THE POLITICAL DYNAMICS OF LEGISLATIVE REFORM: WHAT WILL CATALYZE THE NEXT TELECOMMUNICATIONS ACT OF 1996?

Christopher S. Yoo[†] *& Tiffany Keung*[††]

ABSTRACT

Although most studies of major communications reform legislation focus on the merits of their substantive provisions, analyzing the political dynamics behind the legislation can yield important insights. An examination of the tradeoffs that led the major industry segments to support the Telecommunications Act of 1996 (the "1996 Act") provides a useful illustration of a political bargain. Analyzing the current context identifies seven components that could form the basis for the next communications statute: (1) universal service; (2) pole attachments; (3) privacy; (4) intermediary immunity; (5) net neutrality; (6) spectrum policy; and (7) antitrust reform. Assessing where industry interests overlap and diverge and the ways that the political environment can hinder passing reform legislation provides insights into how these components might combine to support the enactment of the next Telecommunications Act of 1996.

TABLE OF CONTENTS

DOI: https://doi.org/10.15779/Z38FN10T17

† John H. Chestnut Professor of Law, Communication, and Computer & Information Science and Founding Director of the Center for Technology, Innovation and Competition, University of Pennsylvania.

†† Member, J.D. Class of 2022, University of Pennsylvania Carey Law School.

I. INTRODUCTION

When the Telecommunications Act of 1996 (the "1996 Act") was signed into law, it was hailed as an extraordinary feat of legislation.[1] Signed amid unusual fanfare after a deliberative process that spanned many years, this comprehensive legislative reform was the product of bipartisan cooperation during a time of unusually strong partisan acrimony.[2]

Such an unusual achievement offers potential lessons for what might lead to the next great communications statute. Although most of this Symposium's

1. *See, e.g.*, Remarks on Signing the Telecommunications Act of 1996, 1996 PUB. PAPERS 185, 189 (Feb. 8, 1996) (calling the 1996 Act "landmark legislation [that] fulfills my Administration's promise to reform our telecommunications laws . . ."). President Clinton reportedly called it the most significant piece of legislation he signed. Larry Pressler, *Politics and Telecommunications*, 58 FED. COMM. L.J. 555, 555 (2006).

2. Harold Furchtgott-Roth & Arielle Roth, *Answering Four Questions on the Anniversary of the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 83, 85–88 (2016).

other contributions have focused on the impact of the 1996 Act's substantive provisions, this Article focuses on the political dynamics surrounding its enactment. Part II analyzes the 1996 Act as a political deal among the leading commercial and political interest groups. Part III outlines how the 1996 Act's major components have decreased or increased in importance over time, and explores what issues might form the basis for a new compact capable of generating support from the key constituencies. Part IV examines opportunities for potential alignment, political quid pro quo, and potential obstacles to closing such a deal.

II. THE 1996 ACT AS A POLITICAL BARGAIN

The primary focus of the 1996 Act was to break down the regulatory barriers that kept local telephone service, long distance telephone service, and cable television in separate and distinct technological siloes.[3] In return for authorizing their entry into other markets, each segment also had to agree to two broad tradeoffs: allowing other types of firms into their markets and being subjected to some degree of regulatory oversight.[4] Thus, the quid pro quo aspects of the 1996 Act have all the makings of a classic political bargain.[5]

Like all major legislation, the 1996 Act was shaped by factors unique to its time. For example, it arose during a period of strong bipartisan support for deregulation that began during the Reagan years and continued at least through the Clinton Administration.[6] In addition, frustrations with Judge Harold

3. Remarks on Signing the Telecommunications Act of 1996, *supra* note 1, at 188 ("The Act opens up competition between local telephone companies, long distance providers, and cable companies . . . ."); Reno v. ACLU, 521 U.S. 844, 857–58 (1997) ("The major components of the statute . . . were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting.").

4. CHARLES B. GOLDFARB, CONG. RSCH. SERV., RL 33034, TELECOMMUNICATIONS ACT: COMPETITION, INNOVATION, AND REFORM 10, at CRS-12 (2007) (noting that "[t]he general objective of the 1996 Act was to open up markets to competition" while also discussing new obligations imposed on incumbents and new carriers—such as requirements to interconnect their networks and guidelines on intercarrier compensation rates).

5. Other scholars have previously explored these dynamics. *See, e.g.*, Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 866–73 (1997); Furchtgott-Roth & Roth, *supra* note 2, at 84–88; Matthew Spitzer, *Dean Krattenmaker's Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996*, 29 CONN. L. REV. 353 (1996).

6. H.R. REP. NO. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (reporting Congress's intent to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .") (citations omitted). *See generally* Joseph P. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM.

Greene's more than decade-long supervision of AT&T's breakup helped fuel calls for legislative reform.[7]

These factors, while important, would not be sufficient to ensure the 1996 Act's enactment unless all the major industry segments received sufficient benefits to attract their support. Although we cannot go into every detail of a 107-page statute,[8] the deal's outlines are relatively clear. The 1996 Act affected four types of telecommunications: (1) telephony; (2) cable; (3) broadcasting; and (4) the Internet.

A. TELEPHONY

Perhaps the 1996 Act's most important provisions relate to telephony,[9] and especially to local-telephone companies. The 1996 Act authorized local Bell Operating Companies to sell long distance service once they had opened their local telephone markets to competition.[10] At the same time, the 1996 Act repealed the statutory provision prohibiting telephone companies from offering cable television service, authorizing local telephone-companies (called local exchange carriers (LECs)) to offer cable television service.[11] The 1996

L. REV. 1323, 1325–27 (1998) (characterizing the 1996 Act as the archetypical example of the shift away from regulatory oversight toward competition and maximization of consumer choice across six industries: (1) railroads; (2) airlines; (3) trucks; (4) telecommunications; (5) electricity; and (6) natural gas).

7. For a representative example, see PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW § 9.6.1.2, at 828–30 (2d ed. 1999). For a more sympathetic assessment of Judge Greene's performance, see Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation Under Judge Greene*, 50 HASTINGS L.J. 1395, 1459–71 (1999).

8. For overviews of the 1996 Act, see generally Jonathan E. Canis & Enrico C. Soriano, *The Telecommunications Act of 1996: A Global Analysis*, 4 COMMLAW CONSPECTUS 147 (1996); Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123 (1996); Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251 (1997).

9. *See, e.g.*, 145 CONG. REC. 2784 (1999) (statement of Sen. Trent Lott) (calling the telephone provisions the 1996 Act's "centerpiece"); Christopher S. Yoo, *Modularity Theory and Internet Regulation*, 2016 U. ILL. L. REV. 1, 40; James B. Speta, *Antitrust and Local Competition Under the Telecommunications Act*, 71 ANTITRUST L.J. 99, 99 (2003).

10. 47 U.S.C. § 271(c)(2).

11. Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56, 124 (repealing 47 U.S.C. § 533(b)). Congressman Rick Boucher has traced this provision to a bill he co-sponsored with then-Senator Al Gore, which he said planted "the first seeds of the Act." Rep. Rick Boucher, *Reflecting on Twenty Years Under the Telecommunications Act of 1996: A Collection of Essays on Implementation*, 68 FED. COMM. L.J. 1, 4 (2016) [hereinafter *Reflecting on Twenty Years*]. This provision simply codified a string of lower court decisions, holding that the ban violated the First Amendment. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 754–57 (2010); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms,*

Act also preempted all state laws limiting competition in local and long distance telephone service[12] and overturned the Supreme Court's decision in *MCI Telecommunications Corp. v. AT&T Co.*[13] by giving the Federal Communications Commission (FCC) the flexibility to decline to apply any unnecessary regulations.[14]

In return, LECs became subject to measures designed to open their markets to competition. Specifically, the 1996 Act imposed a regime of resale, number portability, dialing parity, and reciprocal compensation on all LECs.[15] Incumbent LECs (ILECs)—defined as those providing service the day the 1996 Act was signed—bore additional obligations to interconnect and provide unbundled access to their network elements.[16] The 1996 Act also codified, for the first time, the FCC's longstanding "universal service" policy that promoted extending communications services to as many Americans as possible. Further, it expanded affordable, nationwide telephone-service to schools, health care providers, and libraires, funded by contributions from telecommunications carriers providing long distance telephone services.[17] At the same time, the 1996 Act codified the FCC's so-called Customer Proprietary Network Information rules, which were developed by the FCC during its Computer Inquiries to protect competition in local telecommunications,[18] and extended them to protect user privacy by applying to both small and large carriers.[19] It also required all LECs and other investor-owned utilities to provide others with access to their poles, ducts, conduits, and rights of way.[20]

---

and Privacy, 1 J. FREE SPEECH L. 463, 493 (2021). The 1996 Act permits telephone companies to offer cable service as an unregulated radio-based service, a common carrier, a cable operator, or a new hybrid category known as *open video systems*, 47 U.S.C. § 571(a), that never amounted to anything significant.

12. 47 U.S.C. § 253(d).

13. 512 U.S. 218 (1994); Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order, 13 FCC Rcd. 4045, 20735 n.11 (1996), https://docs.fcc.gov/public/attachments/FCC-96-424A1.pdf.

14. 47 U.S.C. § 160.

15. *Id.* § 251(b).

16. *Id.* § 251(c).

17. *Id.* § 254(b)(6) & (d).

18. Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958, 1089–90 ¶ 261 (1986), *vacated in part on other grounds sub nom.*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

19. 47 U.S.C. § 222; FED. COMMC'NS COMM'N, REPORT NO. CC 98-5, FCC CLARIFIES CUSTOMER PRIVACY PROVISIONS OF 1996 ACT (1998), https://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1998/nrcc8019.html.

20. 47 U.S.C. §§ 224, 251(b)(4). The prior statute enacted in 1978 did not require utilities to permit pole attachments, but it did regulate the rates utilities could charge for them. Pole Attachments Act of 1978, Pub. L. No. 95-234, 92 Stat. 35 (1978) (amended 1996).

B. CABLE

The deal was more complex for the cable industry, coming on the heels of broad deregulation in 1984 followed by the re-imposition of regulation in 1992[21] and with key parts of the deal emerging late in the legislative process.[22] The primary benefit to the cable industry was a framework that deregulated the rates charged to consumers.[23] The 1996 Act also prohibited state and local governments from limiting cable operators' ability to provide telephone service.[24] The 1996 Act further allowed cable operators to own broadcast networks and expanded their ability to own broadcast stations.[25]

In return, the cable industry accepted significant tradeoffs. As noted earlier, one tradeoff was opening the local cable market to competition from local telephone companies.[26] Cable was also subject to greater restrictions on indecent programming, including: (1) larger fines for transmitting obscene programming;[27] (2) the obligation to scramble sexually explicit programming and to scramble or block programming upon subscriber request;[28] (3) and the obligation not to carry obscenity, indecency, or nudity on public or leased access channels.[29] The 1996 Act also required cable operators to open their networks to third-party set-top boxes[30] and to provide closed captioning for video programming.[31]

C. BROADCASTING

The broadcasting industry was a major beneficiary of the 1996 Act, particularly after Minority Leader Robert Dole put a hold on the legislation passed by the House in 1994, correctly expecting that both houses of Congress would flip to Republican control.[32] The most dramatic change was liberalizing

21. Christopher S. Yoo, *An Unsung Success Story: A Forty-Year Retrospective on U.S. Communications Policy*, 41 TELECOMM. POL'Y 891, 898 (2017).

22. *Reflecting on Twenty Years*, *supra* note 11, at 52 (Sen. Larry Pressler).

23. *See* 47 U.S.C. § 543 (authorizing regulation with a preference for competition, leading to deregulation in practice).

24. *Id.* § 541(b)(3). In calculating the cable franchise-fee, the franchising authority may not include telecommunications. *Id.* § 542(b).

25. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(f)(1), 110 Stat. 56, 111 (revising 47 C.F.R. § 76.501).

26. *See supra* note 11 and accompanying text.

27. 47 U.S.C. § 559.

28. *Id.* §§ 560, 561.

29. *Id.* § 532(c)(2).

30. *Id.* § 549.

31. *Id.* § 613.

32. *Reflecting on Twenty Years*, *supra* note 11, at 70 (Gerard J. Waldron).

ownership restrictions for radio and television stations.[33] Regarding the digital television transition, the 1996 Act added a new provision requiring that "[i]f the Commission determines to issue additional licenses" for digital television, it "should limit the initial eligibility for such licenses" to incumbent broadcasters.[34] The 1996 Act lengthened the licensing term to eight years and revised the renewal process that made incumbent licensees more likely to be renewed.[35] The 1996 Act also removed the restriction barring broadcast stations from affiliating with more than one network.[36]

However, the broadcast industry's biggest burden was the obligation that all television sets with screens of thirteen inches or larger be equipped with a V-chip that permits viewers to block programming based on its rating.[37] The 1996 Act further called for creating an FCC advisory committee to establish a rating system within one year of enactment unless the industry voluntarily created one on its own.[38] Broadcasters must also transmit the rating of any video content that has received a rating.[39]

D. INTERNET

The 1996 Act almost entirely ignored the Internet[40] except for pornography. Congress adopted the CDA, which criminalized using an interactive consumer-service to share content that depicts sexual or excretory activities to minors.[41] These provisions grew out of legislation that Senator James Exon had submitted the previous year and had drawn significant opposition from the Justice Department, an adverse proposed amendment by Senator Patrick Leahy, and a frigid response from House Speaker Newt

33. Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 202(a)-(d), 110 Stat. at 110-11 (revising 47 C.F.R. § 73.3555).

34. 47 U.S.C. § 336(a)(1).

35. *Id.* §§ 307(c), 309(k).

36. Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 202(e), 110 Stat. at 111 (revising 47 C.F.R. § 73.658(g)).

37. 47 C.F.R. § 303(x).

38. *Id.* § 303 note (effective Date of 1996 Amendment).

39. *See id.* § 303(w)(2) (rendered ineffective by an FCC order issued March 12, 1998).

40. Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 2 (2005) (observing that Congress "largely failed to take the Internet into consideration when enacting the [1996 Act] . . . ."); *see also* Reno v. ACLU, 521 U.S. 844, 857 (1997) ("The major components of the [1996 Act] have nothing to do with the Internet . . . .").

41. John D. Podesta—who served as Counselor to Senate Minority Leader Tom Daschle when the 1996 Act was passed and would later serve as White House Chief of Staff during President Clinton's second term—said "with the rather major exception of censorship, Congress simply legislated as if the Net were not there." John D. Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093, 1109 (1996).

Gingrich.[42] CDA opponents backed Representatives Cox and Wyden's floor amendment providing immunity to interactive computer service providers, with both provisions ending up in the final legislation.[43]

E. THE IMPACT OF THE 1996 ACT

Looking back at the 1996 Act from the vantage point of twenty-five years, what is perhaps most striking is the number of major provisions that ended up not having any enduring importance.[44] For example, the 1996 Act's relaxation of the ownership rules was expected to generate greater concentration of media ownership, which in turn would reduce media diversity.[45] Yet both predicted results are more empirically complicated than generally believed. For example, Eli Noam's comprehensive study examined media-concentration levels across various sectors from 1984 to 2005, which he then combined into aggregate measures.[46] Noam found certain mass media sectors remained unconcentrated,[47] others went from concentrated to moderately concentrated,[48] while still others went from unconcentrated to moderately concentrated.[49] From 1996 to 2005, the weighted average of all twenty-seven mass media sectors increased from unconcentrated to the low end of moderately concentrated levels, with submeasures for content media industries and news media remaining unconcentrated.[50] In terms of the effect of concentration on diversity, reviews of the literature find the empirical evidence to be mixed.[51] The Supreme Court's recent decision—upholding the FCC's

42. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 64–67 (1996).

43. *Id.* at 67–72, 91–92.

44. For a related argument, see Stuart Minor Benjamin, *Ships Passing in the Night: The Communications Act and the Convergence on Broadband*, 37 BERKELEY TECH. L.J. ___ (2022)

45. *See, e.g.*, C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 856–57, 862–64, 868–72 (2002); Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 FED. COMM. L.J. 551 (2000).

46. ELI M. NOAM, MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA (2009).

47. *Id.* at 299, 312–13 (TV/video distribution), 313 (combined TV/video programming and distribution), 314 (print).

48. *Id.* at 303–04 (electronic mass media programming distribution), 312–13 (TV/video programming).

49. *Id.* at 299 (mass media distribution), 314 (film), 317 (music).

50. *Id.* at 317–18.

51. Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 699 & nn.126–130, 700, 700 n.136 (2005) (reviewing the empirical literature and finding it inconclusive); Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 797–98 (2009); Joel Waldfogel, *Should We Regulate Media Ownership?*, *in* MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 3 (Philip M. Napoli ed., 2007). Notably, Ho and Quinn's study found that some mergers reduced diversity, while others increased it. Ho & Quinn, *supra*, at 833–60.

2017 order repealing its Newspaper/Broadcast and Radio/Television Crossownership Rules and relaxing its Local Television Ownership Rule as no longer necessary to promote competition, localism, and viewpoint diversity—likely signals the denouement of the media-ownership debate.[52]

Regarding telephony, long distance revenue withered even before voice over Internet Protocol (VoIP) and online video conferencing providers—such as Free World Dialup, Vonage, and Skype—rendered long distance revenue largely worthless.[53] The telephony provisions failed to induce competition in local telephone services and have been abandoned.[54] Competition in local telephone services emerged not through entry induced by the 1996 Act but through the advent of cellular telephony (another technology almost entirely ignored by the 1996 Act).[55]

Nor has the 1996 Act had much effect on the cable industry. For example, rate regulation works only when a provider cannot maintain its profit margin simply by degrading product quality.[56] Somewhat ironically, empirical studies suggest that, given a set level of spending per customer, companies spent less on quality post-regulation.[57] Telephone companies have made small forays into providing cable service but have yet to emerge as significant players. Instead, the primary competition has come from direct broadcast satellite (DBS) providers (such as DirecTV and the DISH Network),[58] and is now giving way to over-the-top providers (such as Netflix, Amazon Prime, Disney+, HBO Max, Hulu, and Peacock).[59] In contrast, the set-top box initiative has languished.[60]

---

52. FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1160 (2021).

53. *See* Yoo, *supra* note 21, at 893–94 (noting the decrease in long distance pricing, which caused revenues to drop even before consumers began using VOIP and video conferencing for long distance communications).

54. *See* Daniel F. Spulber & Christopher S. Yoo, *Toward a Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L.J. 43, 56–57 (2008) (describing how the FCC's 2003 Triennial Review Order and 2005 Triennial Review Remand Order ended unbundling for local telephone service).

55. Yoo, *supra* note 21, at 896.

56. Yoo, *supra* note 51, at 685–87.

57. *See* THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: THE ECONOMICS OF RATE CONTROLS 128–35 (1997); Gregory S. Crawford, *The Impact of the 1992 Cable Act on Household Demand and Welfare*, 31 RAND J. ECON. 422, 444–45 (2000).

58. Yoo, *supra* note 21, at 899.

59. *See* United States v. AT&T, Inc., 916 F.3d 1029, 1034, 1042 (D.C. Cir. 2019) (discussing how internet-based video services are competing vigorously with traditional cable television).

60. On the failure of set-top boxes, see Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO TECH. L.J. 33, 51–52 (2017). For economic critiques, see T. Randolph

The importance of the 1996 Act's broadcasting provisions has similarly faded. After a number of delays, the digital television transition has largely been completed: full-power analog stations went dark in summer 2009,[61] low-power analog stations outside of Alaska returned their second channels by July 13, 2021;[62] and the final licenses were returned on January 10, 2022.[63] The V-chip remains largely unused.[64] The indecency restrictions proved to be short lived: the Supreme Court struck down the CDA in 1997[65] and invalidated the cable-indecency provisions three years later.[66]

Most of the reforms to broadcast, telephone, and cable regulation widely regarded as the key elements of the 1996 Act thus had little-to-no long-term impact. This means that the political deal undergirding its enactment appears not to have played out as expected.

III. POTENTIAL BUILDING BLOCKS FOR A NEW COMMUNICATIONS STATUTE

There was one major component of the 1996 Act that has had lasting importance: universal service. Three others–telecommunications privacy, intermediary immunity under Section 230, and pole attachments—were not considered significant features of the 1996 Act[67] but have continued to have

Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *Wobbling Back to the Fire: Economic Efficiency and the Creation of a Retail Market for Set-Top Boxes*, 21 COMMLAW CONSPECTUS 1 (2012); Ralitz A. Grigorova-Minchev & Thomas W. Hazlett, *Policy-Induced Competition: The Case of Cable TV Set-Top Boxes*, 12 MINN. J.L. SCI. & TECH. 279 (2011).

61. Most full-power analog television stations went dark on June 12, 2009. Press Release, Fed. Commc'ns Comm'n, Full-Power TV Broadcasters Go All Digital (June 13, 2009), https://docs.fcc.gov/public/attachments/DOC-291384A1.pdf. One hundred eighteen stations participating in the nightlight program were permitted to operate until July 12, 2009. FCC Announces Revised Participant List for Statutory Analog Nightly Program, 24 FCC Rcd. 7805 (2009).

62. Fed. Commc'ns Comm'n, Media Bureau Reminds Low Power Television and Television Translator Stations That the July 13, 2021, Digital Transition Date and Other Important Deadlines Are One Week Away, Public Notice No. DA 21-786 (2021), https://docs.fcc.gov/public/attachments/DA-21-786A1.pdf.

63. State of Alaska Request for Waiver of Section 74.731(m) of the Commission's Rules – Low Power Television Analog Termination Date, 36 FCC Rcd. 10765 (2021).

64. Violent Television Programming and Its Impact on Children, 22 FCC Rcd. 7929, 7942 ¶ 29 (2007) (citing a 2004 Kaiser Family Foundation study, a 2003 Annenberg Public Policy Center study, and a 2007 Zogby poll).

65. Reno v. ACLU, 521 U.S. 844, 857 (1997).

66. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 827 (2000).

67. For example, universal service was mentioned in the short summary of the 1996 Act released by the Clinton White House, but privacy, Section 230, and pole attachments were not. *See* Vice President Al Gore, *A Short Summary of the Telecommunications Reform Act of 1996*,

unexpected and lasting significance. In addition, three new issues have arisen that were not part of the 1996 Act, including net neutrality, spectrum policy, and antitrust reform. Together, these seven issues have potential to serve as the basis for a new communications statute.

A. MAJOR PROVISION OF THE 1996 ACT THAT HAS CONTINUING SIGNIFICANCE: UNIVERSAL SERVICE

Unlike the other issues discussed in this Part, universal service was an important enough component of the 1996 Act to merit a reference in President Clinton's signing statement.[68] Since then, extending Internet connectivity to more Americans has received increased bipartisan support, with FCC Chairmen from both parties consistently regarding closing the digital divide as a top priority.[69] Bipartisan support for expanding Internet connectivity has led to a series of reforms to the FCC's universal service programs.[70] Specifically, in 1997, the Clinton Administration expanded the low-income program's support level and geographic scope.[71] In 2008, the George W. Bush Administration broadened universal service to include wireless.[72] The Obama Administration further increased the level of support while cracking down on

WHITE HOUSE, https://clintonwhitehouse4.archives.gov/WH/EOP/OP/telecom/summary.html (last visited Apr. 16, 2022).

68. Remarks on Signing the Telecommunications Act of 1996, *supra* note 1, at 188.

69. *See, e.g.*, William Kennard, Chairman, FCC, Address before the National Telephone Cooperative Association Annual Meeting: A Networked Future for All Americans (Feb. 10, 1999), https://transition.fcc.gov/Speeches/Kennard/spwek907.html; Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 5, 17 (2004); Leslie Cauley, *Martin Wants Broadband Across USA*, ABC NEWS (Aug. 21, 2008, 5:54 AM) (quoting FCC Chairman Kevin Martin), https://abcnews.go.com/Technology/story?id=5614675; Julius Genachowski, Chairman, FCC, Connecting America: A Plan to Reform and Modernize the Universal Service Fund and Intercarrier Compensation System (Oct. 6, 2011), https://docs.fcc.gov/public/attachments/DOC-310252A1.pdf; *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. 1–2 (2016) (statement of Tom Wheeler, Chairman, FCC); *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. 1 (2020) (statement of Ajit Pai, Chairman, FCC).

70. For the early post-1996 history of universal service reform, see Daniel A. Lyons, *Narrowing the Digital Divide: A Better Broadband Universal Service Program*, 52 UC DAVIS L. REV. 803, 817–26 (2019).

71. Federal-State Joint Board on Universal Service, 12 FCC Rcd. 8776, 8957, 8959–61, 8963 (1997).

72. Federal-State Joint Board on Universal Service Tracfone Wireless, Inc., 27 FCC Rcd. 6206, 6207, 6210, 6214–15 (2005).

fraud and abuse in 2012[73] and began phasing out support for voice in favor of broadband.[74]

The COVID-19 pandemic accelerated this conversation, as remote work and school became vital,[75] and additional funding soon followed. The Coronavirus Response and Relief Supplemental Appropriations Act (CRRSAA), enacted during the Trump Administration as part of the Consolidated Appropriations Act of 2021, allocated an additional $3.2 billion for low-income support.[76] The Biden Administration continued implementing this mandate by subsidizing low-income households up to $50 per month and up to $100 for one-time purchases of computers or tablets, with tribal households eligible to receive up to $75 per month.[77] This program was extended as part of the Infrastructure Act, with the Affordable Connectivity Program providing low-income households with $30 per month toward broadband services.[78]

In addition, rural areas received increased financial support, beginning with the FCC creating the High Cost Fund in 1997, which reduced rates in high cost areas.[79] The American Recovery and Reinvestment Act, which passed during the opening days of the Obama Administration, allocated $7.2 billion toward new construction of broadband infrastructure.[80] The Obama Administration began redirecting rural support away from funding fixed-line voice service toward funding mobile voice and broadband service in 2011.[81] The administration also shifted focus from high-cost to unserved areas and used reverse auctions to allocate support.[82] However, ISPs declined $285 million of the $300 million offered during Connect American Fund (CAF) Phase I and the CAF Phase II auctions allocated only $1.5 billion out of the $20 billion available. In response, the Trump Administration replaced CAF

73. Lifeline and Link Up Reform and Modernization, 27 FCC Rcd. 6656, 6659 (2012).

74. *See* Lifeline and Link Up Reform and Modernization, 31 FCC Rcd. 3962, 3964 (2016).

75. Brandon Baker, *The Multilayered Challenges of Broadband Expansion*, PENN TODAY (June 18, 2021), https://penntoday.upenn.edu/news/multi-layered-challenges-broadband-expansion (noting that "the pandemic has underscored the need for broadband in a way that is very popular").

76. Pub. L. No. 116-260, sec. 904(i)(2), 134 Stat. 1182, 2135 (2021).

77. Emergency Broadband Benefit Program, 36 FCC Rcd. 4612, 4614 ¶ 4 (2021).

78. *Affordable Connectivity Program*, FCC, https://www.fcc.gov/acp (last visited Mar. 23, 2022).

79. Federal-State Joint Board on Universal Service, 12 FCC Rcd. 8776, 8784 ¶ 10 (1997).

80. Pub. L. No. 111-5, § 6001(g), 123 Stat. 115, 514 (2008).

81. Connect America Fund, 26 FCC Rcd. 17663, 17671 ¶ 20 (2011), *petitions for review denied sub nom.* In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

82. *Connect America Fund*, 26 FCC Rcd. at 17723 ¶ 150, 17780–83 ¶¶ 321–329.

with the new Rural Digital Opportunity Fund (RDOF),[83] which in November 2020 successfully allocated $9.2 of the $16 billion in available funds in its Phase I auction, covering up to 5.2 million of the 5.3 million targeted homes.[84] The forthcoming RDOF Phase II auction should offer up to $11.2 billion in additional universal service funding.[85]

In addition to these ongoing programs, Congress recently enacted several measures to provide more funding for closing the digital divide. The CRRSAA allocated an additional $1.3 billion for rural broadband.[86] The Broadband Infrastructure Framework, enacted into law with bipartisan support in one of the signature accomplishments of the Biden Administration to date, includes $65 billion for broadband deployment.[87] These contributions provide meaningful assistance, but many areas still need ongoing support for annual operating-costs.

Universal service reform thus already has significant momentum that may lead to additional funding in the next communications statute. Indeed, the Broadband Infrastructure Framework's influx of funding came with a Congressional directive for the FCC to explore the future of Universal Service Funding (USF).[88] That said, the ongoing support's funding mechanism represents a significant challenge. The statute provides that "[e]very telecommunications carrier that provides interstate telecommunications services" shall contribute,[89] a classification exempting "information service providers" from having to provide funding. Taxes that artificially raise the

83. Rural Digital Opportunity Fund Connect America Fund, 35 FCC Rcd. 686, 688 ¶ 4 (2020).

84. *Compare* Press Release, Fed. Commc'ns Comm'n, FCC Releases Final List of Areas Eligible for Rural Digital Opportunity Fund Phase I Auction (Oct. 8, 2020), https://docs.fcc.gov/public/attachments/DOC-367419A1.pdf (5.3 million homes targeted), *with* Press Release, Fed. Commc'ns Comm'n, Successful Rural Digital Opportunity Fund Auction to Expand Broadband to Over 10 Million Rural Americans (Dec. 7, 2020), https://docs.fcc.gov/public/attachments/DOC-368588A1.pdf (5.2 million homes covered).

85. *RDOF/Broadband Federal Funding*, CAL. PUB. UTILS. COMM'N, https://www.cpuc.ca.gov/broadbandfederalfunding/ (last visited January 10, 2022).

86. Coronavirus Response and Relief Supplemental Appropriations Act, Pub. L. No. 116-260, § 905(b), 134 Stat. 3305, 2138 (2020).

87. Investment and Jobs Act, Pub. L. No. 117-58, § 60102,135 Stat. 429, 1182–1205 (2021).

88. Nadia Dreid, *FCC to Probe Future of Universal Service Funding*, LAW360 (Dec. 17, 2021), https://www.law360.com/articles/1449534/fcc-to-probe-future-of-universal-service-funding.

89. 47 U.S.C. § 254(d).

price of elastic incremental activity necessarily create well-known economic inefficiencies.[90]

Moreover, technological change has destabilized this funding mechanism.[91] Due to the steep decline in long distance telephone revenues, the contribution rate has increased steadily, rising from 5.7% in the second quarter of 2000[92] to a peak of 31.8% in the third quarter of 2021[93] before receding to 25.2% in the first quarter of 2022.[94]

At a high level, there are two proposed solutions: expand the contribution base to include the Big Tech firms that send content through the network or fund the program through congressional appropriations. The former approach is supported by FCC Commissioner Brendan Carr,[95] the Broadband Deployment Advisory Committee's model state code,[96] and Senators Wicker, Capito, and Young, who introduced the Funding Affordable Internet with Reliable (FAIR) Contributions Act.[97] The latter has drawn former FCC

90. Jerry Hausman & Howard Shelanski, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 33–36 (1999); Krattenmaker, *supra* note 8, at 165–66; Jerry Ellig, *Intercarrier Compensation and Consumer Welfare*, 2005 U. ILL. J.L. TECH. & POL'Y 97, 106–12 (2005).

91. *See* Lyons, *supra* note 70, at 839–42 (noting that USF costs have been rising, while the revenue base has fallen as demand for traditional long-distance calls has fallen).

92. Fed. Commc'ns Comm'n, Proposed Second Quarter 2000 Universal Service Contribution Factor, Public Notice No. DA 00-517 (Mar. 7, 2000), https://docs.fcc.gov/public/attachments/DA-00-517A1.pdf.

93. Fed. Commc'ns Comm'n, Proposed Third Quarter 2021 Universal Service Contribution Factor, Public Notice No. DA 21-676 (June 10, 2021), https://docs.fcc.gov/public/attachments/DA-21-676A1.pdf.

94. Fed. Commc'ns Comm'n, Proposed First Quarter 2022 Universal Service Contribution Factor, Public Notice No. DA 21-1550 (Dec. 13, 2021), https://docs.fcc.gov/public/attachments/DA-21-1550A1.pdf.

95. Joan Engebretson, *FCC Commissioner Wants Big Tech to Contribute to USF, Help Fund Universal Broadband*, TELECOMPETITOR (May 25, 2021), https://www.telecompetitor.com/fcc-commissioner-wants-big-tech-to-contribute-to-usf-help-fund-universal-broadband/.

96. *See* Broadband Deployment Advisory Comm., Fed. Commc'ns Comm'n, State Model Code for Accelerating Broadband Infrastructure Deployment and Investment 30 ¶ 13 (Dec. 6, 2018), https://www.fcc.gov/sites/default/files/bdac-12-0607-2018-model-code-states-final-approved-sections.pdf [hereinafter BDAC State Model Code] (stating that "[e]ntities that financially benefit for access to a broadband system located in the state, including advertising providers, shall contribute to the Broadband Deployment Fund").

97. Press Release, S. Comm. on Com., Sci., & Transp., Wicker, Capito, Young Introduce Bill to Explore Collecting USF Contributions from Big Tech (July 21, 2021), https://www.commerce.senate.gov/2021/7/wicker-capito-young-introduce-bill-to-explore-collecting-usf-contributions-from-big-tech.

Chairman Ajit Pai's support.[98] The next communications statute may have to address how to make universal service funding mechanisms more sustainable.

B. MINOR PROVISIONS OF THE 1996 ACT THAT HAVE BECOME MORE SIGNIFICANT THAN EXPECTED

In contrast to universal service, which was always considered an important part of the 1996 Act, other provisions that were regarded as minor at the time have turned out to unexpectedly loom large in current communications policy. These provisions include privacy, intermediary immunity under Section 230, and pole attachments.

1. Privacy

In general, U.S. law relies primarily on sector-specific privacy regulation, with primary responsibility for protecting general privacy concerns resting with the Federal Trade Commission (FTC) under its authority to curb deceptive trade practices, ensuring actors honor their privacy policies.[99] The FTC's jurisdiction does not apply to common carriers.[100] This exception took on a new importance when the Obama Administration reclassified broadband Internet access service as a telecommunications service, which divested the FTC of its jurisdiction.[101] The FCC issued new rules reinterpreting the privacy provisions of the 1996 Act to protect all personally identifiable information.[102] Five months later, Congress invoked the Congressional Review Act to invalidate the FCC's new privacy rules.[103]

The more influential development is the wave of state privacy legislation triggered by the referendum-induced enactment of the California Consumer Privacy Act (CCPA).[104] Other states have similarly adopted general privacy

98. Remarks of FCC Chairman Ajit Pai to the Multicultural Media, Telecom & Internet Council and the National Grange (Jan. 12, 2021) (calling on Congress to set aside $50 billion from the C-Band auction to fund the Universal Service Program for the next five years), https://docs.fcc.gov/public/attachments/DOC-369186A1.pdf.

99. 15 U.S.C. § 45(a)(1).

100. *Id.* § 45(a)(2).

101. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5724–25 ¶¶ 283–284 (2015).

102. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 31 FCC Rcd. 13911 (2016).

103. Act of Apr. 3, 2017, Pub. L. No. 115-22, 131 Stat. 88.

104. CAL. CIV. CODE §§ 1798.100-.199.100 (West 2020). The California Privacy Rights Act (CPRA) amended the CCPA by referendum in November 2020. Cal. Proposition 24 (2020), https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1798.100.&nodeTreePath=8.4.47&lawCode=CIV
.

regulation,[105] while still others have enacted legislation targeting ISPs by requiring subscriber permission before disclosing personal information.[106] The proliferation of state privacy laws have led a wide range of companies, many of which had been skeptical of federal privacy legislation, to become more supportive of the idea.[107] Interest in a federal solution might be another aspect incorporated into the next round of major legislative reform.

2. Section 230 of the Communications Decency Act

Although Congress debated most of the 1996 Act's major provisions for years, some provisions received significantly less consideration. For example, although Senator James Exon initially introduced the CDA as standalone legislation designed to curb indecency on the Internet,[108] the Senate added the CDA to the 1996 Act by a vote of 84-16,[109] with many of its provisions never having been subjected to hearings or committee deliberation.[110] The provision that would eventually be codified at 47 U.S.C. § 230 received even less consideration, having been added to the bill on the House floor by a vote of 420-4.[111] Although Section 230 was conceived as an alternative to the CDA, the final legislation included both.[112] When the Supreme Court invalidated the provisions originating in Senator Exon's proposal, Section 230 emerged as the CDA's only enduring provision.[113]

Section 230 reflected an approach that was quite different from that taken by the CDA. Rather than regulate online indecency directly, Section 230 increased private actors' incentives to engage in self-regulation by enacting "Protection for 'Good Samaritan' blocking and screening of offensive material."[114] Section 230 specified that providers that host content are not

105. *See* COLO. REV. STAT. §§ 6-1-1301 to -1313 (2021); VA. CODE ANN. §§ 59.1-575 to -.585 (2021). Other general state privacy statutes preceded the CCPA. *See* DEL. CODE ANN. tit. 6, §§ 1201C-1206C (2015).

106. *See* ME. STAT. tit. 35-A, § 9301 (2019). Other state privacy statutes, which treated ISPs differently, preceded the CCPA. *See* MINN. STAT. §§ 325m.01–.09 (2002); NEV. REV. STAT. § 205.498 (1999).

107. Will Oremus, *Beware of Tech Companies Bearing Privacy Laws*, SLATE (Aug. 28, 2018, 5:50 AM), https://slate.com/technology/2018/08/facebook-and-googles-plan-for-a-new-federal-privacy-law-is-really-about-protecting-themselves.html.

108. S. 314, 104th Cong. (1995).

109. 141 CONG. REC. 16026 (1995).

110. Reno v. ACLU, 521 U.S. 844, 858 (1997).

111. 141 CONG. REC. 22054 (1995).

112. *See* Force v. Facebook, Inc., 934 F.3d 53, 79 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) (noting that USF costs have been rising, while the revenue base has fallen base because people make fewer traditional long-distance calls).

113. *Id.*

114. 47 U.S.C. § 230(c).

publishers and thus are not liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, flighty, excessively violent, harassing, or otherwise objectionable."[115]

During its early years, Section 230 was lauded as "the twenty-six words that created the Internet" due to its role in fostering growth of web platforms by protecting edge providers from third-party content liability.[116] However, the 2018 enactment of a statute variously named the Stop Enabling Sex Traffickers Act (SESTA) and the Fight Online Sex Trafficking Act (FOSTA) withdrew immunity for interactive computer service providers that promote or facilitate prostitution.[117]

More recently, Section 230 has become one of the most controversial aspects of the 1996 Act. While some advocates defend the importance of Section 230 in fostering a free Internet,[118] the statute has faced growing criticism from both sides of the aisle. Both Presidents Trump and Biden have called for its repeal or amendment.[119] Calls for Section 230 reform have come from the bench as well; Justice Thomas encouraged "[p]aring back the sweeping immunity courts have read into § 230" when a more appropriate case comes before the Court.[120] Dozens of bills to revise or repeal Section 230 have been introduced in Congress since 2020.[121]

Bipartisan support creates some possibility that reforming Section 230 might be part of the next communications statute. However, the stark

115. *Id.* § 230(c)(1), (2)(A).

116. *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019) (exploring the explosive legal and economic growth created by the adoption of Section 230).

117. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

118. *See, e.g.*, Eric Goldman, *Dear President Biden: You Should Save, Not Revoke, Section 230*, BULL. ATOMIC SCIENTISTS (Jan. 12, 2021), https://thebulletin.org/premium/2021-01/dear-president-biden-you-should-save-not-revoke-section-230/.

119. *See* Rachel Lerman, *Social Media Liability Law Is Likely to Be Reviewed under Biden*, WASH. POST (Jan. 18, 2021), https://www.washingtonpost.com/politics/2021/01/18/biden-section-230/.

120. Malwarebytes, Inc. v. Enigma Software Grp., 141 S. Ct. 13, 18 (2020) (Thomas, J., concurring).

121. Meghan Anand, Kiran Jeevanjee, Daniel Johnson, Brian Lim, Irene Ly, Matt Perault, Jenna Ruddock, Tim Schmeling, Niharika Vattikonda, Noelle Wilson & Joyce Zhou, *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021), https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html; *see also* Cristiano Lima, *Congress Is Weighing Changes to Section 230, Again. Here Are What Bills Stand a Chance*, WASH. POST. (Nov. 29, 2021, 9:13 AM EST), https://www.washingtonpost.com/politics/2021/11/29/congress-is-weighing-changes-section-230-again-heres-what-bills-stand-chance/.

differences in the two parties' attitudes may leave little room for agreement.[122] Republicans generally believe that online platforms exercise too much editorial discretion,[123] whereas Democrats are concerned that they exercise too little.[124]

3. Pole Attachments

Section 230's amendment of the Pole Attachment Act of 1978 was regarded as minor when it was enacted. The Pole Attachment Act requires utilities to provide cable television systems and telecommunications providers with nondiscriminatory access to their poles, ducts, conduits, and rights of way.[125] Although this was not regarded as a significant provision of the 1996 Act,[126] the deployment of new network technologies has heightened its importance. For example, the ongoing deployment of the newest generation of mobile broadband technology, 5G, employs base stations that serve areas much smaller than those served by previous technologies (often known as

122. *See* Todd Shields & Ben Brody, *Washington's Knives Are Out for Big Tech's Social Media Shield*, BLOOMBERG (Aug. 11, 2020), https://www.bloomberg.com/news/articles/2020-08-11/section-230-is-hated-by-both-democrats-and-republicans-for-different-reasons (explaining that Democrats criticize Section 230 for enabling social misconduct while Republicans feel that it is used as a censorship tool).

123. *See* Exec. Order No. 13,925, 85 Fed. Reg. 34,079, 34,080–81 (May 28, 2020) (noting that

> Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike . . .

and calling for the FCC to initiate a rulemaking to revise Section 230's interpretation); Memorandum from the Energy and Com. Comm. Republican Staff to Stakeholders and Interested Parties, Big Tech Accountability Platform (Apr. 15, 2021), https://republicans-energycommerce.house.gov/wp-content/uploads/2021/04/2021.04.15-Big-Tech-Memo-Staff-Legislative-Concepts.pdf.

124. *See* Shannon Bond, *Democrats Want to Hold Social Media Companies Responsible for Health Misinformation*, NPR (Jul. 22, 2021, 3:59 PM EST), https://www.npr.org/2021/07/22/1019346177/democrats-want-to-hold-social-media-companies-responsible-for-health-misinformat (discussing proposed reforms to Section 230 supported by Democrats that would strip immunity from firms promoting health misinformation during a health crisis); Makena Kelly, *Democrats Take First Stab at Reforming Section 230 After Capitol Riots*, VERGE (Feb. 5, 2021), https://www.theverge.com/2021/2/5/22268368/democrats-section-230-moderation-warner-klobuchar-facebook-google (discussing proposed reforms to Section 230 supported by Democrats that would require platforms to introduce additional moderation).

125. 47 U.S.C. § 224(f)(1).

126. For example, President Clinton's signing statement did not mention the pole attachment provisions. *See* Remarks on Signing the Telecommunications Act of 1996, *supra* note 1.

small cells).[127] The need to locate base stations in more locations is leading 5G providers to invoke the Pole Attachment Act place small cells on utility poles.[128]

The 1996 Act gives the FCC the authority to regulate pole attachment rates, although this authority does not apply to poles owned by cities, cooperatives, or those that are subject to state regulation.[129] However, in 2018, the FCC invoked the authority granted by the 1996 Act to preempt state and local laws that constitute barriers to entry to new broadband service providers[130] to: (1) establish time limits for deciding permit requests, (2) limit fees for small-cell attachments to reasonable approximations of objective costs, (3) invalidate state and local moratoria on telecommunications services and facilities deployment, and (4) implement a federal "one touch make-ready" process that replaced state and local laws.[131] Each of these regulations were largely upheld on judicial review.[132] The need to deploy 5G and other new technologies on pole attachments may create demand for changing the formula for the reasonableness of pole attachment rates or broadening the access obligation to apply to facilities owned by municipalities and cooperatives.

C. ISSUES THAT ARE CURRENTLY SIGNIFICANT THAT WERE NOT PART OF THE 1996 ACT

Given the technological and economic dynamism of the modern communications environment, it is unsurprising that certain provisions of the 1996 Act ended up being more and less important than expected. Equally predictable is that new issues have arisen since 1996 that the 1996 Act failed to anticipate. These include three topics that could form the basis for a new political deal that could support the next great communications statute: net neutrality, spectrum policy, and antitrust reform.

---

127. Christopher S. Yoo & Jesse Lambert, *5G and Net Neutrality*, *in* THE FUTURE OF THE INTERNET – INNOVATION, INTEGRATION AND SUSTAINABILITY 221, 225 (Guenter Knieps & Volcker Stocker eds., 2019).

128. *See* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 32 FCC Rcd. 9760, 9765 (2017).

129. 47 U.S.C. § 224(a)(1) & (3), (b)-(c).

130. *Id.* §§ 253, 332(c)(7)(B)(i).

131. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 9088, 9092 (2018), *denying the petitions for review in part and granting petitions for review in part sub nom.* "One touch make-ready" is a process "that allows new attachers themselves to do all the preparations" necessary to attach new equipment to existing utility poles. City of Portland v. United States, 969 F.3d 1020, 1050 (9th Cir. 2020).

132. *Portland*, 969 F.3d 1020.

1. Net Neutrality

The debate over net neutrality has dominated communications policy for nearly the past two decades.[133] The Obama Administration enacted rules prohibiting last-mile Internet service providers, such as AT&T and Comcast, from engaging in unreasonable discrimination against certain types of traffic, only to see those rules revoked during the Trump Administration.[134] President Biden's Executive Order calling on the FCC to revive net neutrality regulation guarantees that this issue will remain central.[135]

One of the principal legal issues in the debate over net neutrality, which requires ISPs to treat all Internet traffic equally, turns on the narrow question whether services offered by last-mile broadband ISPs, such as AT&T or Comcast, constitute *information services* or *telecommunications services*. The D.C. Circuit has held that the FCC cannot mandate nondiscrimination if they are classified as the former[136] but may do so if classified as the latter.[137] Supreme Court precedent dictates that the statute is ambiguous as to the proper statutory classification of last-mile broadband Internet access service and that, therefore, courts must defer to the FCC's reasonable interpretation under the *Chevron* doctrine.[138]

The FCC has reclassified last-mile broadband Internet access service each of the last three times the White House has changed parties, and each time that action was upheld by the courts.[139] Consistent with the recent change in power, President Biden's Executive Order on Promoting Competition in the American Economy endorsed reclassifying last-mile broadband Internet access service yet again.[140] Moreover, seven states have responded to the most

133. For the article generally credited with coining the phrase net neutrality, see Tim Wu, *Net Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003). For a response and reply published in the same journal the next year, see Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition?: A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004); Tim Wu, *The Broadband Debate: A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69 (2004).

134. For a brief history of net neutrality regulation, see Mozilla Corp. v. FCC, 940 F.3d 1, 17–18 (D.C. Cir. 2019).

135. Exec. Order No. 14,036, § 5(l)(i), 86 Fed. Reg. 36,987, 36,994 (July 9, 2021).

136. *See* Verizon v. FCC, 740 F.3d 623, 650, 655–57 (D.C. Cir. 2014).

137. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 710–11 (D.C. Cir. 2016).

138. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 996–97 (2005).

139. *See id.* at 1003 (upholding the George W. Bush Administration's decision to classify last-mile broadband access as an information service); *U.S. Telecom Ass'n*, 825 F.3d at 744 (upholding the Obama Administration's decision to reclassify last-mile broadband access as a telecommunications service); *Mozilla*, 940 F.3d at 86 (upholding the Trump Administration's decision to reclassify last-mile broadband access as an information service).

140. *See* Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,994 (July 9, 2021).

recent reclassification by enacting statutes regulating net neutrality, with nine additional states introducing similar legislation during their 2021 sessions.[141] Courts have thus far split on whether federal law preempts state attempts to regulate net neutrality.[142] The desire to stop net neutrality from oscillating back and forth every time the White House switches parties and to clarify the role of state legislation may provide some support for addressing net neutrality in the next communications statute.

2. Spectrum Policy

The politics around the 1996 Act focused almost entirely on the digital television transition. As noted earlier, the Act required that should the FCC decide to issue digital television licenses, they could go only to incumbent broadcasters.[143] Even before the Act was passed, a bipartisan group of senators led by Senate Majority Leader Robert Dole criticized this provision as corporate welfare and required the FCC to agree not to issue any digital television licenses until Congress had taken further action.[144] In addition, the Omnibus Budget Reconciliation Act of 1993 had mandated the use of auctions to allocate spectrum licenses starting on July 1, 1997.[145]

Faced with the prospect of having to pay for spectrum, television broadcasters began "tripping all over themselves to give up their First Amendment rights," to use the words of one FCC official.[146] After resisting the idea of ratings for years, the industry quickly capitulated and agreed to create its own rating system.[147] Shortly after Dole left the Senate to campaign for the presidency full time on June 11, 1996, Congress notified the FCC that it had abolished the Dole agreement.[148] Two months later, the FCC and the

141. *See* Casey Lide, S*tate Net Neutrality Laws May Lead to Federal Legislation*, NAT'L L. REV. (Mar. 1, 2021), https://www.natlawreview.com/article/state-net-neutrality-laws-may-lead-to-federal-legislation.

142. *Compare* N.Y. State Telecomm. Ass'n v. James, 544 F. Supp. 3d 269, 279–88 (E.D.N.Y. 2021) (holding the FCC's decision not to regulate broadband preempted state law), *with* ACA Connects – Am.'s Commc'ns Ass'n v. Bonta, 24 F.4th 1233, 1237 (9th Cir. 2022) (holding the opposite).

143. 47 U.S.C. § 336(a)(1).

144. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 352–53 (2003) [hereinafter Yoo, *Rise and Demise*]; Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1700 (2003) [hereinafter Yoo, *Rethinking Free, Local Television*].

145. Pub. L. No. 103-66, sec. 6002, § 309(j), 107 Stat. 312, 388–92 (1993).

146. Quoted in Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 942 (1997).

147. *See* 47 U.S.C. § 303 note (Applicability of Rating Provision).

148. Hazlett, *supra* note 146, at 940; *see also* Yoo, *Rise and Demise*, *supra* note 144, at 353; Yoo, *Rethinking Free, Local Television*, *supra* note 144, at 1700.

industry reached an agreement to impose a three-hour-a-week requirement for children's educational programming.[149] The major broadcast networks began making putatively voluntary commitments to provide more free air time for federal political candidates.[150] In the Balanced Budget Act of 1997, Congress explicitly forbade the FCC from auctioning digital television licenses.[151] The net result of these events doubled the number of digital licenses given to television broadcasters, the only industry receiving spectrum for free, without increasing broadcasting's competitiveness or diversity.[152]

As noted earlier, the completion of the digital television transition and the decline of the broadcast television industry has turned this story into more of a parable than an analysis of a live policy issue.[153] The more important current challenge is the demand for wireless broadband, which has grown precipitously in recent years. The shift is demonstrated eloquently by the recent incentive auction, in which many television broadcasters received payments in return for allowing their spectrum to be redeployed for wireless broadband.[154] Auctions also provide incremental revenue that can allow Congress to avoid the supermajority approval for all measures that are not budget neutral.[155] The FCC has successfully reallocated several new spectrum bands to wireless broadband,[156] but continuing growth may require further legislative attention.

149. *See* Policies & Rules Concerning Children's Television Programming, 11 FCC Rcd. 10660, 10718–23 ¶¶ 120–29 (1996).

150. *See* Hazlett, *supra* note 146, at 942.

151. 47 U.S.C. § 309(j)(2); *see also* Yoo, *Rethinking Free, Local Television*, *supra* note 144, at 1700.

152. Krattenmaker, *supra* note 8, at 163–64.

153. *See supra* notes 61–62 and accompanying text.

154. *See* Thomas W. Hazlett, *FCC "Incentive Auction" Marks Progress and Pitfalls Towards Freeing Wireless Spectrum*, BROOKINGS INST. (May 24, 2017), https://www.brookings.edu/blog/techtank/2017/05/24/fcc-incentive-auction-marks-progress-and-pitfalls-towards-freeing-wireless-spectrum/.

155. *See* Cong. Budget Off., Budgetary Implications of the Balanced Budget Act of 1997, at 11–15 (Dec. 1997), https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/bba-97.pdf.

156. *See* Press Release, Fed. Commc'ns Comm'n, FCC Announces Winning Bidders of 3.5 GHz Band Auction (Sept. 2, 2020), https://docs.fcc.gov/public/attachments/DOC-366624A1.pdf; Press Release, Fed. Commc'ns Comm'n, FCC Opens 100 Megahertz of Mid-Band Spectrum for 5G (Mar. 17, 2021), https://www.fcc.gov/document/fcc-opens-100-megahertz-mid-band-spectrum-5g; Press Release, Fed. Commc'ns Comm'n, FCC Adopts New Rules for the 6 GHz Band, Unleashing 1,200 Megahertz of Spectrum for Unlicensed Use (Apr. 23, 2020), https://docs.fcc.gov/public/attachments/DOC-363945A1.pdf; Press Release, Fed. Commc'ns Comm'n, FCC Grants C-Band Spectrum Licenses (July 23, 2021), https://docs.fcc.gov/public/attachments/DOC-374358A1.pdf.

3. Antitrust Reform

Perhaps the most dramatic change in the political attitudes over technology in the past decade has occurred with respect to digital platforms. At the time when the 1996 Act was passed, these platform companies were flying below the radar. Amazon was a mere two years old, a year from going public, and a platform that only sold books.[157] Google was two years on the horizon,[158] and Facebook was eight.[159] Apple was in the midst of a severe slump, firing its CEO, and a year away from bringing back Steve Jobs.[160] The only established technology firm was Microsoft, which was confronting a series of major antitrust suits.[161] The most significant player was America Online, whose merger with Time Warner would soon make it the target of antitrust scrutiny.[162]

The world looks quite different today. According to *The Financial Times*, Apple, Microsoft, Alphabet (Google), Amazon, and Meta (Facebook) represented five of the seven largest firms in the world by market capitalization as of December 2021.[163] The federal government has brought antitrust cases against Google and Facebook and is investigating cases against Amazon and Apple.[164] During their 2020 campaigns, both presidential candidates endorsed vigorous antitrust enforcement against Big Tech companies.[165] President Biden has issued an executive order encouraging the fair and vigorous enforcement of the antitrust laws and calling on the FTC Chair to consider enacting rules to prevent "unfair data collection and surveillance practices" and "unfair

157. *Amazon.com, Inc. History*, FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/amazon-com-inc-history/ (last visited Aug. 27, 2021).

158. *Google, Inc. History*, FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/google-inc-history/ (last visited Aug. 27, 2021).

159. Christopher McFadden, *A Brief History of Facebook, Its Major Milestones*, INTERESTING ENG'G (July 7, 2020), https://interestingengineering.com/history-of-facebook.

160. *See* OWEN W. LINZMAYER, APPLE CONFIDENTIAL 2.0: THE DEFINITIVE HISTORY OF THE WORLD'S MOST COLORFUL COMPANY 151, 198–202, 289 (2004).

161. *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998).

162. *See* Am. Online, Inc., 131 F.T.C. 829 (2001).

163. Matthew Johnston, *Biggest Companies in the World by Market Cap*, INVESTOPEDIA (Dec. 21, 2021), https://www.investopedia.com/biggest-companies-in-the-world-by-market-cap-5212784.

164. *Factbox: How Big Tech Is Faring Against U.S. Lawsuits and Probes*, REUTERS (Aug. 20, 2021, 6:11 PM EDT), https://www.reuters.com/technology/big-gy-wins-two-battles-fight-with-us-antitrust-enforcers-2021-06-29/.

165. *See* Jon Swartz, *Here's Where Biden and Trump Stand on Antitrust, Social Media and Other Tech Issues*, MARKETWATCH (Oct. 1, 2020, 5:21 PM ET), https://www.marketwatch.com/story/heres-where-biden-and-trump-stand-on-antitrust-social-media-and-other-tech-issues-2020-10-01.

competition in major Internet marketplaces."[166] He also appointed as head of the FTC one of the leading advocates for more stringent antitrust scrutiny of Big Tech firms.[167]

Interest in antitrust enforcement against Big Tech has also been a hot topic on Capitol Hill. The House Judiciary Committee conducted a July 2020 hearing at which the CEOs of Amazon, Apple, Facebook, and Google testified[168] as part of a sixteen-month investigation that produced a 449-page staff report.[169] During the summer of 2021, the House Judiciary Committee passed six bills on antitrust, with provisions on updating merger filing fees, amending the venues for antitrust suits brought by state attorney generals, limiting the ability of technology companies to buy nascent competitors, lowering switching costs between platforms, prohibiting companies from preferencing their own products over those of competitors, and authorizing the breakup of technology companies when necessary to eliminate conflicts of interest.[170] On the other side of the Capitol, Senators Klobuchar and Grassley have introduced antitrust reform legislation that would adopt positions similar to provisions included in the House bills.[171]

The House Judiciary Committee's approval of these bills did not proceed down straight party lines. Some Republicans voted in favor, and some Democrats voted against,[172] with lawmakers from California emerging as key

166. Exec. Order No. 14,036, § 5(b), (h)(i) & (iv), 86 Fed. Reg. 36,987, 36,991–92 (July 14, 2021).

167. *See* Press Release, Fed. Trade Comm'n, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/lina-m-khan-sworn-chair-ftc.

168. *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing Before the House Judiciary Comm.*, 116th Cong (2020) 11–35, https://www.govinfo.gov/content/pkg/CHRG-116hhrg41317/html/CHRG-116hhrg41317.htm.

169. *See* SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L., HOUSE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REP. AND RECOMMENDATIONS (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter CICILLINE REPORT].

170. *See* Sharis A. Pozen, *House Judiciary Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives*, CLIFFORD CHANCE (June 28, 2021), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf.

171. Press Release, Sen. Amy Klobuchar, Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech (Oct. 14, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/10/klobuchar-grassley-colleagues-to-introduce-bipartisan-legislation-to-rein-in-big-tech [hereinafter Klobuchar Press Release].

172. Pozen, *supra* note 170, at 4.

opponents to the legislation.[173] The Senate bill was cosponsored by five Democrats and five Republicans.[174] Opponents have argued that these proposals would hurt the United States' ability to compete with China, while supporters of the legislation have disputed this contention.[175] The complex nature of the coalitions backing these proposals suggests some possibility they could generate enough votes to support passage, but only if they can attract sufficient votes in the Senate to break cloture.

The constellation of interests thus appears to be quite different from the one undergirding the enactment of the 1996 Act. These distinctions necessarily render impossible the recreation of the political deal that led to the 1996 Act. At the same time, they open new potential bases for a political bargain.

IV. POSSIBLE PATHS FOR GETTING TO YES

How might these various components coalesce into a political deal that offers sufficient benefits to enough different segments of the telecommunications and technology industry to support enactment? The key players are likely to play distinctly different roles. Television broadcasting, which has historically exerted strong influence on legislation, is less likely to do so in the future. Although multichannel video continues to serve as a key business of the cable industry, its focus is increasingly shifting to broadband. Regarding telecommunications, voice has become a relatively minor application riding on a broadband pipe, which has brought their interests more into alignment with the future direction of the cable industry, and the technological emphasis has shifted from wired to wireless transmission and from existing networks to the deployment of new technologies such as 5G. The rapid ascent of Internet intermediaries, such as Google, Facebook, and Amazon, adds a new dynamic to the legislative dealmaking. Finally, transactions such as the Comcast-NBC Universal merger, AT&T's short-lived acquisition of Time Warner, and Verizon's unsuccessful purchases of Yahoo! and America Online, have caused the sharp distinctions between these

173. Emily Birnbaum, *California Lawmakers Back the "Goose That Lays the Golden Eggs" in Antitrust Fight*, POLITICO (Jun. 25, 2021), https://www.politico.com/news/2021/06/25/california-lawmakers-antitrust-496180 (explaining how "bipartisan lawmakers are coming out aggressively in defense of Silicon Valley, the 'goose that lays the golden eggs,' in the words of Rep. Lou Correa (D), one of the members of the delegation.").

174. *See* Klobuchar Press Release, *supra* note 171.

175. *See* Zachary Basu & Margaret Harding McGill, *Ex-Intel Officials Claims Antitrust Could Hurt U.S. in China Tech Race*, AXIOS (Sept. 15, 2021), https://www.axios.com/china-antitrust-big-tech-national-security-d0fb2141-aefe-407c-97ef-8da09cb54b55.html.

categories to break down and have given particular companies multiple perspectives on the same issue.

A. AREAS WHERE STAKEHOLDER INTERESTS OVERLAP

Two areas exist where the interests of multiple sectors of the industry potentially overlap. The first is universal service. The second is federal privacy legislation. The alignment of the various sectors makes these issues likely candidates to be key components in any future communications reform legislation.

1. Universal Service

Universal service is an area where the interests of different industry segments largely overlap. Closing the digital divide would clearly benefit Internet intermediaries by providing them with access to more customers. In fact, the leading players have long supported initiatives to develop new technologies for expanding Internet connectivity, such as Facebook's Connectivity initiative;[176] Google's now defunct Loon and Station projects[177] and its much curtailed fiber project;[178] and Amazon's Project Kuiper initiative to use low-earth orbit satellites to provide broadband.[179]

Both telephone-based and cable-based ISPs are becoming more sanguine about universal service as well. Many have supported low-income connectivity initiatives of their own, such as Comcast Internet Essentials, Access from AT&T, and Charter's Spectrum Internet Assist, among others.[180] Regarding rural support, the shift to reverse auctions and other reforms have made large ISPs increasingly open to accepting universal service funding.[181] Large ISPs

176. *See* Shira Ovide, *Facebook Goes Boring. Yes!*, N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2021/06/28/technology/facebook-internet-access.html.

177. Both projects ran for several years but were recently terminated. Manish Singh, *Alphabet Shuts Down Loon Internet Balloon Company*, TECHCRUNCH (Jan. 21, 2021, 7:42 PM EST), https://techcrunch.com/2021/01/21/google-alphabet-is-shutting-down-loon-internet/.

178. *See* David Anders, *Whatever Happened to Google Fiber?*, C|NET (Mar. 5, 2021, 8:50 AM PT), https://www.cnet.com/home/internet/google-fiber-explained/.

179. *See* Harry Menear, *Satellite Showdown: OneWeb vs. Starlink vs. Project Kuiper*, MOBILE MAG. (Mar. 26, 2021), https://mobile-magazine.com/wireless-networks/satellite-showdown-oneweb-vs-starlink-vs-project-kuiper.

180. *See* Julie Zeglen, *Comcast Is Doubling Internet Essentials Speeds. The Move Comes Amid Ongoing Digital Equity Initiatives—and Calls to Do More*, TECHNICAL.LY (Feb. 2, 2021, 4:12 PM), https://technical.ly/2021/02/02/comcast-internet-essentials-digital-divide/; *Connecting Communities to the American Dream*, AT&T PUB. POL'Y (July 30, 2021, 12:43 PM), https://www.attpublicpolicy.com/universal-service/connectingcommunities/.

181. AT&T and Verizon declined to participate in the first round of CAF Phase I in 2012. *See* Joan Engebretson, *Verizon, AT&T Decline Broadband Connect America Funding*, TELECOMPETITOR (July 25, 2012), https://www.telecompetitor.com/verizon-att-decline-

have also begun actively pursuing state grants issued under the Broadband Infrastructure Framework.[182]

A key priority for ISPs is to ensure that these funds are targeted toward areas in which no ISP is already providing service, as reflected in the universal service fund's shift in focus from high cost to unserved areas.[183] This shift makes sense from a policy standpoint: the biggest social returns will likely come from targeting the limited financial support that is available toward those who are completely cut off from the Internet rather than those who have connectivity but only from a single provider. Indeed, the legislation that created the Broadband Infrastructure Framework enacted during the Biden Administration confirms this insight by prioritizing funding for unserved areas over underserved areas.[184] Focusing subsidies on areas where purely private service is uneconomical also eliminates any divergence of interest. If anything, it alleviates political pressure on incumbents from having to make investments that are uneconomical. Directing universal support toward unserved areas also avoids the unfairness of asking a private company that has invested its own capital to compete with a provider that is being subsidized by the government.

The one potential area of divergence is the source of universal service funding. As noted earlier, universal service is currently funded by a tax base (interstate long distance) that is dwindling more and more every year.[185] Suggestions to expand the current tax to include Big Tech firms providing services through the network would run directly counter to the interests of

connect-america-funding/. AT&T began to show greater receptivity during the second CAF Phase I round in 2013 by accepting $100 million, but Verizon continued not participating. Joan Engebretson, *Verizon Again Declines CAF Funding But AT&T Accepts*, TELECOMPETITOR (Aug. 20, 2013), https://www.telecompetitor.com/verizon-again-declines-caf-funding-but-att-accepts/. Large ISPs participated slightly more actively in the 2015 CAF Phase II program, in which AT&T accepted $428 million in funding and Verizon accepted $49 million for properties they were selling to Frontier. Nicole Blanchard, *AT&T, Frontier, Others Accept $1.5B in CAF-II Funding Despite FCC's Changing Broadband Definition*, FIERCE TELECOM (Dec. 2, 2015, 8:00 AM), https://www.fiercetelecom.com/special-report/at-t-frontier-others-accept-1-5b-caf-ii-funding-despite-fcc-s-changing-broadband. Charter Communications was the biggest winner in the RDOF Phase I reverse auction and is incorporating the $1.2 billion in universal service support into a $5 billion rural buildout initiative. *Charter Announces $5 Billion Initiative to Connect Unserved Americans*, CHARTER PUB. POL'Y (Feb. 5, 2021), https://policy.charter.com/blog/charter-announces-5-billion-initiative-to-connect-unserved-americans.

182. *See, e.g.*, Diana Goovaerts, *Comcast, Verizon Snag $44.9M to Help Deliver Universal Broadband in Delaware*, FIERCE TELECOM (Mar. 18, 2022, 11:33 AM), https://www.fiercetelecom.com/broadband/comcast-verizon-snag-449m-help-deliver-universal-broadband-delaware.

183. *See supra* note 82 and accompanying text.

184. Investment and Jobs Act, Pub. L. No. 117-58, § 60102(h)(1)(A)(i)(I)–(II),135 Stat. 429, 1196 (2021).

185. *See supra* notes 91–94 and accompanying text.

Internet intermediaries.[186] Although this could conceivably constitute a wedge issue between Internet intermediaries and ISPs, the latter have chosen to support transitioning universal service support to general appropriations.[187] Not only is funding universal service through general revenue better public policy;[188] it aligns the interests of the different sectors rather than driving a wedge between them.

2. Privacy

The data-driven nature of the Big Tech firms' business models has long made privacy regulation one of their primary concerns. Big Tech firms have become more amenable to federal privacy-legislation, given the potential difficulties of dealing with a patchwork regime produced by lobbying battles fought across all fifty states.[189] Interestingly, leading telephone-based and cable-based ISPs have lent support to the push for federal privacy-legislation[190]

186. *See supra* notes 95–97 and accompanying text.

187. Mike Dano, *Verizon, AT&T Want to Reshape Lifeline*, LIGHT READING (Jan. 22, 2021), https://www.lightreading.com/ossbss/verizon-atandt-want-to-reshape-lifeline-/a/d-id/766862 (explaining that AT&T and Verizon consider the funding mechanism for Lifeline unsustainable, and both advocate for Congress to create a direct appropriation so recipients can pay for their chosen broadband service). Some portions of the industry are holding onto expanding the tax base as a backup option. Jonathan Spalter, *Who Should Pay for Universal Broadband Connectivity?*, MULTICHANNEL NEWS (Mar. 25, 2021), https://www.nexttv.com/blogs/who-should-pay-for-universal-broadband-connectivity.

188. *See supra* note 90 and accompanying text.

189. *See* David McCabe & Cecilia Kang, *As Congress Dithers, States Step in to Set Rules for the Internet*, N.Y. TIMES (May 14, 2021), https://www.nytimes.com/2021/05/14/technology/state-privacy-internet-laws.html (noting that Google, Amazon, and Facebook spent $5 million on state lobbying efforts in 2019, with Facebook's Vice President of State and Local Policy stating that "[w]hile we support state efforts to address specific challenges . . . there are some issues, like privacy, where it's time for updated federal rules for the internet—and those need to come from Congress.").

190. *See, e.g.*, *Privacy*, AT&T, https://about.att.com/csr/home/reporting/issue-brief/privacy.html (last visited Aug. 26, 2021) (describing AT&T's support for federal consumer privacy legislation); Kathy Grillo, *Privacy: It's Time for Congress to Do Right by Consumers*, VERIZON NEWS CTR. (Oct. 9, 2018), https://www.verizon.com/about/news/privacy-its-time-congress-do-right-consumers; Tom Rutledge, *Charter Urges Congress to Pass Legislation Protecting Privacy Everywhere on the Internet*, CHARTER PUB. POL'Y (Apr. 8, 2018), https://policy.charter.com/blog/charter-urges-congress-pass-legislation-protecting-privacy-everywhere-internet; *see also* Letter from the Business Roundtable to Sen. Majority Leader Mitch McConnell et al. (Sept. 10, 2019), https://s3.amazonaws.com/brt.org/BRT-CEOLetteronPrivacy-2.pdf (letter from organization consisting of fifty-one businesses from across the economy, including AT&T, Amazon, and Comcast, calling for federal privacy legislation).

as they pursue more diversified business models based on advertising revenue.[191]

The extent to which federal privacy legislation would preempt state law poses perhaps the biggest privacy-related challenge to technology firms.[192] Although industry members would prefer a uniform federal standard,[193] many privacy advocates regard any federal legislation as a floor above which states would remain free to enact additional restrictions.[194] A complicating factor is the fact that some states have enacted privacy laws that apply only to ISPs, as noted above.[195] Needless to say, ISP-specific measures are of greater concern to ISPs than to edge providers.[196]

B. AREAS WHERE BIG TECH HAS MORE AT STAKE

Although the interests of various stakeholders align for universal service and federal privacy legislation, there are some issues that are more critical for big companies and other issues that loom larger for ISPs. In particular, Big Tech companies have more at stake on two potential areas for future reform

191. *See, e.g.*, Peter Adams, *AT&T Sells Xander to Microsoft, Ending Ill-Fated Bid to Dethrone Digital Duopoly*, MARKETING DIVE (Dec. 21, 2021), https://www.marketingdive.com/news/att-sells-xandr-to-microsoft-ending-ill-fated-bid-to-dethrone-digital-duo/616411/ (describing AT&T's unsuccessful attempts to enter the advertising business by purchasing Time Warner and the Xandr ad-tech platform).

192. *See* Scott Ikeda, *Big Tech Moves to Influence State Privacy Laws, Laying the Groundwork for a Federal Push*, CPO MAG. (May 28, 2021), https://www.cpomagazine.com/data-privacy/big-tech-moves-to-influence-state-privacy-laws-laying-the-groundwork-for-a-federal-push/ ("[The] conventional wisdom is that Silicon Valley would prefer federal privacy laws that are favorable to them to a patchwork of state laws that vary in their terms."); Anupam Chander, Margot E. Kaminski & William McGeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1798 (2021) (describing benefits and costs of federal preemption of privacy regulation).

193. *See* Todd Feathers, *Big Tech Is Pushing States to Pass Privacy Laws, and Yes, You Should Be Suspicious*, MARKUP (Apr. 15, 2021), https://themarkup.org/privacy/2021/04/15/big-tech-is-pushing-states-to-pass-privacy-laws-and-yes-you-should-be-suspicious (explaining that experts believe Big Tech's "ultimate goal is to prompt federal legislation that would potentially override California's privacy protections.").

194. *See* Gicel Tomimbang, *Authors of Federal Privacy Bill and California's Privacy Ballot Initiative Discuss the Future of U.S. Consumer Law*, CONSUMER PRIVACY WORLD (Jan 12. 2022), https://www.consumerprivacyworld.com/2022/01/authors-of-federal-privacy-bill-and-californias-privacy-ballot-initiative-discuss-the-future-of-u-s-consumer-privacy-law/; Makenzie Holland, *Feds Debate While States Act on Data Privacy Laws*, SEARCHSECURITY (Mar. 2021), https://www.techtarget.com/searchsecurity/feature/Feds-debate-while-states-act-on-data-privacy-laws.

195. *See supra* note 106 and accompanying text.

196. *See* ACA Connects – Am.'s Commc'ns Ass'n v. Frey, 471 F. Supp. 3d 318 (D. Me. 2020) (illustrating a First Amendment challenge by four ISP trade associations against Maine's ISP-specific privacy law). In full disclosure, I am serving as an expert consultant in this litigation.

legislation: Section 230 and antitrust. Note that the divergence of interest is not necessarily an insurmountable barrier to a new communications statute. However, it does frame more clearly the terms under which the key subsectors of the industry might strike a mutually beneficial deal.

1. Section 230 of the Communications Decency Act

Given the broad protections from liability that Section 230 currently provides to Big Tech firms, these companies have the most to lose from the increasing calls from both Democrats and Republicans to limit its scope or repeal it entirely, although some companies are making tactical concessions to ensure that wholesale repeal of the statute is off the table.[197] At the same time, some ISPs have come out in support of Section 230 reform, contrasting Internet intermediaries' freedom to moderate content with both the liability imposed on traditional distributors of third-party content, such as book publishers, newspapers, and broadcasters, and the nondiscrimination mandates associated with net neutrality.[198] Content providers have similarly pushed for Section 230 reform as a means to protect their intellectual property, joined by other noncommunications industries supporting such reform for their own reasons.[199]

Differences in the reasons motivating Democrats' and Republicans' calls for Section 230 reform may leave little common ground for agreement,[200] although calls for greater transparency regarding the substance of online platforms' content moderation policies may offer some basis for a compromise solution.[201] The takedowns that occurred in the aftermath of the

197. Adi Robertson, *Mark Zuckerberg Just Told Congress to Upend the Internet*, VERGE (Oct. 29, 2020), https://www.theverge.com/2020/10/29/21537040/facebook-mark-zuckerberg-section-230-hearing-reform-pact-act-big-tech.

198. Joan Marsh, *The Neutrality Debate We Need to Have*, AT&T PUB. POL'Y (Aug. 31, 2020), https://www.attpublicpolicy.com/fcc/the-neutrality-debatewe-need-to-have/.

199. David McCabe, *IBM, Marriott and Mickey Mouse Take on Tech's Favorite Law*, N.Y. TIMES (Feb. 4, 2020), https://www.nytimes.com/2020/02/04/technology/section-230-lobby.html.

200. *See supra* notes 121–124 and accompanying text.

201. Nandita Bose & David Shepardson, *Senators Propose Reform to Key U.S. Tech Liability Shield*, REUTERS (Jun. 24, 2020), https://www.reuters.com/article/us-usa-tech-section-230/senators-propose-reform-to-key-u-s-tech-liability-shield-idUSKBN23V2V3 (discussing the Platform Accountability and Consumer Transparency Act, or PACT Act, co-sponsored by Democratic Senator Brian Schatz and Republican Senator John Thune, which would require tech platforms to explain their content moderation practices).

enactment of SESTA and FOSTA[202] lend some credibility to predictions that limiting Section 230's scope would lead to less posting of Internet content.[203]

2. Antitrust Reform

Big Tech firms are also facing antitrust scrutiny, with Google, Facebook, Apple, and Amazon becoming targets of the antitrust reform movement.[204] Interestingly, the Ranking Member of the House Subcommittee on Antitrust, Commercial and Administrative Law has attempted to draw a link between possible reforms of antitrust and Section 230, arguing that antitrust reform is the only way to curb supposed discrimination in content moderation.[205]

Although the 2020 House Staff proposed several general changes to antitrust that were not specific to Big Tech,[206] the current raft of proposals reported by the House Judiciary Committee on June 24, 2021, largely target "online platforms."[207] The same is true about the bill reported by the Senate Judiciary Committee.[208] The proposals' lack of direct applicability to ISPs have led the industry to remain unsurprisingly silent about the legislation.

ISPs' reticence to get involved does carry some risk. The logic of their technological neutrality arguments when criticizing ISP-specific state privacy

202. *See* Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom (noting that several popular websites like Craigslist and Reddit removed swaths of content soon after the passage of SESTA and FOSTA).

203. Derek E. Bambauer, *What Does the Day After Section 230 Reform Look Like?*, BROOKINGS (Jan. 22, 2021), https://www.brookings.edu/techstream/what-does-the-day-after-section-230-reform-look-like/ ("The first and most predictable effect of a diminution of Section 230 will be a wave of litigation. . . . The second immediate effect is likely that internet sites will become much more cautious about content.").

204. Nicole Goodkind, *Congress Targets Tech Giants Apple, Google, Amazon, and Facebook in New Series of Antitrust Laws*, FORTUNE (Jun. 11, 2021), https://fortune.com/2021/06/11/congress-targets-tech-giants-apple-google-amazon-and-facebook-in-new-series-of-antitrust-laws/.

205. *See* Cat Zakrzewski & Aaron Schaffer, *The Technology 202: GOP Divisions Threaten the Bipartisan Efforts to Pass Antitrust Legislation*, WASH. POST (Jun. 17, 2021), https://www.washingtonpost.com/politics/2021/06/17/technology-202-gop-divisions-threaten-bipartisan-efforts-pass-antitrust-legislation/.

206. *See* CICILLINE REPORT, *supra* note 169, at 383–86, 390–404.

207. Four of the five bills reported by the House Judiciary Committee apply only to *online platforms*, which by definition can only be "a website, online or mobile application, operating system, digital assistant, or online service." H.R. 3816, 117th Cong. § 2(g)(10) (2021); H.R. 3825, 117th Cong. § 5(10) (2021); H.R. 3826, 117th Cong. § 3(h) (2021); H.R. 3849, 117th Cong. § 5(12) (2021). The sole exception is the bill on merger filing fees, which applies to all firms. H.R. 3843, 117th Cong. (2021).

208. S. 2992, 117th Cong. (2022).

laws and net neutrality appears to apply equally to these antitrust proposals. Moreover, telecommunications firms have been active in merger markets in the past[209] and have been the not-infrequent target of enforcement activity, evidenced most recently by AT&T's short-lived acquisition of Time Warner.[210] Criticisms from some quarters that the current proposals do not include ISPs[211] creates some possibility that the bills may expand to include network providers as well, which would of course broaden the scope of the firms concerned about this issue.

C. AREAS WHERE ISPS HAVE MORE AT STAKE

At the same time, other issues exist in which ISPs have more skin in the game than Big Tech. Three areas in particular loom the largest: spectrum policy, pole attachments, and net neutrality. Notably, the more technical nature of these first two topics place them further from the public eye than the third. In each case, Big Tech's interests are not completely opposed to those of the ISPs. In addition, there are some areas in which the interests of different types of ISPs diverge.

1. Spectrum

Wireless broadband is the most rapidly growing segment of the industry, and satisfying this burgeoning demand depends on access to ever-increasing amounts of spectrum. The need for more spectrum unifies all actors in this space. Network providers and Big Tech firms all need spectrum to provide service to their customers. The incentive auction even allowed struggling broadcasters to benefit from mobile broadband's rise.[212]

That said, key industry segments line up somewhat differently with respect to the best way to deploy spectrum. Traditional wireless providers, such as AT&T, Verizon, and T-Mobile, have staked their future on 5G and are lobbying for additional allocations of licensed spectrum to support its

209. Jean-Christophe Lebraud & Peter Karlströmer, *The Future of M&A in Telecom*, MCKINSEY & CO. (2011), https://www.mckinsey.com/~/media/mckinsey/dotcom/client_service/Telecoms/PDFs/M_A.ashx.

210. *See* United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019) (upholding the district court's rejection of the federal government's challenge to AT&T's acquisition of Time Warner).

211. *See, e.g.*, Karl Bode, *Recent Antitrust Push Is Weirdly Narrow, Pretends Telecom and Banking Don't Exist*, TECHDIRT (June 17, 2021, 5:54 AM), https://www.techdirt.com/articles/20210615/07412446992/recent-antitrust-push-is-weirdly-narrow-pretends-telecom-banking-dont-exist.shtml; Katharine Trendacosta, *When It Comes to Antitrust, It's All Connected*, ELEC. FRONTIER FOUND. (Aug. 26, 2021), https://www.eff.org/deeplinks/2021/08/when-it-comes-antitrust-its-all-connected.

212. *See supra* note 154 and accompanying text.

deployment.[213] Big Tech firms like Google and ISPs like Comcast that to date have largely foregone significant investments in licensed spectrum tend to support allocating increasing amounts to unlicensed spectrum.[214]

2. Pole Attachments

In addition to spectrum, firms looking to deploy 5G networks need access to locations where they can locate their small cells. On the one hand, traditional wireless firms embrace pole attachment reforms that make it easier to deploy new network infrastructure.[215] Their position was initially supported by Google to facilitate its deployment of Google Fiber,[216] although questions about the future of this initiative may cause its position to change. Wireline ISPs that are not deploying wireless networks have opposed these reforms because of the additional burdens they impose and concerns that new entrants eager to deploy as quickly as possible will pay too little attention to preventing the disruption of service to existing customers.[217]

The real schism on this issue lies between those deploying new networks and incumbents that are providing service through existing technologies, with the former including the telephone industry and the latter consisting primarily of the cable industry. Indeed, the history of pole attachments reveals the extent to which each industry's position is contingent on its construction plans. Cable was the primary beneficiary of the Pole Attachments Act during the industry's early years,[218] but its position has reversed now that its networks are fully deployed.

3. Net Neutrality

The positions of the different segments of the industry have shifted over time. Net neutrality has been critically important to ISPs throughout the course

213. Unlicensed Use of the 6 GHz Band, 35 FCC Rcd. 3852 (2020).

214. Jay Peters, *Google Is Trying to Test a Secret 6 GHz Network in 17 Different States*, VERGE (Aug. 17, 2020), https://www.theverge.com/2020/8/17/21372797/google-fcc-test-6ghz-network-17-states; Use of the 5.850-5.925 GHz Band, 35 FCC Rcd. 13440 (2020).

215. *See AT&T Statement on Reforming Pole Attachment Process*, AT&T PUB. POL'Y (Aug. 2, 2018, 11:44 AM), https://www.attpublicpolicy.com/regulatory-legislative-reform/att-statement-on-reforming-pole-attachment-process/; Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, Fed. Commc'ns Comm'n (Sept. 11, 2017), https://ecfsapi.fcc.gov/file/10911001404566/2017%2009%2011%20Verizon%20broadband%20deployment%20ex%20parte.pdf.

216. *See* Jon Brodkin, *FCC Sides with Google Fiber over Comcast with New Pro-Competition Rule*, ARS TECHNICA (Aug. 2, 2018), https://arstechnica.com/tech-policy/2018/08/fcc-gives-google-fiber-and-new-isps-faster-access-to-utility-poles/.

217. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 7705 (2018).

218. *See* Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327, 330–31 (2002).

of the debate. Big Tech's relationship with net neutrality has been more complex. During the beginning years of the debate, first Microsoft and then Google represented net neutrality's strongest advocates. This began to change in the lead up to the 2010 Open Internet Order, when Google and Verizon brokered a deal in which both firms would support the imposition of net neutrality on wired broadband in exchange for lighter touch regulation of wireless broadband.[219] Netflix took over as the primary net neutrality advocate during the debates leading up to the 2015 Open Internet Order.[220] When the 2018 Restoring Internet Freedom Order abolished net neutrality, Big Tech companies opposed the decision and began to advocate for legislation to stabilize the situation.[221]

Big Tech companies have been criticized for the tepidness of their support for net neutrality.[222] This perception is far from illusory: Netflix's CEO has acknowledged that net neutrality is "not our primary battle at this point" for the simple reason that "we're big enough to get the deals we want."[223] The same conclusion was drawn by Tim Wu—the scholar credited with coining the phrase "net neutrality," and who is currently serving as special advisor to President Biden for technology and competition policy—acknowledging that Big Tech companies "have mixed motives in this area" and now that they have

219. David Goldman, *Why Google and Verizon's Net Neutrality Deal Affects You*, CNN MONEY (Aug. 5, 2010, 4:29 PM ET), https://money.cnn.com/2010/08/05/technology/google_verizon_net_neutrality_rules/index.htm.

220. Karl Bode, *Google, Facebook, and Netflix Decide They Care About Net Neutrality Again*, VICE (Jan. 9, 2018, 9:00 AM), https://www.vice.com/en/article/d344pj/google-facebook-and-netflix-net-neutrality-lawsuit.

221. *Id.*

222. *Id.*; Karl Bode, *Google Lawyer Again Insists They Didn't Sell Out on Neutrality*, DSL REPS. (Aug. 12, 2010, 3:40 PM EDT), http://www.dslreports.com/shownews/Google-Lawyer-Again-Insists-They-Didnt-Sell-Out-On-Neutrality-109870; Natasha Lomas, *Net Neutrality Protestors Arrested at Google HQ*, TECHCRUNCH (June 25, 2014, 5:48 AM EDT), https://techcrunch.com/2014/06/25/occupygoogle-arrests/; Marguerite Reardon, *FCC beware: Facebook, Google like net neutrality just as it is*, C|NET (July 7, 2017, 12:47 PM PT), https://www.cnet.com/tech/services-and-software/fcc-beware-facebook-google-like-net-neutrality-just-as-it-is; Joe Pinsker, *Where Were Netflix and Google in the Net-Neutrality Fight?*, ATL. (Dec. 20, 2017) https://www.theatlantic.com/business/archive/2017/12/netflix-google-net-neutrality/548768/; Klint Finley, *Tech Giants to Join Legal Battle Over Net Neutrality*, WIRED (Jan. 5, 2018, 4:33 PM), https://www.wired.com/story/tech-giants-to-join-legal-battle-over-net-neutrality/; Klint Finley, *Big Tech's Fight for Net Neutrality Moves Behind the Scenes*, WIRED (May 27, 2018, 7:00 AM), https://www.wired.com/story/big-techs-fight-for-net-neutrality-moves-behind-the-scenes/.

223. Tony Romm, *Netflix CEO: Net Neutrality Is No longer Our 'Primary Battle'*, VOX (May 31, 2017, 1:38 PM EDT), https://www.vox.com/2017/5/31/15720268/netflix-ceo-reed-hastings-net-neutrality-open-internet.

achieved scale, "it's to some degree to their advantage to climb up the ladder and pull it up after them."[224]

Critics are also drawing an analogy between net neutrality and the extent to which Big Tech companies possess market power and prioritize their own content.[225] At the same time, Big Tech companies are becoming significant network operators in their own right, building wide-area networks that cover most continents and becoming the largest constructors of undersea cables in the world.[226] They have largely chosen to operate these as private networks, primarily to avoid the regulatory burdens of the type associated with net neutrality.[227]

The softening of Big Tech's position on net neutrality suggests the possibility of finding some common ground. That said, any legislation that is not sufficiently protective of net neutrality runs the risk of generating significant political backlash.

D. POLITICAL OBSTACLES

Our brief review has identified a number of issues that could form the basis for a political bargain sufficient to support enactment of a new communications statute. Aside from the substance of such a political deal, considerable obstacles remain to its possible enactment.

First and foremost are the priorities of the Biden Administration. To its credit, it has maintained a laser-like focus on seven priorities: COVID-19, climate, racial equity, the economy, health care, immigration, and restoring the United States' global standing.[228] Aside from the inclusion of rural broadband

224. April Glaser & Will Oremus, *The Big Tech Companies That Love Net Neutrality Have a Ton to Gain from Its Demise*, SLATE (Dec. 13, 2017, 4:53 PM), https://slate.com/technology/2017/12/tim-wu-explains-why-the-tech-companies-that-love-net-neutrality-have-a-ton-to-gain-from-its-demise.html.

225. Fred Campbell, *The Truth About 'Net Neutrality,' the Left, and Google*, FORBES (May 3, 2017, 9:49 AM EDT), https://www.forbes.com/sites/fredcampbell/2017/05/03/the-truth-about-net-neutrality-the-left-and-google/; Jeremy Carl, *Debating Net Neutrality: Big-Tech Monopolies Are the Real Problem*, NAT'L REV. (Jun. 11, 2019), https://www.nationalreview.com/2019/06/debating-net-neutrality-big-tech-monopolies-are-the-real-problem/; Ryan Singel, *Net Neutrality Protestors Call for Google to Stand Tall*, WIRED (Aug. 3, 2010, 8:47 PM), https://www.wired.com/2010/08/net-neutrality-google-protest/.

226. Christopher S. Yoo, *Paul Baran, Network Theory, and the Past, Present, and Future of the Internet*, 17 COLO. TECH L.J. 161, 181–82 (2018).

227. *See* Mark Jamison, *Facebook Tells Us Why Net Neutrality Regulation Is a Bad Idea*, AEI (Apr. 16, 2019), https://www.aei.org/technology-and-innovation/telecommunications/facebook-tells-us-why-net-neutrality-regulation-is-a-bad-idea/.

228. *The Biden-Harris Administration Immediate Priorities*, WHITE HOUSE, https://www.whitehouse.gov/priorities/ (last visited Aug. 27, 2021).

funding in the infrastructure bill, none of the priorities identified here appear to fall within this list.

The second is the high level of partisanship in the current Congress. For only the third time in U.S. history, the Senate is equally divided between the two major parties, with Vice President Kamala Harris providing the casting vote to break ties.[229] The Democrats' majority in the House of Representatives is larger but sufficiently thin to limit the prospects for major legislative reform.[230] The loss of a majority in either chamber in the midterm elections would make these possibilities even more remote. That said, the bipartisan nature of the support for the infrastructure bill and for antitrust reform suggest that this problem may not be insurmountable.

Finally, combining the substantive elements discussed above into a single piece of legislation would be complicated by the fact that different provisions fall within the jurisdiction of different congressional committees. Specifically, classic telecommunications issues such as universal service, intermediary immunity, spectrum policy, pole attachments, and net neutrality fall within the ambit of the commerce committees, while the judiciary committees bear responsibility for privacy and antitrust. The involvement of two sets of committee leaders and members will no doubt make the difficult process of enacting major legislative reform even harder.

V. CONCLUSION

Politics is often described as the art of the possible. This pragmatic observation underscores the importance of thinking about major reform legislation as more than just debates over substantive issues but also about building coalitions of support. This approach provides insights into the enactment of the Telecommunications Act of 1996 and reveals possible avenues for the passage of the next major communications statute.

Although predictions are hazardous, especially about the future,[231] some thoughts are warranted on the likely direction of communications reform. In

229. Jennifer Epstein, Steven T. Dennis & Laura Litvan, *Divided Senate Gives Kamala Harris Powerful Tiebreaker Role*, BLOOMBERG (Jan. 17, 2021), https://www.bloomberg.com/news/articles/2021-01-17/senate-divided-by-party-gives-harris-powerful-tiebreaker-role.

230. *See* Party Breakdown, U.S. House of Representatives Press Gallery (accessed Aug. 11, 2021), https://pressgallery.house.gov/member-data/party-breakdown.

231. Although this quotation is often associated with various people, including Mark Twain, Niels Bohr, Samuel Goldwyn, Nostradamus, and Yogi Berra, the earliest verified published use of the phrase appeared in 1948 in the autobiography of Danish politician Karl Kristian Steincke. Garson O'Toole, *It's Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR (Oct. 20, 2013), https://quoteinvestigator.com/2013/10/20/no-predict/.

terms of political salience and financial importance, the most important issue in play is antitrust reform. Although this issue has the most relevance for Big Tech companies, it should interest every stakeholder, as all major telecommunications companies have a strong interest in preserving the economically focused approach that currently animates antitrust law, and they all no doubt plan to undertake mergers and engage in conduct that could be subject to new antitrust rules that may be adopted.

The second most important issue is privacy. Although the Big Tech firms currently rely the most on advertising, many other stakeholders are exploring the possibility of pursuing business models based on the use of data. In addition, the increasing number of state privacy statutes is raising the real possibility that every stakeholder may face a legal environment that is badly fragmented.

Although the ISPs share a degree of interest in both these issues, net neutrality and spectrum reform have bigger implications for their business models. And politicians appear to be most interested in antitrust and Section 230 reform, although those most interested in antitrust tend to advocate for outcomes that almost all of the key stakeholders would tend to resist.

Any enactment of communications reform legislation in the short run would depend on whether any one proposal can cobble together enough interest from a sufficient cross section of stakeholders to induce them to support such a proposal. Many parties that were previously content with the status quo, or at least preferred sticking with it over assuming the risks of major reform, now appear motivated enough to participate in some form of compromise.

Although these immediate concerns will determine whether such reform legislation could be enacted in the near future, it is important not to make too much of the politics of the moment. Major reform legislation is typically the process of years of deliberation. Thus, laying the groundwork for reform legislation can serve important purposes regardless of the short-term prospects.