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Constructing the Digital Regulatory Ecosystem: Agency Collaboration

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INTRODUCTION

The U.S. is embarking on a new era of digital regulation. For decades, digital companies operated free from targeted laws. This is about to change. Over the last five years, there has emerged a bipartisan enthusiasm for digital regulation. In particular, there is a focus on controlling the digital giants that deliver online search, advertising, social media services and applications. These companies have seen an onslaught of Congressional investigations,[1] agency hearings,[2] and now legislative proposals that target a wide array of online harms.[3] The substance of this regulation is still taking shape, but its trajectory is clear—the U.S. is moving toward a more interventionist digital regulatory state.[4]

This essay argues that the most pressing challenge at this frontier of digital regulation is collaboration among federal agencies.[5] The word "collaboration" is meant to invoke the new profundity of agency interaction that will be necessary in the digital regulatory state. Digital regulation will

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[1] SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (2020); *Hearing on Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions, Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (2017).

[2] *Fed. Trade Comm'n., Hearings on Competition and Consumer Protection in the 21st Century, Hearing No. 12: The FTC's Approach to Consumer Privacy* 131 (Apr. 10, 2019).

[3] *See, e.g.,* American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021-2022); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021-2022); Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of H.R. 3849, 117th Cong. (2021); Open App Markets Act, S. 2710, 117th Cong. (2021-2022); American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022) (proposing omnibus federal privacy law); CYBERSPACE SOLARIUM COMM., COUNTERING DISINFORMATION IN THE UNITED STATES 15 (2021) (noting more than 40 bills were introduced in the 117th Congress referencing "disinformation" or "misinformation," an issue often intertwined with digital platform regulation).

[4] The term "regulatory state" has been used to refer to "the collection of federal government laws and institutions that determine significant aspects of social and economic policy." LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, THE REGULATORY STATE, preface (3rd ed. 2019). This essay coins the more specific term the "digital regulatory state" to refer to the subset of those laws and federal agencies with regulatory responsibility in the digital economy.

[5] Authors for this edition of the Virginia Journal of Law & Technology were prompted to frame the main challenges facing regulators in their fields.

require a complex and integrated ecosystem of regulatory control that goes beyond the mere agency cooperation of the past.

The online world suffers from systemic, interconnected problems of competition, privacy, labor, speech, health, corporate power and more, often all at once. Yet the legislation targeting these digital harms has often focused on isolated federal agencies and related areas of legal doctrine.[6]

This essay explains how such siloed thinking misses the fundamental nature of harms in the digital economy, which often transcend the jurisdiction of any single agency. Digital problems cannot be solved through action in any one area of administrative responsibility. These issues demand a digital regulatory ecosystem: administrative structures that emphasize not just the delegation of power from Congress to isolated agencies, but also the power of collaboration between agencies themselves.

The essay finds that the most prevalent mode of such agency interaction—the ad hoc memorandum of understanding—lacks the durability and consistency necessary for the challenges of digital regulation. It calls for Congress to construct a more robust digital regulatory ecosystem, by imposing systematic, statutory obligations on federal agencies to collaborate in their digital work.

A. "Houseboat" Problems in the Digital Economy Demand Agency Collaboration

Administrative law scholarship has traditionally viewed federal agencies as individual actors.[7] For years, the literature examined regulatory agencies in isolation, characterizing these entities as controlled by vertical relationships with the President, Congress and the courts.[8] These accounts tended to overlook the powerful and ubiquitous relationships among agencies themselves.

More recent administrative law scholarship places emphasis on the

[6] In the interest of space, this short essay focuses on federal regulation, though equally pressing concerns exist around state-level interagency collaboration, and state/federal interactions.

[7] Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011) ("administrative law scholarship has tended to contemplate agencies in isolation from each other, subject only to the control of Congress, the President, and the courts."); Verity Winship, *Enforcement Networks*, 37 YALE J. REG. 274, 330 (2020) (noting policy and academic debates often depict agencies as siloed "in solitary pursuit of their own statutory mandates.").

[8] Bradley, *supra* note 7, at 747 ("Traditionally, administrative agencies have been conceptualized as roughly independent actors, formulating and executing policy in their own domains"); Winship *supra* note 7, at 276 ("While agencies have relied on networks for decades, the study of coordinated agency action has been slow to catch up").

importance of interagency influence, both in the relationships between agencies themselves and in the indirect exercise of executive power.[9] Keith Bradley argues that the administrative state is not just a series of vertical silos, but rather "an interlocking web of relationships between agencies, in which the influence that agencies have on each other may be as important as their direction by the executive and legislative branch."[10] Verity Winship similarly conceives of agencies as operating in networks, exercising their power through interconnections with other federal and state agencies.[11] Jody Freeman and Jim Rossi reinforce these views, observing a recent "proliferation" of interagency coordination efforts in response to the increased complexity and scope of modern government.[12] What emerges is a newer perspective on the administrative state, in which the government and courts continue to exert vertical control over agencies, but just as importantly, those agencies also exert horizontally influence over each other.

This essay builds on existing literature in the more specific context of digital regulation. It observes that this older pattern of siloed thinking about agencies is now being repeated in efforts to construct a digital regulatory state. Digital debates gravitate toward the role of solitary agencies in regulation, and the congressional power over each agency. The zeal for new laws to control digital giants includes many single-agency solution—various bills propose a new digital regulator,[13] a new privacy regulator,[14] and a new commission on misinformation.[15]

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[9] Bradley, *supra* note 7, at 748.
[10] *Id*. at 746.
[11] Winship *supra* note 7, at 276 ("Agencies do not work alone, but in fact exercise power via networks, in tandem with other federal and state agencies as well as foreign powers.").
[12] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARVARD L. REV. 1131, 1155 (2012).
[13] *See, e.g.,* Digital Platform Commission Act of 2022, S. 4201, 117th Cong. (2022); Digital Platform Commission Act of 2022, H.R. 7858, 117th Cong. (2022) (proposing the creation of a new digital regulatory agency); *see also* STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS FINAL REPORT 100 (2019) https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf (calling for the establishment of a new federal digital regulator); TOM WHEELER ET. AL., NEW DIGITAL REALITIES: NEW OVERSIGHT SOLUTIONS IN THE U.S. THE CASE FOR A DIGITAL PLATFORM AGENCY AND A NEW APPROACH TO REGULATORY OVERSIGHT 5 (2020) (same). *But see* American Choice and Innovation Online Act, H.R. 3816, 117th Cong. §4 (2022) (establishing a new Bureau within the Federal Trade Commission (an existing federal agency) to regulate "digital markets," rather than a new agency).
[14] *See, e.g.*, The Online Privacy Act of 2021, H.R. 6027, 117th Cong. (2022) (proposing a new privacy regulator).
[15] Educating Against Misinformation and Disinformation Act, H.R. 6971, 117th Cong. (2021-2022) (proposing the establishment of a new commission to "support information and media literacy education and to prevent misinformation and disinformation.").

However, the mandates of each new agencies would overlap with several existing agencies with regulatory responsibility in the digital space. For example, a new digital regulator would face a mish-mash of regulatory power already exercised by the Federal Communications Commission over companies that provide internet service, and by the agencies that enforce consumer protection law, like the Consumer Financial Protection Bureau and the Federal Trade Commission. Recent FTC actions could easily overlap with the responsibilities of a new digital regulatory agency, as they span social media,[16] cryptocurrency,[17] online credit service providers,[18] and tax filing software.[19] While administrative redundancy is not always negative,[20] the success of the emerging digital regulatory state demands greater emphasis on the power and role of interagency relationships.

There is a particular need for agency collaboration in digital regulation because so many digital problems transcend existing regulatory domains. The digital world is rife with what Professor Kiel Brennan-Marquez labels "houseboat" problems—multi-dimensional policy challenges in which new technologies do not fit neatly within existing law.[21] In his law and technology class, Brennan-Marquez asks students to imagine a world in which there is a legal regime applicable to houses, and another legal regime applicable to boats.[22] Then, a houseboat is invented. Which law applies, that of houses or that of boats or both? Or perhaps the solution lies elsewhere, such as the development of a new field of "houseboat law"?

This hypothetical extends nicely to dilemmas of agency jurisdiction. Should the houseboats be subject to the housing regulatory agency, because houseboats serve the same function as a home? Or should the houseboats be subject to the boating regulatory agency, because of the safety risks created by their location on the water? Perhaps both agencies should share

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[16] Fed. Trade Comm'n. v. Facebook, Inc., 581 F. Supp. 3d 34, 41 (D.D.C. 2022).
[17] Fed. Trade Comm'n., *FTC Sends Refunds to Victims of Deceptive Money-Making Schemes Involving* Cryptocurrencies, Nov. 4, 2020, https://www.ftc.gov/news-events/news/press-releases/2020/11/ftc-sends-refunds-victims-deceptive-money-making-schemes-involving-cryptocurrencies.
[18] Complaint, *In the Matter of Credit Karma*, LLC (F.T.C., Sept. 1, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2023138-credit-karma-llc
[19] Fed. Trade Comm'n., *FTC Sues Intuit for Its Deceptive TurboTax "free" Filing Campaign*, March 29, 2022, https://www.ftc.gov/legal-library/browse/cases-proceedings/1923119-intuit-inc-matter-turbotax.
[20] Freeman & Rossi, *supra* note 12 at 1138-39 (summarizing debate over the pros and cons of bureaucratic redundancy, which can have benefits such as insuring against single agency failures).
[21] *See* Rebecca Crootof & BJ Ard, *Structuring Techlaw*, 34:2 HARVARD J. OF L. & TECH. 348, 364 (describing Kiel Brennan-Marquez's helpful analogy, which is adapted here to apply to agencies).
[22] *Id*.

jurisdiction, but what are the parameters of that shared responsibility? It could also be that neither agency has the appropriate expertise, and a new houseboat regulatory agency must be established. The answers to these questions have great potential to result in omissions, conflicts or overlaps in the houseboat regulatory regime.

Digital technologies often present "houseboat problems" that span the bounds of agency jurisdiction. Is cryptocurrency a currency or a security, or something new entirely?[23] The answer dictates whether jurisdiction over cryptocurrency regulation is exercised by the Securities and Exchange Commission, as the federal securities regulator, or by the Office of the Comptroller of Currency, as the U.S. banking regulator. Is an internet-connected medical implant regulated by the Food and Drug Administration because the FDA has jurisdiction over devices used for medical treatment? Or is it regulated by the Federal Communications Commission because the device connects to the internet? The answer is often that multiple agencies share regulatory responsibility over such innovative digital goods and services. This shared space is what makes interagency collaboration so imperative in the digital economy.

Further complicating the task of digital regulation, big tech companies seem to defy the organizational principles of the regulatory state.[24] The phrase "big tech" is commonly used to refer to the large technology companies that have become synonymous with debates over digital regulation. These are often understood to include Alphabet/Google, Meta/Facebook, Amazon, Apple and at times also Microsoft and Twitter. These companies do not fit well with the historical approach of organizing the regulatory state by particular industry. The earliest federal agencies were industry-specific, like the Office of the Comptroller of the Currency established in 1863 to regulate national banks,[25] and the Interstate Commerce Commission, created in 1887 to protect the public from powerful railroad giants.[26] But unlike the singular focus of early giants in railroads or banking,

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[23] Very recently, cryptocurrency regulation has begun to emerge as a bright spot of interagency collaboration, in contrast to the other areas of digital regulation discussed in this essay. See Exec. Order No. 14,067 on Ensuring Responsible Development of Digital Assets, 87 Fed. Reg. 14143 §3 (March 14, 2022) (emphasizing a "whole of government" interagency approach to cryptocurrency regulation); WHITE HOUSE BRIEFING ROOM, *White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Assets* (Sept. 16, 2022) (describing a framework jointly developed by several federal agencies to advance the priorities identified in the Executive Order on Ensuring Responsible Development of Digital Assets).

[24] The term "big tech" is employed here (albeit reluctantly) because of its common usage, with the caveat that its generality can be unhelpful in certain digital policy discussions.

[25] The National Banking Act of Feb. 25, 1863, c. 58, 12 Stat. 668.

[26] Interstate Commerce Commission Act of Feb. 4, 1887, c. 104, 24 Stat. 379.

big tech companies operate a web of businesses that span a broad range of industrial categories. These firms provide computer hardware, software, online search, social media, advertising, cloud services, groceries, consumer products, distribution, artificial intelligence, self-driving cars and virtual reality, just to begin the list.

Nor do big tech companies fit well within later approaches to organizing the regulatory state. Instead of industry-specific agencies, later federal regulators were tasked with remediating a particular type of public harm. Examples include securities fraud (the Securities and Exchange Commission), environmental degradation (the Environmental Protection Agency) and aviation safety (the Federal Aviation Administration), among others. But the public concerns raised by digital giants defy any singular categorization. Policymakers attribute a wide range of harms to large technology firms, from diminished competition,[27] declining media plurality,[28] and addictive products[29] to online disinformation,[30] invasions of digital privacy[31] and more.[32] These digital harms often seem systemic and interconnected, making each hard to disentangle from the others in structuring regulatory intervention.

This transcendence of the administrative state's organizational lines explains, at least in part, why digital giants have gone largely unregulated in the U.S. These companies seem to fit in part everywhere, and yet precisely nowhere within the existing regulatory state. It also explains why the flurry of recent digital policy action is not centralized in any one area of legal doctrine—it seeks to address online problems that are systemic and

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[27] *See generally*, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS, *supra* note 1.

[28] Journalism Competition and Preservation Act of 2021, S.673, 117th Cong. (2022) (proposing a temporary antitrust law safe-harbor for print and print, broadcast, or digital news companies to collectively negotiate with online content distributors for content licensing).

[29] James Niels Rosenquist, Fiona M. Scott Morton & Samuel N. Weinstein, *Addictive Technology And Its Implications For Antitrust Enforcement*, 100 N.C. L. REV. 431 (2022).

[30] *See, e.g.,* Educating Against Misinformation and Disinformation Act, H.R. 6971, 117th Cong. (2021-2022).

[31] Trade Regulation Rule on Com. Surveillance and Data Security: A Proposed Rule by the Federal Trade Commission, 87 Fed. Reg. 51273 (Aug. 22, 2022) (to be codified at 16 C.F.R. chpt. 1) (advance notice of proposed rulemaking on commercial surveillance and data security practices that harm consumers).

[32] The lengthy list of digital concerns often includes perceived partisan bias in moderation of content, and even the facilitation of crimes such as sex trafficking. *See* Ending Support for Internet Censorship Act, S.1914**,** 116th Cong. (2019-2020) (prohibiting large social media companies from engaging in perceived "political bias" in moderation); Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2017) (amending the Communications Act of 1934, 47 U.S.C. 230).

pluralistic.

Most importantly here, this transcendence of the administrative state by big tech creates challenges of agency collaboration. No single agency is likely to be tasked with the problems of the digital economy, nor should it be. Instead, the digital regulatory state will involve overlapping congressional delegations of power to several agencies, and to some extent already does. Every agency that touches digital regulation—which is becoming nearly every agency—will face an unprecedented need to collaborate with other agencies in their digital work.

Collaboration among these "digital" agencies is in the best interest of all stakeholders, from lawmakers and consumers to the agencies themselves. First and foremost, agency collaboration is likely to improve the quality of regulatory decision-making and outcomes in the complex digital world. Broader administrative law literature suggests that interagency collaboration often helps enforcers to think more holistically and to avoid regulatory blind spots, because it harnesses the collective expertise of multiple agencies to catch important risks or impacts that single agency might overlook.[33] This is particularly true when the nature of the regulatory problem is systemic, and requires action across multiple areas—like the task of digital regulation. Collaboration among agencies will muster the regulatory expertise needed to address the multi-faceted issues of the digital economy.

This agency collaboration also provides a more subtle but important signal of strength through alignment. Even for sophisticated federal regulators, digital giants present formidable, well-resourced opponents. Effective interagency collaboration adds heft to the regulatory stick wielded by agencies; it signals the threat of not just a lone agency, but rather the collective power and expertise of many enforcers working together in the digital space.

The stakes of failing to collaborate are high. At best, siloed enforcement may be redundant or inconsistent, wasting the already-scarce resources of these agencies with unnecessary overlap. Without effective collaboration, agencies with interrelated mandates also risk substantive conflict in their overlapping efforts to regulate the digital space.[34] At worst, failures to collaborate will leave regulatory gaps. The multi-faceted nature of many issues in the digital world makes it particularly likely that blinkered single-

[33] Freeman & Rossi, *supra* note 12, at 1184 ("[Interagency consultation] processes can force agencies to consider valuable information they might otherwise overlook, would prefer to overlook, or lack the expertise to produce themselves . . . [It] can help agencies to think more holistically and can help to mitigate systemic risk.").

[34] *See, e.g.,* Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. F. 647, 657-660 (2021) (discussing the under-emphasized tension between data privacy and competition).

agency action could miss serious misconduct.

While agencies may hesitate to collaborate, lest it erode the scope of their power, the instinct should be the opposite. History shows that when agency collaboration fails, the executive branch may respond by re-allocating responsibilities to a newly-created agency. This results in a much greater loss of jurisdiction than would arise from collaboration among the original agencies. President Richard Nixon created the Environmental Protection Agency (EPA) in 1970 in response to failures of regulatory coordination between the Food and Drug Administration and U.S Department of Agriculture. The agencies' ineffective attempts to coordinate the regulation of pesticides drew significant criticism,[35] and each lost part of their mandate to the new EPA.

Today, a similar threat hangs over enforcers with responsibility for digital regulation.[36] Proposals to establish a new privacy agency,[37] and a digital regulator,[38] reflect a certain dissatisfaction with existing agencies' efforts to police digital misconduct. If agencies cannot collaborate in effective digital regulation, they risk losing part of their power to a new enforcer.

Other jurisdictions have already begun to construct agency ecosystems in response to the challenges of digital regulation. In 2017, with the endorsement of European Parliament,[39] EU regulators launched the Digital Clearinghouse. The Clearinghouse is a network of regulators who share authority over the digital sector, including authorities in competition, data protection and consumer protection law.[40] The initiative aims to improve the effectiveness of digital regulatory action, by providing agencies with a forum to exchange information on policy issues that transcend their respective

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[35] Environmental Protection Agency, Reorganization Plan No. 3 of 1970, July 9, 1970, https://archive.epa.gov/epa/aboutepa/reorganization-plan-no-3-1970.html (archived announcement of the creation of the EPA and noting "the present governmental structure for dealing with environmental pollution often defies effective and concerted action.").

[36] Interestingly, the same council that recommended the creation of the EPA—the Ash Council on Executive Organization— also recommended that the FTC be abolished and replaced with two newly created, separate agencies: one for consumer protection and the other for antitrust law enforcement. *See* American Bar Association, *Report of The Section of Antitrust Law on the Ash Council Report*, 40 ANTITRUST L.J. 220, 220-222 (1970).

[37] *See, e.g.*, The Online Privacy Act of 2021, H.R. 6027, 117th Cong. (2022).

[38] *See, e.g.,* Digital Platform Commission Act of 2022, S. 4201, 117th Cong. (2022); Digital Platform Commission Act of 2022, H.R. 7858, 117th Cong. (2022).

[39] European Parliament Resolution of 14 March 2017 on Fundamental Rights Implications of Big Data: Privacy, Data Protection, Non-Discrimination, Security and Law Enforcement, 2018 O.J. (C 263) 1, R.

[40] DIGITAL CLEARINGHOUSE, *About*, https://www.digitalclearinghouse.org/ (last visited September 20, 2022). It is fair to ask whether antitrust law (or competition law, as it is called internationally) is truly "regulatory" in nature. *See generally* Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998) (observing that antitrust law has taken a regulatory turn in its nature).

jurisdictions, interrelated legislative developments and best practices for collaboration.[41] In 2021, the U.K. formed a similar digital regulatory forum between its competition, privacy and telecommunications agencies.[42] The U.K. competition authority and privacy regulator have since carried out a high-profile, joint investigation into Google's proposed termination of third-party cookies on its Chrome browser. The investigation ended with commitments from Google meant to resolve the concerns of both agencies.[43] These initiatives are not proffered here as the perfect solution for digital collaboration, but instead to demonstrate international recognition of "an urgent need for coherent enforcement . . . in all domains of law regulating online markets."[44]

The U.S. is at a much earlier stage in its digital collaboration among federal enforcers. There are no multilateral cooperation initiatives between the equivalent U.S. agencies, such as the Federal Communications Commission (the telecommunications regulator), the FTC (a consumer protection, competition and privacy regulator),[45] or the Consumer Financial

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[41] Giovanni Buttarelli, *The Clearinghouse Gets to Work,* EUROPEAN DATA PROTECTION SUPERVISOR (May 29, 2017), https://edps.europa.eu/press-publications/press-news/blog/digital-clearinghouse-gets-work_en ("The core aim is to respond to the calls from dozens of regulators to allow a space for dialogue and to identify how their respective actions might be made more effective.").

[42] U.K. Competition Markets Authority (CMA), *Policy Paper: Digital Regulation Cooperation Forum Launch Document* (July 1, 2021), https://www.gov.uk/government/publications/digital-regulation-cooperation-forum (announcing the formation of a Digital Regulation Cooperation Forum between the U.K. competition agency, privacy agency and telecommunication agency to "support regulatory coordination in digital markets, and cooperation on areas of mutual importance."); *Opinion on Coherent Enforcement of Fundamental Rights in the Age of Big Data*, EDPS Opinion 8/2016 at 15 (Sept 23, 2016) (recommending the establishment of the Digital Clearinghouse in response to "an urgent need for coherent enforcement of digital rights in all domains of law regulating online markets.").

[43] CMA, Decision to Accept Commitments Offered by Google in Relation to its Privacy Sandbox Proposals, Case No. 50972, Feb. 11, 2022, https://assets.publishing.service.gov.uk/media/62052c52e90e077f7881c975/Google_Sandbox_.pdf; U.K. Information Commissioner's Office, ICO Statement on the Google Privacy Sandbox (Feb. 11, 2022), https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/02/ico-statement-on-the-google-privacy-sandbox/.

[44] EDPS Opinion 8/2016, *supra* note 42, at 15 (recommending the establishment of the Digital Clearinghouse); CMA, *Policy Paper: Digital Regulation Cooperation Forum Launch Document*, *supra* note 42, at 1(observing that "the unique challenges posed by the regulation of online platforms require an even greater level of regulatory cooperation" between the agencies than in the past).

[45] Though it is worth noting that the FTC has participated in some Digital Clearinghouse meetings. Statement From The Third Meeting of the Digital Clearinghouse, June 21, 2018 https://edps.europa.eu/sites/edp/files/publication/18-06-

Protection Bureau (also a consumer protection regulator). The Federal Communications Commission and the Federal Trade Commission have entered into memoranda of understanding, but these agreements are bilateral only, and present various other challenges that are discussed later in this essay.[46]

This lack of collaboration in the U.S. digital space is likely to be exacerbated by pending bills. There is bipartisan support for a new federal privacy regulator,[47] and for a new digital agency with the power to regulate large digital firms in the "public interest."[48] Both agencies would have mandates that overlap with those of existing regulators like the FTC, which uses the FTC Act to combat digital misconduct related to data privacy and consumer protection.

These differences separating the U.K. and the EU from the U.S. may be explained in part by agency structure. Unlike the multi-agency responsibilities in the U.K. and EU that spawned efforts like the Digital Clearinghouse, the U.S. tasks a single agency—the FTC—with several of the same areas of enforcement responsibility. The FTC is the main federal enforcer for three areas of law: privacy,[49] competition, and consumer protection law, though other agencies are also tasked with the latter two areas of law. Since coordination across these areas of law by the FTC would occur internally within one agency—rather than across agencies—it could be that the FTC's collaboration is simply less visible than in jurisdictions with separate regulators.[50]

22_third_meeting_digital_clearinghouse_statement_en.pdf (last visited February 28, 2023) (noting FTC participation).

[46] *See, infra* at B. *The Essential, Inadequate Memoranda of Understanding*.

[47] *See, e.g.*, The Online Privacy Act of 2021, H.R. 6027, 117th Cong. (2022). The creation of a new and separate privacy agency would align the U.S. with global norms, as most nations with omnibus privacy laws also have a dedicated privacy law enforcer. Other federal privacy bills would expressly vest privacy law enforcement with a new Bureau of the FTC. *See, e.g.*, American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022). This would replicate the cross-Bureau collaboration challenges discussed in the text above.

[48] Digital Platform Commission Act of 2022, S. 4201, 117th Cong. §4 (2022) (establishing a digital agency that would focus its attention on the regulation of digital firms, but with a wide mandate to regulate in the "public interest," including in the interests of consumer protection, competition, public safety and to encourage the marketplace of ideas online).

[49] The FTC uses its general consumer protection powers under Section 5 of the FTC Act to protect data privacy, in the absence of federal omnibus privacy legislation. *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 598-600 (2014) (describing and labelling the emergence of a "new common law of privacy" through the FTC's use of its authority under Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1) (2018)).

[50] More generally, Freeman and Rossi also observe that agencies engage in various forms of internal cooperation within and between agencies, such as "routinely exchang[ing]

Still, a lack of visibility is not a full explanation for this gap in cooperation. The internal Bureaus of the FTC exercise their doctrinal areas of responsibility as though each *is* a separate agency. One FTC Bureau enforces competition law, while another enforces both consumer protection and privacy law.[51] The agency's main powers in each area of law are conferred by separate legislative clauses, which were added to the FTC Act at different times.[52] This separation is reflected in the day-to-day agency operations. There are no internal goals or performance metrics that crossover between the two Bureaus—all are delineated separately.[53] There have been no publicly disclosed joint investigations by both Bureaus. Instead, we see only the very beginning of cross-doctrinal thinking in statements from agency leadership—in a 2021 report to Congress, the Chair of the FTC acknowledged that the agency is beginning to focus on "the overlap between data privacy and competition."[54] While this awareness is a positive start, it suggests that cross-silo collaboration has yet to be institutionalized or operationalized to the extent of other jurisdictions, either within the FTC Bureaus or among the other agencies that share digital regulatory responsibility, like the FCC and the CFPB. Despite differences in its agency structures, the U.S. thus faces a similar challenge as other jurisdictions: collaboration across agency silos to achieve effective digital regulation.

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information and intelligence, manag[ing] jurisdictional conflicts, and work[ing] cooperatively on policy issues in ways that can be largely invisible and hard to track." *Supra* note 12, at 1156.

[51] FED. TRADE COMM'N., Bureaus & Offices, https://www.ftc.gov/about-ftc/bureaus-offices (last visited Feb. 20, 2023). The FTC also has a separate Bureau of Economics. *Id*.

[52] The FTC was initially granted only competition powers. Its consumer protection powers were conferred later, with the passage of the 1938 Wheeler-Lea Act. 15 U.S.C. § 45(a)(1) (declaring unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . ").

[53] *See* Fed. Trade Comm'n., *Federal Trade Commission Annual Performance Report for 2021 and Annual Performance Plan for Fiscal Years 2022 to 2023*, 4-7 (annual goals and performance metrics). Note, however, that one metric tracks the number of investigations or cases in which evidence or information was shared between the FTC and other U.S. federal, state or local agencies. *Id*. at 4 (metric 1.3.1).

[54] Fed. Trade Comm'n., *FTC Report to Congress on Privacy and Security* 4 (Sept. 13, 2021) (emphasizing that the agency will "spend more time on the overlap between data privacy and competition."); *See also* Nominations Hearing: Questions for the Record Jonathan Kanter Nominee to be Assistant Attorney General of the Antitrust Division Before the S. Comm. on the Judiciary, 117th Cong. 2 (2021) (Jonathan Kanter responses to questions from Senator Grassley, Ranking Member, S. Comm. on the Judiciary) ("Effective antitrust enforcement should address the full range of competitive harm in markets involving the extraction and use of data. These include, among other things, *harms related to privacy*, innovation, resiliency of technology infrastructure.") (emphasis added).

B. The Essential, Inadequate Memoranda of Understanding

How have federal agencies sought to collaborate so far? This short essay does not review all of the potential modes of interagency cooperation, which are summarized well in other work.[55] Instead, it focuses on the most pervasive and visible tool of federal agency cooperation—the memorandum of understanding (MOU).[56]

MOUs are simply agreements reached between the leadership of one or more agencies at a particular moment in time. While MOUs have long been used to memorialize cooperation plans with foreign nations or entities, more recently these agreements have become popular in domestic agency cooperation as well.[57] The FTC again provides a useful example. The agency identifies 53 cooperative agreements reached with other entities, of which seven are other U.S. agencies.[58] Of those seven, five of the agreements were reached or revised in the last decade.[59]

The strengths and weaknesses of the MOU as a tool of interagency

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[55] *See, e.g.,* Freeman & Rossi, *supra* note 12, at 1155-1180 (cataloguing a variety of substantive and procedural forms that interagency collaboration may take in the context of environmental regulation).

[56] *Id.* at 1161 (observing that MOUs are "the most pervasive instrument of coordination in the federal government"); Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6:4 ADMIN. L. REV. 199, 203-204 (2021) (observing that ,for agencies tasked with regulating labor market, the "primary means of coordinating policy and enforcement priorities are through memoranda of understanding (MOUs) and other informal mechanisms.").

[57] Hafiz, *supra* note 56, at 218 ("a significant proportion of *all* labor MOUs since 1970—a full 34%—were signed during the Obama administration . . "); *see also infra* note 58.

[58] *See*, FED. TRADE COMM'N., *Legal Library: Cooperation Agreements,* https://www.ftc.gov/legal-library/browse/cooperation-agreements (last visited Feb 15, 2023) (listing a total of 53 agreements, all but seven of which are with foreign nations or other foreign entities).

[59] *See id*. (listing, within the last ten years, new MOUs with the National Labor Relations Board, Consumer Financial Protection Bureau, Department of Veteran Affairs, the Commodity Futures Trading Commission and a revised agreement with the Federal Communications Commission). Prior to this, the FTC's domestic agency agreements were more occasional, and included agreements with the U.S. Department of Agriculture (1999), the Food and Drug Administration (1971), and the Federal Communications Commission (dating to at least 2003). *Id*.; The Department of Justice, Antitrust Division (the other U.S antitrust enforcer along with the FTC) has also reached several recent MOUs, including with the Securities and Exchange Commission in 2020, and with both the Department of Labor and National Labor Relations Board in 2022. Memorandum of Understanding between the Antitrust Division, Department of Justice and the Securities and Exchange Commission Relative to Cooperation with Respect to Promoting Competitive Conditions in the Securities Industry (June 22, 2020); Memorandum of Understanding Between the U.S. Department of Justice and U.S. Department of Labor (March 20, 2022); Memorandum of Understanding Between the U.S. Department of Justice and the National Labor Relations Board (July 26, 2022).

cooperation lie in its i) variable contents and ii) voluntary nature on the part of agencies that enter into such agreements. These traits are what make MOUs popular with agencies and, at times, useful.[60] But they also make the heavy, current reliance on MOUs a problem for the future of digital regulation.

The contents of an MOU are entirely determined by the agencies who agree to it, which means MOUs vary widely.[61] This adaptability can be a benefit, making MOUs useful to implement a wide array of interagency coordination. Some MOUs are simply used to agree in principle to the value of cooperation, and to establish basic processes for such cooperation.[62] Others are used to delineate each agency's responsibilities in complex areas of overlapping jurisdiction.[63] Still others involve more substantive promises of cooperation and information sharing, such as strategic collaboration to build agency capabilities. For example, the Department of Homeland Security and the Department of Defense agreed in 2010 to collaborate on strategic planning for national cybersecurity, including mutual support of personnel, facilities and funding to advance this shared mission.[64]

However, this variability in the contents of MOUs can also be a major weakness. Despite their existence as a tool of cooperation, MOUs need not provide for much in the way of substantive cooperation. Some MOUs detail as many caveats, warnings and limits on agency interactions as they do voluntary plans to cooperate.[65] These paper tigers do little to advance interagency cooperation.

It is also important to understand that MOUs are voluntary. Agencies choose to enter into these agreements, then choose what, if any, action to

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[60] Freeman & Rossi, *supra* note 12, at 1192 ("Nonbinding agreements such as MOUs are highly valuable because of their relative informality, ease of enactment, and adaptability.").
[61] *Id*. at 1161 (". . . [T]here appears to be no generally applicable statutory or executive branch policy regarding the use of MOUs, leaving their content largely to the discretion of the agencies.").
[62] *See, e.g.,* Memorandum of Understanding between the Antitrust Division, Department of Justice and the Securities and Exchange Commission Relative to Cooperation with Respect to Promoting Competitive Conditions in the Securities Industry, §1-3 (June 22, 2020).
[63] *See, e.g.,* FCC-FTC Consumer Protection Memorandum of Understanding 2 (November 2015), https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcfcc-mou.pdf (delineating the agencies' position that their jurisdiction overlaps because the statutory exclusion of certain telecommunications companies from the FTC's jurisdiction does not preclude the FTC from addressing misconduct unrelated to the carrying telecommunications signals).
[64] Memorandum of Agreement Between the Department of Homeland Security and the Department of Defense Regarding Cybersecurity (Sept. 27, 2010), https://www.dhs.gov/xlibrary/assets/20101013-dod-dhs-cyber-moa.pdf.
[65] *See, e.g.,* Memorandum of Understanding Between the U.S. Department of Justice and the National Labor Relations Board 1, 4-6 (July 26, 2022), https://www.justice.gov/opa/press-release/file/1522096/download.

pursue in accordance with the MOU. This can be an advantage, because MOUs are relatively easy and quick to enact, and simply require agreement between the current agency leadership. Federal agencies regularly enter into MOUs because of this informality. One study finds that since 1970, there have been over 113 memoranda of understanding between just the ten agencies that share responsibility for certain labor regulation.[66]

The voluntary nature of MOUs is also evident in the easy exit they may provide for the agencies involved. For example, the Department of Justice, Antitrust Division, a federal antitrust law enforcer, recently reached an MOU with the Department of Labor that provides for termination on 90 days' notice.[67] The FTC's agreement with the National Labor Relations Board, entered into around the same time, is terminable on just 30 days' notice.[68] Such termination provisions make MOUs potentially quite transitory as a tool of cooperation—though agency leadership may choose to just ignore the MOU rather than formally exit it.

Perhaps most significantly, the voluntary nature of MOUs means that the signing agencies are not actually required to take any action under these agreements. If the agencies fail to comply with an MOU, the obligations are not generally enforceable by the courts, Congress, interested parties, or even by the agencies that signed the agreement.

The unenforceable nature of MOUs means that these agreements may be entered into and quickly forgotten. The intent to cooperate may lay fallow for various reasons,[69] including very real resource constraints on the agencies involved. MOUs are also susceptible to being ignored or exited as political winds change. Freeman and Rossi observe that, as ad hoc and unenforceable agreements, MOUs may languish after agency signing and can prove unstable across political administrations.[70] Since federal agencies are part of the executive branch, it is fair to expect shifting political priorities to have some influence.[71] The problem is that even if political leadership changes the

[66] Hafiz, *supra* note 56, Appendix A at 240.
[67] Memorandum of Understanding Between the U.S. Department of Justice and U.S. Department of Labor 7 (March 20, 2022).
[68] Memorandum of Understanding Between the Federal Trade Commission and the National Labor Relations Board Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest (July 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf (terminable on 30 days' notice from either agency).
[69] Freeman & Ross, *supra* note 12, at 1165 (observing that "Agencies may negotiate MOUs but then let them languish, sometimes for years.").
[70] *Id*. at 1165.
[71] This influence is apparent even over purportedly independent federal agencies. *See e.g.* Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature Antitrust Enforcement*, 77 OR. L. REV. 1383, 1431 (1998) (observing that "the FTC's formal

substance of agency actions, the need for collaboration persists.

Given the unenforceability of MOUs, their most reliable contribution may be to memorialize explicitly the agencies' intentions to cooperate, turning their collective minds to that task. In doing so, MOUs can serve to encourage more purposeful and frequent touchpoints between their participants, such as the regular meetings or employee exchanges that are often provided for in the terms of MOUs. The value of these agreements thus depends almost entirely on the individuals within these agencies who take action on a day-to-day basis to animate and operationalize the principles of cooperation embodied in the MOU. Those individuals may or may not be the same agency leaders who originally chose to enter into that MOU.

In sum, while MOUs can be a useful tool of interagency cooperation, they are not particularly durable, reliable or consistent in their contents or their implementation. This make the existing reliance on MOUs a serious problem for the new digital regulatory ecosystem, the success of which depends on effective interagency collaboration.

C. Crafting a Durable Ecosystem of Digital Regulation: Beyond MOUs toward Statutory Obligations

Interagency connections are too essential in the digital world to continue in their fragile current form. It is time to shift away from this heavy reliance on voluntary MOUs toward mandatory obligations to collaborate. This section calls for Congress to impose consistent, statutory obligations for federal agencies to collaborate in carrying out their digital regulatory mandates.

Congress wills federal agencies into existence, prescribes their power and exercises control over them through oversight and budgeting. As it crafts the future of digital regulation, Congress should use these powers to place formalized, reciprocal, statutory obligations on federal agencies to collaborate on digital regulatory policy, rules and enforcement. Instead of emphasizing only the vertical relationships of Congressional control, these statutory obligations will help to build the horizontal agency interconnections necessary for success in digital regulation.

This brief essay does not seek to detail the specifics of such obligations, which is a topic worthy of a separate paper. Instead, it emphasizes a change in the form of these obligations, away from the largely MOU-based system and toward mandatory, statutory obligations. As this section explains, the proposed statutory obligations will remedy several of the problems that arise from the heavy, current reliance on MOUs. These obligations will ensure a

political independence has failed to shield it from the wrath of either the executive or legislative branch").

new baseline of agency interactions in the digital space, bringing a much needed stability, force and durability to federal agency collaborations. The intention is for these statutory requirements to bolster, rather than replace MOUs, which will continue to play a useful, secondary role in detailing the specifics of agency interactions.

A major benefit of the proposed statutory obligations is the permanence they can bring to digital agency interactions. As discussed above, MOUs are often subject to change or exit in just a matter of days. Statutory obligations would require agencies to collaborate on digital regulation in a durable way over time, without the option to ignore or exit those collaborations. In this way, the obligations provide a permanent baseline, setting the stage for interactions between federal agencies. The goal is not to construct some unchanging digital regulatory state in the substance of the interactions—this would be an impossible task given the political nature of federal agencies—but rather to build robust interconnections that enable ongoing agency collaboration, even as political leadership shifts.

Statutory obligations to collaborate make it more likely that agency interactions will occur consistently over time where those interacts are needed. Existing MOUs leave these interactions to the whims of busy, changing agency leadership. As a result, agencies that ought to work together may not, agency relationships may develop at a later stage of regulation than necessary, or agencies may reach MOUs but never actively implement those agreements. Statutory obligations will formalize the requirement that agencies interact, and in doing so, make it more likely that collaborations will occur in a systematic, consistent and timely way than under MOUs alone.

This shift from voluntary to statutory collaboration also creates a new imperative for interagency work in the day-to-day operations of digital regulators. The reality is that many federal agencies are constrained in both time and resources. Interagency collaboration can fall by the wayside because of these constraints, as MOUs become little more than aspirational. Legislative mandates will lend a new urgency and force to the need to collaborate with other agencies. Statutory collaboration clauses will push busy, resource-constrained agencies to engage with other agencies in a manner that is not ensured by the now-dominant modality of MOUs alone.

Finally, if agencies do not meet their obligations to collaborate, these statutory duties will be enforceable. As discussed above, MOUs are often unenforceable by agencies, courts or other affected parties. In contrast, scholar Keith Bradley observes when agencies fail to meet a statutory obligation, that inaction is subject to judicial review.[72] The power of the

[72] Bradley, *supra* note 7, at 758 (noting that when agencies are subject to statutory obligations rather than just MOUs, "private parties can secure agencies' compliance by means of judicial review").

courts can be used to press agencies to collaborate when it is required by statute. Other mechanisms of enforceability could also be written into a statutory scheme—Congress could require agencies to report on whether agencies have met their collaboration obligations, tie a portion of budgets to effective interagency work, or both.

This discussion does not prescribe the specific parameters of this statutory collaboration, which would need to vary by agency. However, it is useful to frame the range of statutory obligations that could conceivably be imposed on agencies to collaborate. At the lighter end, statutes could require the acting agency to consider how their digital regulatory actions impact interests outside of their mandate through consultation with other agencies,[73] to review interagency recommendations, or even to accept interagency recommendations by default, unless there is a reasoned basis for their rejection (or a conflict with the receiving agency's own duties).[74] Toward the heavier end, such obligations might require agencies to engage in joint policy issuance or joint enforcement action, to obtain interagency approval before issuing regulations,[75] or even to conduct joint rulemaking.[76]

What might these obligations look like within the digital regulatory ecosystem? Consider, for example, the FTC's recently commenced rulemaking on data privacy and security.[77] If a new privacy agency is established, as multiple bills propose, it would be logical for that agency and the FTC to share a reciprocal obligation to collaborate on rulemaking, or perhaps even for the FTC to conform its rulemaking to that of the privacy agency. This would help to ensure consistency among any new privacy rules, avoid substantive conflicts and limit unnecessary duplication of regulatory efforts.

Legislative proposals for U.S. digital regulation have so far been spotty in imposing collaboration requirements on agencies. Some bills in the digital space make such collaboration express and mandatory, while others are largely silent on the matter. For example, certain sections of the leading

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[73] *See, e.g.,* Freeman & Rossi, *supra* note 12, at 1158 (providing an example from the Endangered Species Act, which requires interagency consultation on protected species.).

[74] *Id*. at 1159 (providing the example of the Federal Power Act, which requires the Federal Energy Regulatory Commission (FERC) to solicit recommendations from interested federal agencies before issuing hydropower licenses, and permits FERC to decline such recommendation only if it believes that doing so would conflict with the agency's legal duties.).

[75] *Id.* at 1160 (noting such approvals are used in the environmental law context).

[76] Though data suggest such joint-rulemaking is fairly rare, it has been used in the securities and environmental contexts. *Id*. at 1167.

[77] Trade Regulation Rule on Com. Surveillance and Data Security: A Proposed Rule by the Federal Trade Commission, 87 Fed. Reg. 51273 (Aug. 22, 2022) (to be codified at 16 C.F.R. chpt. 1) (advance notice of proposed rulemaking requesting public comment on the prevalence of commercial surveillance and data security practices that harm consumers).

proposal for a new federal data privacy law would remove Federal Communications Commission powers that enable the agency to protect private telecommunications information, instead granting the FTC newly-minted privacy power over the digital entities covered by the bill.[78] In other sections, the bill takes the opposite approach, instead preserving the FCC's existing power over data breach notifications by common carriers, and impliedly precluding the FTC's jurisdiction over such issues.[79] This combination of regulatory give and take is likely to complicate interactions between the FTC and FCC, yet the bill includes no obligation for these agencies to collaborate.[80] In contrast, proposed legislation to establish a new digital regulatory agency is much more prescriptive on agency interactions, imposing reciprocal obligations of consultation on all agencies involved in the investigation, regulation, or oversight of "digital platforms."[81] More consistent use of statutory obligations, whether in the form of consultation or more onerous requirements, is important to the future interactions between these agencies tasked with digital regulation.

To be clear, this call for the regular use of statutory agency obligations is not meant to imply that any single intervention will deliver effective digital regulation. The construction of a new digital regulatory ecosystem will necessarily involve a variety of actions at the agency, policy and legislative levels. This will include both top-down statutory interventions, and bottom-up human interactions that bring to life these collaboration mandates on a day-to-day basis within agencies. Collaboration is a complex, multi-faceted task.

This essay highlights one prominent gap within this broader digital regulatory effort—the ad hoc nature of federal agency interactions. It calls for Congress to help construct the digital regulatory ecosystem between federal agencies, instead of leaving this important task only to the agencies themselves.

CONCLUSION

A new era of digital regulation is taking shape in the U.S. The regulatory dialogue is dominated by siloed calls for reform in areas like competition,

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[78] American Data Privacy and Protection Act, H.R. 8152, 117th Cong., §404(b)(4) (2022) (declaring certain telecommunications privacy rules inapplicable to entities that are covered by the proposed act).

[79] *Id*. at §404 (a)(1)(B) (preserving rules for common carriers under §64.2011 of title 47, Code of Federal Regulations (data breach notifications)).

[80] Though, oddly enough, the bill does indicate that the FTC should reach memoranda of understanding with agencies involved in the enforcement of civil rights law related to algorithms. *Id*. at § 207(b)(4).

[81] Digital Platform Commission Act of 2022 S.4201, 117th Cong., §11 (2022).

privacy, consumer protection and speech. Just as important, yet much less examined, is how these legal silos will interact. The precise shape of the substantive legal reforms remains unsettled, but one thing is clear: the problems of the digital economy often transcend any single administrative agency or related area of law.

This essay argues that effective digital regulation will require federal agencies to collaborate more than ever before. It finds that, right now, such interagency action relies heavily on memoranda of understanding, which are voluntary and variable agreements between agencies. The essay calls for a shift away from these ad hoc MOUs toward a more durable and consistent digital regulatory ecosystem. It recommends that Congress impose systematic, statutory requirements on federal agencies to collaborate in their digital work. These requirements would mandate—not just permit—the agency interconnections that are essential to digital regulation.