



# Yale University

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**What is the Optimal Regulatory Structure to Govern  
Digital Platforms?**

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Policymakers seeking to regulate the conduct and mitigate the harms of dominant digital platforms must determine where in the federal government to place – and how to empower and constrain – an effective regulator or regulators. This memorandum summarizes key institutional design considerations that policymakers should weigh when making these decisions, and evaluates several existing legislative proposals according to those considerations.

We find that an effective digital regulator – whether housed in a new or existing agency – will need clear authority to promulgate prophylactic rules. Any regulator must also comply with constitutional limits on delegation and tenure protection. These considerations counsel in favor of legislation that defines with particularity the types of conduct that the regulator is empowered to address, supported by detailed legislative findings.

## I. Institutional Design Considerations

We begin by analyzing the regulatory design considerations with which a digital regulator must contend. An effective regulator should have prophylactic rulemaking authority, and must comply with fast-changing constitutional limits on the scope of its delegated authority and tenure protection for its head(s). Accordingly, a regulator (or regulators) with clear authority to engage in rulemaking addressing specifically defined conduct – rather than one with plenary authority over “digital platforms” as a category – will likely be both most effective and best positioned to withstand legal challenges.

### A. *Prophylactic Rulemaking Authority*

An effective regulator should have clearly defined authority to regulate future conduct through prophylactic rules. Rulemaking authority is particularly important “in a field marked by rapid growth and innovation,” where regulated parties “must have clear ‘rules of the road’ that establish rights and responsibilities.”<sup>1</sup>

Federal agencies have two principal tools for carrying out their missions: adjudication and rulemaking.<sup>2</sup> Adjudication is by nature backward looking, with agencies evaluating past conduct and, if applicable, obtaining a remedy. It is also time and resource intensive: agencies must collect relevant facts and prepare a case before proceeding, and the ultimate resolution is of limited use in future cases.<sup>3</sup> Further, adjudication is particularly ill-suited for the task of

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<sup>1</sup> HAROLD FELD, *THE CASE FOR THE DIGITAL PLATFORM ACT: MARKET STRUCTURE AND REGULATION OF DIGITAL PLATFORMS* 172 (2019).

<sup>2</sup> PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON & ANNE JOSEPH O’CONNELL, *ADMINISTRATIVE LAW: CASES & COMMENTS* 26 (12th ed. 2018).

<sup>3</sup> See, e.g., Bryan Koenig, *FTC's Meta Case Split Up and Set For No Earlier Than 2024*, LAW360 (Mar. 3, 2022), <https://www.law360.com/articles/1470478/ftc-s-meta-case-split-up-and-set-for-no-earlier-than-2024>.

regulating powerful corporations like the dominant platforms. Even large fines may not adequately disincentivize corporate misbehavior when the financial rewards for such misbehavior are even greater.<sup>4</sup> And digital platforms' technological capabilities and business practices evolve rapidly, requiring a nimble regulatory response.

Accordingly, an effective digital regulator should have clear authority to make prophylactic rules. Such rules are generally passed after a notice-and-comment period, where regulated parties, interest groups, and the general public may comment on the proposed rule.<sup>5</sup> The notice-and-comment process takes significant time and agency resources, but allows for robust information-gathering by the agency and ultimately yields rules that carry the force of law and can regulate future conduct.<sup>6</sup> Agencies that make rules may also clarify those rules through guidance documents – informal statements of agency policy that do not need to go through notice and comment but that accordingly do not carry the force of law.<sup>7</sup> Guidance can be a useful tool to react quickly to new developments, but courts will invalidate guidance documents that attempt to create a “binding norm” for regulated parties.<sup>8</sup> Agencies must therefore phrase these documents tentatively,<sup>9</sup> but they can nonetheless provide useful guideposts for regulated parties seeking to understand how an agency might react to a particular factual scenario. These guidance documents, along with the prophylactic rules they interpret, would allow agencies to both regulate future conduct after collecting substantial public input and react quickly to market developments.

### *B. Compliance with the Nondelegation Doctrine*

A digital regulator must comply with the nondelegation doctrine, a constitutional constraint on Congress's authority to delegate its legislative power to executive agencies that is on the cusp of a doctrinal revival.

Since the rise of the modern administrative state, the nondelegation doctrine has been more of a theoretical constraint on federal agencies than a practical one.<sup>10</sup> The Supreme Court

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<sup>4</sup> See, e.g., Cecelia Kang, *F.T.C. Approves Facebook Fine of About \$5 Billion*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/technology/facebook-ftc-fine.html>.

<sup>5</sup> *Notice and Comment Rulemaking*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/sites/default/files/documents/IIB014-Rulemaking.pdf>.

<sup>6</sup> See *Learning from Regulatory Experience*, ADMIN. CONF. OF THE U.S., [https://www.acus.gov/recommendation/learning-regulatory-experience#\\_ftnref24](https://www.acus.gov/recommendation/learning-regulatory-experience#_ftnref24) (“Agencies have opportunities to learn from experience throughout the rulemaking lifecycle.”).

<sup>7</sup> Alexander Nabavi-Noori, Note, *Agency Control and Internally Binding Norms*, 131 YALE L.J. 1278, 1282 (2022) (“Unlike legislative rules . . . guidance documents lack formal legal force.”).

<sup>8</sup> *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

<sup>9</sup> See *Am. Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

<sup>10</sup> Keith E. Whittington & Jason Iulano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 383 (2017) (“The federal courts never posed a significant obstacle to the development of the administrative state and the delegation of extensive policymaking authority to executive officials.”).

has not invoked the doctrine to invalidate a congressional delegation to a federal agency in decades.<sup>11</sup> But the doctrinal landscape is shifting rapidly. Originalist judges are clamoring for a revival of the doctrine, despite serious doubts about the strength of the historical evidence underpinning their claims.<sup>12</sup> In a 2019 case, *Gundy v. United States*, the Supreme Court once again rejected a proposed expansion of the nondelegation doctrine. But four justices signaled that they would revisit the issue in an appropriate case.<sup>13</sup> The Court declined to hear a subsequent case raising a similar question, but Justice Kavanaugh indicated in a separate statement that the dissenters' analysis in *Gundy* "may warrant further consideration in future cases."<sup>14</sup>

Though it is apparent that change is coming, what comes next is far less clear. If the Court abandons its anything-goes approach to delegation, it must come up with a standard for how much delegation is too much. Justice Gorsuch's *Gundy* dissent suggests that several heuristics – that an executive agency can "fill in the details" of a policy program passed by Congress, or engage in fact finding – but they are vague and line drawing would be difficult.<sup>15</sup> Accordingly, it is difficult to assess with precision the effects of the potentially revived nondelegation doctrine on a new digital regulator. But any new regulatory scheme is likely to face a nondelegation challenge. It would be most likely to survive if Congress sets out specific policy objectives, so that the agency is "fill[ing] in the details" rather than designing the regulatory scheme from scratch.<sup>16</sup>

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<sup>11</sup> *Id.* at 384–85.

<sup>12</sup> See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

<sup>13</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* at 2134–35 (Gorsuch, J., dissenting) ("If Congress could pass off its legislative power to the executive branch, the vesting clauses, and indeed the entire structure of the Constitution, would make no sense.") (cleaned up).

<sup>14</sup> *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J.); see also *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("[I]f the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.").

<sup>15</sup> *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting); see also *Jarkesy v. SEC*, No. 20-61007, 2022 WL 1563613, at \*10 (5th Cir. May 18, 2022) (invalidating an agency action on nondelegation grounds because "Congress did not provide the SEC with an intelligible principle by which to exercise [its] power").

<sup>16</sup> A related doctrinal area in which the Court has more readily applied "non-delegation principles" is the major questions doctrine. Lee A. Steven, *Non-Delegation, Major Questions, and the OSHA Vaccine Mandate*, YALE J. ON REG. NOTICE & COMMENT (Nov. 8, 2021), <https://www.yalejreg.com/nc/non-delegation-major-questions-and-the-osha-vaccine-mandate-by-lee-a-steven>. Under this doctrine, the Court "has held that where a statutory ambiguity raises a question of great 'economic and political significance,' it will presume that Congress did not intend the agency to resolve the issue" and "will resolve the ambiguity itself." Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2022 (2018) (footnote omitted). Critics of this doctrine's application have noted that, by declining to give interpretive deference to agencies, the Court is "enhancing its own interpretive power" rather than transferring legislative authority back to Congress. Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1077 (2019). But the major questions doctrine has been reframed in recent decisions to stand for a broader principle: that the Court "expect[s] Congress to speak clearly when authorizing an agency to exercise

### C. Compliance with For-Cause Removal Restrictions

Any regulator must also comply with constitutional restrictions on for-cause removal of agency officials. These restrictions stem from Article II's grant of the federal government's executive power to the President. "That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties," since otherwise "the President could not be held fully accountable for discharging his own responsibilities."<sup>17</sup> Accordingly, executive branch officials are typically removable at will by the President.

There are two exceptions to this general presumption, however. First, if an agency is headed by a group of expert administrators – as the FTC is, for example – Congress may decide to protect those administrators from at-will removal.<sup>18</sup> Second, Congress may similarly protect minor agency officials with narrowly defined duties.<sup>19</sup> But when Congress tried to insulate a single agency head from at-will removal by the President, the Court held in *Selia Law*, a 2020 case, that those protections went too far. Such a structure, the Court found, "clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."<sup>20</sup>

There is, of course, good reason for insulating agency heads in this way. One study of the CFPB, the agency at issue in *Selia Law*, found that because regulation of consumer financial products yields "diffuse benefits and narrowly defined costs," insulation of the agency head forestalled interference from the regulated industry.<sup>21</sup> Still, any agency with a single head would not be able to shield that head with for-cause removal protection under current doctrine. And even a multi-headed agency might run afoul of the Court's analysis in *Selia Law*. In that case, the Court warned that "the contours of the *Humphrey's Executor* exception [for multi-member headed agencies] depend upon the characteristics of the agency before the Court."<sup>22</sup> In a future case, the Court would likely consider the factors that *Humphrey's Executor* emphasized: partisan balance of the multi-member body, the importance of accumulating technical expertise to serve on the multi-member body, and the performance of judicial and legislative (rather than executive) functions by the multi-member body.<sup>23</sup> A multi-headed agency lacking these features

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powers of vast economic and political significance." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (cleaned up); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665. To the extent that the major questions doctrine remains distinct from the nondelegation doctrine, it is unlikely to meaningfully constrain the design of a new regulator or regulators, so long as Congress speaks clearly by "expressly and specifically delegate[ing] to the agency the authority both to decide the major policy question and to regulate and enforce." *Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J.).

<sup>17</sup> *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14 (2010).

<sup>18</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

<sup>19</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>20</sup> *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

<sup>21</sup> Susan Block-Leib, *Accountability and the Bureau of Consumer Financial Protection*, 7 *BROOK. J. CORP. FIN. & COM. L.* 25, 27 (2012).

<sup>22</sup> *Seila L.*, 140 S. Ct. at 2198.

<sup>23</sup> *Id.*

would be vulnerable to legal challenges if its heads were insulated from at-will removal.

#### D. *Synthesizing These Considerations*

These considerations point to a single lesson: that a new regulator (or regulators) will be both more effective and more likely to withstand legal challenges if Congress grants clear rulemaking authority to address specifically defined problems or types of conduct. This insight connects with two broader points about effective digital platform regulation. First, digital platforms are a fluid and difficult-to-define category. Many of the largest digital firms engage in a variety of business lines, and some firms that engage in conduct that policymakers may wish to regulate are not platforms as traditionally understood. While a sensible definition is possible,<sup>24</sup> and regulators in other jurisdictions have designated particular firms as platforms subject to special regulation,<sup>25</sup> defining regulators by the problems they are empowered to address rather than the firms they are entitled to regulate avoids this messy line-drawing. Second, and relatedly, the umbrella of “digital platforms” aggregates a variety of policy problems—including competition, data privacy, self-dealing, social-media addiction, algorithmic radicalization, and child safety—into one unwieldy category. Each of these problems requires different sets of expertise and overlaps with existing bodies of knowledge at extant agencies to varying extents; further, a broad mandate across issue areas without further congressional guidance may lead to regulatory inertia and problems with priority-setting. Disaggregating the broader problem of digital platforms into more specific problems—many of which have been already explored in congressional hearings and investigations<sup>26</sup>—avoids these issues.

## II. **Evaluating Policy Options**

We now analyze a set of legislation before Congress based on the considerations discussed in Part II. Congress has several attractive options: it could expand the FTC’s mission and authority, it could create a new agency, or it could expand the FCC’s purview to digital platforms. Despite appearances to the contrary, there is no right option. Instead, each avenue presents unique challenges and risks, and the best design option will seek to affirmatively address the shortcomings of its chosen agency’s design.

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<sup>24</sup> FELD, *supra* note 1, at 4 (defining a digital platform as “(1) A service accessed via the internet; (2) [that] is two-sided or multisided, with at least one side open to the public that allows the public to play multiple roles (e.g., content creator as well as content consumer); and (3) which therefore enjoys particular types of powerful network effects”).

<sup>25</sup> See *Designation of Digital Platform Providers Subject to Specific Regulations Under the Act on Improving Transparency and Fairness of Digital Platforms*, MINISTRY OF ECON. TRADE & INDUS. (Apr. 1, 2021), [https://www.meti.go.jp/english/press/2021/0401\\_001.html](https://www.meti.go.jp/english/press/2021/0401_001.html).

<sup>26</sup> See, e.g., MAJ. STAFF OF H. SUBCOMM. ON ANTITRUST, COM. & ADMIN L., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020).

### A. *Expanded FTC Authority*

Several of the bills before Congress, including proposals by Senators Moran and Cantwell, would expand or clarify the FTC’s rulemaking authority.<sup>27</sup> In some cases, they provide for a new FTC Bureau of Privacy to engage in enforcement.<sup>28</sup> These proposals to empower the FTC to regulate digital platforms through its existing enforcement powers – and potentially new rulemaking authorities – are a serious option for members on both sides of the aisle.

The FTC is one of the country’s oldest independent agencies. As such, the constitutional issues around its structure and authority are well settled. It is long-established law, for example, that the FTC commissioners’ tenure protections are constitutional. This holding has been affirmed even as the Supreme Court has stripped away for-cause removal protections for other independent agency heads.<sup>29</sup>

Another advantage of the FTC is that it has a proven track record of resisting regulatory capture. The FTC has a broad mandate to “protect consumers and promote competition” and thus regulates many sectors. This makes it less prone to regulatory capture than sector-specific regulatory bodies, because it can withstand pressure from specific groups and is less reliant on industry buy-in to accomplish its mission.<sup>30</sup> Of course, the FTC can still make poor decisions regarding enforcement actions, and industry influence can still cloud its judgment. But given the power of the tech industry, a track record of resisting influence is an important quality in a would-be regulator.

The FTC, however, has several shortcomings as a regulator of digital platforms. For one, the FTC has not typically engaged in unfair methods of competition rulemaking, and there are serious doubts about whether the agency is even authorized to do so.<sup>31</sup> Chair Khan is attempting to dust off long-neglected rulemaking authorities to promulgate a series of notice-and-comment

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<sup>27</sup> See e.g., House Energy and Commerce Bill, § 15(a) (2021); Consumer Data Privacy and Security Act of 2021, S. 1494, 117th Cong. § 9 (2021); Mind Your Own Business Act, S. 1444, 117th Cong. § 6(c) (2021); SAFE DATA Act, S. 2499, 117th Cong. § 401 (2021); Information Transparency and Personal Data Control Act, H.R. 1816, 117th Cong. §§ 4(b), 5(b) (2021); Consumer Online Privacy Rights Act, S. 2968, 116th Cong. § 301(a) (2019); BROWSER Act of 2019, S. 1116, 116th Cong. § 6 (2019).

<sup>28</sup> House Energy and Commerce Bill, § 14, Consumer Data Privacy and Security Act, § 11; Mind Your Own Business Act, § 8; Consumer Online Protection Rights Act, § 301(a); Information Transparency and Personal Data Control Act, § 6(b).

<sup>29</sup> *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2199 (2020) (noting that *Humphrey’s Executor* upheld for-cause removal restrictions for the FTC because it was “a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power”).

<sup>30</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 50 (2011).

<sup>31</sup> Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 505 (2002).

rules on consumer protection, internet privacy, and unfair competition.<sup>32</sup> These rules will be an important test case for the FTC as a regulator with prophylactic rulemaking authority. Several proposed bills could bolster the statutory basis for the FTC's rulemaking powers. Senator Cantwell's proposal would provide the FTC with limited rulemaking authority related to the right of individuals to opt out of sensitive data collection and processing or to stop companies from transferring their data to third parties.<sup>33</sup> Other proposals, like Senator Moran's, would force the FTC to rely on existing powers. This would effectively limit the FTC to regulating through enforcement action against unfair or deceptive practices – an approach that has until now largely failed to check the power of digital platforms.

Second, the FTC staff is already spread thin. Without a major injection of new personnel and funding, the FTC will be unable to succeed at its expanded mission. Unfortunately, the funding and personnel increases in most proposals fall short. Representative DelBene's Information Transparency and Personal Data Control Act, for example, commits \$35 million and an additional 50 privacy and data security staff.<sup>34</sup> That is more generous than some proposals, but still insufficient for regulating some of the United States' most powerful companies. A better direction is sketched out in the bipartisan draft bill from the staff of the House Committee on Energy and Commerce, which proposes establishing a Bureau of Privacy with no less than 500 personnel.<sup>35</sup> Even with an injection of talent and funding, however, organizational inertia could hamper the agency's ability to regulate digital platforms. Moreover, as discussed below, an expanded FTC would still lack the energy and dynamism of a new agency.

Overall, the FTC presents a viable, if practically limited, approach to regulating digital platforms. Special attention should be paid to whether Congress will set up the FTC to succeed by providing new rulemaking authority and funding.

#### B. *Expanded FCC Authority*

The FTC and a new agency are the subject of most legislative proposals. But another option is hiding in plain sight: the FCC. Like the FTC, the FCC has a long history as an independent regulator, making it a more challenging target for a nondelegation or for-cause removal challenge. Unlike the FTC, however, the FCC has well-established rulemaking authority.<sup>36</sup> It also has experience in regulating a rapidly changing communication sector and administering complex licensing schemes. Congress has previously expanded the FCC's purview to reflect evolutions in communication technology. Given the challenges of regulating digital platforms, a regulator with a track record overseeing a complex and challenging industry is a

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<sup>32</sup> See Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

<sup>33</sup> Consumer Online Privacy Rights Act, §§ 104(d), 105(b).

<sup>34</sup> Information Transparency and Personal Data Control Act, § 6(b).

<sup>35</sup> House Energy and Commerce Bill, § 14.

<sup>36</sup> *Rulemaking Process*, FED. COMM. COM'N., <https://www.fcc.gov/about-fcc/rulemaking-process>.



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But there are several reasons to be cautious about the FCC as a platform regulator. First, although platforms share a lot in common with communication networks, they cannot be easily boxed in as another communication technology. In some ways, Meta resembles a dominant telephone provider like AT&T, though it also engages in other business lines. But what are we to make of Amazon or Apple, both of which are far more than communication mediums? The FCC's expertise, in other words, would be only a partial match for the challenges of platform regulation. Second, the FCC has a history of being pliable to industry demands—a source of particular concern, given the political influence of Big Tech. As an industry-specific regulator, the FCC is susceptible to regulatory capture.<sup>37</sup> The agency's cozy relationship with industry has led to industry-friendly regulation, but also a regulatory mindset that supports dominant firms. The FCC has often empowered entrenched players at the expense of new entrants and technology-enabled disrupters. As former Chair Powell put it, “[T]he history of the FCC is, when something happens that it doesn't understand, kill it. We tried to kill cable. We tried to kill long-distance. When [MCI founder] Bill McGowan start[ed] stringing out microwave towers that threatened AT&T, the FCC tried to stop him. The FCC tried to kill cable because it was going to threaten broadcasting.”<sup>38</sup>

These features of the FCC present cause for concern. But they do not mean that the FCC could not be an effective regulator of platform. Indeed, we would invite further proposals that seriously engaged with what a 21st-century FCC that regulates tech platforms could look like.

### C. *New Agency*

Several proposals would create a new agency to regulate digital platforms. Senator Brown's Data Accountability and Transparency Act would establish the Data Accountability and Transparency Agency (DATA), an independent agency within the executive with general enforcement and rulemaking authority related to privacy.<sup>39</sup> Senator Gillibrand's Data Protection Act of 2021 would create a Data Protection Agency (DPA). Like Senator Brown's DATA, the DPA would be an independent agency within the executive that has general enforcement and rulemaking authorities.<sup>40</sup> Most recently, Senator Bennet has teased a separate proposal for a five-person expert commission to oversee Big Tech.<sup>41</sup> Because Senator Bennet's proposal is

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<sup>37</sup> Norm Alster, *Captured Agency: How the Federal Communications Commission Is Dominated by the Industries It Presumably Regulates*, EDMOND J. SAFRA CENTER FOR ETHICS (June 23, 2015), [https://ethics.harvard.edu/files/center-for-ethics/files/capturedagency\\_alster.pdf](https://ethics.harvard.edu/files/center-for-ethics/files/capturedagency_alster.pdf).

<sup>38</sup> Adam L. Penenberg, *An Obscene Waste of Energy*, WIRED (Jan. 6, 2005), <https://www.wired.com/2005/01/an-obscene-waste-of-energy>.

<sup>39</sup> Data Accountability and Transparency Act, 116th Cong. §§ 301, 312 (2020).

<sup>40</sup> Data Protection Act of 2021, S. 2134, 117th Cong. § 3 (2021).

<sup>41</sup> Cat Zakrewski, *Senator Introduces Bill Giving Big Tech Its Own Federal Watchdog*, WASH. POST (May 12, 2022), <https://www.washingtonpost.com/technology/2022/05/12/michael-bennet-big-tech-regulator> (reporting that forthcoming legislation by Senator Bennet will propose a five-member commission to regulate Big Tech).

forthcoming, and details are in short supply, we will primarily focus on the DATA and the DPA proposals.

As an initial matter, both proposals must comply with the restrictions on for-cause removal discussed above. Senator Brown and Senator Gillibrand's proposals are immediately suspect because they create independent agencies headed by a single director with for-cause removal protections.<sup>42</sup> As discussed above, the CFPB's for-cause removal protections were struck down in *Seila Law*; a new agency based on either proposal would likely have their head's for-cause removal protections quickly invalidated as well. In contrast, an expert commission, like the one found in Senator Bennet's proposal, could likely sustain for-cause removal protections, thereby insulating its commissioners from at-will termination by the President.<sup>43</sup> Thus, one question that Congress faces is whether to choose a single agency head who is vulnerable to at-will removal or an expert commission that is insulated from at-will removal.

Where Congress lands on the issue depends on how valuable for-cause removal protections are for a new agency. Some scholars argue that the benefits of for-cause removal protection are largely illusory, since a President can always find ways to undercut the independence of an agency, including by proffering pretextual reasons for removing agency heads for cause.<sup>44</sup> If for-cause protections lack utility, Congress may want to establish a single-agency head to ensure that the new agency has energetic, decisive leadership.<sup>45</sup> Conversely, Congress may decide that a commission with members insulated by for-cause removal protections and staggered terms will provide a steady hand and the most consistent approach to regulating digital platforms.

Beyond agency structure, both the DATA and DPA proposals expressly grant the new agency expansive rulemaking authority. This is a positive step, given the need for prophylactic rulemaking to address digital platform abuse. However, for a new agency to avoid a nondelegation challenge and regulatory inertia, it will need specific grants of rulemaking authority to guide action. In this regard, Senator Brown's proposal is lacking. It provides for "general authority" to "prescribe rules and issue orders and guidance as may be necessary or appropriate to . . . carry out the purpose and objectives of this Act."<sup>46</sup> Beyond this general

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<sup>42</sup> Data Accountability and Transparency Act, § 301(c)(3); S. 2134, § 3.

<sup>43</sup> See *supra* Section II.C (discussing the factors that courts would look to when assessing the constitutionality of for-cause removal protections for a multi-member commission). The Court's analysis in *Seila Law* implied that it may still invalidate for-cause removal protections for a multi-member commission if the commission were too dissimilar to the commission at issue in *Humphrey's Executor*.

<sup>44</sup> See Adrian Vermeule, *Conventions of Agency Independence* 113 COLUM. L. REV. 1163, 1175 (2013) ("[F]or-cause tenure protection turns out to be neither necessary nor sufficient for the operational independence of administrative agencies.").

<sup>45</sup> Cf. Ganesh Sitaraman and Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 723 (2019) ("The central benefits of single-director agencies are that they better ensure agency efficacy at accomplishing statutory mandates, and that they offer clearer lines of responsibility and thus accountability for agency failures.").

<sup>46</sup> Data Accountability and Transparency Act, § 308(b).

allocation of authority, the bill only specifies that the agency may use this rulemaking authority to “prohibit[t] unfair, deceptive, or abusive acts and practices” – a broad and messy category of activity that does little to guide the agency’s actions.<sup>47</sup>

Senator Gillibrand’s proposal fares somewhat better, offering specific categories of rulemaking for the new agency to pursue. These include rulemaking authority for regulating or restricting “high-risk data practices,”<sup>48</sup> “acts or practices” that can cause privacy harms,<sup>49</sup> “unlawful, unfair, deceptive, abusive, or discriminatory acts or practices,”<sup>50</sup> as well as rulemaking authority to specify “rights that data aggregators must provide to individuals”<sup>51</sup> and “obligations on data aggregators” related to data collection, processing, and disclosure practices.<sup>52</sup> Even more specificity, including problems that Congress wants the new agency to address, would help. By naming specific categories for agency action, Congress would set up a new agency for success in using its rulemaking authorities.

Finally, a new agency would harness the energy and expertise of staff to regulate digital platforms. This is a key advantage to a new agency, which neither FTC nor FCC proposals can replicate. The “new agency effect” was pronounced for the CFPB, which recruited from a cadre of would-be regulators that were committed to the agency’s mission.<sup>53</sup> Given the importance of talent in implementing an agency’s mission, this advantage cannot be overstated. As has become clear from Chair Khan’s struggle to win over the staff of the FTC, reorienting an agency to meet a new mission can be difficult.<sup>54</sup>

Nevertheless, developing a stable team of expert agency staffers from scratch may be challenging. A new agency would need to be set up to succeed, with both the budget and the flexible hiring authority to bring in new talent. The CFPB had a budget of \$595.2 million in 2021, and a new agency would need a comparable outlay.<sup>55</sup> Of particular concern would be the need to hire staff members that have experience working at the country’s largest digital platforms. A new agency would have to offer an attractive mission and salary to recruit experts

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<sup>47</sup> *Id.* § 310(a).

<sup>48</sup> Data Protection Act of 2021, § 10 (b)(2)(A).

<sup>49</sup> *Id.* § 10 (b)(2)(B).

<sup>50</sup> *Id.* § 10 (b)(2)(C).

<sup>51</sup> *Id.* § 10 (b)(2)(D).

<sup>52</sup> *Id.* § 10 (b)(2)(E).

<sup>53</sup> Michael Grunwald, *Trump Wants to Dismantle Elizabeth Warren's Agency. Good Luck with That*, POLITICO (Dec. 13, 2017), <https://www.politico.com/magazine/story/2017/12/03/trump-cfpb-elizabeth-warren-215997> (quoting former CFPB director Richard Cordray, who observed that “the people who come [to the CFPB] really feel the mission”).

<sup>54</sup> Margaret Harding McGill & Shaley Gold, *Lina Khan's To-Do List on Big Tech*, AXIOS (May 12, 2022), <https://www.axios.com/2022/05/12/ftc-majority-lina-khan-to-do-list-big-tech> (reporting OPM survey showing low trust in senior leaders among FTC employees).

<sup>55</sup> CONSUMER FINANCIAL PROTECTION BUREAU, FISCAL YEAR 2020: ANNUAL PERFORMANCE PLAN AND REPORT, AND BUDGET OVERVIEW (Feb. 2020), [https://files.consumerfinance.gov/f/documents/cfpb\\_performance-plan-and-report\\_fy20.pdf](https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy20.pdf).

with former industry experience. At the same time, it would need to avoid regulatory capture and develop robust conflict-of-interest rules.<sup>56</sup>

In short, a new agency like the DPA or DATA is a compelling proposition. A new agency could be an energetic, mission-driven regulator of the tech industry.<sup>57</sup> But Congress would have to set up the agency to succeed. That includes both sufficient funding to staff up and rulemaking authorities to craft new regulations. It also requires careful consideration of how to provide clear mission guidance and insulate the agency from legal challenges. Current proposals are a great first step, but their sponsors should carefully consider these issues.

### III. Conclusion

Whichever approach Congress takes, it should ensure that any new regulator has ironclad rulemaking power and a clearly defined regulatory mission. Using and building upon the significant fact-finding that Congress has engaged in recently to specify the problems or types of conduct that the regulator is empowered to address would both guide a new regulator and better insulate it from legal challenges.<sup>58</sup>

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<sup>56</sup> Jacob R. Straus, *Executive Branch Service and the “Revolving Door” in Cabinet Departments: Background and Issues for Congress*, CONG. RSCH. SERV. (Oct. 7, 2019), <https://sgp.fas.org/crs/misc/R45946.pdf>.

<sup>57</sup> Tom Wheeler, *A Focused Federal Agency Is Necessary to Oversee Big Tech*, BROOKINGS (Feb. 10, 2021), <https://www.brookings.edu/research/a-focused-federal-agency-is-necessary-to-oversee-big-tech> (“The 21st-century need is for a 21st-century agency, not the repurposing of an agency designed in another era for another goal.”).

<sup>58</sup> Sandeep Vaheesan, *An Ultraconservative Federal Judiciary Means Congress Has to Work Even Harder*, BALLS & STRIKES (May 19, 2022), <https://ballsandstrikes.org/law-politics/congress-has-to-work-harder> (“Enacting clearer, more detailed statutory text reduces judicial discretion and can limit [the] usurpation of legislative power.”).