural separations to respond to integration among dominant tech platforms).

289. *See, e.g.*, Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 18-32 (2014); Hartzog & Solove, *supra* note 210, at 2265-99; Hirsch, *supra* note 207, at 453-504; Willis, *supra* note 273, at 1330-93. *See generally* Andrew D. Selbst & Solon Barocas, *Unfair Artificial Intelligence: How FTC Intervention Can Overcome the Limitations of Discrimination Law*, 171 U. PA. L. REV. 1023 (2023) (proposing a role for the FTC in tackling algorithmic discrimination); Talia B. Gillis, *The Input Fallacy*, 106 MINN. L. REV. 1175 (2022) (arguing that outcome-focused tests, rather than input-based approaches, should be used to measure the discriminatory impacts of algorithmic pricing practices).

290. *See* Hartzog & Solove, *supra* note 210, at 2243-46, 2257-65; HOOFNAGLE, *supra* note 86, at 119-141; *see also Commission Statement Marking The FTC'S 50th Data Security Settlement*, *supra* note 204, at 1 (discussing the Commission's work to protect consumers from unfair or deceptive practices regarding personal information). *See generally* FED. TRADE COMM'N, *supra* note 204 (laying out recommendations for companies to build in privacy throughout product development, to allow consumers to make decisions about their data, and to make data collection and use transparent).

by Edward Snowden and others)[291] and the near total lack of accountability.[292]

Perhaps the most crucial episode was the Cambridge Analytica scandal, in which a whistleblower revealed that a British political consulting firm had cooperated with Facebook to acquire large amounts of data about the lives and browsing histories of millions of Facebook users and their associates—and then used those data to develop aggressive targeted advertising campaigns for Brexit, Donald Trump's presidential campaign, and other right-wing causes.[293] Many users and observers were shocked by how casually Facebook treated its users' privacy and how widespread efforts to manipulate behavior—including political behavior—were.[294] Both Facebook and Cambridge Analytica were the subjects of congressional hearings and the targets of multiple law enforcement actions, leading to billions of dollars in damages and the bankruptcy of the latter firm.[295] The scandal pushed even the FTC of the Trump administration to take

291. *See* Ewen Macaskill & Gabriel Dance, *NSA Files: Decoded*, GUARDIAN (Nov. 1, 2013), https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section [https://perma.cc/NV3Q-KQPQ].

292. *See* Viljoen, *supra* note 285, at 284-86; Kari Paul, *A Brutal Year: How the 'Techlash' Caught Up with Facebook, Google, and Amazon*, GUARDIAN (Dec. 28, 2019, 6:00 AM EST), https://www.theguardian.com/technology/2019/dec/28/tech-industry-year-in-review-facebook-google-amazon [https://perma.cc/BPA3-Z9HJ]. *See generally Techlash? America's Growing Concern with Major Technology Companies*, KNIGHT FOUND. & GALLUP (Mar. 11, 2020), https://knightfoundation.org/wp-content/uploads/2020/03/Gallup-Knight-Report-Techlash-Americas-Growing-Concern-with-Major-Tech-Companies-Final.pdf [https://perma.cc/D4JP-RN44] (discussing public discontent with the role that large tech firms play in American society and with their use of user data).

293. Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html [https://perma.cc/L25L-58W7]; Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, GUARDIAN (Mar. 17, 2018, 6:03 PM EDT), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election [https://perma.cc/U49Z-XE3U].

294. *Cf.* Brian X. Chen, *Want to #DeleteFacebook? You Can Try*, N.Y. TIMES (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/technology/personaltech/delete-facebook.html [https://perma.cc/7E89-52GU] (discussing calls for users to delete Facebook in the aftermath of the Cambridge Analytica scandal).

295. *Facebook, Social Media Privacy, and the Use and Abuse of Data: Joint Hearing Before the S. Comm. on Com., Sci. & Transp. and the S. Comm. on the Judiciary*, 115th Cong. (2018); *Facebook: Transparency and Use of Consumer Data: Hearing Before the H. Comm. on Energy & Com.*, 115th Cong. (2018); *Cambridge Analytica and the Future of Data Privacy*, SENATE COMM. ON JUDICIARY, https://www.judiciary.senate.gov/committee-activity/hearings/cambridge-analytica-and-the-future-of-data-privacy [https://perma.cc/NC22-E6LT]; Sam Schechner, *Meta to Pay $725 Million to Settle Cambridge Analytica Lawsuit*, WALL ST. J. (Dec. 23, 2022, 7:09 AM ET), https://www.wsj.com/articles/meta-to-pay-725-million-to-settle-cambridge-analytica-lawsuit-11671797385 [https://perma.cc/9T8S-Z5WM]; Mark Townsend, *Facebook-Cambridge Analytica Data Breach Lawsuit Ends in 11th Hour Settlement*, GUARDIAN (Aug. 27, 2022, 12:16 PM EDT), https://www.theguardian.com/technology/2022/aug/27/facebook-cambridge-analytica-data-breach-lawsuit-ends-in-11th-hour-settlement [https://perma.cc/9BF8-UMEF]; Press Release, Sec. Exch. Comm'n, Facebook to Pay $100 Million for Misleading Investors About the Risks It Faced from Misuse of User Data (July 24, 2019), https://www.sec.gov/news/press-release/2019-140 [https://perma.cc/GW2K-FG59].

enforcement action (under pressure from the minority Democratic Commissioners).[296]

As these scandals accumulated, a "techlash" brought an end to the internet's era of good feelings. By the time the Biden administration took power, the pressure for structural reforms had grown, and there was a growing base of privacy and tech-law scholars who could be appointed to the relevant agencies.

D. Scholars Rediscover Unfair Practices

Amid all these developments, scholars began to float new ideas for using the unfair-practices authority. Several suggested that the unfair- (or abusive-) practices authority could be an effective tool against market manipulation.[297] Perhaps the most developed example is Rory Van Loo's recommendation that the FTC use its unfair-practices authority to prevent big retail firms from using their data on consumer purchasing decisions to engage in price discrimination and to manipulate prices to take advantage of consumer inattention.[298] Others considered the possibilities of using these authorities to fill gaps in antidiscrimination enforcement. In 2019, Kate Sablosky Elengold considered the potential for using consumer protection law to further civil rights, exploring strategic deployment of deception and unfairness claims to go after practices that disproportionately harm minority consumers.[299] In 2021, Stephen Hayes and Kali Schellenberg of Relman Colfax PLLC (a plaintiff-side equal protection firm) took the next step and argued that discrimination itself is an "unfair" practice.[300] Andrew D. Selbst and Solon Barocas in 2023 developed a similar argument, bridging it with the literature on algorithmic decision-making and big data.[301] More recently, others have considered using the unfair-practices authority to prevent businesses from arbitraging around the prohibitions of other areas

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296. Complaint, Cambridge Analytica, LLC, No. 9383 (F.T.C. July 24, 2019), https://www.ftc.gov/system/files/documents/cases/182_3107_cambridge_analytica_administrative_complaint_7-24-19.pdf [https://perma.cc/X8GM-RRA4]; Press Release, Fed. Trade Comm'n, FTC Sues Cambridge Analytica, Settles with Former CEO and App Developer (July 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-sues-cambridge-analytica-settles-former-ceo-app-developer [https://perma.cc/CQ32-DPHZ]; Anonymous Interview No. 1, Fed. Trade Comm'n (June 1, 2023); Anonymous Interview No. 3, *supra* note 91; Anonymous Interview No. 2, Fed. Trade Comm'n (June 26, 2023).

297. *E.g.*, Calo, *supra* note 276, at 1043-44; Willis, *supra* note 276, at 176-80; Hirsch, *supra* note 207, at 481-83; Hartzog & Solove, *supra* note 210, at 2280-82.

298. Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1370-82 (2015).

299. Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. REV. 587 (2019).

300. Stephen Hayes & Kali Schellenberg, *Discrimination Is "Unfair": Interpreting UDA(A)P to Prohibit Discrimination*, STUDENT BORROWER PROT. CTR. (Apr. 2021), https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf [https://perma.cc/82Q5-2QQU].

301. Selbst & Barocas, *supra* note 289.

of law: Jonathan F. Harris, Christopher L. Peterson, and Marshall Steinbaum have focused on work law, and Raúl Carrillo on banking law.[302]

E. Appointments in the Biden Administration

The Trump White House was not interested in any of these developments—it treated CFPB as presumptively illegitimate and ran the FTC along familiar neoliberal lines (with notable countervailing influence from the two Democratic Commissioners, Rohit Chopra and Rebecca Kelly Slaughter).[303]

That changed when President Biden took office.[304] Although Biden spent much of his political career as a neoliberal centrist who often opposed even modest expansions of consumer protection law,[305] he attempted to be a reformer as President. Feeling pressure from the progressive left, the Trumpian turn of the Republican Party, the rise of China as a global power, and the twin crises of COVID-19 and global warming, Biden and his advisors positioned themselves as moving "beyond neoliberalism."[306] Their focus was not primarily on consumer protection—more on public investment, trade policy, and antimonopolism. But in pursuing these priorities (and in giving Elizabeth Warren influence over appointments), they incidentally empowered critics of the consumer sovereignty framework and had begun to embrace popular consumer protection efforts.[307] One way this empowerment happened was through appointments: advocates of more robust regulation—especially of regulating Big Tech—filled

302. Harris, *supra* note 197; Peterson & Steinbaum, *supra* note 186; Carrillo, *supra* note 270.

303. Emily Stewart, *Mick Mulvaney Changed the CFPB's Sign to BCFP*, VOX (June 11, 2018, 7:00 PM EDT), https://www.vox.com/policy-and-politics/2018/6/11/17451292/mick-mulvaney-cfpb-bcfp [https://perma.cc/VR4E-AU7C]; Eleanor Eagan, *The Chopra Gambit*, AM. PROSPECT (Jan. 22, 2021), https://prospect.org/cabinet-watch/chopra-gambit-consumer-financial-protection-bureau [https://perma.cc/6T33-ZA22].

304. For example, your humble author has been invited to speak with FTC enforcement staff about the history of the unfair-practices authority.

305. Eric Umansky, *Biden's Cozy Relations with Bank Industry*, PROPUBLICA (Aug. 25, 2008, 10:36 AM EDT), https://www.propublica.org/article/bidens-cozy-relations-with-bank-industry-825 [https://perma.cc/V7S2-LNSS].

306. *See* Andrew Prokop, *The Rise—and Fall?—of the New Progressive Economics*, VOX (Oct. 14, 2024, 8:00 PM EDT), https://www.vox.com/2024-elections/377170/kamala-harris-economic-policy-new-progressive-economics [https://perma.cc/BA4T-FU8D]; Andrew Yamakawa Elrod, *What Was Bidenomics?*, PHENOMENAL WORLD (Sept. 26, 2024), https://www.phenomenalworld.org/analysis/what-was-bidenomics [https://perma.cc/36LU-SJ89]; Adam Tooze, *Great Power Politics*, LONDON REV. BOOKS (Nov. 7, 2024), https://www.lrb.co.uk/the-paper/v46/n21/adam-tooze/great-power-politics [https://perma.cc/B6VR-UMF2].

307. *See* Joseph R. Biden, President of the United States, State of the Union Address (Feb. 7, 2023), https://www.whitehouse.gov/state-of-the-union-2023 [https://perma.cc/5WU9-JF3X] (discussing junk fee initiative); *see also* Press Release, White House, Fact Sheet: President Biden Highlights New Progress on His Competition Agenda (Feb. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/fact-sheet-president-biden-highlights-new-progress-on-his-competition-agenda [https://perma.cc/BMQ8-6K28] (discussing incipient consumer protection rules in the Biden administration, including the Junk Fee Prevention Act and a CFPB rule slashing credit card late fees).

the National Economic Council, the FTC, and CFPB (in addition to the U.S. Department of Agriculture's Agricultural Marketing Service, the Department of Justice's Antitrust Division, and others).[308] Another was Biden's Executive Order on Promoting Competition in the American Economy, which announced a "whole-of-government approach" to promoting competition and (among other things) instructed multiple agencies to rethink their approaches to regulating consumer-facing conduct.[309]

IV. Justifying the Change

When those critics of neoliberalism took office with that mandate to "promote competition," they implemented the changes discussed in Part II. As argued there, these changes amounted to the first fundamental rethinking of the approach of federal consumer protection agencies since 1980. The previous Part describes how that rethinking came about. This Part motivates it theoretically.

Whereas the previous Parts were descriptive/interpretive, the method in this Part is reconstructive. Its goal is not to explain the actual motivations or thought processes of those who implemented the changes described above, but rather to articulate a theory of what the unfair-practices authority is for that makes sense of their statements and actions as a break with the internal perspective of the consumer sovereignty framework discussed in Part I. My sense is that some of those involved with the rethinking of the unfair-practices authority would agree with most or all of my reconstruction (indeed, some of them read drafts of this Article), while others would explain their approach differently.

The argument in this Part proceeds by first arguing against the basic premises of the consumer sovereignty framework: that the purpose of consumer protection regulation is to make actually existing markets work more like a "perfect" market in which consumer choice among competitive sellers results in everybody getting as much of what they want as possible and that, even in an imperfect world, market self-correction is to be preferred to regulatory intervention.[310]

308. *See* Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html [https://perma.cc/576C-J9JW]; David Dayen & Alexander Sammon, *The New Brandeis Movement Has Its Moment*, AM. PROSPECT (July 21, 2021), https://prospect.org/justice/new-brandeis-movement-has-its-moment-justice-department-antitrust-jonathan-kanter [https://perma.cc/6YPQ-Q32P]; Andrew Ackerman, *Rohit Chopra, Biden Pick for CFPB Head, Moves Toward Senate Confirmation*, WALL ST. J. (Sept. 21, 2021, 8:18 PM ET), https://www.wsj.com/articles/rohit-chopra-biden-pick-for-cfpb-head-moves-toward-senate-confirmation-11632247316 [https://perma.cc/US7H-RQKP]; Mike Dorning, *New USDA Appointee for Fair Markets Signals Focus on Antitrust*, BLOOMBERG (Mar. 1, 2021, 11:55 AM EST), https://www.bloomberg.com/news/articles/2021-03-01/new-usda-appointee-for-fair-markets-signals-focus-on-antitrust [https://perma.cc/RB4E-S3AL].

309. Exec. Order No. 14,036 §§ 1, 2(e), (g), 3, 5, 3 C.F.R. 609, 609-23 (2022).

310. Many of the arguments presented here are adaptations or elaborations of arguments previously made in Herrine, *supra* note 23.

It then argues in favor of an alternative, antidomination framework. The basic idea is, as with employment law or public utility law, to set up an administrative agency that looks out for the interests of relatively disempowered transacting parties by changing the conditions on which the parties deal. To protect the *interests* of consumers, consumer protection regulators must interpret what those interests are and determine which to prioritize. Doing so requires sympathetic reconstruction of the consumer's situation, using inductive modeling to provide a convincing account of how one or more subgroups of consumers are prevented from pursuing legally recognized interests in the market in question and how a rule change could make things better.

A. Critiquing the Premises of the Consumer Sovereignty Framework

To begin, it is useful to rehash the consumer sovereignty framework. In doing so, it is useful to think of the consumer sovereignty framework as an effort to develop an antipaternalist approach to consumer protection by putting consumer choice at both the normative and descriptive center of analysis. In the consumer sovereignty framework, consumers themselves are to define the values a market should pursue and how to trade them off against each other. The regulator's role is to facilitate consumers' pursuit of their own ends. So long as consumers have all relevant information, they are assumed to know which option is best for them and to manifest that knowledge in their shopping (or hypothetical shopping) decisions. Balancing the interests of consumers is to be done by comparing their relative willingness to pay for various outcomes, which involves deferring to their own indication of their priorities. Consumer markets generally are to be presumed to produce the best possible outcomes—as defined in terms of consumers' own values—because, under the presumed baseline of perfect competition, consumers will pursue those values and competitive businesses will be forced to accommodate them as much as possible, prioritizing the values that consumers are most willing to pay for. Only if there is a clearly identifiable market failure interfering with this normal competitive process should intervention even be contemplated. And when intervention is contemplated, the intervention should, as much as possible, attempt to make the actual market more like the "perfect" one in which consumer choice guides outcomes—doing so ties the regulatory goal to (hypothetical or actual) informed consumer choice.

On top of that, even the presence of market failures is not sufficient reason to intervene, because (and now this is the Hayekian point) the decentralized wisdom of markets should be presumed to make them better at adjusting to remedy the problem (e.g., determining the best way to correct for a consumer bias by hiring the best ad agents).

This Section will argue that this is a failed approach to the problem of paternalism and of guiding regulation more generally. And the failure is

deep. The point to be made here is not the usual point that actually existing markets have many market failures, so perfect competition is too simplistic. It is rather that thinking about actually existing markets as having failures relative to a hypothetical world of perfect competition is to deceive oneself about how consumer choice relates to consumers' interests and how market structure affects market outcomes.

1. Taking Behavioralism Seriously

Begin with consumer choice. It is now almost hackneyed to note that, contrary to standard neoclassical assumptions, consumers do not know about or understand most of the contract terms that bind them or many of the risks and benefits that come with the products they buy.[311] They are often less able to predict their own usage patterns than are firms that sell to them, can be swayed to buy more expensive versions of even chemically identical products merely because of brand recognition, and so on.[312] And there is little evidence for the hypothesis that an informed minority can police the market for everybody else—especially now that sellers can more easily identify "nudniks" for special treatment.[313]

Under the influence of the consumer sovereignty framework, these findings were mostly interpreted as a series of information asymmetries and behavioral market failures that could be tacked onto the standard neoclassical model of how market competition aggregates consumer decisions[314]: If, applying a "libertarian paternalist" approach, one sought to correct for these deviations—and *only* these deviations—one could nudge consumers back onto track and preserve the basic notion of letting consumer choice discipline markets.[315] Notice and consent *could* work, but it just required the notice to be carefully designed.

But, as discussed above, it has become increasingly obvious (and was obvious to some the entire time)[316] that notice and consent frequently doesn't work.[317] That is because these differences between model and reality are not a series of discrete shortcomings in cognitive apparatuses or in information provision that can be resolved through nudges to push

311. *See* Ayres & Schwartz, *supra* note 272, at 546-48. *See generally* Bakos et al., *supra* note 272 (finding that very few software consumers read the license agreement); RADIN, *supra* note 275.

312. Van Loo, *supra* note 298, at 1331-35; ELENA BOTELLA, DELINQUENT: INSIDE AMERICA'S DEBT MACHINE 47-54 (2022).

313. Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 960-68 (2020).

314. *See, e.g.*, *supra* notes 216-219 and accompanying text.

315. *See* Bubb & Pildes, *supra* note 222, at 1604.

316. *See generally* Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 271.

317. Levine, *supra* note 113, at 2-8; *see also* Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 GEO. WASH. L. REV. 1 (2021) (discussing the difficulty of informing consumers sufficiently to make decisions about the use of data about them).

consumers back on track.[318] Rather, consumers *always* have a limited amount of information, a limited ability to make sense of it, and a limited amount of time and attention to process all the information that is available. Consumers *always* make decisions through a series of heuristics and habits that work better in some situations and worse in others.[319]

If this is so, we would do better to view these limits not as bugs in an otherwise all-powerful optimization machine but as characteristics of living in time and space, of having a general-purpose brain, and of having to navigate a complex social world.[320] Once we do, we can conceptualize savvy shopping not as the default mode of human existence, but as a set of *methods*—acquired behaviors and proclivities that are adaptive to some circumstances and can sometimes be modified to adapt to others. Though there are surely inborn differences in knack, such methods take time and effort to acquire, to maintain, and to use well.[321] Like any acquired skills, they are unevenly distributed because of biological differences, differences in experience, and differences in social networks—making some consumers more vulnerable than others to opportunistic firms.[322] Efforts to educate consumers in prudence, numeracy, and the pitfalls of boilerplate have to contend with the much-better-funded counterefforts of profit-motivated sellers to inculcate profligate, impulsive, and status-seeking habits and to develop products that evade the heuristics taught by more publicly minded consumer educators.[323] The failures of financial-literacy education demonstrate the difficulty of climbing that hill.[324]

Once consumers are viewed in this way, many efforts to increase consumer sovereignty by maximizing information and options and educational opportunities appear as costly and perverse exercises in increasing the burden of strained consumers. They increase the risk that comes with making unconsidered decisions and increase the amount of effort necessary to make a considered one. They make sophistication a precondition to getting the best product and perhaps to avoiding harm, which makes it likely that

318. *See* Maier et al., *supra* note 275, at 1-2; Bubb & Pildes, *supra* note 222; Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155 (2013); *see also* Natasha Sarin, *Making Consumer Finance Work*, 119 COLUM. L. REV. 1519 (2019); Jacob Goldin, *Which Way to Nudge? Uncovering Preferences in the Behavioral Age*, 125 YALE L.J. 226 (2015).

319. *See* Nathan Berg & Gerd Gigerenzer, *As-If Behavioral Economics: Neoclassical Economics in Disguise?*, *in* SIMPLY RATIONAL: DECISION MAKING IN THE REAL WORLD 225 (Gerd Gigerenzer ed., 2015).

320. *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 149-74 (2003); Herrine, *supra* note 23, at 263-68.

321. Herrine, *supra* note 23, at 266.

322. *See* N. Helberger, M. Sax, J. Strycharz & H.-W. Micklitz, *Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability*, 45 J. CONSUMER POL'Y 175, 179-82, 184-86 (2022).

323. Willis, *supra* note 276, at 121-51.

324. *See generally* Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197 (2008) (documenting evidence of these failures).

better-resourced buyers will have better options. They reward complexity and manipulation.

2. Undisembedding Markets

We can add on to these limits on information processing the institutional limits on the ability of even informed or rational consumers to affect market outcomes through exit or voice.[325] Under perfect competition, a consumer experiencing any dissatisfaction that is cost-effective to remedy under existing technology could immediately switch to an alternative seller. The threat of such a switch creates an incentive for the original seller to remedy the dissatisfaction preemptively—making consumer choice on markets an effective disciplinary tool (and making efforts to increase consumer welfare by restricting choice perverse). In the real world, it is not so easy for any consumer to find or switch to an alternative seller (and it is *impossible* to do so with the frictionlessness necessary to make perfect competition work), and it is more difficult in some markets, and for some purchasers, than others.

One source of seller power is market power in the most widely accepted sense: the ability of incumbent firms to shift the bargain in their favor without a competitor undercutting them.[326] Such market power seems to be present in oligopolistic credit card markets, for example: multiple researchers have found that, when the CARD Act banned certain hidden fees, credit card companies eliminated those fees without increasing price elsewhere.[327] Other firms in industries with high fixed costs, network effects, and returns to scale—air travel, e-commerce platforms, meatpacking, telecommunications, and so on—will also have room to extract surplus. And as CFPB has pointed out, more localized forms of market power exist in, for instance, "consumer relationships . . . [that] are generally structured such that people cannot exercise meaningful choice in the selection or use of any particular entity as a provider" because the provider is chosen for them.[328] Such relationships "includ[e] but [are] not limited to

325. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

326. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 212-13 (1986) (defining market power as "the ability to raise prices above competitive levels and to restrict output").

327. *See* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards*, 130 Q.J. ECON. 111, 114-15 (2015); Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 975-1001 (2012).

328. Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883, 21888-89 (Apr. 12, 2023); *see also* Chopra, *supra* note 126 (describing the lack of choice that consumers face in many markets).

those with credit reporting companies, debt collectors, and third-party loan servicers."[329]

Other barriers to finding alternatives have sometimes been grouped under the broad label "switching costs."[330] These are any investments in time or money necessary to change from one product (or seller) to another.[331] In a market with even small switching costs, consumers will be more tolerant of price increases or quality reductions, which can reinforce incumbents' power, facilitate consolidation, and generally shift power in firms' direction to use as they please.[332] One important source of switching costs is product or service complexity: if it takes more effort to figure out all the relevant aspects of a transaction, it is more difficult to compare different options.[333] Comparison is especially difficult if product attributes are contingent on difficult-to-anticipate scenarios (such as overdrafts) or change over time (such as terms and conditions on revolving credit). Reducing these switching costs is one justification the White House has offered for the cross-agency effort to eliminate junk fees by simplifying pricing.[334]

These are just two broad categories of market-channeling institutional structures. More could be added. The important point for now is that, as with correcting for consumers' limitations, effectively accounting for switching costs and barriers to entry does not necessarily involve attempting to remove them to make the market more like the perfect-competition ideal. One can never *eliminate* switching costs or barriers to entry, thereby achieving perfect competition. Nor is it necessarily desirable to do so.

Regarding switching costs: It always takes *some* effort to learn about a new product, to compare alternatives, to enter into a new transaction, to adjust to the new provider (e.g., transferring data, changing settings), and there is always the opportunity cost of doing each of these things rather than taking some other action. That means there is always some benefit—and sometimes a great benefit—to *not* having to put the effort into shopping around.

Regarding barriers to entry: Network effects, high fixed costs, and the like can potentially be ameliorated (by, say, imposing interoperability requirements or subsidizing investment), but only so much. And, as anybody

329. Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. at 21888.

330. *See generally* Paul Klemperer, *Competition when Consumers Have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics, and International Trade*, 62 REV. ECON. STUD. 515 (1995) (examining generally the causes and effects of switching costs).

331. *Id.* at 517-19.

332. *Id.* at 515-16.

333. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 473-76 (1992); *cf.* Deese et al., *supra* note 133 (explaining that junk fees can raise switching costs by "obscuring the full price" and thus "making it harder for consumers to comparison shop").

334. Deese et al., *supra* note 133.

familiar with market-power debates will tell you, consolidation can confer many advantages—lowering production and distribution costs, increasing convenience, and the like.[335] So there will always be tradeoffs in determining which switching costs and barriers to entry to try to reduce and what to do about the power conferred by those that remain.

Taking these and other enduring "imperfections" of markets seriously means taking seriously the inevitability of channeling choices. Correcting for the inability of consumers to discipline firms might not involve making choice easier. It might be more effectively done by compelling all firms in an industry to conform to some standard, so that comparison or interoperability is easier, or to actively prevent competition by taking certain options off the table.

To be clear: both these institutional and those above-discussed cognitive considerations imply that promoting effective consumer choice in the real world can require *limiting* choices. Sometimes—as when there are unambiguously inferior options or when consumers can be manipulated into paying more for little gain—the best thing may be to take choice off the table altogether. When it makes sense to keep consumer choice on the table, making it more effective at sorting good from bad options might require restricting the options available—as with the efforts to rein in junk fees—or restricting the ability of firms to shape the conditions of choice—as with the crackdown on dark patterns. These actions look perverse from the perspective of making consumer markets more like the perfectly competitive ideal, but they look pragmatic from a more empirically grounded understanding of human cognition and institutions.

But wait. A Hayekian might agree that perfect competition is a useless abstraction, and even that consumers are vulnerable to firms' market power, while nevertheless arguing that markets have a tendency to self-correct. In this style of argument, this tendency to self-correct need not be perfect to be worthy of deference—it need only be superior to any attempt to redirect the process of market competition.[336]

With respect to consumer vulnerability, the argument would go something like this: Firms that mistreat a particular group of consumers make *themselves* vulnerable to losing business to a competitor firm (whether extant or entrant) that treats that group of consumers better (and thus scoops up some market share). If market competition is left to run its course, some firms will discover better and better ways to customize offerings that

335. *See, e.g.*, Neale Mahoney & E. Glen Weyl, *Imperfect Competition in Selection Markets*, 99 REV. ECON. & STAT. 637, 642-45 (2017). Certainly I don't mean to imply any general view about how to assess when market power is good.

336. *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (arguing that open markets will always be superior to centrally planned economies because of open markets' capacity to disseminate otherwise diffuse information); F.A. Hayek, *Competition as a Discovery Procedure*, Q.J. AUSTRIAN ECON., Fall 2002, at 9 (Marcellus S. Snow trans.) (arguing that market competition plays a crucial role in uncovering knowledge that would otherwise remain unknown).

account for the different circumstances and vulnerabilities of different consumers, and firms that fail to do so will lose business. This process is likely to result in an institutional architecture that is more attuned to the differences between consumers, and the way these differences change over time, than any top-down approach to regulation that tries to account for the complexity of the social space through a single effort. And such top-down regulation is likely to interfere with the competitive process. Better, then, to design regulations that facilitate the dynamic process of market competition than to attempt to address problems directly.

A big problem with this style of argument was noted by Director Levine in a 2022 speech: we have plenty of evidence that markets cannot be relied on to structure themselves in a manner that favors consumers' interests.[337] Sometimes they fail catastrophically, throwing millions of people out of their homes, hundreds of millions of people out of work, and letting most of the people who designed the products that caused it profit all the while.[338] Even when it does not cause macroeconomic crises, business rivalry to make more money off of consumers does not inherently reward sellers that treat consumers better (or do so better than a regulated market would).[339] This possibility is a central focus of the empirical side of the behavioral economics literature (and information economics before that): firms with the ability to obscure the bad features of their product have a competitive advantage over those unable or unwilling to do so as long as those bad features remain obscured. Paul Heidhues, Botond Kőszegi, and Takeshi Murooka recently theorized the concept of "exploitative innovation" to make sense of this possibility.[340] Other reasons firms can maintain market share even as they treat consumers worse include network effects, exclusionary practices, selling addictive products, and effective business propaganda.[341] And, as we will turn to next, it is ambiguous what it means

337. Levine, *supra* note 113, at 2-3.

338. For some discussion of the endogenous market forces that can lead to crisis, see generally Robert Hockett, *Recursive Collective Action Problems: The Structure of Procyclicality in Financial and Monetary Markets, Macroeconomics and Formally Similar Contexts*, J. FIN. PERSPS., July 2015, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2591&context=facpub [https://perma.cc/JFR2-79QS]; and LEVITIN & WACHTER, *supra* note 234, at 181-85, which theorizes the reason that the mortgage market collapsed despite thick markets of well-informed buyers.

339. Joseph E. Stiglitz refers to the "functionalist fallacy" that market or nonmarket self-correction inherently produces the best approach to solving a given problem, and offers evidence to the contrary. *See* Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 479 (2002).

340. Paul Heidhues, Botond Kőszegi & Takeshi Murooka, *Exploitative Innovation*, 8 AM. ECON. J.: MICROECONOMICS 1 (2016).

341. *See generally* DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION (2009) (explaining how network effects can lock consumers into a particular system simply because so many others continue to participate); NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING (2010) (describing how industry ran campaigns that effectively misled the public and denied scientific findings).

for a market to treat "consumers" well—since markets may select for practices that treat some consumers well at others' expense.[342]

3. Reinterpreting Welfare

These criticisms of the descriptive side of the neoclassical approach also present problems for its normative side. For one thing, it makes it more difficult to avoid substantive normative judgments by outsourcing them to consumer choice. Informed consumer choice may be valuable, but we have just reviewed several reasons to think that, if it is to guide *any* outcomes, it cannot guide *all* of them at once. Indeed, consumer protection is often most useful in precisely those situations in which consumers are *not* the best judges of what is good for them.[343] Consumers need protection from fraud, from strategic nondisclosure, from efforts to get them addicted. They need protection from unsafe product features they have no ability to judge, from advantage-taking around credence goods, from the onslaught of business propaganda. Protecting consumers from those things requires making judgments about how consumers would have been better off had they not been subjected to seller shenanigans. Doing so requires interpreting what would have been good for consumers had they chosen differently—in other words, why consumers chose *badly*. That means regulators have to think about when and why it is valuable to facilitate consumer choice and how to balance that value against others.[344]

To which one might respond that the normative inquiry should focus on what consumers *would have chosen* had they been properly informed and reflective. Unfortunately, that way of framing the matter runs into a more subtle version of the problem that the simple defer-to-choice approach does: it depends on assumptions about consumers that are false. If consumers are *always* biased and limited relative to the perfectly competitive ideal, how can we know what they would have chosen under ideal circumstances? We can't. We *might* be able to specify under which circumstances we have confidence that consumers are choosing wisely, but that is not at all the same thing. Conflating the two risks doing exactly what neoclassical analysis meant to avoid: substituting the observer's judgment about what makes a wise choice for the observed's.

Adumbrating those specifications would require identifying which type of knowledge matters for which types of decisions, which forms of influence and coercion are consistent with autonomy and which aren't, how consumers who have made wise decisions are like and unlike those

342. *See infra* Section IV.B.

343. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 422 (1988).

344. *Cf.* Jolls et al., *supra* note 217, at 1541 (arguing that behavioral effects "call [the idea of consumer sovereignty] into question").

who haven't, and so on.[345] Those specifications involve thicker judgments about human decision-making and freedom than the formalistic specifications of rationality and competition involved in neoclassical theory. And, critically, they are almost certain to be informed by *substantive* judgments about which choices are good for which consumers, even if chosen by them. At the very least, we will want to rule out decision processes that arrive at obviously bad results (paying higher prices for the same service, say). In sum, as Daniel Markovits and Zachary Liscow have argued at greater length, "[b]y showing that revealed preferences suffer from irrationality and manipulation, descriptive [behavioral law and economics] requires a new normative foundation grounded in a substantive account of well-being."[346]

An independent reason to doubt the disinterestedness of willingness to pay as an indicator of wellbeing is that it ignores the institutionalization of payment decisions. Because it is impossible to distinguish willingness to pay from ability to pay without having an independent account of what people want, to treat willingness to pay as a measure of value prioritizes the desires of those whom our social system has provided with more money.[347] That produces an obvious bias against the wants and needs of lower-income and lower-wealth households—which is to say, the already socially disempowered. It also makes the social value of something implausibly depend on the match between the monetary cost of providing it and the monetary income of those in need of it, tilting analysis against people with relatively resource-intensive needs—such as those with chronic health conditions or physical and mental disabilities.[348] And relying on commodification to reveal value is at best extremely difficult for hard-to-price things such as the value of preventive care, of privacy, or of racial equality; and it is perverse for things for which payment is anathema, such as a noncorrupt judicial system.[349]

For these and related reasons, taking welfare and freedom seriously requires looking past market (or other institutional) outcomes and toward the ends people are pursuing by participating in those markets. Regulatory

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345. *Cf.* RAZ, *supra* note 343, at 422-23 (discussing how what is valuable about autonomy is not just the ability to make a decision but the ability to decide between valuable options).

346. Zachary Liscow & Daniel Markovits, *Democratizing Behavioral Economics*, 39 YALE J. ON REGUL. 1274, 1284 (2022).

347. *See, e.g.*, Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018) (arguing that high earners tend to have higher willingness to pay and thus that efficiency analysis is biased in favor of high earners); Glick & Lozada, *supra* note 95, at 71-73.

348. *See* Amartya Sen, *Equality of What?*, *in* 1 THE TANNER LECTURES ON HUMAN VALUES 195 (Sterling McMurrin ed., 1980); Kaushik Basu & Luis F. López-Calva, *Functionings and Capabilities*, *in* 2 HANDBOOK OF SOCIAL CHOICE AND WELFARE 153, 159-64 (Kenneth J. Arrow, Amartya Sen & Kotaro Suzumura eds., 2011).

349. *See* Herrine, *supra* note 23, at 275-80. *See generally* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004) (criticizing reliance on economic metrics like ability to pay to make decisions about health and safety).

standards cannot avoid taking a position on which values a market should promote and how to balance multiple values.

B. Elements of an Antidomination Framework

Accepting these arguments requires throwing out the ideal of perfect competition as a normative and descriptive baseline for analysis of consumer protection regulation. This Section argues that, to fill that void, consumer protection regulators should instead ask how well actually existing markets further a variety of *interests* that consumers (or other disempowered buyers) have and that the law ought to recognize—low prices, equal treatment, safety, variety (or standardization, depending), and so on. And, in the context of conduct regulation like that at issue here, it should ask whether changing the rules for what consumer-facing firms can do would better further those interests without unacceptably undermining others. Focusing in this way will generally lead regulators to examine power asymmetries that favor sellers over consumers. It is thus useful to think about this alternative framing as an exercise in *antidomination*, in preventing firms from controlling the conditions in which consumers decide in a way that undermines consumers' interests.

1. Institutionalized Markets, Inductive Modeling

The above critiques aim to motivate a view of markets as pervasively imperfect, with market outcomes caused by a variety of factors. One response one sometimes hears to the suggestion that the outcomes markets produce are pervasively shaped by social and institutional context is that saying so amounts to throwing up our hands and saying "it's all complicated—anything can cause anything." It is said that one needs a simplifying model to get anywhere, and the neoclassical model helps one do so by isolating which market failures matter.

But the acknowledgment of multiple causal factors and a rejection of the neoclassical model does not imply that no simplification or modeling is possible—that anything goes. It *does* imply that no single model is likely to capture all elements of all markets—let alone do so with any elegance. Instead, the modeling process is likely to be inductive and iterative, with researchers testing one set of simplifications against others, without assuming that the model that works best in one context will necessarily extend to others.[350] Models help us answer questions, and different models will help answer different types of questions. Regulators need models to help them make sense of why markets are producing certain outcomes and what alternative outcomes they might produce if one or another rule was changed.

350. *See generally* PETER SPIEGLER, BEHIND THE MODEL: A CONSTRUCTIVE CRITIQUE OF ECONOMIC MODELING (2015) (discussing the many complexities of economic modeling).

To perform this analysis, regulators do not need to know what would happen if consumers were perfectly empowered and firms perfectly disciplined by competition; they need only know what would happen if a given disclosure, mandate, prohibition, or other form of conduct regulation were implemented in the market in front of them.

To illustrate, it will be helpful to look at it from a different baseline: Lauren E. Willis's generative concept of "performance-based consumer law."[351] Willis argues that, given firms' well-documented ability to maneuver around well-meaning mandates, regulators should articulate the desired outcomes that the products should produce (say, a certain default rate or a given improvement in a medical condition with a given set of side effects) or standards for what consumers should understand if their decisions are to be taken as considered judgments (say, the all-in monthly cost of a loan or the health risks of using a drug).[352] Regulators can then enforce penalties if businesses fail to produce those outcomes or can reward especially beneficial outcomes.[353]

Even if we do not (for now) adopt Willis's suggestion to shift our attention to performance-based regulation, we can apply this general way of thinking about how consumer protection intervenes in markets. When a regulator mandates or bans particular conduct (rather than mandating particular outcomes and leaving it to firms to decide which conduct to alter), it does so in order to produce a particular type of outcome, and it can measure the intervention's effectiveness with respect to that outcome. It still attempts to redirect competition away from certain ways of treating consumers, but it does so with more specificity. Doing so requires not just identifying what is undesirable about the status quo (and thus what would be a desirable change) but which aspect of the way business is done produces that undesirability.[354] Developing a model of some sort is necessary. But that model need not have anything to do with perfect competition (or, indeed, marginal-cost pricing or any other neoclassical chestnut). It need only be an effective predictor of what motivates businesses and consumers and how they are likely to respond to a given rule, grounded in empirical evidence about how they decide under different circumstances.

Take the example of junk fees. In a statement cowritten for the White House, economists Brian Deese and Neale Mahoney and law professor

351. Willis, *supra* note 273, at 1309.

352. *See id.* at 1316-93.

353. *See id.* at 1312, 1368-70.

354. This does not imply that conduct regulation is merely a degraded form of performance-based regulation. For one thing, a type of conduct may produce multiple undesirable outcomes (for example, fraud can lead people to choose worse products and become less trusting of even truthful claims). So banning conduct may be a more efficient way to intervene (efficient here does not mean "efficient" in the sense of Pareto or Kaldor-Hicks optimality, of course). For another, there are situations where drawing a line between conduct and outcomes will be difficult—such as where the conduct in question is violent or harassing—or where banning conduct serves an expressive value.

Tim Wu (all in their roles on the National Economic Council) name three "economic issues" with such "hidden fees, charges, and add-ons."[355] One is that "hidden fees risk obscuring the full price, making it harder for consumers to comparison shop."[356] Another is that "[s]urprise termination and cancellation fees can . . . increas[e] switching costs—locking consumers into sub-standard products" and "mak[ing] it harder for new entrants . . . to win over market share."[357] A third is that, when such tactics produce a competitive advantage, they lead to "'exploitative innovation'" that diverts the direction of product development away from "the actual quality of the product."[358]

The basic claim here is that junk fees produce the bad outcomes of making consumers pay more than necessary for the products to which they apply and, what is sometimes the same thing, that they degrade the quality of product offered. Three overlapping mechanisms are offered by which junk fees channel competition toward those outcomes.

In some respects, this account seems consistent with a consumer sovereignty framework. The problem in the markets in question is that consumers do not have adequate price information to exert their disciplining influence, and the solution is aimed at making them more effective choosers. But, first, notice that this version of the consumer sovereignty framework would still be significantly different from that which has prevailed since 1980. Most obviously, it jettisons the case-by-case approach in favor of a condemnation of a whole class of practices, using a variety of authorities and enforcement strategies to eliminate them.

Second, and more importantly for our purposes, this broad condemnation is paired with a focus on altering *business* and not *consumer* conduct, often by outright banning certain low-value practices. In other words, it involves *eliminating options* in the name of improving the overall option set (for some or all consumers) rather than (only) attempting to make consumers better at choosing from existing options.[359] It does so in part to simplify consumers' choices in the spirit of increasing their disciplinary power on firms, but it does so by eliminating low-value aspects of a transaction, acknowledging the inherent limits of our cognitive apparatuses. It aims to prevent firms from manipulating consumers who are presumed to have limited time and bandwidth, channeling competition toward higher-value options rather than burdening consumers. That approach is directly opposed to the longstanding practice of attempting to improve consumers'

355. Deese et al., *supra* note 133.

356. *Id.*

357. *Id.*

358. *Id.* (quoting Heidhues, *supra* note 340, at 1).

359. *Cf.* Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883, 21886 (Apr. 12, 2023) (discussing the need to eliminate "financial products and services that [are] 'set up to fail,'" which allow lenders to benefit from consumer harm and can also harm third parties).

ability to determine for themselves which fees were junk and considering bans only as a last resort.[360]

Further, the authors of the statement do not leave the value question (entirely) up to consumers. The badness of the outcome is due to the judgment that consumers are being charged an unfair price—paying something for nothing—or that the product they are offered is "sub-standard."[361] Although the economists drafting that statement would surely be inclined to explain the inferior value of products with junk fees in terms of what would prevail in a perfectly competitive market or under conditions of marginal-cost pricing,[362] there is no reason to think that most of the markets they are considering—banks, airlines, and so on—are even close to perfectly competitive (or ever could be). Nor is there any reason to think that, given high fixed costs and the need for price stability and so on, sellers in such markets could price each product at its marginal cost if they tried.[363] All that needs to be claimed (and, indeed, all that the econometric studies the economists rely on show) is that some types of junk fees can be eliminated without firms' raising prices elsewhere.[364] In other words, as compared to a world without them, these junk fees are almost entirely a benefit to firms without providing any benefit to consumers. No need to appeal to the baseline of unfettered consumer choice or perfect competition at all.

2. Interpretive Moral Reasoning

Above it was argued that consumer protection institutions cannot avoid doing interpretive work to identify what the relevant consumer interests are in any given context. Only when they do so can they say how a market fails or succeeds to serve (that subset of) consumers' interests.[365] The example of junk fees that concludes the previous Section illustrates that there is nothing inherently mysterious or antichoice or controversial about this task. It is not a particularly impressive interpretive feat to say that consumers have an interest in avoiding charges that serve no purpose

360. *E.g.*, Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 753-54 (2008) (agreeing with Richard Epstein that regulation is generally unlikely to be justified in consumer markets but maintaining that evidence of persistent market failures that disclosure cannot remedy is a reason for intervention).

361. Deese et al., *supra* note 133.

362. *See generally* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, *A Simple Framework for Estimating Consumer Benefits from Regulating Hidden Fees*, 43 J. LEGAL STUD. S239 (2014) (discussing the relevance of "market power" to pass-through fees, using a simple linear parameter ungrounded in any theory of market power).

363. *See generally* Thorsten Fischer & David R. Kamerschen, *Price-Cost Margins in the US Airline Industry Using a Conjectural Variation Approach*, 37 J. TRANSP. ECON. & POL'Y 227 (2003) (discussing real-world challenges in pricing at marginal costs).

364. Agarwal et al., *supra* note 362, at S240 (explaining that the reason for developing their model is to predict the degree to which regulating a hidden fee will simply increase other prices); Alexander Rasch, Miriam Thöne & Tobias Wenzel, *Drip Pricing and Its Regulation: Experimental Evidence*, 176 J. ECON. BEHAV. & ORG. 353, 354-55 (2020) (same).

365. Herrine, *supra* note 23, at 292-95.

other than transferring their money to sellers, but it is an interpretive feat nonetheless. Ho-hum acts of interpretation are also implicitly at work whenever an economist declares that employees are choosing retirement plans that will not fit their needs[366] or whenever the Food and Drug Administration declares that a drug or device is not safe or effective.

The basic interpretive task involved here is asking how a given product feature or sales technique benefits or harms some subset of consumers. Answering that question requires having a view about what those consumers have reason to care about.[367] Frequently, the best way to determine consumers' interests is to ask them or to see which choices they make—but not always, not automatically. Consumers who continuously find themselves victim to scams do not thereby demonstrate an interest in having their money stolen.[368] Interpreting consumers' interests requires looking past choices and past market outcomes toward the ends people are pursuing by participating in those markets. There are multiple robust traditions of moral inquiry that do so. The most influential such tradition in the economics literature is the "capability approach" originally developed by Amartya Sen drawing on broadly Aristotelian concepts of wellbeing,[369] but it is far from the only option.[370] Common among them is the task of asking which ends people have reason to pursue and prioritize and then evaluating institutions in terms of how well they allow people to pursue those valuable ends and how fairly they distribute the opportunities to do so.

For present purposes the upshot is that consumer protection regulators, in asking how a given industry makes (some) consumers' lives better and how worse, are asking which consumer *interests* are implicated, where "interest" is used in an intersubjective sense. People are understood *not* as pursuing preference orderings that are immediately and perfectly known to them but comprehensible to others only through observation of purchasing decisions, *but rather* as pursuing their own interpretations of their

366. *Cf.* Bubb & Pildes, *supra* note 222, at 1607-37 (discussing behavioral choices in retirement savings); Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476 (2015) (arguing that certain fees and dominated funds harm retirement portfolios and that reform is necessary to prevent their inclusion).

367. *See generally* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 44-54 (1993) (discussing the evaluation of states of affairs as an interpretive process based on reflection on individual and social norms about what to care about).

368. Perhaps some people do have such an interest—they like the attention or they enjoy the craft and are willing to pay for it by having their money stolen. They are "taken for a ride" in more than one sense. But that does not imply that each person who is victimized in this way has such an interest—determining which is which requires interpretation!

369. Ingrid Robeyns & Morten Fibieger Byskov, *The Capability Approach*, STAN. ENCYC. PHIL. § 1.1 (Edward N. Zalta & Uri Nodelman eds., Sept. 21, 2024), https://plato.stanford.edu/archives/fall2024/entries/capability-approach [https://perma.cc/Z6UJ-NNME].

370. *E.g.*, RAZ, *supra* note 343 (providing a perfectionist account of liberalism in which an autonomous life is valuable for people in a particular type of society); Cornelius Castoriadis, *From Marx to Aristotle, from Aristotle to Us*, 45 SOC. RSCH.: INT'L Q. 667 (Andrew Arato trans., 1978) (discussing Aristotelian theory from a social constructivist perspective).

interests. These interpretations are fallible. People may or may not have a privileged view into their own interests. They might not even think they do, if, say, they seek guidance from others or even defer to a trusted friend or influencer or consumer testing company to make decisions for them. And they might change their own interpretations of their interests as they themselves change—regretting a pattern of purchasing decisions in the past, for instance.

Of course, consumer protection regulators are not tasked with open-ended inquiries into the nature of the good life. Their interpretive ambit is narrower—channeled by the category of interests they are charged with protecting and the techniques they are given to do so. If one were to hazard a general description of the task these regulators have in common, it might be this: correcting for power asymmetries that prevent (some) consumers from pursuing their interests or enable sellers to pursue their interests at the expense of consumers'. More concisely: preventing sellers from dominating consumers.

In doing so, regulators must attempt to identify what consumers are trying to do in a given market. This is an act of sympathetic reconstruction, once described as a two-part process in Jean Braucher's neglected article on the unfair-practices authority.[371] "In the first step, the Commission tries to understand the limitations under which consumers operate"[372]—not just information asymmetries and cognitive limitations but also how race, class, gender, disability, market structure, and so on create different capacities for differently situated people.[373] "In the second, it tries to imagine what consumers would want if not constrained by these limitations."[374] Once they engage in this feat of interpretation, regulators can explicate how a market fails or succeeds to serve (that subset of) consumers' interests—rather than examining how a market fails to live up to an impossible ideal of perfect competition.[375]

No doubt, one interest consumers frequently have is the interest in effective choice. But this is neither their only interest nor a simple one. Sometimes, choice can be valued inherently: one wants to be able to make up one's mind and own one's mistakes even if doing so results in outcomes that are harmful and distasteful. Other times—perhaps more frequently—one wants to be able to choose successfully the option that works best for one. That is, one values the ability to make up one's mind but also having

371. Braucher, *supra* note 198, at 352-54, 393. Jean Braucher is not quite clear about her theoretical framework—drawing on both utilitarian and Rawlsian ideas. I do not mean to adopt any more of her argument than I have reproduced above the line.

372. *Id*. at 352-53.

373. *Id.* at 365-67, 392-93 (discussing how a sympathetic analysis requires accounting for structural barriers in determining which choices different people have, not just differences in information).

374. *Id.* at 353.

375. Herrine, *supra* note 23, at 292-95.

the tools necessary to make a decision one will reflectively endorse. Promoting that type of choice might not involve deference but rather increasing *capabilities*—to find the financial product that best fits their circumstance, to detect genuine offers to help from scams, and so on.

Of course, consumer protection institutions should take special care not to perpetuate the very harms they aim to protect consumers from: control over their circumstances by somebody who does not have their true interests at heart. Pursuant to that goal, each part of this interpretive exercise can be—should be—informed by evidence, not just speculation. Interviews and surveys of the affected group of consumers or observations of how similar consumers in more favorable circumstances go about choosing can speak to the question of what consumers would want. Research identifying the ways that business shape the context of choice can identify relevant limitations. But the effort is not a purely empirical endeavor. There will always be normative and interpretive lines to draw: Is a comparison group similar in the right ways? Do consumers have an accurate enough sense of what they will prefer when actually confronted with the choice? What if consumers don't like a change at first but then come to adore it?

A second challenge is determining how to prioritize different consumers and balance conflicting interests. The standard economistic way to do so is to give priority to the things for which consumers are most willing to pay. As we have seen, setting priorities in this way risks tilting the analysis in favor of wealthy consumers and easily priced needs.[376] That tilt is not justifiable if our goal is preventing firms from using consumer markets to further their interests at the expense of consumers', since, among other things, it discounts harms to consumers made vulnerable by lack of money. It also runs contrary to broader social goals that we have at least attempted to apply to all social institutions, including consumer markets: facilitating equal rights to expression,[377] preventing racialized domination,[378] protecting bodily autonomy,[379] and supporting public goods that further substantive and procedural justice like a disinterested court system.[380]

Instead, agencies with UDAP authority should prioritize the interests of consumers most vulnerable to firms' manipulation—for example, children, people with disabilities, people with limited options and resources. And they should prioritize firm behavior that undermines or threatens to undermine important social values. This is consistent with the overall priorities that Chair Khan discussed above: targeting behavior that affects large numbers of consumers and weighing more heavily the interests of

376. *See supra* text accompanying notes 347-349.

377. *See, e.g.*, U.S. CONST. amend. I.

378. *See, e.g.*, *id.* amend. XIV.

379. *See, e.g.*, *id.* amends. IV, XIV.

380. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that settlement undermines the social goods that a judicial system is supposed to advance).

consumers made vulnerable by social position or reduced capacities.[381] And it is consistent with longstanding focuses on protecting children and the emerging focuses on antidiscrimination and on prioritizing preventing privacy violations that implicate intimate information.[382]

V. UDAP and Antidomination

Now we are in a position to turn back to doctrine and revisit the three-part "substantial injury" test that both the FTC and CFPB are statutorily required to use in applying the unfair-practices authority.[383] Because the substantial-injury test was designed to quell congressional worries about paternalism, it will also provide an opportunity to outline how an antidomination framework manages that thorny problem without reverting to the inadequate tools of the consumer sovereignty framework.

Paternalism is a contested concept, but the basic idea involves one actor (a paternalist) preventing another actor (a principal) from making her own decision about something on the grounds that doing so would better "promote the interests, values, or good" of the principal.[384] In many situations, paternalism might be welcomed by the principal (ex post or ex ante), but it can be problematic insofar as it has perverse consequences (based on a paternalist's error or failure to empathize), it interferes with the principal's freedom (including freedom to err or deviate from the norm), or it is engaged in by an actor without the authority to do so. The antidomination lens on the unfair-practices authority just articulated risks engaging each of these worries by encouraging unelected bureaucrats to interpret consumers' interests for them.[385]

The downsides of paternalism—or, indeed, a souring into authoritarianism—cannot be entirely prevented through proper theory or legal interpretation. But interpreting the substantial-injury test through the lens of the antidomination framework just articulated can help us get some traction on the problem. It can do so by orienting regulators toward empathetic

381. *See supra* note 124 and accompanying text.

382. *See supra* Section II.B.

383. *Supra* Section I.A; *see* 15 U.S.C. § 45(n) (2018); 12 U.S.C. § 5531(c) (2018).

384. Gerald Dworkin, *Paternalism*, STAN. ENCYC. PHIL. § 2 (Edward N. Zalta & Uri Nodelman eds., Sept. 21, 2024), https://plato.stanford.edu/archives/fall2024/entries/paternalism [https://perma.cc/NLC6-L24U].

385. The consumer sovereignty framework does not avoid this risk. One way it attempts to correct for bad choices while avoiding these worries is to favor choice-preserving interventions—to attempt to correct the information environment without overruling choices. In addition to the deep conceptual problems discussed above, this approach risks facilitating something worse than paternalistic restriction of consumers' choices by public agencies tasked with furthering their welfare: restriction of consumers' choices by unaccountable private agencies attempting to undermine their welfare. Another way consumer sovereignty has attempted to avoid paternalism is by overruling choices only when (and in the way that) consumers themselves would have had they been fully informed and rational. But that is just one way of parsing the paternalistic sentiment that consumers' choices should be corrected when they do not serve those consumers' own interests. It does nothing to recommend the neoclassical framework in particular.

(and empirically informed) interpretation: asking which interests consumers themselves are trying to pursue and forcing regulators to identify what prevents consumers from pursuing those interests themselves. It also compels regulators to use established public policy to guide their articulation of which interests to recognize (as "injuries") and prioritize, which forces regulators to be guided by collective choices expressed through surrounding political institutions. And it forces regulators to articulate any potential benefits to a purportedly problematic practice as well as downsides to interfering with it. Of course, regulators are also checked by the watchful eyes of Congress and (ideally in a more deferential manner) courts, and by ongoing public engagement with consumers—all of which in principle allow consumers to have a voice in articulating *their own* individual and collective interests.[386]

A. Reinterpreting the Substantial Injury Test

Recall that, according to the substantial-injury test, a practice is unfair if it "[1] causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition."[387] Though the FTC and CFPB "may consider established public policies as evidence to be considered with all other evidence," "[s]uch public policy considerations may not serve as a primary basis" for an unfairness determination.[388] Each of these prongs plays a role in cabining regulators' discretion toward sympathetic interpretation of consumers' interests without having to rely on neoclassical theory.[389]

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386. There is much more to be said about how to incorporate democratic values into consumer protection via federal administrative agencies, but I leave it for another day. On administrative institutions as democratic media more generally, see generally Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. 1 (2023); Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 167 U. PA. L. REV. 1783 (2019); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022); and Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

387. 15 U.S.C. § 45(n) (2018); *accord* 12 U.S.C. § 5531(c) (2018). This is worded slightly differently (and in a different order) from how the test is articulated in the 1980 policy statement, which is quoted *supra* note 49. In practice, they have been treated as identical.

388. 15 U.S.C. § 45(n) (2018); *accord* 12 U.S.C. § 5531(c)(2) (2018).

389. One might ask: doesn't the substantial injury test *itself* mandate the use of a consumer sovereignty framework? The answer is no, at least not as currently understood. The relevant statutes merely require agencies that have unfair-practices authority to apply the substantial-injury test. Nothing in the statutory language (or the legislative history either in 1938 or 1994) commands a consumer sovereignty interpretation. Nor have courts interpreting the statute imposed such an interpretation. There is only one Supreme Court case that has addressed the scope of the unfair-practices authority—*FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)—and that case (1) came before the 1994 amendments, (2) was highly deferential to the FTC's interpretation, (3) implicitly endorsed the Cigarette Rule rather than the substantial-injury test that modified it, and (4) was not really a consumer protection case. *See supra* notes 41-46 and accompanying text. With a recent exception to be discussed below, courts of appeals are generally quite deferential to the

1. Injury

What is an injury? On the subjective notion of welfare used in standard neoclassical theory, an "injury" should just be any way in which a consumer feels worse off compared to some alternative scenario. Attempting to distinguish different setbacks from each other imposes a vision of how to prioritize different interests not put forward by the consumer herself. Yet proponents of the consumer sovereignty framework have thought that "injury" should *not* include "emotional injury and other subjective harms."[390] Instead, they have said, it should be "an objective test"[391] (though they have conceded that "[s]ubjective value, as opposed to emotional distress, can be a form of real injury" when it involves something like "falsely claiming that a product is kosher").[392]

To justify these limitations, consumer sovereignty advocates have appealed to the difficulties of proof for "harms that are too intangible to be practicably litigated," or to circumstances where "'the existence of consumer injury'" is itself disputed, or to the longstanding requirement "that a Commission action be in the public interest" rather than a matter of merely individual or interpersonal interest.[393] But these reasons are in tension with the effort to define value by aggregating idiosyncratic private valuations. If the public interest is in preserving private value, then why not define the former in terms of the latter? If regulators have evidence that consumers are genuinely distressed or annoyed or disappointed by some firm conduct, then why should they be categorically prevented from putting it forward?

Instead, what seems to be at play in defining injury in objective terms is identifying "which subjectively[ ]felt harms count"[394] for the purposes of public policy (and which harms count even if not subjectively felt). In other words, it requires identifying which *interests* are worthy of social

FTC's applications of its unfair-practices power, requiring only that the substantial-injury test be applied and that the FTC apply its own theories consistently. *See* cases cited *supra* note 41. The only attempt I know of to hold an agency to something like a consumer sovereignty interpretation of the unfair-practices standard was the largely ignored *dissent* in the D.C. Circuit's 1985 review of the FTC's Credit Practices Rule, 16 C.F.R. pt. 444 (2024). *See* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 992-98 (D.C. Cir. 1985) (Tamm, J., dissenting). That said, the 1980 policy statement *does* have some phrases in support of consumer sovereignty and talks about markets' presumptively self-correcting. *See* 1980 Policy Statement, *supra* note 49, app. at 1074. But the phrases in question are too squishy to create a clear standard, and the policy statement itself is not binding. Nor have courts used these phrases to limit the FTC's authority.

390. Averitt, *supra* note 99, at 247 (citing 1980 Policy Statement, *supra* note 49, app. at 1073).

391. Beales, *supra* note 37, at 195.

392. *Id.* at 195 n.13 (citing Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379 (1983)).

393. Averitt, *supra* note 99, at 246 n.136, 247 & n.149 (quoting 1980 Policy Statement, *supra* note 49, app. at 1073 n.17); *see* Beales, *supra* note 37, at 193-96.

394. Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 98 (1995).

recognition and government enforcement. Indeed, as the U.S. District Court for the District of Idaho noted in its first published opinion in *FTC v. Kochava Inc.*, "'injury'" is "a term of art in the legal field that refers broadly to any 'actionable invasion of legally protected interest.'"[395] The court rightly notes that what matters is not whether the purported injury is "tangible or intangible" or whether the harm is inside or outside a consumer's head or even whether it is beyond dispute.[396] Rather, what matters is whether the purported injury invades an interest that U.S. law recognizes as in need of protection. We protect the interests of people with religiously grounded dietary restrictions like kashrut because we have collectively committed to allowing people to practice their religion in a way that we have not committed to, say, deferring to people's aesthetic preference not to eat orange food. The test is objective in the sense that the ambit of protection is defined *socially*, by public deliberation about what matters. (That is not to deny that it matters whether an injury is easy to fake—it is one consideration among others in determining whether to recognize it.)

In identifying consumers' interests, regulators (and reviewing courts) are not engaging in a free-flowing moral inquiry. They must "consider established public policies as evidence" of which interests are to be protected.[397] In practice, that means pointing to laws that recognize the existence and importance of an interest, perhaps on the logic offered by Blake Emerson: "the existence of a law creates rebuttable reasons to believe that its norms are sound" in public discourse.[398] In any case, it constrains the moral inquiry of regulators to domains already deliberated over by other public lawmakers.

Most of the time, an interest will be so well established that this inquiry need be only cursory. One hardly needs to pile on legal authorities to establish that losing money, being physically harmed, or being lied to are injuries under section 5 of the FTC Act. But when a regulator seeks to identify an injury that is concerning but not yet well settled in UDAP precedents, it must point to evidence that other parts of the legal system have recognized the interests allegedly being invaded.

In the *Kochava* case, for example, the FTC has sought to declare unfair a data broker's selling information that, for example, could allow

395. FTC v. Kochava, Inc., 671 F. Supp. 3d 1161, 1173 (D. Idaho 2023) (citing *Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019)). This opinion initially dismissed the FTC's suit with leave to amend. After the FTC amended its complaint, the court denied the motion to dismiss. FTC v. Kochava, Inc., 715 F. Supp. 3d 1319 (D. Idaho 2024).

396. *Kochava*, 671 F. Supp. 3d at 1173-74.

397. 15 U.S.C. § 45(n) (2018); *see also* LabMD, Inc. v. FTC, 894 F.3d 1221, 1231 (11th Cir. 2018) (discussing the relevance of established public policies, even if the FTC does not clearly articulate the relevant laws); FTC v. Accusearch Inc., 570 F.3d 1187, 1194 (10th Cir. 2009) (discussing the relevance of the Telecommunications Act in establishing the wrongness of a privacy breach, without imposing the limits of that Act).

398. BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE POLICY 167 (2019).

purchasers to identify when anybody with a cell phone has gone to a reproductive-health clinic.[399] One theory of alleged injury was the invasion of privacy itself.[400] In determining whether invasions of privacy, specifically concerning sensitive information, amounted to a legally cognizable injury under section 5, the court looked both to laws specifically governing consumer transactions and to more generally applicable laws.[401] It found that privacy in general has been a value discussed and protected "[s]ince our nation's founding" and, "[m]ore specifically, [that] privacy protections against the disclosure of certain kinds of sensitive personal information are embedded in countless federal and state statutes, regulations, and common law doctrines."[402] Similar inquiries have been undertaken in establishing (or attempting to establish) interests in special protections for children, in not being treated with racial bias, and so on.[403]

2. Avoidability

To help ensure that regulators remain focused on conduct that is actually unwelcome to consumers, the second prong requires that injuries "not [be] reasonably avoidable."[404] If a consumer was presented with the choice of whether to face the alleged injury or not and chose not to avoid it, then there is reason to believe the consumer either did not experience the purported injury as an injury or was willing to endure it in exchange for benefits that came with the harm. I take it that this basic understanding of this prong is common to both consumer sovereignty and antidomination frameworks and is central to addressing the paternalism concern. Where those frameworks differ is in how they think about what is avoidable and how to determine when things that are *possible* to avoid are also *reasonable* to expect consumers to avoid.

During the consumer sovereignty era, consumers were assumed to be capable of avoiding most anything, so long as they had the information necessary and there was some competition in the relevant market. That meant it was reasonable to expect most harms to be avoidable.[405] We have

399. *Kochava*, 671 F. Supp. 3d at 1166-68, 1174.

400. *Id.* at 1173.

401. *Id.* at 1173-74.

402. *Id.* at 1173; *see also* FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 244-49 (3d Cir. 2015) (discussing role of policy in section 5 and the public policy around data security).

403. *See* RATNER ET AL., FED. TRADE COMM'N, *supra* note 59, at 28, 206-17 (pointing to an FCC policy statement on subliminal advertising, and the history of legal protections focusing on children's special vulnerabilities, to justify the KidVid rulemaking that was ultimately scuttled); Continental Airlines, Inc., No. OST 2004-16943, 2004 WL 720318 (D.O.T. Apr. 2, 2004) (reviewing DOT case law finding that discrimination is unfair, often pairing with specific antidiscrimination statutes); *see also* LabMD, Inc. v. FTC, 894 F.3d 1221, 1231 (11th Cir. 2018) (relying on the common law of negligence to conclude that a failure adequately to protect consumers' data can constitute an unfair practice).

404. 15 U.S.C. § 45(n) (2018); *accord* 12 U.S.C. § 5531(c)(1)(A) (2018).

405. *Cf.* Beales, *supra* note 37, at 196 ("If consumers could have made a different choice but did not, the commission should respect that choice.").

just discussed at length why the antidomination approach rejects the notion that consumers faced with boilerplate disclosures or even with unambiguous disclosures necessarily understand the implications of a transaction, let alone have the capacity to avoid them.[406] The antidomination approach also sees that the presence of nonbehavioral or informational constraints, such as market consolidation, switching costs, and social factors like racial discrimination or limited service in rural areas, lowers the number of options for some and thus provides further reasons to doubt that avoidance is easy.[407]

Accounting for these aspects of consumer choice within markets means that avoidability should be understood as a spectrum. Something is not just avoidable or not, but more or less easily avoidable. To determine whether something is *reasonably* avoidable, then, one must draw a normative line. What should be expected of consumers in this context? Answering that question requires both an empirically grounded understanding of the limits that different consumers actually face and a normative account of what consumers ought to be expected to do (given those limits) to protect their interests in the market in question.

For some harms, policy reasons dictate that the threshold should be quite low. Just because most businesses in a neighborhood do not have employees who spout homophobic epithets does not mean that queer customers should be expected to avoid the one that does. Setting the threshold low reflects a zero-tolerance policy—a desire to rid the market of such harassment altogether in the name of inclusion. For other harms, such as making an inherently complex tradeoff between products that each have their own advantages, we might have a higher threshold. Some of this threshold setting can be done by determining whether to empathize with the "reasonable consumer," the "least sophisticated consumer," or some other character.[408]

In addition, in enacting the abusive-practices authority in the Consumer Financial Protection Act, Congress can be seen as having provided additional guidance: it articulated categories of conduct for which it is presumptively unreasonable to expect a consumer to avoid the injury in question. Recall the four types of abusive practices enumerated in the CFPA:

1. materially interfering with a consumer's ability to understand a term or condition of a financial product or service;

406. *Supra* Section IV.A.1.

407. *Cf.* Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883, 21885-89 (Apr. 12, 2023) (discussing the role of market power in undermining consumer choice).

408. *Compare* Avila v. Riexinger & Assocs., LLC, 817 F.3d 72 (2d Cir. 2016) (interpreting the "least sophisticated consumer" standard in the context of the Fair Debt Collection Practices Act), *and* FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) (discussing the "ordinary purchaser" standard for purposes of UDAP), *with* U.C.C. § 2-104(1) (AM. L. INST. & UNIF. L. COMM'N 1951) (defining "merchant" for the purpose of the Uniform Commercial Code).

2. taking unreasonable advantage of a consumer's failure to understand the risks, costs, or conditions of a financial product or service;
3. taking unreasonable advantage of a consumer's inability to protect her interests in selecting or using a financial product or service; and
4. taking unreasonable advantage of a consumer's reasonable reliance on a provider to act in her interests.[409]

Each of these points to a vulnerability that firms induce or take advantage of. Each still requires making a reasonableness determination, but of a more specific variety. And CFPB has, after a decade of application, provided further guidance in its 2023 policy statement.[410]

3. Balancing

A similar reorientation applies to determining whether an injury is "outweighed by countervailing benefits to consumers or to competition."[411] We have discussed several reasons why this prong should not be seen as mandating quantified cost-benefit analysis based on maximization of net willingness to pay. Indeed, fully quantified cost-benefit analysis has been rejected as impossible even by James Miller, who both brought consumer sovereignty to the FTC and brought cost-benefit analysis to OIRA.[412]

On an antidomination approach, the purpose of this prong is both to reinforce the second prong—encouraging regulators to think twice about whether consumers might actually be benefitting from an apparent injury—and to balance the injuries to some consumers against the potential benefits to others. The balancing involved will vary depending on the sort of interest being protected. A practice that violates a clearly established policy, such as preventing deception or abusiveness or disparate treatment of a protected class, does not require any balancing. The balancing analysis has been done wholesale: any potential benefits from these types of harm have been categorically excluded as irrelevant. On the other hand, a practice that has some harms and some benefits that are unevenly distributed among different consumers—such as charging a penalty fee or a fee for

409. 12 U.S.C. § 5531(d) (2018); *see supra* text accompanying note 250.

410. Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883.

411. 15 U.S.C. § 45(n) (2018); *accord* 12 U.S.C. § 5531(c) (2018).

412. Budnitz, *supra* note 56, at 379 (explaining that James C. Miller III, during his confirmation hearing to be Chair of the FTC, "advocated the use of an economic approach in general and cost-benefit analysis in particular, but acknowledged that such an analysis would be applied in a subjective manner"); *see supra* notes 87-89 and accompanying text; *see also* S. REP. NO. 103-130, at 13 (1993) (explaining that the FTC need not conduct fully quantified cost-benefit analysis "in every case" and acknowledging that such analysis will "[i]n many instances" be "unnecessary" or "impossible").

extra service—requires commensuration and active balancing. Money-money tradeoffs will be the easiest to assess mathematically—more money for consumers is clearly better—but even then regulators will have to weigh money differently depending on who gets it.

When interests go beyond money, commensuration requires providing reasons for prioritizing one over another, grounded in established public policy. Sometimes this will be relatively uncontroversial: regulators should generally prioritize the interests of those who face a risk of losing their life over those who face a risk of losing convenience. Sometimes it will be more contested, as with current issues involving privacy and behavioral manipulation. Deliberation, feedback, and other forms of political accountability will be especially important to make sure this reasoning is connected to the actual interests of consumers rather than the fantasies of regulators. Waiting on guidance from Congress will often be advisable if the issue is novel enough to go beyond well-established policy balancing. But such guidance need not take the form of explicit permission, let alone legislation: regulatory agencies have their own forms of accountability and can always be influenced by Congress (and other public actors) as they deliberate.[413]

B. Potential Legal Limits

Rethinking the substantial-injury test in this way expands the scope of the unfair-practices authority and locates more policymaking discretion in agencies that have such authority. Especially in a moment when the federal judiciary has become increasingly skeptical of novel uses of longstanding authorities and, indeed, of administrative discretion generally, that creates some legal risks. Here is not the place to address all possible risks,[414] but two particular possibilities are worthy of brief consideration.

1. Limitations on Public Policy?

The antidomination interpretation of the substantial injury test relies on evidence of public policy to constrain regulatory discretion at all three

413. *See* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1676 (2023); Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 809-10 (2021).

414. In particular, I pass over the question of whether the unfair-practices authority, interpreted this way, might be adjudged an unconstitutional delegation of legislative authority under an expanded version of that doctrine or might be seen as a categorically impermissible reading of the statute when the nondelegation-informed major-questions doctrine is applied. I think the most likely challenges will be as-applied statutory interpretation challenges, and I do not think the constitutional arguments are likely to win, even with an increasingly aggressive Court. Among other reasons, I would note that the Court appeared to take for granted that the FTC's "unfair methods of competition" authority—which is *broader* than its unfair-practices authority—complied with the structural separation of powers in *A.L.A. Schechter Poultry Corp. v. United States.*, 295 U.S. 495, 531-34 (1935).

prongs of its analysis: in defining injury, in determining the amount of effort a consumer should be expected to exert to avoid a harm, and in setting priorities to guide equitable balancing. However, section 5(n) of the FTC Act and section 1031(c)(2) of the CFPA explicitly say that "public policy considerations may not serve as a primary basis for" a "determin[ation] whether an act or practice is unfair."[415] One might worry that the antidomination framework is in direct violation of—or at least in tension with—this limit.

This worry would be misguided. The FTC has repeatedly relied on evidence of public policy in defining injury, especially when adopting novel theories of harm under the FTC Act, with repeated approval from reviewing courts.[416] Reviewing courts themselves frequently look to evidence of public policy in determining whether the FTC's concept of injury is justified—sometimes even adducing their own evidence when the FTC has not.[417] I am not aware of any decision striking down an FTC—or other agency—unfairness action on the grounds that the FTC improperly relied on public policy in making its determinations.

In fact, what the limitation on public policy considerations prohibits is the FTC's (and other agencies') using evidence of public policy *in lieu of* the substantial injury test. The initial restriction of public policy in the 1980 policy statement was an explicit effort to channel the part of the Cigarette Rule that asked "whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise."[418] In the 1980 policy statement, the Commission stated that public policy "is used most frequently by the Commission as a means of providing additional evidence on the degree of consumer injury caused by specific practices," and it "emphasize[d] the importance of examining outside statutory policies and established judicial principles for assistance in helping the agency ascertain whether a particular form of conduct does in fact tend to harm

415. 15 U.S.C. § 45(n) (2018); *accord* 12 U.S.C. § 5531(c)(2) (2018).

416. *See, e.g.*, FTC v. Kochava Inc., 671 F. Supp. 3d 1161, 1171, 1173-74 (D. Idaho 2023) (pointing to several statutes and common-law doctrines protecting sensitive information in concluding that an invasion of privacy can constitute substantial injury, yet cautioning that courts may not "giv[e] mechanical deference to public policy in determining whether acts or practices are unfair"); LabMD, Inc. v. FTC, 894 F.3d 1221, 1231 (11th Cir. 2018) (relying on the common law of negligence to conclude that a failure adequately to protect consumers' data can constitute an unfair practice); FTC v. Accusearch Inc., 570 F.3d 1187, 1194 (10th Cir. 2009) (endorsing the FTC's theory "that the substantial-injury element of an unfair practice was met partly by the subversion of consumer privacy protections afforded by the Telecommunications Act" (citation omitted)); Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1367-68 (11th Cir. 1988) (holding that breach of contract can constitute an unfair practice); *cf.* FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 244-47 (3d Cir. 2015) (explaining that section 5(n) of the FTC Act "acknowledges the potential significance of public policy" to unfairness determinations).

417. The clearest example of this is *LabMD*, in which the court inferred a tort-like theory. 894 F.3d at 1231.

418. Cigarette Rule, 29 Fed. Reg. 8324, 8355 (July 2, 1964).

consumers."[419] In other words, public policy evidence is primarily germane in determining whether a substantial injury occurred, not as an independent ground for a finding of unfairness. In the original statement, the Commission also endorsed the occasional use of public policy to "independently support a Commission action" when the policy is sufficiently well established,[420] but it is this residual aspect of public policy as a "primary basis" for a determination of unfairness that section 5(n) seems to rule out.

What regulators with unfairness authority cannot do is use evidence of public policy to skip over the substantial injury test. They cannot say, for instance, that a general policy favoring religious freedom demands that businesses hire experts in religion to determine whether their policies burden any potential customers' religious practices, without any evidence that any consumer has faced or might in the future face such a burden and that such a burden would not be reasonably avoidable. But using public policy to guide analysis of injury and other aspects of the substantial injury test is entirely appropriate, especially when an agency ventures into relatively new territory. It keeps agencies' exercise of policymaking judgment channeled into domains of relatively settled policy.

2. Non-Overlapping Magisteria?

On the other hand, in being guided by the policy underlying other laws, enforcers of the unfair-practices authority can prohibit conduct that those other laws stop short of prohibiting. As the Tenth Circuit put it in its 2009 *Accusearch* opinion, "the FTCA enables the FTC to take action against unfair practices that have not yet been contemplated by more specific laws."[421] That capacity may seem to undermine the bargains struck in those specific laws and thereby to loosen the legislature's ability to constrain the discretion of consumer protection agencies. A carefully crafted statute with definitions and safe harbors calibrated to set limits without undermining innovation might be confounded by an agency that takes the "public policy" underlying the statute and creates its own limits without such calibration.

This type of objection is at issue in a live challenge to CFPB's use of its unfair-practices authority to prohibit discriminatory conduct. In *Chamber of Commerce v. CFPB*, the district court enjoined the Bureau from having its bank supervisors consider the possibility that financial companies' unequal treatment of similarly situated consumers might amount to an unfair practice.[422] The court reasoned that "[t]he choice whether the

419. 1980 Policy Statement, *supra* note 49, app. at 1075.

420. *Id.* app. at 1075-76.

421. 570 F.3d at 1194.

422. Chamber of Com. of U.S. v. CFPB, 691 F. Supp. 3d 730, 746 (E.D. Tex. 2023), *appeal docketed*, No. 23-40650 (5th Cir. Nov. 8, 2023). The case is currently on appeal in the Fifth Circuit, where it has been fully briefed but not argued as of this writing.

CFPB has authority to police the financial-services industry for discrimination against any group that the agency deems protected, or for lack of introspection about statistical disparities concerning any such group, is a question of major economic and political significance."[423] It therefore determined that the major-questions doctrine—which requires "exceedingly clear language" from Congress authorizing a challenged agency action[424] (here, considering disparate impact in making unfairness determinations)—should apply.[425] And because Congress created separate authorities—some of which enforced by CFPB—to police discrimination, and because the term "unfair" does not clearly mean "discriminatory" as opposed to (what is purportedly distinct) "vindicating the sovereignty of individual consumer choice," the Court concluded that such a clear statement did not exist.[426]

The Court's reasoning here is confused and the larger objection at issue is misdirected. Regarding the former, it misunderstands the nature of the unfair-practices authority to attempt to look for some sort of clear statement that the unfair-practices authority applies to a given category of consumer-facing wrongdoing. It is elementary that the meaning of "unfair" is open-textured and that agencies charged with enforcing the authority can use it to, well, "take action against unfair practices that have not yet been contemplated by more specific laws."[427] The major questions doctrine does not alter that well-settled principle: the use of a difficult-to-define word like "unfair," and the failure to modify that language in light of longstanding practice and interpretation treating it as giving license to define new sorts of wrongdoing while guided by evidence of public policy, provides the clear evidence that Congress meant to create a broad and evolving authority. The fact that Congress separately prohibited discriminatory conduct speaks to the public policy at issue—just as tort law and the Telecommunications Act speak to a policy in favor of privacy and data security and false-advertising law speaks to a policy in favor of honest dealing.[428]

As to the broader question, it is true that agencies with unfair-practices authority can go beyond explicit prohibitions, but that does not mean that they undermine legislative control. Part of the legislative intent behind creating agencies with broad authority to declare harmful conduct wrong

423. *Id.* at 740.

424. *Id.* at 741 (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (per curiam)).

425. *Id.* at 740-41.

426. *Id.* at 740-43.

427. *Accusearch*, 570 F.3d at 1194.

428. There are further points to be made about the long relationship between "unfair" and "discriminatory." *See generally* Jeff Sovern, *Is Discrimination Unfair?*, 41 GA. STATE L. REV. (forthcoming 2025), https://ssrn.com/abstract=4712271 [https://perma.cc/Z4YW-D37K] (arguing that both plain meaning and longstanding Agency practice support the view that discrimination is unfair under section 5(n) of the FTC Act).

is to move some of that lawmaking capacity out of the logrolling process and place it into the hands of people with special training, designated research teams, and different types of deliberative processes. These agencies must still be guided by public policies declared by others, but where those policies come up short in redressing harm, it is appropriate for agencies to fill gaps. In doing so, the agencies still have to establish that the conduct at issue causes substantial injury that is not reasonably avoidable or outweighed by countervailing benefits. In other words, they have to actually establish that the gap in the otherwise-existing legal scheme creates genuine problems for consumers and that redressing them would do more good than harm. If Congress wants to prevent agencies from holding certain parties liable or declaring certain conduct unlawful, it can create—and has created!—explicit grants of immunity that agencies must respect.[429] And if Congress does not like the direction that an agency is going in, it can overrule—and has overruled!—the agency, whether through the Congressional Review Act, through hearings and threats to remove funding, through passing legislation that creates a standard different from an agency's, or otherwise.

How these lines are drawn may well change over time—and may be forced to change by more aggressive notions of nondelegation and "major questions." It would, however, be a major repudiation of decades of case law to declare that a statute governing a given area cannot be used as evidence of public policy unless an agency restricts its action in that area to the exact boundaries of the statute. There has long been a give-and-take, and it is one that should be welcomed by those interested in sound and democratically accountable consumer protection policy.

Conclusion

I have argued that there has been a recent shift in the understanding of the unfair-practices authority. This shift is still in its early stages and will likely not be much in evidence during the Trump administration (although some aspects of it may survive, judging by the pattern of dissents during the Biden administration—a topic that goes beyond our scope here). I have teased out some of the patterns involved and used them to inspire a reinterpretation of the authority—built on a different vision of consumer protection than has long been dominant.

My core interpretive argument is that the unfair-practices authority should be seen as a tool to interrupt business domination of consumers. It is an effort to correct for power asymmetries in consumer markets that prevent consumers from furthering their interests in a way that is

429. *Cf. Accusearch*, 570 F.3d at 1195-1201 (discussing the effect of immunities from the Telecommunications Act on the application of the unfair-practices authority to entities regulated by that statute).

consistent with social values. Applying the unfair-practices authority requires identifying the interests in play, which is often a contested activity.

Fear of contestation over the values that should guide consumer markets was, of course, what got us to the consumer sovereignty framework in the first place. So I conclude by addressing a final worry: What if political winds change or the FTC kicks a hornets' nest and we have KidVid-style backlash all over again? Whatever the merits of the theoretical or even the substantive policy arguments, wouldn't it be a better use of what are, after all, quite limited resources to police the most egregious conduct and nudge Congress to make the harder policy judgments?

I think not. As I have argued elsewhere, "KidVid was a perfect storm."[430] It is worth keeping in mind, but dangerous to treat as always around the corner. The Commission has waded into controversial territory before and after and has even been overruled by Congress without shutting down.[431] And CFPB, which regulates arguably the most powerful corporations in the history of the world, has taken a number of controversial positions and has been buffeted with attacks on its legitimacy (most successfully in the courts), but it remains standing with its full substantive powers intact.[432] Not every time the FTC or CFPB ventures into controversial territory—not even every time a congressional majority musters the energy to oppose its efforts—should we expect disaster to follow. To the contrary, this back-and-forth is part of what it takes to have an administrative agency accountable to democratically elected bodies.

Of course, agencies must be attuned to their political surroundings, for reasons of both strategy and accountability. As the "policy feedback" literature in political science has demonstrated, one of the effects of policy development and implementation is to shape the political conditions in which future policies can be developed.[433] One pattern of feedback is backlash, but it is not the only or the primary one. And even where backlash occurs, progress can be made. For agencies charged with protecting consumers from powerful entities, a cowering posture will not cut it. Thinking through different ways of creating and reinforcing political legitimacy for norm setting in consumer markets can have the dual benefits of making regulation more responsive to substance (and less to avoidance) and creating space for democratic feedback, including contestation and critique.

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430. Herrine, *supra* note 188, at 881.

431. The FTC's Cigarette Rule is a good example. Congress overruled the FTC with its 1994 amendments, but the rule started a conversation leading to future regulation of cigarette advertising. Robert McAuliffe, *The FTC and the Effectiveness of Cigarette Advertising Regulations*, 7 J. PUB. POL'Y & MKTG. 49, 49-52 (1988).

432. *See* Seila L. LLC v. CFPB, 591 U.S. 197 (2020) (striking down removal limitations); Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616 (5th Cir. 2022) (striking down CFPB's funding scheme), *rev'd*, 601 U.S. 416 (2024).

433. *See* Daniel Béland & Edella Schlager, *Varieties of Policy Feedback Research: Looking Backward, Moving Forward*, 47 POL'Y STUD. J. 184 (2019) (reviewing the literature on "policy feedback," theoretical and empirical).

That is a more virtuous political cycle, although it is one that requires patience and a longer time horizon. It is worth trying for.