

Toward a Proper Understanding of Consumer Privacy and Its Regulation (FTC Hearings, ICLE Comment 10)

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Digital privacy and data security are important ongoing concerns for lawmakers, particularly in light of recent, high-profile data breaches and allegations of data misuse. Understandably, in the wake of such incidents advocates regularly call for tighter restrictions on data collection and use. But, as we detail below, privacy is a highly complex topic comprising a wide variety of differing, and often conflicting, consumer preferences. While undoubtedly in need of ongoing assessment in the face of new challenges, the US federal government's sectoral, tailored model of privacy regulation remains the soundest method of regulating privacy.

Although the US does not have a single, omnibus, privacy regulation, this does not mean that the US does not have "privacy law." In the US, there already exist generally applicable laws at both the federal and state level that provide a wide scope of protection for individuals, including consumer protection laws that apply to companies' data use and security practices, as well as those that have been developed in common law (property, contract, and tort) and criminal codes. In addition, there are specific regulations pertaining to certain kinds of information, such as medical records, personal information collected online from children, credit reporting, as well as the use of data in a manner that might lead to certain kinds of illegal discrimination.

Before engaging in a deeply interventionist regulatory experiment—such as intervening in the design of algorithms or imposing strict privacy regulations in contravention to revealed consumer preferences—there should be empirically justifiable reasons for doing so; in the language of economics, there should be demonstrable market failures in the provision of "privacy" (however we define that term), before centralized regulation co-opts the voluntary choices of consumers and firms in the economy.

It surely might be the case that some consumers, abstractly speaking, would prefer one-hundred percent perfect privacy and security. It is also a certainty that, faced with tradeoffs—including the price of services, the number of features, the pace of innovation, ease of use and convenience—consumers are willing to settle for some lesser degree of privacy and security.

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