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UNFAIR ARTIFICIAL INTELLIGENCE: HOW FTC INTERVENTION CAN OVERCOME THE LIMITATIONS OF DISCRIMINATION LAW

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INTRODUCTION

Discriminatory artificial intelligence is unfair.[1] Until very recently, the Federal Trade Commission, the United States federal agency charged with regulating "unfair or deceptive acts or practices" in commerce,[2] has not sought to address the harms stemming from discriminatory AI. Increasingly, however, the FTC is demonstrating a willingness to take a much more aggressive enforcement stance than it has at any other time in the last forty years, and that includes a clear interest in using its existing authorities to rein in discriminatory AI.[3]

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1 Certainly, discrimination would seem to fall under any commonly understood definition of unfairness. *See Unfair*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/unfair?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [https://perma.cc/8UV5-D3GL] (defining unfair as either "marked by injustice, partiality, or deception," or "not equitable in business dealings"); *see also* Stephen Hayes & Kali Schellenberg, *Discrimination is "Unfair": Interpreting UDA(A)P to Prohibit Discrimination* 14 (Student Borrower Prot. Ctr. Rsch. Paper, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832022 [https://perma.cc/4V7G-63N6] ("Beginning with the plain text, discrimination and unfairness are often synonymous. The term 'unfair' has been used for decades to describe discrimination based on protected classes.").

2 15 U.S.C. § 45(a)(1).

3 *See, e.g.*, Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, FTC BUS. BLOG (Apr. 19, 2021), https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai [https://perma.cc/W6QZ-XQA5] (advising businesses that the FTC will use its current authority to address algorithmic discrimination); Samuel Levine, Director, Bureau Consumer Prot., Keynote Remarks at the Cleveland-Marshall College of Law Cybersecurity and Privacy Protection Conference (May 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Samuel-Levine-Cleveland-Marshall-College-of-Law.pdf [https://perma.cc/U6WB-YPBM] (stating that discrimination that results from

This intent was formally announced in the Commission's August 2022 Advanced Notice of Proposed Rulemaking (ANPR).[4] The ANPR focuses on regulatory rules for commercial surveillance and data security broadly, and notably includes a number of questions about "algorithmic discrimination" and "discrimination by automated decision-making systems."[5] This was followed shortly by an enforcement action by the FTC which explicitly claimed for the first time that a business could be liable for discrimination not only under discrimination law, but under the FTC Act as well.[6]

In this Article, we argue that FTC intervention in this space is a positive and overdue development. The Commission can do a lot of good by applying its authority to address unfair and deceptive acts and practices to discriminatory AI.[7] Surprisingly, though the discriminatory harms of AI have been frequently discussed in the last decade of legal literature[8] and scholars

surveillance is a top concern of the FTC); Rebecca Kelly Slaughter, 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 1, 40-41 (2021) (presenting an argument by Commissioner Slaughter that the FTC "can and should be aggressive in its use of unfairness to target conduct that harms consumers" including "discrimination" and "other algorithmic harms").

4 Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (proposed Aug. 22, 2022) (to be codified at 16 C.F.R. ch. 1).

5 *Id.* at 51276, 51284.

6 *See* Order for Permanent Injunction at 6-9, *In re* Passport Auto. Grp., Inc., No. TDC-22-2670 (D. Md. Oct. 21, 2022). This move parallels similar developments at the Consumer Financial Protection Bureau, which, in March 2022, updated its Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) exam manual to explain that its unfairness authority covers discrimination and to detail the ways in which the Bureau would go about assessing companies' processes for dealing with the risk of discrimination. *See* CONSUMER FIN. PROT. BUREAU, UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES EXAM MANUAL 1 (2022) [hereinafter 2022 UDAAP EXAM MANUAL].

7 15 U.S.C. § 45(a).

8 *See, e.g.*, Ifeoma Ajunwa, *An Auditing Imperative for Automated Hiring Systems*, 34 HARV. J.L. & TECH. 621, 622-23 (2021) [hereinafter Ajunwa, *Auditing Imperative*]; Thomas B. Nachbar, *Algorithmic Fairness, Algorithmic Discrimination*, 48 FLA. STATE U. L. REV. 509, 515 (2021); Andrés Páez, *Negligent Algorithmic Discrimination*, LAW & CONTEMP. PROBS., 2021, at 19; Sandra Wachter, Brent Mittelstadt & Chris Russell, *Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI*, COMPUT. L. & SEC. REV., 2021, at 1-2; Jason R. Bent, *Is Algorithmic Affirmative Action Legal?*, 108 GEO. L.J. 803, 830 (2020); Deborah Hellman, *Measuring Algorithmic Fairness*, 106 VA. L. REV. 811, 811 (2020); Aziz Z. Huq, *A Right to a Human Decision*, 106 VA. L. REV. 611, 612-14 (2020); Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1260 (2020); Ifeoma Ajunwa, *Age Discrimination by Platforms*, 40 BERKELEY J. EMP. & LAB. L. 1, 6 (2019); Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1673 (2020) [hereinafter Ajunwa, *Paradox*]; Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 56 (2019); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2221 (2019); Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 522 (2018); Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1057 (2017); Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023, 1024 (2017); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 860 (2017); David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 655 (2017); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 674 (2016); Danielle Keats

have occasionally suggested a possible role for the FTC,[9] there has been no full-length scholarly treatment of the benefits of the Commission's involvement in regulating discriminatory AI and its legal authority to do so.[10] We provide that treatment here.

The FTC's consumer protection authority is most useful when the Commission can fill gaps in existing legal regimes. The Commission's flexible authority allows it to be nimble and adjust to new developments and changing circumstances. This is why the FTC has always been a central regulator of new technological development[11] and has become the de facto data protection regulator in the United States[12]—the Commission reacts and fills the gaps in existing law. But this presents a puzzle: Why does the FTC want to get involved in regulating discriminatory AI when we already have an extensive list of civil rights laws? And why is that a good idea?

As with other instances of technological development, the landscape of decisionmaking has changed. Where discrimination laws were designed to prevent harmful decisions by people, today many of these decisions are technologically mediated or delegated to automated procedures, which increasingly include AI. There are some aspects of these automated decisionmaking procedures that traditional civil rights laws can likely address,

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Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 5 (2014); Tal Z. Zarsky, *Understanding Discrimination in the Scored Society*, 89 WASH. L. REV. 1375, 1375 (2014).

9 *See, e.g.*, 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, 491-92 (2020) [hereinafter Hirsch, *New Paradigms*]; Dennis D. Hirsch, *That's Unfair! Or Is It? Big Data, Discrimination and the FTC's Unfairness Authority*, 103 KY. L.J. 345, 354 (2015) [hereinafter Hirsch, *That's Unfair!*]; Michael Spiro, *The FTC and AI Governance: A Regulatory Proposal*, 10 SEATTLE J. TECH. ENV. & INNOVATION L. 26, 52 (2020); Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115, 177 (2020); Woodrow Hartzog, *Unfair and Deceptive Robots*, 74 MD. L. REV. 785, 822 (2015); Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 42 (2018) (noting the possibility, but with some skepticism); Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907, 945 (2022); Meirav Furth-Matzkin, *Racial Discrimination by Retailers: A Field Study of Willingness to Accept Returns* 54 (Dec. 2, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4034828 [https:// perma.cc/AGD8-YS7P] (arguing that courts could interpret UDAP authority to include discrimination).

10 The most comprehensive treatment of discrimination-as-unfairness appears in a white paper by civil rights attorneys Stephen Hayes and Kali Schellenberg, which addresses the FTC and CFPB's abilities to use their unfairness authority to fill gaps in laws that apply to discrimination in lending and other forms of consumer finance. *See generally* Hayes & Schellenberg, *supra* note 1. Though the scopes of our analyses ultimately differ, they make similar observations and come to some of the same conclusions about the FTC's unfairness authority.

11 CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 25-26 (2016).

12 Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 600 (2014); Steven Hetcher, *The* De Facto *Federal Privacy Commission*, 19 J. MARSHALL J. COMPUT. & INFO. L. 109, 109 (2000).

but a new technological reality means new gaps to fill. Indeed, while public statements by the FTC suggest that its initial focus is on regulation of those activities that can already be addressed by discrimination law,[13] there are also hints that it aims to go further. In Commissioner Slaughter's words: "Civil rights laws are the logical starting point for addressing discriminatory consequences of algorithmic decision-making . . . . [But] in many cases, existing civil-rights jurisprudence may be difficult to apply to algorithmic bias . . . . So, we must consider what other legal protections currently exist outside of direct civil rights statutes."[14]

Thinking about discrimination as unfairness confers several advantages that have so far been overlooked. It allows the Commission to regulate commercial domains, actors, injuries, and business practices that existing discrimination laws are unlikely to reach. These benefits may not be obvious because we typically think of discrimination as a separate problem from consumer protection, but where a large commercial industry creates products that discriminate or enable discrimination, the two merge, necessitating new ways to think about the problem. And though it might on its face seem incongruous to address discrimination with consumer protection authority, the FTC's actual charge is to regulate commerce broadly,[15] so there is no reason that the FTC's authority could not apply to issues of discrimination.[16]

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13 For example, the Commission's 2021 blog post addressing issues of unfairness notably focuses on cases of algorithmic bias in the context of employment, credit, housing, and healthcare—all domains subject to laws that seek to guard against discrimination. *See, e.g.*, 42 U.S.C. § 2000e-2; 15 U.S.C. § 1691; 42 U.S.C. § 1301; 42 U.S.C. § 2000d. While the blog post also touches on advertising, it focuses specifically on ads related to these regulated domains (e.g., ads for jobs), which are themselves covered by discrimination law. *See generally* Amit Datta, Anupam Datta, Jael Makagon, Deirdre K. Mulligan & Michael Carl Tschantz, *Discrimination in Online Advertising: A Multidisciplinary Inquiry*, PROC. OF MACH. LEARNING RSCH., 2018, at 7-11 (analyzing legal liability under civil rights laws for algorithmic discrimination in the distribution of job and housing ads).

14 Slaughter et al., *supra* note 3, at 38.

15 *See* 15 U.S.C. § 45(a)(1) ("[U]nfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.") "Consumer" is not defined in the FTC Act itself, but consumers are generally defined as individual people acting in their commercial capacity. *See generally* Meg Leta Jones, The Characters of Consent: The History of Cookies and Future of Technology Policy (June 2022) (unpublished manuscript) (on file with authors) (discussing information law's various descriptions of people as "users," "consumers," and "data subjects").

16 *See* Joint Statement of Chair Lina M. Khan & Comm'r Rebecca Kelly Slaughter, *In re* Napleton Auto. Grp. (Mar. 31, 2022) [hereinafter *In re* Napleton Auto. Grp. Joint Statement], https://www.ftc.gov/news-events/news/speeches/joint-statement-chair-lina-m-khan-commissioner-rebecca-kelly-slaughter-matter-napleton-automotive [https://perma.cc/HJ8W-NXC2] ("[D]iscrimination based on protected status is a substantial injury to consumers."); *see also* Joint Statement of Chair Lina M. Khan, Comm'r Rebecca Kelly Slaughter & Comm'r Alvaro M. Bedoya, *In re* Passport Auto. Grp., Inc. (Oct. 18, 2022) [hereinafter *In re* Passport Auto Grp., Inc. Joint Statement], https://www.ftc.gov/system/files/ftc_gov/pdf/joint-statement-of-chair-lina-m.-khan-commissioner-rebecca-kelly-slaughter-and-commissioner-alvaro-m.-bedoya-in-the-matter-of-passport-auto-group.pdf [perma.cc/JL6S-VRCB] (explaining that the FTC Act allows the

To be sure, the problem of discriminatory AI is multifaceted, and we do not argue here that FTC oversight is the best or only way to address it. We have in the past argued for application of and revisions to discrimination law,[17] the use of additional procedural protections,[18] the adoption of documentation standards,[19] and the introduction of impact assessment requirements.[20] Instead, this Article argues that the FTC can play a unique—and so far overlooked—role in the larger set of regulatory responses that are necessary to rein in discriminatory AI, and further argues that the Commission should focus its efforts there.

The Article proceeds in three Parts. In Part I, we identify key advantages of FTC intervention. One set of advantages stems from the Commission's expansive scope of authority, which allows it to address activities, actors, harms, and business practices that are beyond the reach of most antidiscrimination statutes. Two additional advantages stem from the FTC's capabilities as a regulatory agency, as compared to those of individual plaintiffs or plaintiff classes and to those of other enforcement agencies.

Part II addresses the Commission's legal authority. The FTC Act defines unfair acts and practices with a three-part test: (1) a likelihood of substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing benefits to consumers.[21] Generally, to be unfair, something need not be otherwise illegal, but the Commission may take inspiration from established public policies,[22] and for the most part, it will not be difficult to find that discriminatory AI constitutes an unfair business practice. Part II also addresses deception and external challenges to the Commission's authority.

Part III examines one way that the FTC could go about this work. Over the last two decades, the Commission has addressed data security by developing a program of enforcement that amounts to a pseudo-common law approach, by issuing guidance and settling enforcement actions with public consent decrees that demonstrate the best and worst practices respectively. There are several interesting parallels between data security harms and

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Commission to "consider established public policies as evidence," and that the United States has an established public policy of combatting racial discrimination) (footnotes omitted) (quotation marks omitted).

17 Barocas & Selbst, *supra* note 8, at 675.

18 Joshua A. Kroll, Joanna Huey, Solon Barocas, Edward W. Felten, Joel R. Reidenberg, David G. Robinson & Harlan Yu, *Accountable Algorithms*, 165 U. PA. L. REV. 633, 637 (2017).

19 Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 87 FORDHAM L. REV. 1085, 1129-30 (2018).

20 Andrew D. Selbst, *An Institutional View of Algorithmic Impact Assessments*, 35 HARV. J.L. & TECH. 117, 190-91 (2021).

21 15 U.S.C. § 45(n).

22 *Id.*

discriminatory AI that lead us to think that the data security model could be a good one to build on. The other regulatory model that the FTC could—and seems likely to—pursue is the creation of trade regulation rules to affirmatively define what practices are unfair.[23] We focus on the common law approach because of the interesting parallels, because it is an established model that would likely be the easiest for the FTC to replicate, and because it would be worth pursuing in parallel to rulemaking, but we briefly discuss the rulemaking option as well.

I. The Benefits of FTC Intervention

There are several reasons that FTC intervention into the regulation of discriminatory AI would be a positive development. Currently, the regulatory scheme that is most directly applicable to discriminatory AI is the set of civil rights laws, which include Title VII, the Equal Credit Opportunity Act (ECOA), and the Fair Housing Act (FHA), among others. Algorithmic and AI-based decisionmaking poses challenges to enforcement of those laws in ways that have been documented at length in other scholarship.[24] Our interest here is slightly different. The FTC's Section 5 authority will indeed allow it to replicate some of the successes of those civil rights laws, but more importantly, the FTC's reach is broader. In this Part, we identify six benefits to FTC intervention that can help it reach beyond the structural and procedural limitations of discrimination law as applied to AI.

A. *The Broader Scope of Discrimination as Unfairness*

The FTC's broad and flexible authority to regulate unfair practices allows it to reach circumstances that should be deemed unfair because they are discriminatory, even though they are not contemplated by discrimination law. This includes domains outside those targeted by specific statutes, actors that the statutes do not reach, harms that are not specifically enumerated in the statutes, and business practices that promote discrimination but are not themselves discriminatory.

1. Domains

One major benefit of FTC intervention to address discriminatory AI is the Commission's ability to reach domains other than those already regulated by discrimination law. Most discrimination law applies to specific domains,

23 For codification of the Commission's rulemaking authority, see 15 U.S.C. § 57a(a).

24 *See supra* note 8 (collecting scholarship).

such as employment,[25] credit,[26] and housing,[27] and is focused on concrete decisions within those domains, such as whether to hire, lend, or rent a home. Other laws consider discrimination in contracting[28] or access to public accommodations.[29] Many commercial applications of AI take place in domains outside those regulated by discrimination law or upstream from the regulated decision, yet nonetheless create discriminatory harms. As a result, troubling instances of discriminatory AI often escape the reach of discrimination law, including those that have been the subject of some of the most well-known studies of algorithmic bias.

Consider *Gender Shades*, the widely cited study by Joy Buolamwini and Timnit Gebru, which demonstrated that many commercially available gender classification tools exhibited significant performance disparities by skin tone and gender, performing especially poorly for darker-skinned women.[30] Gender classification tools are unlikely to be integrated into decisionmaking in domains regulated by discrimination laws because these laws forbid disparate treatment on the basis of gender.[31] This is cold comfort, however, as there remain many other potential applications of gender classification and related computer vision tools outside these domains where such biases would be cause for serious concern. As Buolamwini has stated elsewhere, "[t]he same data-centric techniques that can be used to try to determine somebody's gender are also used . . . to unlock your phone."[32] There is no discrimination law that would hold phone manufacturers liable if the facial recognition that is commonly used to unlock users' devices demonstrates systematic differences in performance across different demographic groups. The same holds true for the automated speech recognition that powers the virtual assistants on many phones (e.g., Apple's Siri, Google Assistant, etc.), which

25 Title VII of the Civil Rights Act, 42 U.S.C. § 2000e.

26 Equal Credit Opportunity Act, 15 U.S.C. § 1691.

27 Fair Housing Act, 42 U.S.C. § 3601.

28 Civil Rights Act of 1866, 42 U.S.C. § 1981.

29 Title II of the Civil Rights Act, 42 U.S.C. § 2000a.

30 Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, PROC. MACH. LEARNING RSCH., 2018, at 12.

31 There are, of course, many efforts to use computer vision in decisionmaking in regulated domains, especially in the realm of employment. *See, e.g.*, Luke Stark & Jevan Hutson, *Physiognomic Artificial Intelligence*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 922, 955 (2022) (describing the use of AI-dependent video interviewing and hiring tools); Ifeoma Ajunwa, *Automated Video Interviewing as the New Phrenology*, 36 BERKELEY TECH. L.J. 101, 103 (2021) (discussing the implications of AI-based video interviewing on employment discrimination).

32 Larry Hardesty, *Study Finds Gender and Skin-Type Bias in Commercial Artificial-Intelligence Systems*, MIT NEWS (Feb. 11, 2018), https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212 [https://perma.cc/8952-DR6Y] (quotation marks omitted).

has likewise been shown to exhibit disparities in accuracy by race.[33] These activities are, however, well within the scope of the FTC's authority. The Commission can reach AI-based products and services targeted at everyday consumers, not just those targeted at decisionmakers in the set of domains regulated by discrimination law.

Consider another canonical example from research on algorithmic bias. Several early studies showed that natural language processing (NLP) tools can encode a range of troubling biases.[34] These studies revealed that NLP tools using "word embeddings"—a commonly used mathematical representation of how words relate to each other—would learn stereotypical associations between gender and occupation, as highlighted in the very title of one of the studies: *Man Is to Computer Programmer as Woman Is to Homemaker*.[35] Yet again, tools that exhibit such properties remain outside the scope of discrimination law unless they are adopted for decisionmaking in a regulated domain. Only once word embeddings have been incorporated into a particular task like ranking job applicants according to the content of their resumes would such tools implicate discrimination law. In contrast, the FTC has the authority to go after general-purpose AI tools before they have been incorporated into a decisionmaking process in a regulated domain. The Commission can reach these tools, outside of specified domains, if there is good reason to believe that the tools will cause harm in the future.[36] The legal authority is especially clear when these general purpose tools are explicitly marketed to decisionmakers in the domains regulated by discrimination law and where the marketing stresses the utility of the tools for making such decisions.[37]

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33 Allison Koenecke, Andrew Nam, Emily Lake, Joe Nudell, Minnie Quartey, Zion Mengesha, Connor Toups, John R. Rickford, Dan Jurafsky & Shared Goel, *Racial Disparities in Automated Speech Recognition*, 117 PROC. OF NAT'L ACAD. OF SCIS. 7684, 7687 (2020).

34 *See, e.g.*, Tolga Bolukbasi, Kai-Wei Chang, James Zou, Venkatesh Saligrama & Adam Kalai, *Man Is to Computer Programmer as Woman Is to Homemaker?: Debiasing Word Embeddings*, NEURAL INFO. PROCESSING SYS., 2016, at 2-3 (showing that a word embedding trained on Google News articles, and other publicly available word embeddings, exhibited gender bias); Aylin Caliskan, Joanna J. Bryson & Arvind Narayanan, *Semantics Derived Automatically from Language Corpora Contain Human-Like Biases*, 356 SCI. 183, 183 (2017) (finding that the application of a widely used word embedding technique to a large corpus of text from the Internet encoded stereotypical associations similar to those exhibited by humans).

35 Bolukbasi et al., *supra* note 34.

36 *See* 15 U.S.C. § 45(n) ("The Commission shall have no authority under this section . . . *unless* the act or practice causes or is likely to cause substantial injury to consumers . . . ." (emphasis added)).

37 *See* Manish Raghavan, Solon Barocas, Jon Kleinberg & Karen Levy, *Mitigating Bias in Algorithmic Hiring: Evaluating Claims and Practices*, PROC. OF 2020 ACM CONF. ON FAIRNESS, ACCOUNTABILITY & TRANSPARENCY, 2020, at 472 (reviewing eighteen vendors offering recruitment technologies and finding several that claimed to "fix" bias or adverse impact in their pre-employment assessments).

2. Actors

Just as discrimination law is limited in the range of domains that it can reach, so, too, is it limited in the range of actors that it can hold liable. These are related points: If the focus of discrimination law is on decision points, then the main actors regulated will be the decision makers. And just as the FTC is well positioned to overcome the limits of regulated domains, so, too, is it well positioned to overcome the limits of regulated actors.

To begin, consider the range of actors subject to Title VII, the ECOA, and the FHA. Title VII applies to employers, employment agencies, labor organizations, and joint labor-management committees overseeing training programs.[38] But it does not extend to the various entities that might provide support to these actors, such as vendors of employment assessments.[39] Similarly, the ECOA's list of defendants is limited to creditors, defined as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."[40] The ECOA does not appear to apply to actors that provide information informing credit decisions, such as vendors of credit scores,[41] despite Congress's and federal agencies' long-standing interest in uncovering potential racial disparities in credit scores.[42]

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38 42 U.S.C. § 2000e-2(a)-(d).

39 *See* Stewart v. Hannon, 469 F. Supp. 1142, 1148 n.3 (N.D. Ill. 1979) (holding that § 1981 cannot reach third-party vendors with which the plaintiff did not contract and accepting the plaintiffs' concession that an employment test vendor "cannot properly be charged with a Title VII violation because it is neither plaintiffs' employer, an employment agency, nor a labor organization," and accordingly, it is "not covered by the substantive provisions of Title VII"). Although federal law does not contain any prohibitions on aiding and abetting employment discrimination, some states do. *See* Datta et al., *supra* note 13, at 9 ("[S]everal states including California, New York[,] and Pennsylvania, prohibit any person from aiding, abetting, inciting, compelling, or coercing discriminatory employment practices.").

40 15 U.S.C. § 1691a(e).

41 *See, e.g.*, Hilton v. Fair Isaacs, Inc., No. C-05-01285-RMW, 2005 WL 8177639, at *3 (N.D. Cal. Aug. 8, 2005) (holding that the plaintiff failed to state a claim against a credit-scoring vendor under the ECOA because he failed to allege that the vendor was involved in extending credit); Arikat v. JP Morgan Chase & Co., 430 F. Supp. 2d 1013, 1020 n.9 (N.D. Cal. 2006)("[P]laintiffs conceded their claims under the ECOA as to Fair Isaac because Fair Isaac does not act as a direct creditor with respect to plaintiffs." (citation omitted) (quotation marks omitted)).

42 *See, e.g.*, BD. OF GOVERNORS OF FED. RSRV. SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT at S-1 (2007) (reporting on racial disparities in credit scoring at the direction of Congress through the Fair and Accurate Credit Transactions Act); FED. TRADE COMM'N, CREDIT-BASED INSURANCE SCORES: IMPACTS ON CONSUMERS OF AUTOMOBILE INSURANCE 51 (2007) (studying how consumer credit scoring affects the availability of credit and its impact on different groups of consumers, like racial and income groups, as required by Congress in the Fair and Accurate Credit Transactions Act).

The FHA is more flexible than Title VII and the ECOA. With two exceptions, the law does not explicitly define a set of covered entities under the FHA.[43] Instead, the FHA describes a range of actions that fall under its purview, regardless of the specific actor who might be undertaking them. In a notable departure from Title VII and the ECOA, the FHA has already been read by one federal district court to extend to vendors of tenant screening tools. In *Connecticut Fair Housing Center v. Corelogic*, plaintiffs sued a vendor, Corelogic, claiming that the company "had a duty not to sell a product to [a landlord] which would unwittingly cause [the landlord] to violate federal housing law and regulations."[44] In reaching this decision, the court stressed the close nexus between the vendors' conduct and the denial of housing, noting that landlords defer critical aspects of their decisionmaking processes to vendors, even if the ultimate decisions regarding prospective tenants rest with the landlords.[45]

The more expansive scope of the FHA was also apparent in two high-profile lawsuits against Facebook. In *National Fair Housing Alliance v. Facebook*, the court addressed a practice first publicized by ProPublica,[46] in which Facebook allegedly provided tools to advertisers that allowed them to engage in disparate treatment by intentionally exposing members of protected classes to employment-related, credit-related, and housing-related ads at different rates.[47] In a second suit, the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) argued that Facebook was not only permitting advertisers to discriminate, but was itself engaging in unlawful discrimination under the FHA.[48] The suit centered around Facebook's advertisement delivery algorithms, which

43 *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 12B:1 (2017) ("The statute makes little effort to define the scope of proper defendants. With the exception of § 3605's ban of discrimination in certain real estate-related transactions and § 3608's affirmative command to federal agencies, the substantive provisions of the statute simply declare certain housing practices to be unlawful without specifying who may be held responsible for these practices." (footnote omitted) (citations omitted)).

44 Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC, 369 F. Supp. 3d 362, 372 (D. Conn. 2019).

45 *Id.* at 375 ("Defendant [vendor] cannot downplay its role in the screening process. It was Defendant's form, Defendant's screening process and Defendant's adverse action letter that contributed to the denial of [the plaintiff's] application.").

46 Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, PROPUBLICA (Oct. 28, 2016, 1:00 PM), https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race [https:// perma.cc/K3Q2-MFTB].

47 Complaint at 17-18, Nat'l Fair Hous. All. v. Facebook, Inc., No. 1:18-CV-02689 (S.D.N.Y. June 25, 2018).

48 For a full account of Facebook's alleged unlawful discrimination, see ALJ's Charge of Discrimination at 3-6, Facebook, Inc., FHEO No. 01-18-0323-8 (Dep't of Hous. & Urb. Dev. Mar. 28, 2019), https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf [https://perma.cc/4V7K-WGYC].

displayed housing-related ads at much different rates to different groups of people, apparently based on protected traits or their proxies.[49] HUD and the DOJ alleged that this was happening even where the advertisers had not set out to target users based on race or other protected traits.[50] Both suits have now settled, with Facebook agreeing to reform its advertising tools.[51]

While the FHA seems to be up to the task of tackling housing discrimination caused by AI,[52] this does not seem to be the case with Title VII and the ECOA.[53] Actors in the context of employment or credit that would seem to be equivalent to the entities covered by the FHA are not subject to Title VII and the ECOA. Vendors of employment assessments and credit scores seem to be beyond the scope of these statutes, despite the decisive roles that each might play in employment and credit decisions.[54] This split between the apparent reach of Title VII and the ECOA, on the one hand, and the FHA, on the other, reveals a gap in the potential reach of discrimination law that the FTC would be well positioned to fill. To reach the vendors that sell to employers and creditors, the Commission could rely on its unfairness authority to hold these actors responsible for their roles in

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49 *Id.* at 5.

50 *Id.*

51 *See Facebook Settlement*, NAT'L FAIR HOUS. ALL. NEWS (Mar. 14, 2019), https://nationalfairhousing.org/facebook-settlement [https://perma.cc/Z9NP-ZNEL] (noting that the "historic settlement" involves "sweeping changes to Facebook's paid advertising platform"); *see also* Settlement Agreement, United States v. Meta Platforms, Inc., No. 1:22-CV-05187 (S.D.N.Y. June 21, 2022), ECF No. 5-1 (proposing a settlement awarding injunctive relief related to Facebook's advertising practices). There are some indications that merely preventing advertisers from exercising discriminatory preferences has been inadequate to prevent discrimination on the platform. *See* Ava Kofman & Ariana Tobin, *Facebook Ads Can Still Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement*, PROPUBLICA (Dec. 13, 2019, 5:00 AM), www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement [https://perma.cc/XT6H-N924]. To date, it is unclear whether the DOJ's settlement terms with Facebook will be more effective.

52 Even so, a recent story from *ProPublica* does not paint a very favorable picture of the current state of affairs, noting that "tenants often get the runaround when they complain about screening decisions." *See* Erin Smith & Heather Vogell, *How Your Shadow Credit Score Could Decide Whether You Get an Apartment*, PROPUBLICA (Mar. 29, 2022, 6:00 AM), https://www.propublica.org/article/how-your-shadow-credit-score-could-decide-whether-you-get-an-apartment [https://perma.cc/Z5GV-ZQRZ]. The story further notes that "[t]he screening companies say landlords decide what criteria to use," but that landlords conversely "say screening companies make the decision." *Id.*

53 It is worth noting that in Facebook's settlement with the National Fair Housing Alliance, Facebook settled multiple cases simultaneously, involving claims about discriminatory ads for not just housing, but employment and credit as well. But it is likely that once Facebook had to make changes to its platform to settle the housing suit, it was essentially costless to agree to make the same changes in all five suits, regardless of whether the company faced a real prospect of liability outside the FHA.

54 *See* Hayes & Schellenberg, *supra* note 1, at 10 (arguing that such entities could "effectively dictate the substance of credit decisions in entire markets" while potentially falling beyond the reach of the ECOA).

perpetuating discrimination, in much the same way that the FHA has been read to do so. More broadly, the FTC could seek to hold accountable any actor that the Commission finds to have unfairly contributed to discriminatory outcomes, whether or not these actors are recognized as covered entities under any existing discrimination law.

One benefit to focusing on upstream actors in the AI pipeline is that they are often the cheapest cost avoider, better positioned to identify and address the source of discriminatory outcomes. For example, the FTC can target vendors of employment assessments or hiring software, rather than being limited to employers. In doing so, the Commission could place regulatory pressure on the actors who are much more likely to have the relevant knowledge and practical skills to address the source of discriminatory outcomes.

Addressing vendors also brings benefits of scale. In targeting vendors, the FTC's enforcement actions could have a much greater effect in reducing discrimination because any remedial actions taken by vendors would cascade down to all their clients. In many cases, going after the upstream suppliers of AI tools will be both more effective and more efficient in limiting discrimination than going after the downstream users of these tools.

Of course, the Commission need not pin all responsibility on just one actor. It can hold both vendors *and* clients responsible. The ability to do so may be especially useful because the distinction between developers and users of AI systems has begun to blur in many real world applications. Vendors often provide a general purpose AI capability that is then adapted by clients to their particular requirements or circumstances.[55] Rather than having to decide in advance where it will allocate legal responsibility—a difficult question currently being debated by legislators in the European Union drafting the proposed AI Act[56]—the FTC can target its interventions at the actors that its investigations reveal to be responsible in any given case.

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55 *See* Carlos I. Gutierrez, Anthony Aguirre, Risto Uuk, Claire C. Boine & Matija Franklin, *A Proposal For a Definition of General Purpose Artificial Intelligence Systems* 1-2 (Future of Life Inst. Working Paper, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4238951 [https://perma.cc/5EWT-9D59] (pointing out that there are now a number of general purpose AI systems on the market, like large language models, that can be fine-tuned to support tasks for which they were not originally or specifically trained); *see also* Jennifer Cobbe & Jatinder Singh, *Artificial Intelligence as a Service: Legal Responsibilities, Liabilities, and Policy Challenges*, COMPUT. L. & SEC. REV., 2021, at 4 ("Some providers offer AI services on a consultancy basis, working closely with the customer to tailor services to their needs (sometimes involving pre-built models that are heavily or entirely [customized] for the customer) . . . .").

56 Michael Veale & Frederik Zuiderveen Borgesius, *Demystifying the Draft EU Artificial Intelligence Act: Analysing the Good, the Bad, and the Unclear Elements of the Proposed Approach*, 22 COMPUT. L. REV. INT'L 97, 100 (2021).

3. Harms

In addition to expanded domains and actors, the idea of discrimination harm or injury is also more capacious under the FTC's Section 5 authority than under most discrimination law. Drawing on our prior and related work, we identify three types of discrimination harms that could concern the Commission: allocative harms, quality-of-service harms, and representational harms.[57] Allocative harms concern the distribution of a desirable resource or opportunity, such as a job, credit, or a home. Traditional discrimination law primarily concerns itself with these types of harms. Quality-of-service harms occur when consumer products and services work less well for certain demographic groups than for others. Finally, representational harms capture cases where certain demographic groups are represented in a stereotypical or demeaning manner or where they are not acknowledged at all, harming their dignity and social standing in society.[58]

We begin with allocative harms because they are both the most familiar, and—perhaps surprisingly—the most complicated. It is one thing to simply state that "discrimination is unfair," a statement few would disagree with, and another to understand how the legal expression of discrimination contained within the civil rights statutes translates to unfairness under Section 5.

As a starting point, the Commission could rely on determinations of existing courts and other agencies with respect to discrimination law.

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57 *See, e.g.*, Solon Barocas, Kate Crawford, Aaron Shapiro & Hanna Wallach, Presentation at the 9th Annual Conference of Special Interest Groups for Computing, Information & Society: The Problem with Bias: Allocative Versus Representational Harms in Machine Learning (Oct. 29, 2017) (drawing a distinction between the allocative and representational harms that can be caused by machine learning systems and offering an early taxonomy of representational harms); Artificial Intelligence Channel, *The Trouble with Bias—NIPS 2017 Keynote with Kate Crawford*, YOUTUBE (Dec. 10, 2017), https://www.youtube.com/watch?v=fMym_BKWQzk [https://perma.cc/VRB6-RL2E] (same); Su Lin Blodgett, Solon Barocas, Hal Daumé III & Hanna Wallach, *Language (Technology) Is Power: A Critical Survey of "Bias" in NLP*, 2020 PROC. OF 58TH ANN. MEETING OF ASS'N FOR COMPUTATIONAL LINGUISTICS 5454, 5455-76 (surveying 146 papers from the field of Natural Language Processing focused on bias, finding that it is often unclear which of the many possible representational harms the proposed measurement and mitigation techniques are seeking to address); Su Lin Blodgett, Sociolinguistically Driven Approaches for Just Natural Language Processing (Feb. 2021) (Ph.D. dissertation, University of Massachusetts Amherst) (on file with ScholarWorks, University of Massachusetts Amherst) (offering a more elaborate taxonomy and analysis of representational harms in the context of natural language processing); Jared Katzman, Angelina Wang, Morgan Scheuerman, Su Lin Blodgett, Kristen Laird, Hanna Wallach & Solon Barocas, *Taxonomizing and Measuring Representational Harms: A Look at Image Tagging*, PROC. OF 2023 AAAI CONF. ON A.I. (forthcoming 2023) (presenting a taxonomy of representational harms in the context of image tagging).

58 *See* sources cited *supra* note 57. Note that this literature further subdivides representational harms into more fine-grained categories in an effort to bring greater normative and technical precision to research on the harms of "bias" in natural language processing and computer vision. For the purposes of this Article, however, we limit ourselves to the differences between allocative, quality-of-service, and representational harms.

Disparate treatment is concerned with a decisionmaker's motives for an adverse action against a member of a protected class,[59] and disparate impact is concerned with whether a decisionmaker had justification to use a facially neutral decision procedure that nonetheless had a disproportionate impact on people in a protected class.[60] A violation of either doctrine should be deemed unfair.

But the Commission is not limited to such determinations. Unfairness is more flexible than discrimination law; it is restricted to neither the specific definitions of disparate treatment and disparate impact set out by statute, nor to the restrictive judicial interpretations that have narrowed these ideas over the years. But then, what does an unfairness determination look like?

The structure of an unfairness inquiry looks different than a discrimination inquiry. Unfairness requires that the Commission find a "significant injury"[61] as a predicate to a determination that an action is unfair. This requirement makes direct legal translation a little tricky. Neither disparate treatment nor disparate impact doctrines are explicit about what constitutes a discrimination harm or injury. This is a well-known critique of discrimination law—it is not explicit about what harms it aims to rectify.[62] Antidiscrimination is torn between anticlassification and antisubordination ends.[63] It is also torn between a distributive justice approach that aims to achieve equality in society broadly and a corrective justice approach that aims to rectify harm to an individual victim.[64] While there clearly is a legal injury embedded in antidiscrimination doctrine, it is never made explicit in the law and there is no theoretical agreement on precisely what the harm is. Ultimately, this debate is a challenging one to resolve, but for our purposes it suffices to note that the Commission must offer a theory of what constitutes the discrimination injury that it seeks to rectify.[65] Regardless of how the FTC

59 42 U.S.C. § 2000e-2(m).

60 42 U.S.C. § 2000e-2(k).

61 15 U.S.C. § 45(n).

62 *See* Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1379 (2017) ("[T]he fundamental question for the [discrimination] field is the nature of the relevant injury." (citation omitted)).

63 *See generally* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9 (2003).

64 *See* Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 411-20 (explaining that antidiscrimination law in principle was meant to address distributive justice, but in practice was set up to vindicate corrective justice principles); *see also* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 866 (2007) (distinguishing between an employer's wrong against an employee and an action that contributes to social inequality generally).

65 For a fuller exploration of the discrimination injury, see generally Zatz, *supra* note 62. Zatz argues that the different versions of equality law—individual disparate treatment, systemic disparate treatment, disparate impact, and nonaccommodation—are unified by the common injury of "status

ends up defining the discrimination harm, what the FTC ultimately needs to determine is whether a business practice that imposes such harm on a group of people is unfair. But the flexibility inherent in the Commission's definition of injury directly leads to flexibility in their determination of whether a practice is unfair. While discrimination law tends to scope responsibility narrowly, the Commission need not do so.

Discrimination harms are not always easily traceable to single, concrete actions. Instead, discrimination can result from everyday individuals interacting with our existing social, political, and economic environments to produce worse outcomes for historically oppressed groups.[66] As a basic example, the decision not to rent to people with lower incomes and fewer assets is entirely rational—and, from the perspective of discrimination law, justifiable—despite its likely outcome of hurting people of color, who on average have lower incomes and much less generational wealth. Today, these phenomena—often referred to as institutional or structural discrimination[67]—are well-recognized.

This is particularly important to recognize in the case of AI discrimination. One of the primary causes of discriminatory AI is that it draws expressly on historical data to make predictions about the future.[68] In doing so, it takes historical inequality, which discrimination law often sees as outside its scope,[69] and actively reintroduces it into the decisionmaking process. As we have argued in prior work, disparate impact law likely scopes responsibility for harm too narrowly to capture this concern with discriminatory AI.[70] But a choice to use AI tools is a choice to actively rely on historical data and subject people to new forms of discrimination based on the past. Thus, an unfairness regime should include the ability to judge when

causation," which he defines as occurring when an individual suffers harm because of the individual's status as a member of a protected class. *Id.* He further treats the differences between the forms of equity law as different rationales for holding a decisionmaker responsible for causing an injury, but stops short of articulating a theory for determining responsibility for disparate impact. *Id.* at 1378, 1408.

66 *See* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 5 (2014) ("[Racial] gaps are produced by the everyday decisions that structure our social, political and economic interactions.").

67 *See* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 148-49 (2019) (defining institutional and/or structural racism as including four elements: 1) lack of intentionality; 2) production by everyday decisions; 3) facial neutrality in decisions; and 4) lack of an identifiable bad actor).

68 Barocas & Selbst, *supra* note 8, at 673.

69 Courts sometimes dismiss structural racism as mere "societal discrimination," a term that has never been specifically defined but has instead come to mean "discrimination for which no one is legally responsible." *See* Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1605 (2002).

70 For a fuller account of this argument, see generally Barocas & Selbst, *supra* note 8.

such a reliance is unfair, and the FTC should expand its understanding of discrimination injury to encompass the decision to subject consumers to discrimination based on historical data.[71]

Not every reproduction of past discrimination will be unfair. Rather, the FTC must figure out when this type of harm amounts to an unfair act or practice. There are many possible ways for the Commission to make this determination. The FTC could implement a negligent discrimination framework—which some scholars have previously argued is what disparate impact is trying to achieve anyway.[72] Whereas discrimination statutes often do not place any legal obligations on employers to affirmatively test selection procedures for discrimination, the FTC could put the burden on the employers, asserting that a failure to test would constitute an unfair practice. This avenue would go toward establishing the "affirmative duty of care" that Ifeoma Ajunwa has called for in automated hiring, which would require employers to proactively subject their tools to audits for discrimination.[73]

This duty could be extended beyond testing alone to include an affirmative obligation to search for a less discriminatory alternative. Recent research has demonstrated that there can often be multiple models that are similarly accurate in their predictions but more or less disparate in their effects on protected classes,[74] such that it might be deemed unfair to not make reasonable efforts to search for these less discriminatory models. While imposing these new duties on companies is one possible vision of unfairness, it is necessarily predicated on the FTC's ability to consider a broader scope of harm as described above.

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71 *See* Deborah Hellman, *Sex, Causation, and Algorithms: How Equal Protection Prohibits Compounding Prior Injustice*, 98 WASH. U. L. REV. 481, 486 (2020) (arguing that preventing the compounding of prior injustice is central to discrimination law); *see also* Benjamin Eidelson, *Patterned Inequality, Compounding Injustice, and Algorithmic Prediction*, 1 AM. J.L. & EQUAL. 252, 255 (2021) (arguing that algorithmic decisionmaking can be normatively problematic if it sustains or aggravates patterns of inequality).

72 *See, e.g.*, David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993) ("[T]he existing law of employment discrimination, while eschewing the term negligence, frequently incorporates the doctrine."); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1389 (2014) (comparing discrimination to negligence); Suk, *supra* note 64, at 414 (arguing that disparate impact and its failure to accommodate can be "analogized to the tort of negligence"). Ultimately, defining both injury and responsibility will be difficult in the abstract. More can be said about it, but a fuller discussion will be the subject of future work.

73 Ajunwa, *Auditing Imperative*, *supra* note 8, at 625-26.

74 *See* Emily Black, Manish Raghavan & Solon Barocas, *Model Multiplicity: Opportunities, Concerns, and Solutions*, PROC. OF 2022 ACM CONF. ON FAIRNESS, ACCOUNTABILITY & TRANSPARENCY, June 2022, at 850 (describing the phenomenon of "multiplicity" in which it is possible to develop a range of models that all exhibit the same overall accuracy but differ in the predictions that they make for certain individuals or specific groups).

So far, we have addressed only allocative harms. Another benefit of FTC involvement is that it can address quality-of-service harms as well. Quality-of-service harms are a different category of harm entirely, but are still discriminatory and, therefore, concerning. As previously mentioned, if Apple's Siri or Google Assistant are simply less capable of understanding the spoken language of certain demographic groups, the Commission might assert that the sale of such products is unfair. Consumers undoubtedly suffer a harm when products and services don't work for them as promised; they don't get what they paid for and they may bear the cost of inconvenience, either because they must take additional steps to get the products or services to work or because they must find some other way to achieve their goals. For example, in the case of voice recognition, consumers may need to alter their natural ways of speaking or resort to more onerous input methods, like typing directly into their phones. This is not a harm traditionally recognized by discrimination law.[75] Rather, it is a difference in the value that consumers are able to derive from the AI products and services that they have paid for. And this deprivation is the most classic of consumer harms, an even more natural fit for the Commission as a consumer protection agency than the injuries covered by discrimination law.[76]

Representational harms are the final type of injury that the FTC might seek to address. Such harms are not typically directly actionable under existing discrimination law,[77] but may be within the scope of unfairness.[78] In

75 Under very specific circumstances, existing discrimination laws might be able to reach such cases. Imagine an employer who issues its employees a workplace device that includes speech recognition. Further imagine that the effective functioning of speech recognition on this device makes employees' jobs significantly easier to perform. Finally, imagine that the speech recognition on these devices works less well for certain demographic groups than for others. These hypothetical circumstances might be understood as differences in the terms, conditions, and privileges of employment that Title VII recognizes as a form of discrimination. *See* 42 U.S.C § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."). Outside of this specific set of hypothetical circumstances, however, this harm is not generally captured within the scope of discrimination law.

76 Notably, the same activity can be one type of harm for one set of stakeholders and a separate type of harm for another set of stakeholders. For example, if a decisionmaker—an employer, a lender, or a landlord—in good faith buys an AI product that is advertised as "fair," when in fact the product is not fair, then that decisionmaker has not gotten what they have paid for. Those subject to the resulting discrimination will experience this as an allocative harm while the decisionmaker will suffer a separate consumer harm.

77 Representational harms are relevant to existing discrimination law in the following sense: Decisions that appear based in stereotypes can form the basis for a determination of disparate treatment after a separate adverse action is taken. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (establishing sex stereotyping as an actionable disparate treatment claim under Title VII). Business practices that create, reinforce, or propagate stereotypes are not, however, themselves actionable under existing discrimination law.

78 *See* subsection II.A.1 *infra* (discussing the "substantial harm" requirement).

her article, Commissioner Slaughter raised the prospect of the FTC regulating the type of harms that Safiya Noble has raised with regard to Google's search results.[79] Namely, Noble reported that searches for "black girls" resulted in a slew of pornographic and sexual content and searches for "three black teenagers" showed images of mugshots.[80] In Commissioner Slaughter's article, she suggests that these harms could be construed as a failure to adequately test algorithms, but does not offer a theory as to why they constitute consumer injury.[81] One way to account for the injuriousness of such representations is to focus on the subjective experience of an individual who has been exposed to demeaning or stereotypical representations of the group to which they belong—that is, to focus on the harm to individual dignity.[82] Conversely, another way to potentially establish injuriousness is to focus on how such demeaning or stereotypical representations affect the beliefs and attitudes that *others* hold about the group so represented—that is, to focus on the harm to the social standing of the entire group.[83] Or perhaps a person feels a sense of personal degradation knowing that other people are likely to encounter such representations of people like them—a sense that their dignity is always wrapped up with the social standing of the group to which they belong. Whatever the case, these are injuries of real consequence. And there have been a litany of AI systems perpetrating them: gender classification systems misgendering people,[84] software and websites autocorrecting names that are not Anglo,[85] chatbots

79 Slaughter et al., *supra* note 3, at 19, 40-41.

80 Safiya Noble, *Google Has a Striking History of Bias Against Black Girls*, TIME (Mar. 26, 2018, 4:30 PM), https://time.com/5209144/google-search-engine-algorithm-bias-racism [https://perma.cc/23SE-4QSK].

81 Slaughter et al., *supra* note 3, at 19.

82 Harms to dignity are not limited to cases involving demeaning or stereotypical representations. AI products and services that fail more often for some consumers than for others can also cause dignitary harms if such failures communicate to consumers that the specific groups to which they belong are simply not worthy of having these products and services work well for them. Thus, even beyond the material costs of failure, AI products and services that exhibit performance disparities across demographic groups can inflict psychic harms, thereby undermining consumers' senses of self-worth (*i.e.*, quality-of-service harms can give rise to representational harms).

83 Representations that harm the social standing of specific demographic groups will often have downstream allocative consequences as well. Groups that are commonly cast as less trustworthy, for example, are likely to be perceived as less desirable in the contexts of employment, credit, and housing (*i.e.*, representational harms can give rise to allocative harms).

84 James Vincent, *Automatic Gender Recognition Tech is Dangerous, Say Campaigners: It's Time to Ban It*, VERGE (Apr. 14, 2021, 9:43 AM), https://www.theverge.com/2021/4/14/22381370/automatic-gender-recognition-sexual-orientation-facial-ai-analysis-ban-campaign [https://perma.cc/B29K-J8EL].

85 *See* Rashmi Dyal-Chand, *Autocorrecting for Whiteness*, 101 B.U. L. REV. 191, 194 (2021) ("Ask anyone with a name that does not look 'White' or 'Anglo' whether their name has ever been autocorrected and you will probably get an earful. Aziza is changed to Alicia. Ayaan is changed to Susan. DaShawn and Fatima are underlined with red squiggly lines and offered the respective

using ethnic slurs,[86] photo management software automatically labeling Black people as gorillas,[87] and image-captioning tools failing to recognize people in counter-stereotypical roles,[88] among many others. Unfortunately, as discussed in more detail in Part II, in all but the most extreme cases, individual dignitary harms are likely not considered injuries that the FTC may address under its unfairness authority.[89] But harms to a group's overall social standing may fare better under the Commission's authority.

4. Business Practices

Whereas discrimination law must start from a claim of discrimination, the FTC focuses on unfair business practices in general. This focus means that it can address certain business practices that make discrimination more likely to occur or more difficult to address. This includes business practices that would not, by themselves, give rise to a claim of discrimination, but could nonetheless be considered unfair because they will very likely lead to discriminatory injuries in commerce.

Such business practices could include the development and marketing of algorithmic systems that are untested for discrimination or where the results of the testing are inadequately disclosed. Any time a company releases a product that fails to test for likely harms or fails to adequately disclose facts that consumers need to safely use the product, the Commission does not need to wait for harms to unfold before bringing an unfairness claim. The failure to adequately test or disclose could itself be an unfair business practice, rather than any resulting downstream discrimination.[90] Another such practice could be a failure to anticipate or prevent foreseeable misuses. In one notable study, the ACLU of Northern California showed that Amazon's facial recognition product, Rekognition, had falsely matched twenty-eight members of the

suggestions 'Dash Away' and 'Fat Imagination' or 'Fathomable' to replace them." (footnotes omitted) (quotation marks omitted)).

86 Amy Kraft, *Microsoft Shuts Down AI Chatbot After it Turned Into a Nazi*, CBS NEWS (Mar. 25, 2016, 7:53 PM), https://www.cbsnews.com/news/microsoft-shuts-down-ai-chatbot-after-it-turned-into-racist-nazi [https://perma.cc/6A6L-ZGW2].

87 Alistair Barr, *Google Mistakenly Tags Black People as 'Gorillas,' Showing Limits of Algorithms*, WALL. ST. J. (July 1, 2015, 3:41 PM), https://www.wsj.com/articles/BL-DGB-42522 [https://perma.cc/3MNT-5UV3].

88 Lisa Anne Hendricks, Kaylee Burns, Kate Saenko, Trevor Darrell & Anna Rohrbach, *Women Also Snowboard: Overcoming Bias in Captioning Models*, PROC. OF EUR. CONF. ON COMPUT. VISION, Sept. 2018, at 794.

89 *See* Mark MacCarthy, *New Directions in Privacy: Disclosure, Unfairness and Externalities*, 6 J.L. & POL'Y FOR INFO. SOC'Y 425, 484 (2011) ("Emotional distress, mental anguish, loss of dignity and other harms are not ruled out by [the substantial injury] criterion, but they must be effects that all or most or reasonable persons would construe as genuine harms.").

90 *See, e.g.*, *In re* Apple Inc., 157 F.T.C. 621, 622 (2014) (issuing a consent order based on Apple's *failure to disclose* an aspect of technological design, rather than based on a claim that the technological *design was itself injurious*).

United States Congress against a database of mugshots, with mismatches falling disproportionately on people of color.[91] The company responded by asserting that the study was flawed because it failed to adopt the appropriate confidence threshold for police use of ninety-nine percent.[92] The default threshold, however, was set to eighty percent, and subsequent reporting revealed that police were unaware that they needed to change it, as the instructions were buried in documentation that predictably went unread.[93] The reporting further revealed that Amazon, as a matter of policy, does not suspend police use of the product even if the police fail to use the ninety-nine percent confidence threshold.[94] Both the design of a product that will be used in a foreseeably harmful way and the failure to take steps to prevent the ongoing harm can be considered unfair.[95]

These claims will often coincide with discrimination claims, if only for the reason that such claims are how the Commission would even discover the practice. But the FTC's theory of the case would not be based on a discrimination claim at all. Take one likely scenario: a decisionmaker, such as an employer who relies on algorithmic hiring software, is sued for discrimination and subsequently defends itself by pointing to a lack of disclosure by the developer or a lack of tools to mitigate the discrimination. This lawsuit would alert the FTC to the possibility that discrimination has occurred. But instead of trying to prove the discriminatory harm to the employee—a notably difficult task—the Commission could instead focus on the consumer harm to the good-faith employer who relied on inadequately tested software. After all, the employer who is sued did not get the "fair" algorithmic tool it paid for and additionally faces litigation risk and cost. This would be a scenario where the FTC could reasonably claim that the failure to test for, disclose, and mitigate discriminatory harm is, itself, an unlawful business practice, but based on a different legal theory than discrimination.[96]

Other types of business practices could similarly be considered unfair. For example, Jenny Yang, Director of the Office of Federal Contract Compliance

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91 Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots*, ACLU NEWS & COMMENT. (July 26, 2018), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28 [https://perma.cc/5F5F-H9KX].

92 Matt Wood, *Thoughts on Machine Learning Accuracy*, AWS NEWS BLOG (July 27, 2018), https://aws.amazon.com/blogs/aws/thoughts-on-machine-learning-accuracy [https://perma.cc/L6R7-JSAR].

93 Bryan Menegus, *Defense of Amazon's Face Recognition Tool Undermined by Its Only Known Police Client*, GIZMODO (Jan. 31, 2019, 4:55 PM), https://gizmodo.com/defense-of-amazons-face-recognition-tool-undermined-by-1832238149 [https://perma.cc/53LK-5RQG].

94 *Id.*

95 *See* Hartzog, *supra* note 9, at 819-20 (discussing the FTC's focus on design and defaults as unfair practices).

96 Failure to disclose can be considered either deceptive or unfair. *See* discussion *infra* Section II.B (discussing deceptive practices).

Programs and former Chair of the U.S. Equal Employment Opportunity Commission (EEOC), has noted that vendors of hiring software have been known to sign contracts that indemnify their clients should their clients be sued for employment discrimination.[97] As Yang points out, although such contractual terms might have been necessary to convince clients to adopt emerging technology with clear legal risks, indemnification by these vendors—usually small companies—may be unreliable because multiple large cases could simply bankrupt them.[98] If software vendors offer indemnification to sell their products while knowing that they will be unable to fulfill such guarantees—because the follow-on claims after the first successful claim will result in bankruptcy—then it may be reasonable to deem that practice unfair. As the sector matures further, other business arrangements may become common which leave businesses better off but end up shifting risk to consumers.[99] Those kinds of concerns are classically in the domain of consumer protection, and the FTC could get involved.

B. *The FTC as a Regulatory Agency*

The FTC also has some advantages as a regulatory agency over both traditional litigants and other enforcement agencies that are specifically charged with enforcing discrimination laws. In this Section, we describe the advantages inherent in the Commission's status as a regulator and compare its regulatory authority to that of the EEOC, HUD, and the CFPB.

1. Advantages as a Litigant

Like other agencies that can litigate existing civil rights claims, the FTC possesses certain advantages as compared to individual plaintiffs or plaintiff classes.[100] First, where individual plaintiffs might not even know discrimination is occurring, the Commission can collect complaints from

97 *See* Jenny R. Yang, Senior Fellow, Urban Institute, The Future of Work: Protecting Workers' Civil Rights in the Digital Age (Feb. 5, 2020), https://edlabor.house.gov/imo/media/doc/YangTestimony02052020.pdf [https://perma.cc/R8T8-3HHP] (summarizing Yang's statements made to the Civil Rights and Human Services subcommittee of the House of Representatives).

98 *Id.*

99 *Cf.* Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 621 (2020) (arguing that platforms similarly use contract law to shift responsibility for accessibility to the users of the platforms).

100 *See* Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1358-62 (2012) (discussing the potential benefits of public enforcement of civil rights claims, while noting practical challenges like resource constraints and the changing politics of the executive branch over time).

multiple sources. As an enforcer with the power to open an investigation,[101] the Commission can also gain access to the necessary information from a defendant before bringing a formal claim.[102] Second, courts often view discrimination claims by individual litigants with skepticism.[103] There is an overriding concern that unless courts heavily police discrimination claims, innocent decisionmakers will end up buried in costly discovery on meritless cases. This skepticism has been present for a long time, resulting in discrimination plaintiffs who rarely win.[104] Where a court might be skeptical of the initial claim by a single plaintiff, a claim by a government agency that a product or company discriminates against many people will likely not seem fanciful.

Third, the legal standard of injury under Section 5 is that an act or practice must either cause or be "*likely* to cause substantial injury to consumers"[105]—an inherently less demanding standard of proof than demonstrating that discrimination already did occur in the past. Moreover, as an enforcement agency, the Commission will not face a standing hurdle, even for harm that has not yet occurred. In recent years, the Supreme Court has expanded standing doctrine to make it ever harder for plaintiffs to bring claims of intangible harm. In *TransUnion v. Ramirez*, the Court held that to satisfy standing, an injury must be both "concrete" and "particularized," where the concreteness requirement is not well defined but is contrasted with a "bare procedural violation"[106] and asks whether there exists a "close historical or common-law analogue" to the claimed injury.[107] This may make it harder

101 15 U.S.C. § 46(a).

102 *See* Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1617-22 (2019) (highlighting the FTC's monitoring and investigatory powers).

103 *See, e.g.*, Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 562 (2001) ("[C]ourts tend to view the claims of race plaintiffs skeptically."); Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1938 (2006) ("The Court's reluctance to defer to EEOC interpretations may also reflect a broader skepticism about the scope of the problem of discrimination and the appropriateness of empowering a federal agency to define the problem and its possible solutions."); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 115 (2011) ("[We note] the skepticism and hostility with which judges have regarded employment discrimination plaintiffs, as opposed to the way in which they have regarded traditional tort plaintiffs . . . .").

104 *See* Selmi, *supra* note 103, at 557-61 (describing the poor success rates of employment discrimination plaintiffs as compared to other plaintiffs throughout the 1990s).

105 15 U.S.C. § 45(n) (emphasis added).

106 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2206, 2213 (2021) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016)).

107 *Id.* at 2204.

for individual plaintiffs to bring discrimination claims,[108] but it will not affect the FTC, which as a federal enforcement agency will remain unaffected by the standing doctrines that impede individual plaintiffs.

Fourth, the Commission need not rely on class actions. Many of the claims we discuss here are too small to support the expense of individual litigation. The class action mechanism exists to allow plaintiffs to band together and take advantage of economies of scale. But in 2011, the Supreme Court decided *Wal-Mart v. Dukes*, a case that limits the ability of discrimination plaintiffs to claim the common injury necessary to certify a class.[109] Scholars immediately noted that this case made class actions immensely harder for discrimination plaintiffs.[110] So, too, here. Some algorithmic discrimination cases might include claims that are amenable to class certification, such as a consumer suit against a company where the software was systematically worse for a class of purchasers in exactly the same way. In that hypothetical circumstance, the company's action would be identical with respect to each consumer.[111] But other types of cases will falter on class certification. For example, in a case where many different landlords buy tenant screening systems from the same vendor and then customize them, it is unlikely that a multi-jurisdictional class of rental applicants would have enough commonality to be certified under *Wal-Mart*. This is true even if only one AI company developed the offending software. As scholars have noted with respect to the EEOC and employment discrimination, enforcement by government agencies is one way to get around the *Wal-Mart* problem.[112]

Many of these advantages are inherent to the fact that the FTC is an enforcement agency rather than an individual plaintiff, but they are still worth noting because discrimination enforcement has heavily relied on individual plaintiffs. Not only have courts been making such claims harder for plaintiffs for years now, but the threats of discriminatory AI occur at

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108 *See* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez*?*, 96 N.Y.U. L. REV. ONLINE 269, 283-84 (2021) (arguing that after *TransUnion*, standing doctrine will become an even greater hurdle for civil rights laws than it was before).

109 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011).

110 *See, e.g.*, Joseph A. Seiner, *Weathering* Wal-Mart, 89 NOTRE DAME L. REV. 1343, 1350 (2014) ("Scholars immediately—and correctly—denounced the case as one that undermines the rights of workplace discrimination victims." (citing exemplative scholarly works)).

111 *See* Matthew U. Scherer, Allan G. King & Marko J. Mrkonich, *Applying Old Rules to New Tools: Employment Discrimination Law in the Age of Algorithms*, 71 S.C. L. REV. 449, 495 (2019) ("[A] unified employment practice . . . could serve as the basis for a class action disparate impact suit.").

112 *See, e.g.*, Seiner, *supra* note 110, at 1352 ("Perhaps the most obvious response to *Wal-Mart* is insisting that the case applies only to *private* plaintiffs bringing suit pursuant to Federal Rule of Civil Procedure 23. Thus, governmental agencies, such as the [EEOC], are not subject to the decision."); Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011) ("Alternatively, the [EEOC] . . . can sue on behalf of a class of women without obtaining class certification.").

greater scale than the individual claims. When it comes to AI, reliance on individual claims to regulate large scale harms becomes a serious structural weakness of discrimination law.

2. The FTC Compared to Other Agencies

Though the FTC lacks general rulemaking authority under the Administrative Procedures Act, it is otherwise a flexible agency, with a suite of useful tools. It can investigate, it can adjudicate enforcement actions internally or in court, and it can pass some rules, even though the process might be onerous.[113] The other administrative agencies charged with enforcing discrimination law have different powers, some of which can render them less effective than they could be in addressing discrimination.

The EEOC has neither rulemaking power nor the power to adjudicate private sector claims.[114] Julie Chi-hye Suk argues that the agency was set up to enforce a model of discrimination law focused on individual harms and lawsuits, treating discrimination law as a matter of corrective justice rather than distributive justice, which would be better served by an administrative model.[115] Congress expanded the EEOC's power over time to allow it to bring pattern-and-practice cases, but the EEOC's enforcement model still requires filing cases in federal court.[116] When it updated the EEOC's powers, Congress actually rejected a version of the bill that would have treated the EEOC as a "quasi-judicial" agency, granting it administrative enforcement power.[117] The bill's authors compared their vision of the EEOC to existing agencies, including the FTC.[118] Indeed, though the FTC's unfairness authority is premised on consumer injury,[119] the basis for its authority is administrative enforcement rather than corrective justice: it can bring suit on its own behalf, not only as a stand-in for injured consumers. As Suk explains, the administrative model, where an agency can investigate on its own and can seek remedies other than damages, better allows an agency to achieve the distributive justice goals of antidiscrimination law.[120]

HUD is somewhat less limited than the EEOC in terms of its investigatory and enforcement powers. It contains the power to first

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113 *See* Section III.D *infra* (assessing the advantages and disadvantages of Magnuson-Moss Rulemaking).

114 Suk, *supra* note 64, at 406.

115 *Id.* at 411-20.

116 *Id.* at 439.

117 H.R. REP. NO. 92-238, at 2 (1971); *see also* Suk, *supra* note 64, at 439.

118 *See* Suk, *supra* note 64, at 439 (comparing the EEOC with the National Labor Relations Board and the FTC).

119 *See* discussion *infra* subsection II.A.1.

120 Suk, *supra* note 64, at 453-59.

investigate claims, then either file internally with an administrative law judge or refer the matter to the Attorney General for filing in federal court.[121] As Olatunde C.A. Johnson observes, this authority can be significant, especially when the DOJ can bring its resources to bear, but agencies who exercise authority in this form still suffer the weaknesses inherent in a litigation model.[122] She notes, however, that HUD also has rulemaking authority coupled with a requirement that it "'affirmatively further' fair housing," giving HUD both tools beyond litigation and a mandate to rectify housing discrimination, thereby making it arguably more effective.[123]

Finally, the CFPB is the agency most similar to the FTC, in that it has the flexible authority to regulate unfair, deceptive, and abusive acts and practices (UDAAP) in consumer finance.[124] The CFPB understands its unfairness authority to be aligned with that of the FTC, and the agencies have agreed to coordinate interpretation and enforcement efforts on the topics where they overlap.[125] Similarities in the UDAAP authority of the CFPB and the UDAP authority of the FTC mean that many of the benefits outlined earlier in this Section would be as true of the CFPB's actions with respect to discriminatory AI as of the Commission's. Indeed, earlier this year, the CFPB updated its UDAAP examination manual to specifically identify discrimination as an act or practice that falls under its unfairness authority,[126] a move very much in line with the FTC's own recent enforcement actions, the questions posed in the FTC's ANPR, and the reasoning and recommendations of this Article. Notably, the CFPB asserts that "[a] discriminatory act or practice is not shielded from the possibility of being unfair, deceptive or abusive even when fair lending laws do not apply to the conduct"—that is, even where discrimination laws such as the ECOA or the FHA would not apply.[127] But the CFPB is notably more restricted than the FTC when it comes to the range of domains to which its unfairness authority

121 42 U.S.C. § 3610(a)-(b).

122 *See* Johnson, *supra* note 100, at 1359 (noting the advantages of this power while simultaneously discussing the expense, time, and burdens of litigation).

123 *Id.* at 1361-70; *see also* 42 U.S.C. § 3608(e)(5) (requiring federal agencies and grantees to administer programs "in a manner affirmatively to further the policies" of the FHA).

124 12 U.S.C. § 5531.

125 *See* Memorandum of Understanding Between the Consumer Fin. Protect. Bureau and the Fed. Trade Comm'n (Feb. 25, 2019), https://www.ftc.gov/system/files/documents/cooperation_agreements/ftc-cfpb_mou_225_0.pdf [https://perma.cc/Q3EQ-E6PH] (establishing coordination protocols between the FTC and the CFPB).

126 *See* 2022 UDAAP EXAM MANUAL, *supra* note 6, at 1 ("These examination procedures provide general guidance on . . . . the interplay between unfair, deceptive, or abusive acts or practices and other consumer protection and antidiscrimination statutes.").

127 *Id.* at 10.

applies: while the FTC has authority to regulate commerce broadly, the CFPB is limited to consumer financial products and services.[128]

II. THE FTC'S AUTHORITY TO REGULATE DISCRIMINATORY AI

Section 5 of the FTC Act provides the Commission with authority to regulate "unfair or deceptive acts or practices" in commerce.[129] These concepts are expansive,[130] and Congress's goal in the original FTC Act was to leave the concepts flexible, giving the Commission the authority to determine what practices stand out as unfair or deceptive, even as those practices evolve over time.[131] As a result, this authority can reach essentially any type of activity in commerce that can injure individuals acting in a commercial capacity.[132]

While the deceptive practices authority is not particularly controversial or contested, the Commission's unfairness authority has been the subject of much controversy. To lawyers acquainted with the history of the FTC, the tale is familiar: In the 1970s, the Commission sought to aggressively expand the use of its unfairness authority and failed spectacularly when it turned out that government control of so much of the economy was unpopular. By 1980, the Commission had retreated, chastened. The Commission adopted a policy statement seeking to limit its own authority (the Unfairness Statement),[133] and then, in 1994, Congress incorporated those limitations into the FTC Act,[134] leading to the modern understanding of unfairness as focused on

128 *Compare* 12 U.S.C. § 5531(a) (giving the CFPB enforcement authority over any transaction or offering of a "consumer financial product or service"), *with* 15 U.S.C. § 45(a)(2) (giving the FTC enforcement authority over all companies in or affecting commerce, except financial institutions, common carriers, and certain meatpackers and stockyards).

129 15 U.S.C. § 45(a).

130 *See* Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2246 (2015) ("Rather than attempt to define the specific consumer protection issues that the FTC should focus on, Congress created two broad categories—practices that are deceptive and practices that are unfair—with virtually no hard boundary lines." (footnote omitted)).

131 *See* Atl. Refin. Co. v. Fed. Trade Comm'n, 381 U.S. 357, 367 (1965) ("Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce . . . .'" (quoting S. REP. NO. 592 (1960))); *see also* Fed. Trade Comm'n v. Bunte Bros., Inc., 312 U.S. 349, 353 (1941) ("[U]nfair competition was designed by Congress as a flexible concept with evolving content." (quotation marks omitted)).

132 *See* 15 U.S.C. § 45(n) (stating that the Commission may consider public policy questions in determining whether an act or practice is "likely to cause substantial injury to consumers").

133 *See* FED. TRADE COMM'N, COMMISSION STATEMENT OF POLICY ON THE SCOPE OF THE CONSUMER UNFAIRNESS JURISDICTION (1980), *reprinted in In re* Int'l Harvester Co., 104 F.T.C. 949, 1072-88 (1984) [hereinafter UNFAIRNESS STATEMENT] (seeking to concretely define the criteria for establishing consumer injury, violation of public policy, and unscrupulous practices).

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

consumer injury and consumer sovereignty.[135] Since then, the FTC has focused much more on deception than on unfairness. The major exception would be the FTC's moves over the last decade to bring enforcement actions for unreasonably lax data security practices—moves that have engendered fierce opposition from industry, which once again argues that the FTC is overstepping its bounds.[136]

This received wisdom has been enormously influential, shaping lawyers' and even commissioners' understanding of the FTC's role and the limits of its power for decades.[137] Fear of blowback from aggressive use of the Section 5 authority has starkly limited the Commission's use of its unfairness authority. While such a fear may be sound as a political matter—big business is very influential and high-profile members of both parties still prefer market self-regulation to government oversight of markets—it is a matter of politics rather than a legal requirement. As Luke Herrine has persuasively argued, "[t]he main limitation on the use of the unfairness authority . . . has been the ideology of regulators charged with its enforcement," rather than any purely legal constraint within the FTC Act.[138] While the 1994 Amendments did put some formal constraints on what the FTC can do under its unfairness authority, the legal authority remains quite expansive, and whether because of conviction in the correctness of the consumer sovereignty view or timidity in the face of hostile politics, the Commission has, until recently, not truly sought to test the authority since the 1994 Amendments were passed.

In this Part, we argue that addressing discriminatory AI falls squarely within the FTC's Section 5 power to regulate unfair and deceptive practices, despite the fact that the FTC had not used its authority this way until recently. Nonetheless, while the current legal authority is relatively clear, the Supreme Court has become quite hostile to administrative agencies, especially when they try to address novel problems. Thus, this Part will also discuss the potential impact of external challenges to the Commission's authority.

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135 *See, e.g.*, Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 441, 512 (2021) (describing the Commission's treatment of unfairness as a matter of consumer sovereignty).

136 *See, e.g.*, Fed. Trade Comm'n v. Wyndham Worldwide Corp., 799 F.3d 236, 240 (3d Cir. 2015); LabMD, Inc. v. Fed. Trade Comm'n, 894 F.3d 1221, 1229 (11th Cir. 2018).

137 *See* Herrine, *supra* note 135, at 439-44.

138 *Id.* at 433; *see also* Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1375 (2015) ("Deregulatory ideology from the 1980s does not, by itself, explain the FTC's inaction in the consumer goods sector."); *id.* at 1376 ("A more comprehensive explanation of FTC inaction requires examining its narrow ex post enforcement focus.").

A. *Unfair Practices*

The FTC has wide latitude to determine that a particular business practice is unfair. As long as the practice is "in or affecting commerce[,]" Section 5 imposes no subject matter restrictions.[139] The only legal limitations are set out in Section 5(n) of the FTC Act. To be considered unfair, an act or practice must (1) cause or be 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 . . . ."[140] Nonetheless, the FTC has historically been cautious in using its unfairness authority, instead relying principally on its deception authority.[141] Below, we illustrate why, if the Commission pursues discriminatory AI under an unfairness theory, it should not have much trouble satisfying the legal requirements.

1. Substantial Injury

The first requirement is that an unfair act or practice must cause or be likely to cause "substantial injury to consumers." There is little concrete law regarding what counts as a substantial injury.[142] We know that the type of injury matters. Tangible harms, including economic, monetary, or health-related harms, all count.[143] Intangible harms are more controversial. While the Commission has brought an action arguing that secret monitoring inside a home was unfair,[144] purely emotional harms are usually only considered in extreme cases.[145] The degree of harm also matters. The harm cannot be trivial or speculative.[146] But the harm to an individual need not be large on its own

139 15 U.S.C. § 45(a)(1).

140 15 U.S.C. § 45(n).

141 *See* Terrell McSweeny, *Psychographics, Predictive Analytics, Artificial Intelligence, & Bots: Is the FTC Keeping Pace?*, 2 GEO. L. TECH. REV. 514, 522 (2018) ("[T]he FTC uses its unfairness authority cautiously in data privacy and security cases."); *see also id.* ("The FTC continues to rely primarily on its deception authority when policing consumer privacy and the use of consumer data.").

142 *See* Statement from Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, In the Matter of VIZIO, Inc. (Feb. 6, 2017), https://www.ftc.gov/system/files/documents/public_statements/1070773/vizio_concurring_statement_of_chairman_ohlhausen_2-6-17.pdf [https://perma.cc/X36S-9C32] ("This case demonstrates the need for the FTC to examine more rigorously what constitutes substantial injury in the context of information about consumers." (quotation marks omitted)).

143 HOOFNAGLE, *supra* note 11, at 132; Hirsch, *New Paradigms*, *supra* note 9, at 482-83.

144 Complaint at 6, *In re* DesignerWare, LLC, No. 112-3151 (F.T.C. Apr. 11, 2013).

145 *See* MacCarthy, *supra* note 89, at 484 ("Emotional distress, mental anguish, loss of dignity and other harms are not ruled out by [the unfairness] criterion, but they must be effects that all or most or reasonable persons would construe as genuine harms."); *see also* UNFAIRNESS STATEMENT, *supra* note 133, at 1073 n.16 (noting that emotional harm may be sufficient only in an "extreme case").

146 UNFAIRNESS STATEMENT, *supra* note 133, at 1073.

if the Commission can find substantial harm by aggregating across many consumers.[147]

Allocative harms have clear and concrete economic consequences. If an employer, creditor, or landlord purchases AI-based screening software, and that screening blocks people in protected classes from opportunities for employment, loans, or housing, there is no doubt that any injury is substantial because the injuries incurred involve the denial of major life opportunities.[148] The FTC's focus, at least so far, has been on allocative harms, likely because they are the clearest to name as injurious.[149]

Quality-of-service harms also result in concrete economic harm. Recall the hypothetical in which a phone manufacturer implements a facial recognition feature to help users more easily unlock their devices—but where that feature fails more often for certain demographic groups than for others. If part of the value of these devices is that they offer such a feature, then the people paying for them who find that they are unable to make use of the feature will have suffered a classic consumer injury: they do not enjoy some benefit that they have paid for.[150] Of course, the injury must be substantial. But this requirement should pose no problem; the aggregation of even small injuries can result in substantial harm to a group of consumers. Consider what this might mean concretely in the case of phones. Some estimates put the last several years of annual phone sales in the United States at approximately $55 to $75 billion;[151] in a market of this size, if such a feature adds even a tenth of a percent of the value of the phone, and even five percent of people are unable to use the feature, then the total cost to consumers could be approximately $3 million. That estimated aggregate harm is not out of line with prior FTC consumer protection cases.[152] Perhaps more importantly, the substantiality

147 *See, e.g.*, Fed. Trade Comm'n v. Certified Merch. Servs., Ltd., 126 F. App'x 651 (5th Cir. 2005) (finding that falsifying signatures and other credit procedures were unfair due to the aggregate harm caused to consumers); Fed. Trade Comm'n v. Zuccarini, No. CIV-A-01-CV-4854, 2002 WL 1378421 (E.D. Pa. Apr. 9, 2002) (finding that redirecting consumers to particular websites caused small individual harm, but enough aggregate harm to constitute unfairness); Hirsch, *New Paradigms*, *supra* note 9, at 483; HOOFNAGLE, *supra* note 11, at 132.

148 Hirsch, *That's Unfair!*, *supra* note 9, at 354.

149 *See* Jillson, *supra* note 3 (discussing examples like employment, credit, and health care).

150 *Cf.* Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. REV. 587, 596 (2019) (discussing the application of consumer law to a fair housing claim).

151 *Smartphone Sales Forecasts in the United States from 2005 to 2022*, STATISTA (Jan. 2022), https://www.statista.com/statistics/191985/sales-of-smartphones-in-the-us-since-2005 [https://perma.cc/NY7U-2FNA]; Chris Kolmar, *U.S. Smartphone Industry Statistics [2022]: Facts, Growth, Trends, and Forecasts*, ZIPPIA (Jan. 30 2022), https://www.zippia.com/advice/us-smartphone-industry-statistics [https://perma.cc/EA9N-WE8V].

152 *See* Fed. Trade Comm'n v. Wyndham Worldwide Corp., 799 F.3d 236, 242 (3d Cir. 2015) (finding $10.6 million in damages); *In re* Dave & Buster's, Inc., 149 F.T.C. 1449, 1452 (2010) ("To date, issuing banks have collectively claimed several hundred thousand dollars in fraudulent charges on some of these implicated accounts.").

requirement refers more to the type of injury than to the degree of harm.[153] Physical and economic harms are recognized as substantial injuries, but "[e]motional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair."[154] Because quality of service harms are economic in nature, they will easily be established as substantive.

Lastly, we consider representational harms, including those that Commissioner Slaughter alluded to in discussing harms from search engine results. These forms of harm are certainly trickier. Construed as a dignitary harm—a subjective and individual experience—a representational harm might be dismissed as "merely . . . offend[ing] the tastes or social beliefs of some [consumers,]"[155] and thus not rising to the level of a substantial injury. But when understood as a harm to the social standing of a group of consumers overall, representational harms might have a better chance of being perceived as causing substantial injury. The textual requirement of Section 5 states that an unfair practice must include a "substantial injury to consumers."[156] While it is arguably most natural to read the plural form of consumer as the aggregate of individual consumers, and thus the substantial injury requirement as an aggregation, the language can also be read to include injuries to consumers as a body. In this way, harms to the social standing of entire groups of consumers can be distinguished from harms to the dignity of any one consumer.[157] While consumers in the aggregate can suffer many individual, subjective dignitary harms, the specific groups to which they belong may also suffer a collective, objective harm to their social standing.[158] Representations that present certain groups of people as inherently inferior to others—as second-class citizens—have been recognized as harmful to the affected group and to society as a whole.[159] By considering consumers as a

153 *See* Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis?*, 83 GEO. WASH. L. REV. 1999, 2017 (2015) (noting that in *In Re International Harvester Co.*, 104 F.T.C. 949 (1984), the case that established the current unfairness requirements most clearly, the FTC focused on the "character of the injury rather than its magnitude").

154 UNFAIRNESS STATEMENT, *supra* note 133, at 1073.

155 *Id.*

156 15 U.S.C § 45(n).

157 *Cf.* MacCarthy, *supra* note 89, at 484 (describing the dignitary harm to an individual).

158 *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998) ("Expressive harms are . . . social rather than individual. Their primary effect is not the tangible burdens they impose on particular individuals but the way in which they undermine collective understandings.").

159 *See, e.g.*, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 566-67 (2003) ("Leading decisions from *Strauder v. West Virginia* to *Brown v. Board of Education* turned at least in part on the anti-egalitarian social meanings of the practices at issue . . . . Disparate impact doctrine has not traditionally been thought of as something that might give rise to expressive harms, but . . . .[o]nce the question is asked, it seems plausible . . . ." (footnotes omitted)); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L.

group, rather than an aggregate of individuals, the Commission may be able to argue that this type of harm is not subjective like emotional harm, and should be counted as a substantial injury.[160]

Finally, as to all three types of injury, there is a good argument that the FTC would be within its rights to call discrimination per se injurious. Indeed, according to *In re Napleton Automotive Group Commission*, a recent enforcement action, Chair Lina Khan and Commissioner Slaughter seem to interpret discrimination in exactly this way.[161] To understand why, it is useful to examine how the Commission may consider public policy in its determinations. According to Section 5(n), "[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination."[162] On the one hand, public policy may be considered; on the other hand, it may not be primary. What does this mean?

The language, as with the rest of Section 5(n), came from the Unfairness Statement. Because Section 5(n) codified the exact test in the Unfairness Statement, and because the legislative history of the statute is otherwise scant, the Unfairness Statement is usually treated as the legislative history of Section 5(n). Prior to that, the FTC's position on whether a practice was unfair had been governed by the Cigarette Rule, which held that a practice is unfair if it "offends public policy," is "immoral, unethical, oppressive, or unscrupulous," or "causes substantial injury to consumers."[163] In 1972, the Supreme Court upheld this broad understanding, holding that the FTC should, "like a court of equity, consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the . . . laws,"[164] despite

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REV. 1, 2 (2000) (arguing that equal protection "inheres in what the law expresses"); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 428 (1960) (arguing that segregation is unlawful because of social meaning); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 74 (Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlé Williams Crenshaw eds., 1993) ("*Brown* . . . articulates the nature of the injury inflicted by the racist message of segregation.").

160 The courts, however, may be skeptical about this. While the Supreme Court has been willing to recognize racial discrimination as an expressive harm, it seems more likely to do so in affirmative action cases brought by white plaintiffs than in disparate impact cases brought by people of color. William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 19-29 (2011).

161 *In re* Napleton Auto. Grp., No. 2023195, 2022 WL 1039797, at *3 (F.T.C. Mar. 31, 2022) ("[D]iscrimination based on protected status is a substantial injury to consumers.").

162 15 U.S.C § 45(n).

163 Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964) (codified as amended at 16 C.F.R. § 408).

164 Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (footnote omitted).

it being seen by many as unprincipled, allowing commissioners to substitute their "personal values" for any sort of measured determination of unfairness.[165] Ultimately, the Unfairness Statement—and thus Section 5(n)—was a reaction to the breadth of this authority.

The purpose of the amendment was to concretize the FTC's unfairness authority by tethering it to the three elements that were later codified, structuring it beyond regulating a "general sense of the national values."[166] As Herrine observes, however, while the Unfairness Statement sought to narrow the FTC's authority, it did so in a way that "emphasize[d] continuity":

> Although the Unfairness Policy Statement is now commonly treated as a break from past statements on the meaning of unfair acts, its purpose was to emphasize continuity. On its face, the Statement presents itself as a synthesis of the most important principles of general applicability that can be drawn from decided cases and rules. Rather than using the history of consumer unfairness to articulate a *new* standard, the Statement uses that history to clarify the meaning of the closest thing to an *old* standard: the Cigarette Rule . . . . That is not to say that the Statement simply restates the Cigarette Rule. It instead elevates the first (consumer injury) prong, cabins the meaning of the second (public policy) prong, and tosses aside the third (immoral, unethical, oppressive, or unscrupulous) prong. But it does so on the grounds that the FTC's experience applying the unfairness standard has clarified the relevance of each prong . . . [and] the third prong [was] largely duplicative.[167]

While the amendment sought to structure and limit the FTC's unfairness analysis, it did so not by rejecting old interpretations or limiting the types of practices that the Commission could find as unfair, nor—most importantly—by rejecting public policy as a consideration. Indeed, the Unfairness Statement discussed the use of public policy explicitly, describing two ways it should be used. First, it said that public policy may inform whether a practice is injurious or unfair, in either direction.[168] Second, public policy may

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165 J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FED. TRADE COMM'N (May 30, 2003), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection [https://perma.cc/Q3R9-TQPQ].

166 UNFAIRNESS STATEMENT, *supra* note 133, at 1076.

167 Herrine, *supra* note 135, at 509-10 (footnotes and quotation marks omitted).

168 *See* UNFAIRNESS STATEMENT, *supra* note 133, at 1075 (footnote omitted)):

> [T]he Commission wishes to emphasize 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 consumers. Thus[,] the agency has referred to First Amendment decisions upholding consumers' rights to receive information, for example, to confirm that restrictions on advertising tend unfairly to hinder the informed exercise of consumer choice.

"independently support a Commission action," overriding the injury question, "when the policy is so clear that it will entirely determine the question of consumer injury, so there is little need for separate analysis by the Commission."[169] Thus, Section 5(n)'s prohibition on using public policy as a "primary basis" for an unfairness determination sounds like a stronger prohibition than it actually is.[170] Because there was no injury requirement at the time of the Unfairness Statement, Section 5(n)'s prohibition is instead best read as a limitation solely on where public policy may be held to *substitute* for the brand new injury requirement of Section 5(n).[171] Either the policy is to be used to support the injury decision, or the policy is so clear that the demonstration of injury is simply unnecessary. For any practice that would create discrimination liability under law, the FTC may not only find that practice to be unfair, but need not even demonstrate any other concrete injury, as the injury can be presumed. At least for that subset, the FTC can argue injury per se.

The remaining question for quality-of-service and representational harms is how antidiscrimination public policy either informs or supplants the injury determination. Here, the picture is unclear. On the one hand, current discrimination law doesn't capture these forms of harm. No law currently

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> Conversely, statutes or other sources of public policy may affirmatively allow for a practice that the Commission tentatively views as unfair.

169 *Id.*

170 15 U.S.C. § 45(n). Unfortunately, this language has sometimes been read as an additional constraint on the FTC's unfairness authority beyond the three-part test written into the statute. Take *LabMD, Inc. v. Federal Trade Commission*, 894 F.3d 1221 (11th Cir. 2018), for example. While evaluating the FTC's authority to regulate data security under its unfairness authority, the court based its rationale on the Unfairness Statement: "[A]n act or practice's unfairness must be grounded in statute, judicial decisions—*i.e.*, the common law—or the Constitution. An act or practice that causes substantial injury but lacks such grounding is not unfair within Section 5(a)'s meaning." *Id.* at 1229 (quotation marks omitted). This statement turned out to be dicta because the court assumed (without deciding) that the FTC did have such authority. *See id.* at 1231 ("We will assume *arguendo* that the Commission is correct and that LabMD's negligent failure . . . constituted an unfair act or practice."). And it's a good thing, too, because the statement is simply not true. Nothing in the statute or the statute's history creates an independent requirement that unfairness must be premised on a violation of other law. The Supreme Court expressly rejected that idea in 1972, holding that the FTC's unfairness authority was meant to be broad and flexible and that "Congress [did not] intend[] to confine the forbidden methods to fixed and unyielding categories." *See* Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 243 (1972) (quoting Fed. Trade Comm'n v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934)). The 1994 Amendments did not disturb that finding, instead observing that everything the FTC did find unfair was already covered primarily by consumer injury and secondarily by public policy. Rather than disturb the Supreme Court's reading of the breadth with respect to subject matter, the amendment changed how unfairness should be presented and defended.

171 *See* UNFAIRNESS STATEMENT, *supra* note 133, at 1075 ("In these cases the legislature or court, in announcing the policy, has already determined that such injury does exist and thus it need not be expressly proved in each instance.").

imposes liability for quality-of-service or representational harms alone. This could be seen not only to fail to support a determination of per se unfairness, but to actively cut against such a determination. On the other hand, many existing laws currently forbid discrimination, demonstrating that if something is considered discrimination, we should be confident that it should also be treated as unfair.

The key question, it seems, is whether the recognition of discrimination injuries for purposes of finding per se injuries is limited to those injuries recognized by existing antidiscrimination law. We do not see much difference between quality-of-service harms in principle and any other type of discriminatory harm. As demonstrated by prohibitions on discrimination in public accommodations,[172] discrimination is not merely wrongful in cases that affect major life opportunities. Receiving lower quality of service in a purchased good due to race is no less an injury than being denied service at a lunch counter for the same reason.

Representational harms are, again, a tricky case. They are not as universally recognized as harms as allocative discrimination is. But these types of harms are not entirely unfamiliar. For example, scholars have discussed *Brown v. Board of Education* in terms of the expressive harm of segregation.[173] The principle of expressive or social meaning harm lives on in various other contexts as well.[174] So while public policy may not enable the Commission to label representational harm as per se discrimination, there does seem to be support in existing policy for at least the recognition of this type of injury. There is also a good reason that representational harms are not included in existing discrimination law outside of the equal protection context: Discrimination law as understood today targets individual injury, not group harms, and expressive harm is not individual. Thus, its absence from existing discrimination law should not be thought to conclusively reject the idea that expressive harm is a harm; rather it could be a harm that the existing laws did not reach for structural reasons. The FTC could, in theory, address

172 *See, e.g.*, 42 U.S.C. § 2000a.

173 *See supra* note 159 and accompanying text.

174 *See, e.g.*, Hellman, *supra* note 159 (discussing violations of equal protection in terms of social meaning harm); C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 934 (1983) (arguing for the "equality of respect" model of equal protection); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-07 (1993) ("An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.").

it separately. Of course, if the FTC brought a case on this theory, it may implicate First Amendment concerns.[175]

Ultimately, the Commission should have no trouble counting allocative and quality-of-service harms as substantial injuries, and it would have an argument for counting representational harms as an injury, as well.

2. Not Reasonably Avoidable

The second requirement under Section 5(n) is that the injury must be "not reasonably avoidable by consumers themselves."[176] This requirement enshrines the ideas of consumer sovereignty and consumer choice.[177] If something would injure consumers, but they could nonetheless choose whether to encounter it, then, by the reasoning of the statute, calling such a situation unfair would be unreasonably paternalistic, presuming consumers are not capable of balancing pros and cons on their own.

Here, too, we can split the analysis into allocative, quality-of-service, and representational harms. Allocative harms are again the easy cases. When an employer, lender, or landlord uses a discriminatory AI product that harms consumers, the harmed consumers cannot avoid such harm because it is not their choice whether the product is used or not. In fact, most of the time, consumers will not even be made aware of the product's use. Even in cases where decisionmakers are up front about their use of AI tools, the only way for applicants to avoid such tools is to first investigate their potentially discriminatory effects, then decline to apply for the particular job, loan, or residence.[178] While this suggests that there is some limited sense in which

175 *See, e.g.*, Meg Leta Jones, *Silencing Bad Bots: Global, Legal and Political Questions for Mean Machine Communication*, 23 COMMC'N L. & POL'Y 159, 184 (2018) (arguing that offensive content produced by algorithm is still likely protected by the First Amendment).

176 15 U.S.C § 45(n).

177 Herrine, *supra* note 135, at 441-42.

178 Two recent laws have tried to address this problem in cases of hiring. In 2020, Illinois passed a law that requires job applicants to receive notice when their video interviews are subject to "artificial intelligence analysis." *See* Artificial Intelligence Video Interview Act, 820 ILL. COMP. STAT. 42/1, 42/5 (2020), https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68 [https://perma.cc/76RM-FVP5]. In 2021, New York City passed a law that requires job applicants to receive notice when they are subject to an "automated employment decision tool"; the law further requires that such tools be subject to audit and that a summary of the results of the audit be made publicly available. *See* N.Y.C., N.Y., ADMIN CODE § 20-870 (2021), https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-135598 [https://perma.cc/7EVC-R8JT]. Both laws require that applicants receive notice *prior* to being subject to evaluation and that applicants have the option of requesting an alternative means of evaluation—that is, of opting out of the evaluation performed by AI or an automated tool. Even under these circumstances, advocates have worried that applicants might lack the necessary knowledge to make well-informed decisions about whether to agree to such evaluations, largely because the laws do not compel sufficient disclosure to determine whether the tools might exhibit bias. For more discussion of these laws, see generally Brittany Kammerer, *Hired by a Robot: The Legal*

these algorithmic harms are avoidable, a "reasonably avoidable" requirement cannot be thought to mandate such extreme measures.

Only slightly harder are cases of quality-of-service harms. If the harm in these cases is that certain consumers will fail to receive the benefit of the purchased products and services, then such a harm will not be unfair so long as these consumers can reasonably avoid it by purchasing alternatives available in the market. But there are several reasons that consumers will generally be unable to do so. First, whether a consumer AI product and service is discriminatory is not generally known, even to its developers and vendors. Most consumer AI products and services are not currently tested for bias.[179] Rather than performing thorough audits of their products and services, many companies appear to declare them discrimination-free based on simplistic and often faulty understandings of discrimination.[180] When confronted with claims of discrimination, some companies have responded by denying accusations and further obfuscating how their products and services work.[181] But even when a company wants to audit its products, doing so can be quite challenging, and no standard frameworks exist with which to evaluate the quality of the audit.[182]

Implications of Artificial Intelligence Video Interviews and Advocating for Greater Protection of Job Applicants, 107 IOWA L. REV. 817 (2022), and Matt Scherer & Ridhi Shetty, *NY City Council Rams Through Once-Promising but Deeply Flawed Bill on AI Hiring Tools*, CTR. FOR DEMOCRACY & TECH. (Nov. 12, 2021), https://cdt.org/insights/ny-city-council-rams-through-once-promising-but-deeply-flawed-bill-on-ai-hiring-tools [https://perma.cc/AKG9-3J3H].

179 *See* Inioluwa Deborah Raji, Andrew Smart, Rebecca N. White, Margaret Mitchell, Timnit Gebru, Jamila Smith-Loud, Daniel Theron & Parker Barnes, *Closing the AI Accountability Gap: Defining an End-to-End Framework for Internal Algorithmic Auditing*, PROC. OF 2020 ACM CONF. ON FAIRNESS, ACCOUNTABILITY & TRANSPARENCY, Jan. 2020, at 33 (arguing for the necessity of internal audits before products are released).

180 *See* Raghavan et al., *supra* note 37, at 472; *see also* Elizabeth Anne Watkins, Michael McKenna & Jiahao Chen, The Four-Fifths Rule Is Not Disparate Impact: A Woeful Tale of Epistemic Trespassing in Algorithmic Fairness 1-2 (Feb. 19, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4037022 [https://perma.cc/6XYA-DJD6] (arguing that computer scientists' lack of legal nuance when evaluating AI fairness amplifies the potential for harm).

181 *See, e.g.*, Joy Buolamwini, *Response: Racial and Gender Bias in Amazon Rekognition—Commercial AI System for Analyzing Faces*, MEDIUM (Jan. 25, 2019), https://medium.com/@Joy.Buolamwini/response-racial-and-gender-bias-in-amazon-rekognition-commercial-ai-system-for-analyzing-faces-a289222eeced [https://perma.cc/CM78-EU32] ("Amazon's approach thus far has been one of denial, deflection, and delay."); Inioluwa Deborah Raji & Joy Buolamwini, *Actionable Auditing: Investigating the Impact of Publicly Naming Biased Performance Results of Commercial AI Products*, PROC. OF 2019 AAAI/ACM CONF. ON AI, ETHICS, AND SOCIETY, 2019, at 429 ("[C]orporations still have little incentive to disclose details about their systems . . . .").

182 *See, e.g.*, McKane Andrus, Elena Spitzer, Jeffrey Brown & Alice Xiang, *"What We Can't Measure, We Can't Understand": Challenges to Demographic Data Procurement in the Pursuit of Fairness*, PROC. OF 2021 ACM CONF. ON FAIRNESS, ACCOUNTABILITY & TRANSPARENCY, 2021, at 249 (discussing challenges to collecting the necessary demographic information to perform fairness assessments of algorithmic systems); Inioluwa Deborah Raji, Timnit Gebru, Margaret Mitchell, Joy

There is a push within the academy and industry for regularized auditing and better documentation, so there is a chance that auditing may soon become a more common and more standardized practice. But this brings us to the second problem. Even if audits become commonplace, consumers will still not be aware of the discriminatory nature of the products they use. Companies have plenty of incentives to keep the audit results private, such as fear of liability or the possibility of exposing trade secrets. Legislation seeking to mandate impact assessments and documentation is often designed with limited transparency as an explicit tradeoff to enhance the likelihood of procedural compliance.[183] As these incentives are being built into the legal responses that we are likely to see, they are unlikely to significantly change. Even when audits are made public, they may be difficult to interpret,[184] and most consumers will lack the sophistication to understand their implications for the products they buy.[185] Finally, even in a hypothetical future world where every company somehow makes an audit publicly available and easily understandable, discrimination audits may become yet another document—like privacy policies[186]—that consumers cannot possibly read for each and every product they use, making the harms nonetheless unavoidable.

Even setting aside these serious problems with consumer knowledge and understanding, the ability of consumers to avoid biased products and services

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Buolamwini, Joonseok Lee & Emily Denton, *Saving Face: Investigating the Ethical Concerns of Facial Recognition Auditing*, PROC. OF 2020 AAAI/ACM CONF. ON AI, ETHICS, AND SOC'Y, Feb. 2020, at 145 (outlining ethical concerns in the design and execution of algorithmic audits); Solon Barocas, Anhong Guo, Ece Kamar, Jacquelyn Krones, Meredith Ringel Morris, Jennifer Wortman Vaughan, W. Duncan Wadsworth & Hanna Wallach, *Designing Disaggregated Evaluations of AI Systems: Choices, Considerations, and Tradeoffs*, PROC. OF 2021 AAAI/ACM CONF. ON AI, ETHICS, AND SOC'Y, May 2020, at 368 (identifying a wide range of choices and tensions in the design of evaluations of AI systems); Alfred Ng, *Can Auditing Eliminate Bias from Algorithms?*, MARKUP (Feb. 23, 2021, 8:00 PM), https://themarkup.org/ask-the-markup/2021/02/23/can-auditing-eliminate-bias-from-algorithms [https://perma.cc/RX2G-AK2X] (noting the lack of industry standards that could hold auditors accountable).

183 *See, e.g.*, Algorithmic Accountability Act of 2022, S. 3752, 117th Cong. § 6 (2022) [hereinafter Algorithmic Accountability Act] (requiring no publication of impact assessments but requiring the FTC to publish annual reports and a limited repository of public information); WORKING PARTY ON PROT. OF INDIVIDUALS WITH REGARD TO PROCESSING OF PERS. DATA, GUIDELINES ON DATA PROTECTION IMPACT ASSESSMENT (DPIA) AND DETERMINING WHETHER PROCESSING IS "LIKELY TO RESULT IN A HIGH RISK" FOR THE PURPOSES OF REGULATION 2016/679, at 17 (2017) (providing official guidance stating that DPIAs under GDPR Article 35 require no publication, but recommending publication of a summary).

184 Barocas et al., *supra* note 182, at 368.

185 *See* Hirsch, *That's Unfair!*, *supra* note 9, at 354 ("Few[] [consumers] can understand how companies use data analytics to infer additional information about them and make decisions that affect them.").

186 *See generally* Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 J.L. & POL'Y FOR INFO. SOC'Y 543 (2008) (arguing that the high cost of reading privacy policies renders them ineffective as a tool to regulate privacy).

requires that there be sufficient competition for consumers to have viable alternative choices. This might pose a particular challenge in the case of AI. By their very nature, AI and other tools that facilitate automation tend toward scale and standardization. In replacing a large set of hiring managers, loan officers, or landlords with software, hiring, lending, and housing decisions become far more uniform across applications.[187] As Cathy O'Neil has argued, problematic software has the potential to affect a much larger scale of people than does the faulty decisionmaking of any given human.[188] Scholars have also recently warned of an algorithmic monoculture that leaves unsuccessful applicants, perhaps subject to biased assessments, with no place to turn when the natural diversity present in human decisionmaking is replaced with the homogeneity of a fixed decision rule.[189] Much the same applies for AI-based products and services, as advances in these technologies depend on access to large datasets that are difficult for new market entrants to develop, limiting the degree of competition that is likely to occur. For these tools to be reasonably avoidable by consumers, there must be meaningful differences in the decisionmaking of the various actors in the market and in the products and services they offer. AI, as a technology, is likely to work against this goal.

Finally, representational harms are inherently unavoidable. Representational harms work to undermine the social standing of members of certain groups by affecting the beliefs and attitudes that *others* hold about these groups. There is no way for members of these groups to avoid such harms because they are in no position to control the representations to which others are exposed.

3. Cost-Benefit Analysis

The final requirement of Section 5(n) is the cost-benefit analysis. For a practice to be deemed unfair, the harms must not be "outweighed by

187 *See* Jon Kleinberg & Manish Raghavan, *Algorithmic Monoculture and Social Welfare*, 118 PROC. OF NAT'L ACAD. OF SCIS. 1, 1 (2021) ("The rise of algorithms used to shape societal choices has been accompanied by concerns over *monoculture*—the notion that choices and preferences will become homogeneous in the face of algorithmic curation.").

188 *See* CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 29 (2016) ("[S]cale is what turns [Weapons of Math Destruction] from local nuisances into tsunami forces.").

189 *See* Kathleen Creel & Deborah Hellman, *The Algorithmic Leviathan: Arbitrariness, Fairness, and Opportunity in Algorithmic Decision-Making Systems*, 52 CANADIAN J. PHIL. 26, 27 (2022) (showing how applicants can be arbitrarily excluded from a broad range of opportunities due to algorithmic homogeneity). For further examples of this argument, see generally Kleinberg & Raghavan, *supra* note 187, which discusses the dangers of using the same algorithms to screen applicants in various contexts.

countervailing benefits to consumers . . . ."[190] There is surprisingly little law on how the FTC should conduct such an analysis, and the statute itself is silent as to what a cost-benefit analysis should entail or how it should be performed. The Unfairness Statement is also light on specifics, though it stresses that an analysis must consider the cost of possible remedies, not just the cost of the challenged practice.[191] It states, for example, that failing to disclose information that might aid consumers in avoiding some harm could be justified if doing so allows a company to charge consumers lower prices (because furnishing disclosure can be a costly undertaking and might raise operating costs and thus prices).[192] It further notes that the Commission must consider the cost of "increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."[193] While there is an explicit focus on the ancillary costs of a remedy, there is no mention of the ancillary costs to consumers of failing to remedy consumer harm, including increased time and resources spent to avoid the harm, where possible.

Although cost-benefit requirements generally evince a deregulatory posture,[194] the history of FTC enforcement suggests that they do not present a significant hurdle to intervention. In most of the cases that the FTC brings under its unfairness authority, it alleges that the cost-benefit test is satisfied without any real argument, and such claims seem rarely to be challenged,[195] which at least partly explains the lack of legal development. The precedent set by these cases suggests that little analysis is necessary to satisfy the cost-

190 15 U.S.C § 45(n); *see also* Hirsch, *New Paradigms*, *supra* note 9, at 484 ("The FTC and commentators have interpreted this to require a cost-benefit analysis.").

191 UNFAIRNESS STATEMENT, *supra* note 133, at 1065 ("The principal tradeoff to be considered in this analysis is that involving compliance costs.").

192 *Id.* at 1073 ("A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects.").

193 *Id.* at 1073-74.

194 *See* David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 402 (2006) (finding that cost-benefit analysis is deregulatory as a matter of historical practice); *see also* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1268-84 (2006) (arguing that OIRA budget review is a deregulatory "one-way ratchet").

195 *See, e.g.*, Complaint at 12-14, *In re* Residual Pumpkin Entity, LLC, No. 1923209 (F.T.C. June 23, 2022) (alleging unfair practices without any cost-benefit analysis); Fed. Trade Comm'n v. Wyndham Worldwide Corp., 799 F.3d 236, 256 (3d Cir. 2015) ("Wyndham does not argue that its cybersecurity practices survive a reasonable interpretation of the cost-benefit analysis required by § 45(n)."); *id.* ("[W]e leave for another day whether Wyndham's alleged cybersecurity practices do in fact fail, an issue the parties did not brief."); Fed. Trade Comm'n v. Neovi, Inc., 604 F.3d 1150, 1159 (9th Cir. 2010) (holding the FTC met its burden by producing an expert to show the challenged practice held no substantial benefit to consumers, while the defendant did not offer any evidence to challenge the expert testimony).

benefit test—and that the law affords the Commission flexibility in setting up and conducting its analysis.

On the few occasions when the FTC has engaged in a more substantial cost-benefit analysis, much of the analysis has focused on questions of scoping. Cost-benefit analysis is notoriously sensitive to how relevant costs and benefits are scoped and measured; different choices can give rise to opposing conclusions.[196] Cost-benefit analysis is also indifferent to the uneven distribution of costs and benefits; highly concentrated and substantial harms could be excused by diffuse and minor benefits, so long as the total costs are not outweighed by the total benefits.[197] As a result, which and whose costs and benefits are counted will almost entirely determine the outcome.

In a series of enforcement actions, the Commission has suggested that the relevant costs and benefits can and should be scoped to (1) the offending practice at issue; (2) the population at risk of harm; or (3) in a discrimination case specifically, the costs that are strictly necessary to achieve the benefits. In what follows, we consider the motivation behind each approach to scoping, and we explore how they could be applied to discriminatory AI.

In re International Harvester is the first case to discuss the cost-benefit analysis in any depth and is the case that introduced the Unfairness Statement into the FTC's record.[198] International Harvester was a manufacturer of agricultural equipment, and the case concerned the company's lack of effective disclosure alerting users of its tractors to the risk of fuel geysering, which can cause serious injury.[199] To support its claim that the company's lack of sufficient disclosure was unfair, the Commission argued that the proper way to conduct a cost-benefit analysis was to compare the cost to those harmed by the lack of sufficient disclosure to the benefits—the cost savings—

196 *See* Frank Pasquale, Revaluing Data Protection Law: The Case of Information Access Rights 52 (Sept. 2022) (unpublished manuscript) (on file with authors) ("Mechanical calculation of costs that leaves benefits under or un-specified, is itself a biased algorithm."). *See generally* Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93.

197 *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1574 (2002) ("Implicit in this innocuous-sounding procedure is the controversial assumption that it does not matter who gets the benefits and who pays the costs. Both benefits and costs are measured simply as dollar totals; those totals are silent on questions of equity and distribution of resources."). Note, however, that the Biden Administration has made recent efforts to incorporate distributional considerations into the cost-benefit analyses performed by the Office of Information and Regulatory Affairs, which is charged with reviewing significant executive branch regulatory actions. *See* Modernizing Regulatory Review, 86 Fed. Reg. 7223, 7223 (Jan. 20, 2021) ("I therefore direct the Director of [the Office of Management and Budget] . . . . [to] propose procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities . . . .").

198 *In re* Int'l Harvester Co., 104 F.T.C. 949 (1984).

199 *Id.* at 950, 1052-53.

specifically due to not providing more effective disclosure.[200] Notably, the Commission did not weigh the costs of the ineffective disclosure against the benefit provided by the company's tractors overall or by its business altogether, which would have tipped the analysis in favor of benefits. Instead, it narrowly scoped its analysis—both costs and benefits—to the offending practice at issue. In later commentary, former Commissioner Ohlhausen argued that the Unfairness Statement itself dictates this latter interpretation.[201]

A similar maneuver can be observed in *In re Apple,*[202] a more recent case in which the FTC brought an unfairness claim related to Apple's practice of storing a password that permitted in-app purchases for fifteen minutes after an initial purchase. Apple failed to provide notice that the password remained active, and children were able to rack up bills for purchases that their parents never intended to authorize.[203] Much like the charges in *International Harvester*, the FTC's claim was not that the practice of storing the password was unfair, but rather that the lack of notice was an unfair practice that created a risk of consumer harm. And once again, the Commission scoped its cost-benefit analysis to the ineffective disclosure. Reflecting on the case, Commissioner Ohlhausen explained:

> [I]t would have been incorrect for the Commission to compare the harm caused by the failure to notify consumers with the benefits of the design choice to use a fifteen-minute purchase window, or to compare the harm to the overall sales of the iPhone or iPad or total Apple sales more broadly . . . . [S]uch an approach would stack the deck against consumers, in favor of large companies. As long as a company's extensive line of products benefited consumers overall, the company would be free to inflict a significant amount of consumer harm with impunity.[204]

As Commissioner Ohlhausen's comments make clear, if the FTC were compelled to incorporate such a broad scope of benefits, it could easily lead

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200 *Id.* at 1061 ("The second element is that the conduct must be harmful in its net effects . . . . In analyzing an omission this part of the unfairness analysis requires us to balance [against] the risks of injury the costs of notification and the costs of determining what the prevailing consumer misconceptions actually are."); *see also* Ohlhausen, *supra* note 153, at 2019 ("[T]he principal tradeoff to consider was compliance costs—how much money had IHC saved by not notifying consumers about the risk of fuel geysering?" (citing *Int'l Harvester*, 104 F.T.C. at 1065)).

201 Ohlhausen, *supra* note 153, at 2018-19 ("[T]he language of the Unfairness Statement is clear: '[T]he injury must not be outweighed by any offsetting consumer or competitive benefits *that the sales practice* also produces.' And '[t]he Commission . . . will not find that *a practice* unfairly injures consumers unless *it* is injurious in *its* net effects.'" (quoting UNFAIRNESS STATEMENT, *supra* note 133, at 1073) (emphasis added)).

202 *In re* Apple Inc., 157 F.T.C. 621 (2014).

203 *Id.* at 622.

204 Ohlhausen, *supra* note 153, at 2024 (footnote omitted).

to absurd situations in which the Commission would be kept from reaching even the most egregious cases of consumer harm. The FTC must therefore possess the freedom to scope the cost-benefit analysis in such a way that the benefit provided by a product or service overall does not excuse the harms caused by a particular feature.

Applying this principle to discriminatory AI, the FTC would not have to conduct its cost-benefit analysis by comparing the overall benefits of an AI product or service to the costs imposed on those consumers subject to discrimination. Instead, the FTC would compare the benefits of abstaining from efforts to reduce the discriminatory impact of the AI product and service against the costs imposed by the current level of discriminatory impact. Scoped in this way, the cost-benefit analysis might not present a serious hurdle in seeking to address discriminatory AI. There may very well be cases where the cost of reducing discrimination in an offending product or service translates into a benefit of equal or greater value for consumers as a whole. Where the harm is sufficiently costly, even seemingly expensive remedial actions could generate a value for consumers far greater than the expense involved. These would be the easy cases for the Commission.

The reverse is possible as well. Some harms—even particularly costly harms—will affect such a small number of people that the benefits of addressing the harm will fail to outweigh the expense of doing so. As mentioned earlier, the lack of distributional considerations in cost-benefit analysis means that a practice that inflicts harm on a small number of people for the benefit of a much larger group would still be defensible because it enhances overall welfare. If reducing discrimination in AI products and services only benefits a small number of people, but the cost of doing so gets passed along to all consumers, then it is possible to imagine situations where consumers do not benefit overall. This is largely because many consumers, for whom a product or service might have been working perfectly fine already, enjoy no additional benefits for the additional cost.

But further examination of *Apple* shows this is not the correct interpretation for harms applied to small groups. In dissent, Commissioner Joshua Wright made such an argument. He compared the total costs to the consumers who would have not made purchases had they received effective notice with the benefits to the people who avoided the inconvenience of an unnecessary notice and paid a slightly lower price when Apple did not have to pursue expensive consumer research to determine how much more disclosure would have been necessary to avoid unauthorized purchases.[205] Because the victims constituted a "miniscule" fraction of overall users, he

205 *In re* Apple, 157 F.T.C. at 667-68.

concluded that there is no evidence that the costs outweigh the benefits.[206] But Commissioner Wright's reasoning would lead to precisely the outcome that Commissioner Ohlhausen rejects as absurd: that it is reasonable for a huge harm to befall a small group in exchange for a widespread but tiny benefit. The cost-benefit analysis requirement should not be understood to give companies license to, as Commissioner Ohlhausen says, "inflict a significant amount of consumer harm with impunity,"[207] and any analysis that counts benefits to a population many times the size of the injured population would set up such a result.

The second scoping approach that the Commission has adopted follows from that observation. In their joint concurring statement in *Apple*, Chair Edith Ramirez and Commissioner Julie Brill wrote:

> [O]ur complaint focuses on conduct affecting Apple account holders whose children may unwittingly incur in-app charges in games likely to be played by kids. The proportion of complaints about children's in-app purchases as compared to total app downloads, . . . sheds no light on the extent of harm alleged in this case. More fundamentally, the FTC Act does not give a company with a vast user base and product offerings license to injure large numbers of consumers or inflict millions of dollars of harm merely because the injury affects a small percentage of its customers or relates to a fraction of its product offerings.[208]

Combined with Commissioner Ohlhausen's comments, this suggests that, where the harmed population is a small subset of the total population that could be considered, the Commission could restrict the costs and benefits considered to only those experienced by the harmed group.[209] Applying this principle to discriminatory AI, the Commission would not compare the benefits that all consumers enjoy when a company abstains from efforts to reduce the discriminatory impact of its AI products and services against the costs imposed on the subset of consumers impacted by the current level of discrimination. Instead, it would only consider the benefits of abstention

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206 *Id.* at 665-69. Commissioner Wright took the argument one step further, asserting that the FTC could not even complete the cost-benefit analysis because FTC staff did not conduct a study to determine what fraction of the victims would have changed their behavior with more notice. *Id.*

207 Ohlhausen, *supra* note 153, at 2024.

208 *In re* Apple, 157 F.T.C. at 644.

209 For a parallel analysis that demonstrates the appropriateness of focusing on costs and benefits specifically to the disadvantaged subgroup where distributional effects are the goal, see Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 230-61 (2000), which demonstrates that the benefits of accommodation mandates in employment can be seen when considering the disadvantaged and non-disadvantaged groups separately, but not when collapsing workers into a single whole.

(e.g., lower prices) that accrue to the subset of consumers who also experience the costs of discrimination.

Finally, in the recent case of *In re Napleton Automotive Group*,[210] the Commission addressed cost-benefit analysis in discrimination specifically, proposing yet another approach to scoping. In this case, the FTC brought an enforcement action against a franchise of car dealerships alleged to have charged consumers for various add-ons without consumer consent, and—most important for our purposes—in a way that affected Black consumers more than white consumers.[211] In the discussion of cost-benefit analysis, Chair Khan and Commissioner Slaughter asserted that the only defensible costs are those that are strictly necessary to achieve the benefit: "Any purported benefit that can be achieved without engaging in the [discriminatory] conduct causing substantial injury is not countervailing, and does not overcome the costs associated with discrimination."[212] This version of scoping is not based on the practice at issue or the population at risk of harm. This version instead seemingly aligns the cost-benefit analysis with an idealized version of disparate impact law, which holds there to be liability where a practice could have achieved the decisionmaker's goals equally well but with less adverse impact on the plaintiffs.[213] Applying this principle to discriminatory AI should be relatively straightforward.[214]

Any of these scoping methods could allow the Commission to call discriminatory AI unfair. Ultimately, the degree of flexibility that the Commission has—assuming it chooses to pursue these actions—will be determined by the amount of deference decisions are granted if and when they are challenged in court—and there is no obvious reason that the FTC would not be accorded deference when construing Section 5.[215] Thus, cost-

210 *In re* Napleton Auto. Grp., No. 2023195, 2022 WL 1039797 (F.T.C. Mar. 31, 2022).

211 *Id.* at 2.

212 *Id.* at 4.

213 42 U.S.C. § 2000e-2(k).

214 The operation of cases using this principle will not necessarily look the same as disparate impact law and may be more effective. In discrimination law, the plaintiff must prove the existence of a less discriminatory alternative without access to information or many resources, whereas the FTC may investigate beforehand, obtaining information from the defendant and determining the existence of less discriminatory alternatives before bringing an enforcement action. *See* discussion *supra* subsection I.B.1. This functionally accomplishes a result similar to those sought by scholars who advocate a burden-shifting approach in discrimination law because of how poorly positioned plaintiffs are to prove less discriminatory alternatives. *See, e.g.*, Ajunwa, *Paradox*, *supra* note 8, at 1728; James Grimmelmann & Daniel Westreich, *Incomprehensible Discrimination*, 7 CALIF. L. REV. ONLINE 164, 170 (2016); Kim, *supra* note 8, at 921.

215 *See, e.g.*, Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 375 (2020) ("Rulemaking under unfair methods of competition is governed by the Administrative Procedure Act and is eligible for *Chevron* deference." (quotation marks omitted)); Justin (Gus) Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 250-58 (2014) (addressing common arguments as to why *Chevron* should not

benefit analysis should not present a barrier to an FTC determination that discriminatory AI is unfair.

B. *Deceptive Practices*

Our focus on unfairness should not be taken to suggest that regulating deceptive practices is unimportant to discriminatory AI. The Commission's authority to regulate deceptive practices is far-reaching, touching any type of material deception made in any form, whether explicit or implicit.[216] And because the FTC's deception authority is less contested, cases are easier to prosecute, and the FTC has historically been more willing to pursue novel cases on deception grounds than on unfairness grounds.[217]

In the case of discriminatory AI, deceptive practices are most likely to take the form of products that are deemed to have some discrimination mitigation measure built in, and are thus marketed as "fair," "unbiased," "equitable," or some similar claim. This is a limited set of cases, as most AI products and services on the market are not even tested for bias, let alone designed with discrimination mitigation measures that would justify marketing them as "fair." Over time, however, this may change. Awareness of the discriminatory potential of AI has exploded in the last decade, and fairness in algorithm solutions is already becoming a selling point in the vein of ethical consumerism.[218]

Deceptive fairness claims would likely take one of two forms. If a product is advertised as "fair" with reference to some verifiable standard, then the company producing that product can be held to that standard. Where the AI products and services do not function as the developers claim, the FTC can consider that a deceptive practice.[219] For example, some companies appear to be creating "fair" algorithmic solutions by constraining their models to satisfy

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apply to Section 5); Daniel G. Lloyd, *The Magnuson-Moss Warranty Act v. the Federal Arbitration Act: The Quintessential* Chevron *Case*, 16 LOY. CONSUMER L. REV. 1, 26-27 (2003) (arguing that the FTC has an especially good case for *Chevron* deference, especially when issuing rules under Magnuson-Moss).

216 *See* Hartzog & Solove, *supra* note 130, at 2246-47.

217 *Cf.* Jillson, *supra* note 3 (advising businesses that the FTC will use its current authority to address discriminatory harms and warning companies not to exaggerate what their algorithms can or cannot do).

218 *See generally* Daniel Greene, Anna Lauren Hoffmann & Luke Stark, *Better, Nicer, Clearer, Fairer: A Critical Assessment of the Movement for Ethical Artificial Intelligence and Machine Learning*, PROC. OF 52ND ANN. HAW. INT'L CONF. ON SYS. SCIS., Jan. 2019.

219 Inioluwa Deborah Raji, I. Elizabeth Kumar, Aaron Horowitz & Andrew D. Selbst, *The Fallacy of AI Functionality*, PROC. OF 2022 ACM CONF. ON FAIRNESS, ACCOUNTABILITY & TRANSPARENCY, June 2022, at 966.

the four-fifths rule.[220] If a company declares publicly that this is their metric and then fails to live up to that standard, it is a clear deceptive practice. In addition, as part of the overall algorithmic accountability discourse, some scholars have proposed certification measures for fairness.[221] If certification—and especially self-certification—becomes an accepted method to establish fairness, the FTC will have the authority to check the veracity of those certifications.[222] Note that this does not suggest that a company can simply declare their models fair because they meet an arbitrary standard; an intolerable standard would trigger an unfairness claim as surely as no standard at all. But the deception claim would be limited to ensuring that the company meets their representations.

The second form of deception claim could arise if a company declares that its product is fair or unbiased without providing any reference point. To deem this practice deceptive, the Commission would need to have first established its own reference point for a fairness baseline. If the company then makes such fairness claims but made no effort to test or audit their own systems, the Commission would have a strong argument to deem that company's practices deceptive. Similarly, if a company has mitigation measures in place and calls its product fair, then for this practice to be deemed deceptive, the FTC would have to rule that the company failed to meet the FTC's established fairness standard despite its claims of fairness.

This last case, then, merges the deception and unfairness issues. The conduct can be described alternately as deception (i.e., the company represents its product as fair but fails to meet some minimum fairness threshold of which the company had notice) or unfairness (i.e., the company created a fair algorithm according to its own metric, but its internal definition of fairness does not meet the minimum threshold required to be fair). In either case, the Commission would need to have established a minimum threshold of fairness that could be relied upon in making deception or unfairness arguments. Thus, this last example ties the deception claim to the

220 *See, e.g.*, Raghavan et al., *supra* note 37, at 472-73 (finding that among those who make concrete claims about bias, vendors are "specifically focus[ed] on equality of outcomes and compliance with the 4/5 rule," and thus take steps to modify their assessments, such as removing features highly correlated with a protected attribute where those features are found to contribute to adverse impact).

221 *See, e.g.*, Ajunwa, *Auditing Imperative*, *supra* note 8, at 666-68 (proposing a certification mark for employers who subject their automated hiring systems to voluntary audits and meet certain fairness criteria); Gianclaudio Malgieri & Frank Pasquale, From Transparency to Justification: Toward Ex Ante Accountability for AI (May 3, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4099657 [https:// perma.cc/8CMY-DLBW] (proposing an ex-ante self-certification requirement for algorithm developers).

222 *Cf.* Robert R. Schriver, Note, *You Cheated, You Lied: The Safe Harbor Agreement and its Enforcement by the Federal Trade Commission*, 70 FORDHAM L. REV. 2777, 2791-92 (2002) (discussing the FTC's ability to enforce data privacy self-certifications under its deceptive practice authority).

standards of unfairness, which echoes many of the FTC's enforcement actions in which they have brought both types of claims.

C. *External Challenges to FTC Authority*

1. "Unfairness Does Not Include Discrimination"

In October 2022, the FTC settled *In re Passport Automotive Group*, a case alleging that a group of car dealerships "routinely charged bogus fees and imposed higher borrowing costs on Black and Latino buyers."[223] This case had nothing to do with AI, but is nonetheless important for our purposes because it is the first case in which the Commission settled a count explicitly based on the theory that discrimination directly violates Section 5.

In one of his last acts before resigning, Commissioner Noah Phillips dissented from this settlement[224] (and was joined on this issue by the other Republican Commissioner, Christine Wilson[225]). His objection was essentially based on two main legal arguments.[226] First, he argued that Section 5 is not an antidiscrimination statute, and that Congress knows how to outlaw discrimination when it seeks to.[227] For evidence of this, he notes that "Section 5 looks nothing like the antidiscrimination laws Congress passed," and that the Commission's application of the statute doesn't specify the domains or the protected classes to which it applies.[228] This portion of Commissioner Phillips's dissent presents a parade of horribles that has a surprising amount in common with what we identify as the benefits of FTC intervention in Section I.A. The premise of this argument—that to address discrimination, a statute must look like all the other discrimination statutes—is actually never stated explicitly. This Article so far should demonstrate that we clearly do not think this premise holds.

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223 *In re* Passport Auto Grp., Inc. Joint Statement, *supra* note 16, at 1.

224 Dissenting Statement of Commissioner Noah Joshua Phillips, *In re* Passport Auto. Grp., Inc. (Oct. 14, 2022) [hereinafter Dissenting Statement of Commissioner Phillips], https://www.ftc.gov/system/files/ftc_gov/pdf/Dissenting-Statement-of-Commissioner-Noah-Joshua-Phillips.pdf [https:// perma.cc/9H5D-VD56].

225 Concurring and Dissenting Statement of Commissioner Christine S. Wilson at 4, *In re* Passport Auto. Grp., Inc. (Oct. 18, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/commissioner-wilson-statement-regarding-passport-automotive-group-inc [https:// perma.cc/EX8D-RGN6].

226 Commissioner Phillips also argued that even assuming that Section 5 is a discrimination statute, there is no reason to think it can address disparate impact as well as disparate treatment, but this is a second-order issue that we will not address here. *See* Dissenting Statement of Commissioner Phillips, *supra* note 224, at 4-5.

227 *Id.* at 3.

228 *Id.*

Second, Commissioner Phillips argues that the history of Section 5[229] restricts the definition of unfairness in a way that excludes discrimination.[230] But he never explains why that might be the case. This is another instance where someone opposed to the FTC's use of its unfairness authority invokes the history of Section 5 in almost talismanic fashion, rather than engaging the text or history,[231] and once again, our discussion above explains why this argument fails: Section 5 has three requirements, and as long as they are met, the statute is satisfied. In the same discussion, Phillips argues that the Commission impermissibly relied on public policy.[232] But the majority disputed the claim as a factual matter, stating that they simply did not rely on public policy,[233] despite the fact that, as we explain above, they may have had a good argument to do so.[234]

Notably, Commissioner Phillips echoes the arguments presented by the Chamber of Commerce and several bankers' associations challenging the CFPB's decision to consider discrimination under its UDAAP authority, first in a white paper,[235] then in a complaint filed in federal court.[236] Thus, we can assume that the moment the FTC acts on discriminatory AI, business-friendly interests will challenge the action in court, raising these same arguments.

The joint statement of the majority responded to Commissioner Phillips's dissent quickly, arguing that the fact that Section 5 overlaps with other laws in no way implies that the FTC lacks authority to bring claims on that basis.[237] The majority also calls the dissent's argument about the unfairness amendments an "implied repeal" argument—that the 1994 Amendments narrowed the FTC's power in a way that removes authority to address discrimination.[238] The majority notes that the Third Circuit squarely rejected

229 *See* discussion *supra* subsection II.A.1 (describing the history of Section 5).

230 *See* Dissenting Statement of Commissioner Phillips, *supra* note 224, at 5-6 (noting that using Section 5 as a gap filler for antidiscrimination misinterprets Section 5's history).

231 *See supra* note 170 and accompanying text.

232 *See* Dissenting Statement of Commissioner Phillips, *supra* note 224, at 5-6 (contending that the history of Section 5 does not support reliance on public policy considerations).

233 *In re* Passport Auto Grp., Inc. Joint Statement, *supra* note 16, at 3.

234 *See* discussion *supra* subsection II.A.1 (explaining that Section 5 and the Unfairness Statement allow the Commission to consider public policy).

235 *See generally* AM. BANKERS ASS'N, CONSUMER BANKERS ASS'N, INDEP. CMTY. BANKERS OF AM. & U.S. CHAMBER OF COM., UNFAIRNESS *AND* DISCRIMINATION: EXAMINING THE CFPB'S CONFLATION OF DISTINCT STATUTORY CONCEPTS (2022) (arguing that Congress has not authorized the CFPB to fill discriminatory gaps).

236 *See generally* Complaint, Chamber of Com. v. Consumer Fin. Prot. Bureau, No. 6-22-CV-381 (E.D. Tex. Sept. 28, 2022) (arguing that the CFPB violated its statutory authority by considering discriminatory conduct).

237 *See In re* Passport Auto Grp., Inc. Joint Statement, *supra* note 16, at 2 (claiming that Section 5 does not become irrelevant when Congress legislates on the topic).

238 *Id.*

an identical argument about the FTC's ability to regulate data security in *FTC v. Wyndham*.[239]

2. Major Questions Doctrine

Aside from statutory authorization, we must consider a potentially more difficult hurdle for FTC intervention: the major questions doctrine.[240] According to *West Virginia v. EPA*, in "certain extraordinary cases" of great "economic and political significance," courts should apply a clear statement rule to determine whether an agency action was within the scope of the authority they received from Congress.[241] The precise contours of the doctrine are not clear, as it is still emerging.[242] The Court did not provide a test when formally announcing the doctrine in *West Virginia*, so it is difficult to know how to apply it.[243]

The doctrine originally arose in the context of *Chevron* deference, where courts are concerned with whether a congressional grant of authority to an agency is ambiguous, and if so, whether the agency interpretation of that authority is reasonable.[244] But in more recent years, the Court has stopped

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239 Fed. Trade Comm'n v. Wyndham, 799 F.3d 236 (3d Cir. 2015). For more discussion on *Wyndham*, see Section III.C, *infra*.

240 *See, e.g.*, Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, CATO SUP. CT. REV. (forthcoming 2023) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179468 [https://perma.cc/VQN6-UXWV] ("While *West Virginia v. EPA* represents a missed opportunity to clarify and ground the major questions doctrine, it remains a tremendously important decision. It will be cited routinely in legal challenges to new regulatory initiatives.").

241 West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2594-95 (2022); *id* at 2609, 2616 (Gorsuch, Alito, JJ., concurring) (describing the holding as a "clear-statement" rule).

242 *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724 [https://perma.cc/XX3D-ZZQG] (highlighting major shifts and changes in the major questions doctrine); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 480-85 (2021) (recounting the history of the doctrine and noting its ambiguity); Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y 773, 775 (2022) ("[T]he lower federal courts will have to flesh out the doctrine's contours, especially given that the majority opinion in *West Virginia v. EPA* did little to establish an administrable framework.").

243 *See generally* Deacon & Litman, *supra* note 242 (describing the ongoing uncertainty with the major questions doctrine); Ronald M. Levin, The Major Questions Doctrine: Unfounded, Unbounded, and Confounded 25-26 (Wash. Univ. St. Louis Sch. of L. Research Paper, Paper No. 22-10-02, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304404 [https://perma.cc/BZR7-K4ZK] (same).

244 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000). The doctrine has usually been applied to the question of whether the statute unambiguously grants authority in the first place (*Chevron* step one). *See* Nathan D. Richardson, *Keeping Big Cases From Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 365 (2016) ([T]he majority did still, at least formally, characterize its opinion as a *Chevron* step one holding."). But the doctrine may also apply in the context of whether the agency interpretation was reasonable (*Chevron* step two). *See* Utility Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 321 (2014).

treating the doctrine as one focused on resolving ambiguities, and has instead treated it as a question prior to *Chevron* analysis.[245] In *King v. Burwell*, the Court held that *Chevron* deference did not apply to an Internal Revenue Service (IRS) interpretation of a tax credit provision of the Affordable Care Act because it involved "billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people"[246]—even though it was the IRS interpreting the tax code. This shifted the doctrine from an interpretive tool to an automatic finding that *Chevron* did not apply.[247] But the transformation of the doctrine did not stop there. In *West Virginia*, the Court used the major questions doctrine to strike down an EPA policy after previously using it to block agency actions twice during the COVID-19 pandemic in short "shadow docket" opinions.[248] Whereas, in *Burwell*, the Court ultimately agreed with the IRS's initial interpretation that it had the requisite authority,[249] now the doctrine acts a separate and prior injunction against dramatic and costly agency action.

After *West Virginia*, there are two open questions about the major questions doctrine: first, what counts as "major," and second, how clear must a statement by Congress be to satisfy the Court? Daniel Deacon and Leah Litman identify "three indicia of 'majorness,' in addition to the costs imposed by the agency policy," on which the court relies: (1) political significance or controversy, (2) novelty of a policy, and (3) essentially a slippery slope argument about what approving such a broad policy could lead to in the future.[250] Then, once the Court finds a policy to implicate a "major" question, the Court in theory applies a clear-statement rule, but as Deacon and Litman observe, "[e]ven broadly worded, otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems 'major.'"[251]

245 *See* Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 978 (2021) (calling the major questions doctrine an "all-out assault" on *Chevron*).

246 *King v. Burwell*, 576 U.S. 473, 485 (2015); *see also* Christopher J. Walker, Notice & Comment, *What* King v. Burwell *Means for Administrative Law*, YALE J. REGUL. BLOG (June 25, 2015), https://www.yalejreg.com/nc/what-king-v-burwell-means-for-administrative-law-by-chris-walker [https://perma.cc/YNB4-9RAK] (noting the novelty of *King*'s holding for administrative law).

247 *See* Deacon & Litman, *supra* note 242, at 3 ("[R]ather than resolving an ambiguity or even placing a thumb on the scale as the Court attempts to discern the meaning of a statute, the new major questions doctrine functions as a kind of carve out to an agency's authority.").

248 *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2594-95 (2022); *see also* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (blocking the Center for Disease Control & Prevention's extension of an eviction moratorium); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 666-67 (2022) (blocking OSHA's COVID-19 vaccination mandates).

249 *King*, 576 U.S. at 485.

250 Deacon & Litman, *supra* note 242, at 4.

251 *Id.* at 1.

If we take seriously the language of *West Virginia*, the FTC might not actually have a problem. If any agency could justifiably take refuge in the breadth of the authority expressly delegated to it by Congress, it is the FTC. The FTC's authority is based on the incredibly general phrase "unfair or deceptive acts or practices in or affecting commerce."[252] Congress clearly intended the FTC to be able to regulate large swaths of the economy and to adapt to previously unforeseen harms, and the Supreme Court has on several occasions noted how expansive that authority is.[253] Ultimately, the expansiveness and adaptability is the whole point of the unfairness authority. Even more to the point, discrimination is paradigmatically unfair conduct as a matter of ordinary English usage[254] and as understood by legislators from the same era as the creation of the FTC, who initially styled employment discrimination laws aiming to ensure "fair employment practices" and create "fair employment practice commission[s]."[255]

In theory, this history and usage would suggest that the FTC is on solid footing with respect to the major questions doctrine.[256] But to treat the

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252 15 USC § 45(a).

253 *See, e.g.*, Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 239-40 (1972) ("When Congress created the Federal Trade Commission . . . it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply."); Atl. Refin. Co. v. Fed. Trade Comm'n, 381 U.S. 357, 367 (1965) ("The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce . . . .'" (quoting S. REP. NO. 592 (1960))); *id.* ("In thus divining that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight."); Fed. Trade Comm'n v. Bunte Bros., Inc., 312 U.S. 349, 353 (1941) ("Unlike the relatively precise situation presented by rate discrimination, 'unfair competition' was designed by Congress as a flexible concept with evolving content." (quoting Fed. Trade Comm'n v. Keppel & Bro., 291 U.S. 304 (1934))).

254 *See* Hayes & Schellenberg, *supra* note 1, at 14 ("[D]iscrimination and unfairness are often synonymous. The term 'unfair' has been used for decades to describe discrimination based on protected classes. Foundational antidiscrimination laws like the 'Fair Housing Act' and 'Fair Lending' laws reflect this usage."); *see also* New Negro All. v. Sanitary Grocery Co., 303 U.S. 551, 561 (1938) ("Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation."); Corning Glass Works v. Brennan, 417 U.S. 188, 207 (1974) (describing the Equal Pay Act as representing congressional recognition "that discrimination in wages on the basis of sex constitutes an unfair method of competition") (quotation marks omitted).

255 Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 394-97 (1953).

256 One might be tempted to argue that because discrimination is not expressly mentioned as an example of unfairness in the statute, FTC regulation addressing discrimination should trigger the major questions doctrine's clear statement rule. *See* Omer Tene, *The FTC's Privacy Rulemaking: Risks and Opportunities*, IAPP (Aug. 17, 2022), https://iapp.org/news/a/the-ftcs-privacy-rulemaking-risks-and-opportunities [https://perma.cc/F55H-CJHF] (describing major questions as a specter looming over the FTC's rulemaking). We disagree. Despite the unfairness authority's breadth, it is a *clearly* broad delegation of authority to the FTC. Perhaps one could object to such a broad delegation of authority on its face, but such an objection would come from a nondelegation principle,

expansion of this doctrine as a normal exercise of legal reasoning would be disingenuous. The Court does not really seem to be *doing law* in the sense we typically understand it.[257] Both of the COVID-19-era cases were non-merits cases on the shadow docket, so neither of them were fully reasoned, and the Court played fast and loose with precedent in *West Virginia*, treating the shadow docket cases as precedential, while providing little in the way of reasoning to support the changes to the doctrine.[258] As Justice Kagan notes in her *West Virginia* dissent, these cases have become law by judicial eyebrow-raise,[259] and as Mark Lemley notes, the case is one part of the Court's broader effort to "strip[] power from every political entity *except* the Supreme Court itself."[260]

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not major questions doctrine. While scholars have noted the similarities between nondelegation and major questions—see for example, Sunstein, *supra* note 242, at 489—and have sometimes suggested that major questions doctrine is being used to substitute for nondelegation, only Justice Gorsuch has signed on to an opinion embracing nondelegation—in *West Virginia*—meaning that the two doctrines should be treated as distinct. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2624 (2022) (Gorsuch, J., concurring); *see also* Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (treating major questions doctrine as a nondelegation rule). For exemplative scholarly arguments that major questions is being used to substitute for nondelegation, see Gocke, *supra* note 245, at 995-97, which criticizes the doctrine, and Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 53 (2010), which defends the doctrine. For a differing view, however, see Walker, *supra* note 242, at 777, which suggests that the major questions doctrine could serve as a check where Congress previously delegated broadly, but may not have anticipated future circumstances.

257 *See West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting) ("The majority claims it is just following precedent, but that is not so. The Court has never even used the term major questions doctrine before." (quotation marks omitted)); *see also* Levin, *supra* note 243, at 5, 31 (describing the Court's use of "strained readings" and "exaggerated accounts" of precedent to justify the new doctrine).

258 *See* Blake Emerson, *The Real Target of the Supreme Court's EPA Decision*, SLATE (June 30, 2022, 4:08 PM), https://slate.com/news-and-politics/2022/06/west-virginia-environmental-protection-agency-climate-change-clean-air.html [https://perma.cc/G39S-SFXX] ("Chief Justice John Roberts makes no serious effort to defend his assertion that EPA exercised a power beyond what Congress could reasonably be understood to have granted." (quotation marks omitted)).

259 *See West Virginia*, 142 S. Ct. at 2636 (Kagan, J., dissenting) ("The eyebrow-raise is indeed a consistent presence in these cases . . . .").

260 Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022). For a differing view, see Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. (forthcoming 2023) (manuscript at 6), https://ssrn.com/abstract=4234683 [https://perma.cc/74KZ-GYZZ] ("Rather than being a modern fabrication, *West Virginia* is merely the latest chapter of an old book."). This Article takes no position on whether *any* form of major questions doctrine is sensible or normatively desirable, instead noting that the Supreme Court is changing the rules in a clear antiregulatory direction, without offering any clear justifications to do so. Many administrative law scholars have written in favor of versions of the doctrine. *See, e.g.*, Richardson, *supra* note 244, at 359 (presenting the major questions doctrine as a check against agency aggrandizement); Loshin & Nielson, *supra* note 256, at 53 (viewing the doctrine as a substitute for the underenforced nondelegation principle); John F Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 260 (same, as a canon of avoidance); Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1015-17 (1999) (same, as a limitation on *Chevron* deference as applied to the extent of an agency's own authority); William

Ultimately, if the Supreme Court decides that the FTC should not be regulating discriminatory AI, then there is not much the FTC can do to stop that determination. And there is good reason to believe such a move by the Commission would rub the Court's conservatives the wrong way. For one, they are famously hostile to discrimination law and its goals.[261] Even more concerning is the centrality of the Court's "antinovelty" line of reasoning, in which the Court displays skepticism of novel government action on the grounds of novelty itself.[262] At several points in *West Virginia*, the majority and the concurrence observed that the EPA had never sought to regulate under Section 111(d) of the Clean Air Act before—calling it a regulatory "little-used backwater"[263]—as if the novelty was self-discrediting.[264] This is the eyebrow raise in action: gesture at the novelty, expecting the reader to nod along in agreement at the self-evident absurdity of the government action. While it seems more accurate to say that the novelty in treating discrimination as unfair is a result of the Commission's general wariness of its unfairness authority rather than any new view of what unfairness means, it is not hard to imagine the Court reacting to the novelty in a negative way.

Once we acknowledge this possibility, however, it is not clear that it changes much for the FTC. Perhaps blowback will affect other Commission priorities, and that fear is rational. But if the Court wants to cut agency authority, it can find a vehicle to do so from another agency—after all, *West Virginia* was a case about the EPA, yet it could easily affect the FTC. Pursuing discriminatory AI won't change that. Meanwhile, a failure to act due to speculative concerns would mean foregoing any possibility to use its authority to prevent any new kind of harm.

N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 436 (same, as support for democratic legitimacy); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 596-97 (2008) (same, as a tool to arbitrate between congressional and executive action on the same topic).

261 *See generally* Khiara M. Bridges, Foreword, *Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022).

262 *See generally* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017) (critiquing antinovelty reasoning in the context of statutes' constitutionality).

263 *See, e.g.*, *West Virginia*, 142 S. Ct. at 2613; *accord id.* at 2602 (referring to "Section 111(d) as an obscure, never-used section of the law." (quotation marks omitted)); *id.* at 2610 (referring to "an unbroken list of prior Section 111 rules" as evidence that the Section 111 rule at issue, which was different in kind, was invalid); *id.* at 2596 ("Nor can the Court ignore that the regulatory writ EPA newly uncovered in Section 111(d) conveniently enabled it to enact a program . . . that Congress had already considered and rejected numerous times.").

264 *See id.* at 2628 (Kagan, J., dissenting) ("The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms.").

The implication of the major questions doctrine is that the FTC's position is more precarious than it should be. But given that the alternative is to stop reacting to new types of consumer threats—essentially abandoning the entire mission of the FTC's consumer protection bureau—we believe the best course of action is for the FTC to simply proceed and meet the challenge head on.

III. Adapting the Data Security Model

Assuming the FTC proceeds, the remaining question is how the FTC's approach should work in practice. How should the Commission determine what constitutes unfair discrimination? There are two main options: a case-by-case approach that mirrors common law development or the creation of rules to define practices that are unfair.

Canvassing recent literature on discriminatory AI, many scholars have proposed solutions to help regulate AI, but none offer a framework that the FTC can apply to determine the merits of when something is unfair. For example, looking to reform discrimination law, several scholars have proposed burden-shifting approaches.[265] Ifeoma Ajunwa, for example, proposes to create a "discrimination per se" standard to reform Title VII, which "would shift the burden of proof from the plaintiff to the defendant (employer) to show that its practice is non-discriminatory."[266] But when it comes to determining what substantively counts as discrimination per se, Ajunwa would defer to a common law approach.[267] Gianclaudio Malgieri and Frank Pasquale argue for a predeployment self-certification approach.[268] From the FTC's perspective, this approach would certainly change the landscape, as it would functionally entwine deception and unfairness; a system that fails to meet the standard would come with a false declaration that it meets the standard.[269] While this would make the FTC's life easier when bringing a case, it would still not provide an answer for what actions are or are not unfair.

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265 *See, e.g.*, Ajunwa, *Paradox*, *supra* note 8, at 1728 (proposing a discrimination per se approach that shifts the burden to the defendant to prove that its practice is not discriminatory); Grimmelmann & Westreich, *supra* note 214, at 170 (arguing that if a plaintiff has found a disparate impact, the defendant should have the burden of showing its model's output explains job performance); Kim, *supra* note 8, at 921 (contending that an employer should bear the burden of proving its model is valid by showing an absence of traits that result in bias).

266 Ajunwa, *Paradox*, *supra* note 8, at 1728.

267 *See id.* So too would the various scholars who have discussed flavors of negligent discrimination. *See, e.g.*, Páez, *supra* note 8, at 27-32 (highlighting the centrality of intent to the common law doctrine of disparate treatment).

268 *See* Malgieri & Pasquale, *supra* note 221, at 2 (proposing that firms must show that their AI technology meets nondiscrimination requirements before deployment).

269 *Cf.* Schriver, *supra* note 221, at 2792 (discussing data privacy self-certifications under the FTC's deceptive practice authority).

As a final example, Paul Ohm's proposal for "forthright code" would ratchet up the deception standard to require affirmative disclosure of harm.[270] This would similarly bring deception and unfairness closer together, but would again fail to provide an answer on the merits. Even a strict liability approach would not be concrete where the injury is unspecified.

This leaves two possible approaches to defining unfairly discriminatory AI: either the common law approach that many scholars implicitly or explicitly rely on or affirmative rules defining unfairness. In this Part, we are focused on the common law approach, but the Commission does have the authority to pass "trade regulation rules" that affirmatively define practices that are unfair or deceptive.[271] We discuss this very briefly at the end of the Part.

The reason we focus here on direct enforcement is that, over the last two decades, the FTC has developed just such an approach to a different problem: regulating data security. The Commission has brought direct actions against companies that have failed to provide reasonable data security under the theory that such a failure is an unfair act or practice, drawing on negligence principles to define inadequate security.[272] The FTC brings enforcement actions against the worst actors, which everyone agrees should fall below any reasonable threshold of data security, and almost invariably settles with them, ending the enforcement action with a public consent decree.[273] The Commission then uses the consent decrees, in conjunction with industry best practices and published guidance, to develop a body of knowledge about what constitutes inadequate security.[274] Armed with this knowledge, businesses can understand what constitutes the outer bounds of reasonableness, while still retaining a large degree of flexibility such that they can adapt their approach to their particular size and security needs. While there are some important differences between this approach and a "true" common law—most notably that the FTC is both prosecutor and judge, and it can in theory change the

270 Paul Ohm, *Forthright Code*, 56 HOUS. L. REV. 471, 473 (2018) (arguing that forthrightness would require an affirmative warning of harm).

271 *See* 15 U.S.C. § 57a (authorizing the FTC to issue interpretative rules and policy statements concerning unfair or deceptive practices).

272 *See* William McGeveran, *The Duty of Data Security*, 103 MINN. L. REV. 1135, 1194-97 (2019) (providing examples of FTC actions against companies that failed to remedy data security flaws and arguing that civil suits based on similar allegations would proceed on a negligence theory); *see also* Solove & Hartzog, *supra* note 12, at 648 (citing cases in which the FTC concluded the companies' failure to follow Safe Harbor principles rendered their purported adherence to the principles deceptive).

273 Solove & Hartzog, *supra* note 12, at 607, 613.

274 *Id.* at 676; McGeveran, *supra* note 272, at 1193-95.

standards unilaterally[275]—the use of an incremental style of reasoning to define the merits is the key point and is the reason that this method has been referred to as a sort of common law.[276]

We are interested in this approach because it is now a well-worn path for the Commission, and it turns out that there are a surprising number of parallels between data security and algorithmic discrimination. We discuss these parallels below.

A. *A Risk Mitigation Approach*

The first parallel between data security and algorithmic discrimination is conceptual. Both are fundamentally about risk recognition and mitigation, where liability should attach where defendants fail to do enough to mitigate harm or risk, rather than where defendants simply fail to prevent any harm at all. In both cases, there is likely no possibility of completely preventing what amounts to an inescapable background risk.

The parallel here may not be obvious, as the source of background risk is quite different in each case. The FTC's approach to data security recognizes that hackers who steal people's data are nearly impossible to find, and if located, they are usually outside the jurisdiction of the United States. Thus, the FTC addresses data security by assigning responsibility to those companies who suffer data breaches, and in doing so, treats the hackers' existence as a background risk to be mitigated by businesses as stewards of consumer data. No one knows when and where a company will suffer a breach—and often it is not entirely the company's fault when a breach occurs—but this does not mean the company bears no responsibility to make the intrusion more difficult for hackers and less costly to consumers. Because this is the FTC's theory, it makes sense to adopt a responsibility-focused approach on the question of security *practices*, not liability based on the final result. The question becomes not whether the company was breached, but rather whether the company did enough to mitigate the background risk and harms of potential breaches.

The parallel in discriminatory AI comes from a recognition of extant disenfranchisement of subordinated groups. It is overwhelmingly likely, if not inevitable, that allocative algorithmic decision systems will evince some degree of bias in decisions whenever applied to people in different demographic groups. But there is no way to fully debias these systems.

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275 *See* Justin (Gus) Hurwitz, *Data Security and the FTC's Uncommon Law*, 101 IOWA L. REV. 955, 984-88 (2016) (noting that the FTC adjudicates its enforcement actions while simultaneously acting as a party in these actions).

276 *See, e.g.*, Solove & Hartzog, *supra* note 12, at 619 (arguing that FTC cases are functionally similar to the incremental, case-by-case development of common law principles).

Appeals to accuracy do not work. An inherent aspect of predicting the future from past data is the absence of a ground truth by which to arbitrate the accuracy of different models. Because accuracy is therefore in a real sense undefined, every predictive model requires some element of persuasive justification for its use, and part of that persuasive justification is how discriminatory it turns out to be and in what ways.[277] But just as there is no one answer on the accuracy question, there is no one answer on the bias question. There are many reasonable yet often incompatible ways to measure bias,[278] and therefore by some metric, every allocative decision will evince *some* bias. Hence, in allocative decisions, there is no such thing as zero bias. It is a persistent background risk that the FTC cannot eliminate. Thus, if the Commission seeks to hold companies accountable for it, the question must ask whether the businesses did enough to mitigate the risk of harm from the likelihood of discrimination.

The case of quality-of-service harms is a little different in that it should be possible, at least in theory, to require that products work as well for underrepresented groups as they do for dominant groups. As the authors of the *Gender Shades* study showed, biased products are fixable to a large degree. When the authors confronted the companies that they studied with their results, many of the companies went back and fixed their products.[279] But at what point, exactly, is a product "fixed"? If the FTC wants to hold companies liable for even *de minimis* differential quality of service, then unfairness essentially becomes strict liability. But assuming companies can partially mitigate the disparities at less cost, there may come a point where the effort to make a product perform with perfectly equal accuracy across groups requires a great deal more research and development cost. In that case, the FTC will be forced to apply cost-benefit analysis to determine whether the company did enough to mitigate the harm. This question, too, sounds in negligence: did the company do enough to satisfy their duty of nondiscrimination in their products?

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277 *See, e.g.*, Sorelle A. Friedler, Carlos Scheidegger & Suresh Venkatasubramanian, *The (Im)possibility of Fairness: Different Value Systems Require Different Mechanisms for Fair Decision Making*, COMMC'NS OF ACM, Apr. 2021, at 140 (arguing that different approaches to fairness within computer science stem from fundamental differences in researchers' underlying beliefs about the degree to which data reliably captures people's true qualities).

278 *See, e.g.*, Alexandra Chouldechova, *Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments*, 5 BIG DATA 153 (2017) (identifying three ways to define unfairness and finding that it is mathematically impossible to satisfy all at the same time); Jon Kleinberg, Sendhil Mullainathan & Manish Raghavan, *Inherent Trade-Offs in the Fair Determination of Risk Scores*, PROC. OF INNOVATIONS THEORETICAL COMPUT. SCI., 2017, at 2-3 (same).

279 *See* Matt O'Brien, *Face Recognition Researcher Fights Amazon Over Biased AI*, ASSOCIATED PRESS (Apr. 3, 2019), https://apnews.com/article/north-america-ap-top-news-artificial-intelligence-ma-state-wire-technology-24fd8e9bc6bf485c8aff1e46ebde9ec1 [https://perma.cc/QGW6-783H] ("Months after [the] first study . . . all three companies showed major improvements.").

Finally, due to the nature of how representational harms occur, they are often more difficult to foresee. But if a company fails to fix their system—for example, if Microsoft allowed Tay to continue operating after transforming into a digital hatebot overnight[280]—then, again assuming that this failure is a legitimate injury the FTC can address,[281] it would certainly seem reasonable for the FTC to deem that failure unfair.

Thus, there is something fundamentally similar about data security and discrimination. The targets of FTC enforcement in both cases are operating in a world where there is a persistent risk of the relevant harm for which it would be unreasonable to hold companies fully responsible. Based on this similarity, the question transforms into one that separates the fact of injury from the question of responsibility. There may be different ways to do this, but a common method that separates injury and liability is negligence, which also serves as the basis for the FTC's data security approach. It should work similarly with discrimination.

It is also worth noting that the idea of discrimination as negligence—where defendants have essentially a duty to prevent or mitigate a background risk of discriminatory harm—is not new and is not particular to algorithmic harms. Disparate impact law asks whether a decisionmaker used a facially neutral decision tool with a discriminatory effect, but nonetheless had a good enough reason for its use. Formally, this is a burden-shifting test about "business necessity" and less discriminatory alternatives. But as David Oppenheimer observed three decades ago, many courts functionally treat disparate impact as a negligence inquiry.[282] Under this theory, the business necessity and alternative practice prongs convert the strict liability question (i.e., whether there is a disproportionate impact) into a question of fault (i.e., whether the practice is nonetheless justified). Negligence reasoning makes discrimination suits a determination about whether a defendant is responsible

280 *See* James Vincent, *Twitter Taught Microsoft's AI Chatbot to Be a Racist Asshole in Less than a Day*, VERGE (Mar. 24, 2016, 6:43 AM), https://www.theverge.com/2016/3/24/11297050/tay-microsoft-chatbot-racist [https://perma.cc/3QYU-2N9K] (explaining that Microsoft did not fix Tay's timeline until the morning after its release); *see also* Frank Pasquale, *Toward a Fourth Law of Robotics: Preserving Attribution, Responsibility, and Explainability in an Algorithmic Society*, 78 OHIO ST. L.J. 1243, 1248 (2017) ("At this point, if a corporation decides to unleash an algorithm on Twitter substantially similar to Microsoft's Tay, it should know that there is a very high likelihood it will begin spewing racist and sexist cant within days.").

281 *See* discussion *supra* subsection II.A.1.

282 *See, e.g.*, Oppenheimer, *supra* note 72, at 899 (concluding that courts frequently incorporate a negligence inquiry but do not use the term negligence); Ford, *supra* note 72, at 1389 (comparing discrimination to negligence); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1364 (2009) (arguing that third-party harassment cases can functionally be seen as negligence-based); Páez, *supra* note 8, at 27 (arguing that negligence might be a more appropriate doctrine than disparate impact to respond to recent developments in AI used for hiring practices).

for compounding the injustice[283] or failing to mitigate it,[284] which seem like reasonable questions under conditions of structural discrimination. Though certainly not a universally accepted view of discrimination law, the idea of discrimination as negligence is not restricted to algorithms.

B. *The Flexibility of a Common Law Approach*

The Commission's common law approach to data security also offers a few concrete benefits that would be mirrored in its approach to discrimination. The first is the ability to be sensitive to context. The appropriate level of security is highly contextual. It depends on the type of data being stored, the quantity of data stored, the business that the company is in, the extent to which the company has reason to believe it will be attacked, and the resources a company has available to devote to security. The FTC's approach sets a minimum absolute baseline as a calibration point, but also offers companies leeway to tailor their operations to their particular circumstances, for which they may be the best judge.[285] Reasonableness admits of a world where there are multiple permissible and defensible solutions to data security problems, as long as overall results satisfy some minimum baseline. In a world where the right result is so fact-laden, it is quite difficult to take a more prescriptive, rules-based approach.[286]

The same context-sensitivity is necessary for algorithmic fairness.[287] The specific determinations of whether something is or is not discriminatory will depend on the type of harm, the specific sector it is being deployed in, what decisions and tradeoffs were made in design, what attempts were made to address the discriminatory harm, what remedies might have been practically available, and a host of other considerations. An approach focused on

283 Hellman, *supra* note 71, at 486.

284 Eidelson, *supra* note 71, at 254-55.

285 *See* Solove & Hartzog, *supra* note 12, at 661 (explaining that the FTC has established baseline standards for firms based on industry and consumer expectations); *see also* Justin (Gus) Hurwitz, *Response to McGeveran's* The Duty of Data Security*: Not the Objective Duty He Wants, Maybe the Subjective Duty We Need*, 103 MINN. L. REV. HEADNOTES 139, 143 (2019) (noting that the evolving industry norm is for firms to follow a minimum baseline they can work individually to exceed).

286 Gus Hurwitz objects to the description of the FTC's actions as negligence because of this subjectivity, arguing that it "roughly corresponds to a subjective reasonableness standard backed by a *per se* negligence standard for extremely objectionable conduct." Hurwitz, *supra* note 285, at 143.

287 *See* Doaa Abu-Elyounes, *Contextual Fairness: A Legal and Policy Analysis of Algorithmic Fairness*, 2020 U. ILL. J.L. TECH. & POL'Y 1, 6 (arguing that a uniform approach will not achieve algorithmic fairness); *see also* Andrew D. Selbst, Danah Boyd, Sorelle A. Friedler, Suresh Venkatasubramanian & Janet Vertesi, *Fairness and Abstraction in Sociotechnical Systems*, PROC. OF 2019 CONF. ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY, 2019, at 59 (positing that the solutions to algorithmic bias necessitate consideration for the unique social contexts intertwined with this technology).

reasonableness will allow for leeway in attempts to address the discriminatory harms that are sure to arise, while a minimum baseline would at least give some teeth to the requirement.

The second, related benefit is that the approach is based in negative determinations. In short, it is much easier in the face of uncertainty and disagreement to say when a specific set of facts does not satisfy a threshold of risk mitigation than it is to offer a prescriptive set of rules for when activities will satisfy it. That is, it's easier to reject practices that are *unfair* than have a rule dictating which practices are *fair*. It is perhaps not coincidental that the language of the FTC's mandate prohibits unfair practices rather than permitting fair ones.[288]

Whether for practical or legal reasons, the FTC's approach results in bringing enforcement actions against the "worst practices" in data security. There are certain accepted ways to mitigate data security risk, but where a company does not even try, they fall so short of these accepted practices that it is easy to bring an enforcement action. It is much easier to iteratively address extreme violations than to say where the line would have been in the abstract. Same with discrimination. Take allocative harms, where recent research has shown that it is often possible to develop many different machine learning models that each exhibit the same degree of accuracy overall, yet differ in the degree to which they result in disparities in outcomes across groups.[289] Those developing or procuring algorithmic employment assessments, credit scoring models, and tenant screening software, among many other such tools, will frequently find that they do not need to forgo a commitment to maximizing the accuracy of their decisions to reduce disparities in hiring, lending, and leasing rates.[290] Now that this is a known possibility, firms should be expected to make reasonable efforts to figure out if such models exist, and a failure to even try should be seen as an unfair practice.

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288 This also aligns with Ben Hutchinson and Meg Mitchell's suggestion that *technical* work be oriented around *un*fairness rather than fairness, as attempts to develop methods for producing fair machine learning models have been much less successful and productive than attempts to develop techniques for determining when machine learning models are unfair. *See* Ben Hutchinson & Margaret Mitchell, *50 Years of Test (Un)fairness: Lessons for Machine Learning*, PROC. OF 2019 CONF. ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY, 2019, at 50, 56.

289 Black et al., *supra* note 74, at 850.

290 This observation speaks directly to the idea in disparate impact doctrine that decisionmakers should face liability if they fail to adopt an alternative business practice that serves their goals equally as well but generates a less disparate impact. It also echoes Chair Khan and Commissioner Slaughter's argument that firms cannot assert that a business practice provides an overall benefit to consumers if it generates a disparate impact that could have been avoided at no cost. *See supra* notes 210–214 and accompanying text.

The situation is much the same with quality-of-service harms. It is now widely understood that the standard way of evaluating the overall performance of machine learning models can easily conceal that such models may perform much less well when applied to certain demographic groups than to others. For example, a model reported to have ninety-five percent overall accuracy could be accurate 100% of the time for a majority group that constitutes ninety-five percent of the population and zero percent of the time for a minority group that constitutes five percent of the population.[291] Standard performance metrics would fail to reveal this extreme disparity. As a result, it has become increasingly common to expect firms to perform disaggregated evaluations: breaking apart the reported performance of machine learning models by group.[292] While it might turn out, in some cases, that it is unreasonably difficult for firms to conduct a thorough disaggregated evaluation or to address revealed performance disparities (due to the difficulty of obtaining the necessary demographic information by which to disaggregate the evaluation, the cost involved in performing the evaluation or remedying the disparity, or other technical limitations),[293] it is unacceptable for firms to fail to even try to perform such assessments. Of course, as the cost of conducting an assessment and remedying any revealed performance disparities drops, these costs may become a less reasonable justification for the failure to uncover and address any gaps in performance, rendering the continued use of a model unfair.

The final point in the previous paragraph highlights how a reasonableness standard with a minimum baseline can evolve over time. With data security, standards have changed over time. Technology evolves; the threats, the available responses, and the cost of responses change over time. We have a better sense of which responses work and which do not, and how to evaluate risk tradeoffs. As Gus Hurwitz has observed, "[t]he duty of data security . . . is . . . akin to keeping apace of advancements in the field of cybersecurity, of constantly monitoring, updating, testing, and replacing the locked box that data is secured into."[294]

Once again, the same is true here. Today, we do not know all of the failure modes of AI systems, including which types of decisions lead to particularly

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291 *See* Moritz Hardt, *How Big Data Is Unfair*, MEDIUM (Sept. 26, 2014), https://medium.com/@mrtz/how-big-data-is-unfair-9aa544d739de [https://perma.cc/3NGR-SNXX] ("[An algorithm] [c]ould have low accuracy on the minority despite being seemingly very accurate on the population.").

292 *See, e.g.*, Buolamwini & Gebru, *supra* note 30, at 10-12 (disaggregating error rates by gender and skin tone); Barocas et al., *supra* note 182, at 369 ("[R]esearchers and practitioners seeking to uncover performance disparities exhibited by AI systems often conduct disaggregated evaluations.").

293 *See* sources cited *supra* note 182.

294 Hurwitz, *supra* note 285, at 148.

bad outcomes for discrimination, but we are learning over time how to test for and mitigate discriminatory harms.[295] Just like in the data security context, technology to perform some of this measurement and mitigation will likely develop, standardize, and become less expensive over time. As possible responses become less expensive, they should and will become part of the expected suite of mitigations.[296]

Inherent in this approach is also a foreseeability limitation: firms may only be held responsible for harms that they are reasonably able to anticipate. On the one hand, this means that the FTC may struggle to declare unfair any business practice that results in harms that were difficult or impossible to foresee. This limitation will be especially relevant to representational harms, which can manifest in a wide variety of ways, many of which will be difficult to fully anticipate. Take the example of Google Photos tagging an image of two Black people with the label "gorillas."[297] While this controversy has fostered broad recognition of the harm that might be caused by mislabeling a Black person as a gorilla, it remains very difficult to imagine the full range of labels whose misapplication to a particular type of image might be similarly demeaning. Given the remarkably expressive capacity of language and the seemingly infinite possible variation in the composition of photos, enumerating all the label-image pairs that might be widely perceived as harmful is an enormously challenging, likely impossible task.[298] On the other hand, a regulatory regime based on foreseeability also means that as the range of foreseeable harms continues to grow, firms will be expected to address more of them. Thus, not only would Google be expected to address the foreseeable harm of mislabeling Black people as gorillas, but it would also be expected to address the foreseeable harm of returning pornographic images in response to a search query for "black girls" or images of violence for "black teenagers."[299] Once harms along these lines are no longer unforeseeable, the FTC could ask, in negligence terms, whether enough was done to test for and remedy the problem such that Google bears no liability.

As a general matter, it is much easier to use a common law approach to extrapolate whether a particular practice is so foreseeable that efforts should

295 Selbst, *supra* note 20, at 121.

296 Raghavan et al., *supra* note 37, at 476 ("In the past, such exploratory efforts might have been costly and difficult, since discovering an alternative business practice that is equally effective for the firm, while generating less disparity in selection rates, was no easy task. Many modern assessments (e.g., those with a large number of features) make some degree of exploration almost trivial, allowing vendors to find a model that (nearly) maintains maximum accuracy while reducing disparate impact.").

297 Barr, *supra* note 87.

298 Katzman et al., *supra* note 57, at 4.

299 *See* Noble, *supra* note 80.

have been made to address it than it is to proactively predict all possible harms. An approach that allows the FTC to start with the worst of the worst and slowly ratchet up the baseline will also give companies ample time to stay ahead of their responsibilities and will allow the law to adjust as the set of known harms expands and our understanding of the issues evolve. Of course, such an approach may also create perverse incentives: if firms are only held responsible for foreseeable harms, they may purposefully avoid investing the effort to discover more about the harms that their systems could bring about.[300] This, in turn, may place much of the burden for uncovering and raising awareness of such harms on the people who directly experience them or other outsiders, such as advocates, journalists, and researchers, who are generally less well-resourced and less well-positioned to undertake such investigations.

C. *Parallel Challenges to the FTC's Authority*

Despite its utility, the FTC's approach to data security has proved contentious, with businesses furious at the lack of clearly articulated data security rules—or less charitably, that the FTC dared to regulate data security at all. Ultimately, the FTC has survived two major challenges to its authority to regulate data security in this manner, with the Third Circuit ruling in the Commission's favor in *FTC v. Wyndham*,[301] and the Eleventh Circuit avoiding the issue in *LabMD, Inc. v. FTC.*[302] Though neither of these cases was a full-throated endorsement, the FTC's approach continues unchanged. This suggests that a similar approach to discrimination should also be legal. But just as important for our purposes is that despite bitter disagreement over the legality of the data security model, one issue was never even raised: whether the fact that only a small population bore the costs of bad data security rendered the cost-benefit analysis problematic for the Commission.

In *Wyndham*, the hotel chain raised three challenges to the data security model of regulation, all of which were rightly rejected by the court. First, it argued that unfairness means more than what is included in the language of Section 5, and that unfairness must include unscrupulous or unethical

300 This is a major difference between an unfairness regime limited by reasonable foreseeability and a requirement for affirmative investment in research, like an impact assessment regime. For example, the Algorithmic Accountability Act of 2022 would also have sought to regulate AI through the FTC, but largely through an impact assessment regime, violation of which would independently be considered an unfair practice. *See* Algorithmic Accountability Act, *supra* note 183, §§ 3(b), 9.

301 *See* Fed. Trade Comm'n v. Wyndham, 799 F.3d 236, 247 (3d Cir. 2015) (holding that bad cybersecurity can be included in unfairness); *see also id.* at 255 (holding that the FTC's reasonableness approach and lack of precise standards did not violate principles of fair notice).

302 *See* LabMD, Inc. v. Fed. Trade Comm'n, 894 F.3d 1221, 1231 (11th Cir. 2018) (assuming without deciding that negligent data security constitutes an unfair act or practice).

behavior.[303] Wyndham argued that it was not unscrupulous—in fact, because the company was hacked, it was really a victim![304] The court rejected this argument, noting that unfairness was envisioned by Congress as an open-ended and flexible concept meant to be adaptable to the problems of the day, and that cybersecurity was not outside the plain meaning of "unfair."[305] This line of reasoning applies equally well to discriminatory AI; unfairness is flexible and adaptable and should pose no problem here.

The second challenge was a statutory argument, in which Wyndham claimed that Congress had granted the FTC limited authority over cybersecurity in other specific contexts, including children's privacy, finance, and credit, and would not have done so if the Commission already had such authority.[306] The court rejected this argument as well, recognizing that the statutes granted authority to the FTC to regulate with different kinds of procedures, and overlapping grants of authority do not preclude a more general approach under Section 5.[307] To the extent we should take anything away from an argument that is rather specific to the data security context, it is that the existence of other antidiscrimination statutes with their own procedures does not preclude the FTC's use of Section 5 in this context.

Finally, Wyndham argued that the Commission's reasonableness approach violated principles of fair notice. Wyndham essentially argued that the FTC did not make a concrete enough determination and was thus owed no deference.[308] The court performed some legal jiujitsu here, trapping Wyndham in its own argument. The court pointed out that if Wyndham is correct that the FTC is due no deference, the implication is not that the conduct was not unfair (the result Wyndham wanted), but that a *court* must so decide in the first instance.[309] And when it comes to courts, there is no "ascertainable certainty" standard—courts decide reasonableness questions all the time without vagueness problems.[310] Thus, "Wyndham was not entitled to know with ascertainable certainty the FTC's interpretation of what cybersecurity practices are required by § 45(a). Instead, the relevant question in this appeal is whether Wyndham had fair notice that its conduct *could* fall within the meaning of the statute."[311] And it had such notice.

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303 *Wyndham*, 799 F.3d at 244.
304 *Id.* at 246.
305 *Id.* at 243, 247.
306 *Id.* at 247.
307 *Id.* at 248.
308 *Id.* at 252.
309 *Id.* at 253, 255.
310 *Id.* at 255.
311 *Id.* (emphasis added).

The court did not entirely let the FTC off the hook. Instead, it continued with the question of whether Wyndham had fair notice that its conduct *could* have been considered unfair, treating the vagueness claim as an as-applied challenge.[312] It is at this point that the court noted just how bad the facts were for Wyndham: the hotel had been hacked three times, and had implemented next to no security measures even after the first two incidents.[313] The court acknowledged that the meaning of the statute itself might fail to give fair notice as applied in a future enforcement action, but told Wyndham that its case simply wasn't a close one.[314]

The *Wyndham* analysis applies directly to a future discriminatory AI case. If the FTC declares that it intends to address discriminatory AI through Section 5, publishes guidance, and goes after the worst offenders, it should not have any vagueness problem. Perhaps if it gets too aggressive, a court will push back, but until then there is no real problem with this approach.

The Eleventh Circuit in *LabMD, Inc. v. FTC* was much more skeptical.[315] The opinion ultimately expressed its skepticism about the FTC's authority in dicta, assuming without deciding that the FTC had the authority it claimed.[316] So the Commission survived the challenge to its authority intact. But the court vacated the Commission's cease and desist order, stating that the order "contain[ed] no [specific] prohibitions," but "[r]ather, it command[ed] LabMD to overhaul and replace its data-security program to meet an indeterminable standard of reasonableness."[317] Ultimately, it's hard to know what to make of *LabMD* because it is a bizarre opinion in many ways,[318] but the apparent takeaway is that enforcement orders must contain

312 *Id.* at 256.

313 *Id.* at 256-59.

314 *Id.* at 259.

315 LabMD, Inc. v. Fed. Trade Comm'n, 894 F.3d 1221 (11th Cir. 2018).

316 *See* discussion *supra* subsection II.A.1.

317 *LabMD*, 894 F.3d at 1236.

318 The court reasoned based on a hypothetical future FTC enforcement action for a practice it believed was unfair, noting that the FTC could pursue its claim either internally or in district court. *Id.* at 1232. The court then said, without citing supporting authority, that the ALJ and the district judge would use "materially identical procedural rules in processing the case to judgment." *Id.* Next, the court asserted that a district court would have to enforce its injunctive order pursuant to its contempt power, but the order's vagueness would cause it to exceed the scope of the contempt power. *See id.* at 1235-36 ("Being held in contempt and sanctioned pursuant to an insufficiently specific injunction is therefore a denial of due process."). Finally, the court repeated that because the standards are the same in the FTC and the district court, *ipso facto*, a cease and desist order must be unenforceable by the FTC. *Id.* at 1237. This bizarre reasoning is largely unsupported. *Id.* at 1234-37. Adding to the weirdness, the court in the same opinion (1) accused the FTC of telling LabMD "precious little" about how its data security program overhaul should be accomplished, and (2) expressed fear that this would result in the FTC "micromanaging" LabMD's security practice. *Id.* at 1237.

some specificity as to the deficiencies the Commission would like corrected.[319] In the end, *LabMD* says little about the FTC's authority to address data security, or *mutatis mutandis* to address discriminatory AI.[320]

Finally, one absence stands out in both of these cases: the lack of challenge as to the cost-benefit prong of Section 5. The Commission may consider something unfair only if the costs are not outweighed by "countervailing benefits to consumers."[321] But as described above, whose costs and whose benefits count is left unspecified.[322] In a discrimination case, the costs will be borne by a minority of consumers, while the concomitant benefits could be enjoyed by everyone at once; testing for discriminatory harm is costly, and that cost will be theoretically passed back to consumers in the form of higher prices. An interpretation of cost-benefit analysis that looks only at global aggregate costs could suggest that even intentional discrimination is acceptable where the costs imposed on the minority group are less in aggregate than the costs involved in correcting the discrimination.

As explained above, we do not believe that looking only at the global aggregate costs is the correct way to interpret the cost-benefit test. The data security challenges are another data point in support of that view. In a case like *Wyndham*, "hundreds of thousands of consumers" were affected, leading to "over $10.6 million dollars in fraudulent charges."[323] Wyndham is a massive corporation with many locations.[324] Yet the court never even asked whether the cost of improving Wyndham's data security practices outweighed the harm of those practices. The court did note that the "costs to consumers that would arise from investment in stronger cybersecurity" was a relevant consideration, but only in the context of what Wyndham should be aware of for purposes of fair notice.[325] There was never an attempt to evaluate the numbers, and Wyndham never even raised it in its briefs.[326] Given the aggressiveness of these challenges, we believe that if cost-benefit analysis

319 *See id.* at 1236 ("In sum, the prohibitions contained in cease and desist orders and injunctions must be specific. Otherwise, they may be unenforceable.").

320 *Id.* This is true despite much of the commentary after the decision by political opponents of FTC authority. *See, e.g.*, *LabMD Court Blocks FTC's Approach to Data Security*, TECHFREEDOM (June 6, 2018), https://techfreedom.org/labmdftcdatasecurity [https:// perma.cc/WNK4-98YQ] ("The court could hardly have been more clear: the FTC has been acting unlawfully for well over a decade." (quoting Berin Szóka, President of TechFreedom)).

321 15 U.S.C. § 45(n).

322 *See* discussion *supra* subsection II.A.3.

323 Fed. Trade Comm'n v. Wyndham Worldwide Corp., 799 F.3d 236, 240 (3d Cir. 2015).

324 WYNDHAM HOTELS & RESORTS, https://www.wyndhamhotels.com [https://perma.cc/97V6-BT8M].

325 *Wyndham*, 799 F.3d at 255-56.

326 Brief for Appellant, Fed. Trade Comm'n v. Wyndham Worldwide Corp., No. 14-3514 (3d Cir. Oct. 6, 2014); Reply Brief for Appellant, Fed. Trade Comm'n v. Wyndham Worldwide Corp., No. 14-3514 (3d Cir. Dec. 8, 2014).

were seen as a live issue, the details would have been discussed. But as this issue was mentioned neither in the briefing nor the opinion, we can be more confident that the views expressed by the majority in *Apple* is widely shared, and the global aggregate cost approach is not the right way to interpret the cost-benefit test.[327]

D. *The Alternative: Magnuson-Moss Rulemaking*

Thus far, we have focused on developing a common law approach through direct enforcement of Section 5. But as noted above, the FTC possesses the authority to pass "trade regulation rules" that affirmatively define practices that are unfair or deceptive.[328] This rulemaking authority is much more onerous than APA rulemaking, with many additional requirements.[329] The Commission has therefore not used this authority to pass any new rules since 1980.[330] In 2021, however, the FTC voted to revise its internal Rules of Practice to make it easier to pass new trade regulation rules.[331] The Commission has since issued its ANPR,[332] demonstrating that it is pursuing rulemaking in addition to direct enforcement.[333]

We focused on data security because it offers an interesting parallel and the approach is more straightforward than Magnuson-Moss rulemaking. But it is not obviously the right path. Magnuson-Moss rulemaking has some advantages compared to the data security approach: the authority to rely on it is less controversial, the Commission can more easily garner public engagement in rulemaking, and rules allow businesses to better know where they stand. Rulemaking could also help the FTC avoid some of the claims recently filed against the CFPB, as the lawsuit focused not only on statutory interpretation but also on matters of administrative procedure.[334] But

327 *See supra* notes 198–208 and accompanying text.

328 15 U.S.C. § 57a; *see also* 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, 525 (2022) (noting that trade regulations rules have "solid textual grounding" in the language of the FTC Act).

329 *See* Solove & Hartzog, *supra* note 12, at 620 ("[T]he FTC has only Magnuson-Moss rulemaking authority, which is so procedurally burdensome that it is largely ineffective." (footnote omitted)).

330 Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1989 (2015).

331 Press Release, Fed. Trade Comm'n, FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct (July 1, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger-deterrence-corporate-misconduct [https:// perma.cc/WM9L-PQUY].

332 87 Fed. Reg. 51273 (proposed Aug. 22, 2022) (to be codified at 16 C.F.R. ch. 1).

333 *See id.* ("[T]he Commission invites comment on whether it should implement new trade regulation rules . . . .").

334 For an example of such a recent lawsuit, see Complaint at 21-22, Chamber of Com. v. Consumer Fin. Prot. Bureau, No. 6:22-CV-381 (E.D. Tex. Sept. 28, 2022).

Magnuson-Moss rulemaking also takes an extraordinarily long time,[335] and agency rules are less adaptable than case-by-case enforcement in an area where technology is rapidly evolving. Regulating discriminatory AI is a matter of some urgency, and if Magnuson Moss rules take too long, there is a legitimate concern that the Commission will act too slowly to be the regulator it needs to be. It is not obvious to us that either approach is ultimately better. Instead, they should be pursued in parallel.

CONCLUSION

The FTC's desire to regulate discriminatory AI is a welcome development because the scope of FTC enforcement is far less constrained than discrimination law. The Commission has the capacity to reach a broader set of domains than employment, credit, and housing, among the few others subject to regulation. It can likewise hold accountable a broader set of actors. Rather than being limited to the ultimate decisionmaker targeted by most discrimination laws, the FTC can regulate the many other actors that support the decisionmaking process, including vendors of AI products and services. It can consider a broader set of possible discrimination injuries beyond the narrow confines of the traditional allocative concerns of discrimination law, including cases where AI products and services exhibit systematic performance disparities across different demographic groups. The FTC can target not only acts of discrimination, but also the surrounding business practices that make discrimination more likely to occur. As a regulatory agency, it can also avoid many of the procedural and structural challenges that limit individual plaintiffs' abilities to vindicate their rights under existing discrimination laws. And the Commission has some clear advantages over other agencies charged with enforcing discrimination laws and even agencies with similar unfairness authority. Such intervention by the FTC will be possible under its existing authority, and there are existing models for how they can go about it.

Taken together, these advantages suggest that the FTC can play a unique role by both filling gaps in discrimination law and helping to enforce existing discrimination laws more effectively. In taking on this role, though, the FTC should make special efforts to coordinate with other relevant agencies that enforce discrimination laws, working, for example, with the EEOC, the CFPB, and HUD in employment, credit, and housing cases. Rather than competing with these agencies or potentially stepping on their toes, the FTC

335 One study examined the time from rule proposal to completion of different procedures, finding that under APA informal rulemaking, the average rule took nine to ten months, while under Magnuson-Moss, it took more than five years. Lubbers, *supra* note 330, at 1997-98.

should work with these agencies to carve out a unique role that leverages its strengths as an agency in coordinated enforcement actions—and focus its efforts there.[336] Moreover, other agencies with a history of discrimination enforcement could be valuable partners in the Commission's effort to define unfairness standards. Many other agencies have been grappling with the questions raised by AI.[337] The FTC should work with them and learn from their experience and domain expertise. An announcement that accompanied the recently released Blueprint for an AI Bill of Rights, which detailed a range of agency actions focused on AI,[338] suggests that the White House has already been trying to play such a role in helping to facilitate coordination and knowledge sharing.[339] At the same time, the FTC should not act in merely a supportive role. Its authority grants it the ability to tackle issues well beyond the scope of these other agencies, and it likely possesses relevant technical expertise beyond that of other agencies.[340] Not only can it fill gaps, but it can chart new regulatory terrain where there is obvious unfairness, but no immediately relevant discrimination law.

While FTC intervention can be helpful, the Commission will have limitations. The FTC has the authority to initiate investigations of what it

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336 The FTC regularly coordinates with other agencies where enforcement authorities overlap. *See, e.g.*, *Prepared Statement of the Federal Trade Commission on Opportunities and Challenges in Advancing Health Information Technology, Before the H. Oversight and Gov't Reform Subcomms. on Info., Tech and Health, Benefits, and Admin. Rules*, at 3 n.6 (2016), https://www.ftc.gov/legal-library/browse/prepared-statement-federal-trade-commission-opportunities-challenges-advancing-health-information [https:// perma.cc/RJ5G-UXAA] (describing cases in which the FTC has worked with Office of Civil Rights of Health and Human Services to address data security in the medical context).

337 *See supra* notes 48–51 and accompanying text (discussing HUD's lawsuit against Facebook); *see also Artificial Intelligence and Algorithmic Fairness Initiative*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (2022), https://www.eeoc.gov/ai [https:// perma.cc/92KT-RVLW]; Press Release, Consumer Fin. Prot. Bureau, CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms (May 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-acts-to-protect-the-public-from-black-box-credit-models-using-complex-algorithms [https:// perma.cc/H6MP-X7VR].

338 BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE, WHITE HOUSE OFF. SCI. TECH. POL'Y (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [https://perma.cc/SS2Y-RVLY].

339 *See Fact Sheet: Biden-Harris Administration Announces Key Actions to Advance Tech Accountability and Protect the Rights of the American Public*, WHITE HOUSE OFF. SCI. TECH. POL'Y (Oct. 4, 2022), https://www.whitehouse.gov/ostp/news-updates/2022/10/04/fact-sheet-biden-harris-administration-announces-key-actions-to-advance-tech-accountability-and-protect-the-rights-of-the-american-public [https:// perma.cc/6PZX-PBTC] ("The framework builds on the Biden-Harris Administration's work to hold big technology accountable, protect the civil rights of Americans, and ensure technology is working for the American people.").

340 For example, the FTC has a rotating chief technologist role and is actively recruiting technologists. *See Technologist Hiring Program*, FED. TRADE COMM'N (2022), https://www.ftc.gov/about-ftc/careers/work-ftc/technologists [https://perma.cc/AH49-DDAS].

believes to be unfair practices, but it lacks the authority to compel businesses to routinely produce and share information that might reveal when their AI products or services are discriminatory.[341] As a result, the FTC is likely to use its investigative powers only when there is already evidence that there is something to discover. The FTC's enforcement actions have tended to follow this pattern, only initiating investigations after some practice had been brought to light by a journalistic or academic investigation. But discrimination is notoriously difficult to uncover through individual observations because discrimination often expresses itself through systematic differences in the treatment of entire groups. Stray observations and ad hoc studies may be insufficient to determine whether there is a pattern worthy of more serious and systematic investigation. As a result, FTC intervention is likely to be most effective when there are additional laws and policies in place that make discovering unfairness easier, such as legally required impact assessments, audits, or other forms of evaluation. In addition, the Commission has long been resource-constrained,[342] and as the market in AI grows, enforcement will become more resource-intensive.

But as with other efforts to address discriminatory AI, the FTC need not solve the problem entirely. The FTC already has the tools it needs to begin addressing the problem of discriminatory AI, and it is good to see the Commission starting to use them.

341 The Algorithmic Accountability Act of 2022 was proposed to give it exactly this authority by requiring the FTC to pass rules requiring impact assessments. Algorithmic Accountability Act, *supra* note 183, § 3(b).

342 *See* Testimony of Chair Lina M. Khan Before the House Appropriations Subcommittee on Financial Services and General Government (May 18, 2022) (requesting more funding for the FTC); *see also* Tony Romm, *Will Congress Fund Internet Privacy?*, POLITICO (June 3, 2011, 4:36 AM), https://www.politico.com/story/2011/06/will-congress-fund-internet-privacy-056134 [https://perma.cc/6CML-L9GY] (discussing the FTC's need for more resources to support a privacy agenda).

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