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THE POLITICAL DYNAMICS OF LEGISLATIVE REFORM: POTENTIAL DRIVERS OF THE NEXT MAJOR COMMUNICATIONS STATUTE

Christopher S. Yoo¹ & Tiffany Keung²

ABSTRACT

Although most studies of major communications reform legislation focus on the merits of their substantive provisions, analyzing the political dynamics that led to the enactment of such legislation can yield important insights. An examination of the tradeoffs that led the major industry segments to support the Telecommunications Act of 1996 provides a useful illustration of the political bargain that it embodies. Application of a similar analysis to the current context identifies seven components that could form the basis for the next communications statute: universal service, pole attachments, privacy, intermediary immunity, net neutrality, spectrum policy, and antitrust reform. Determining how these components might fit together requires an assessment of areas in which industry interests overlap and diverge as well as aspects of the political environment that can make passage of reform legislation more difficult.

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I. INTRODUCTION

When the Telecommunications Act of 1996 was signed into law, it was hailed as an extraordinary feat of legislation.³ Signed amid unusual fanfare after a deliberative process that spanned many years, this comprehensive legislative reform was the product of bipartisan cooperation achieved during a time of unusually strong partisan acrimony.⁴

Such an unusual achievement offers potential lessons for what might lead to the next great communications statute. Although most of the other contributions of this symposium have focused on the impact of the 1996 Act’s substantive provisions, we would like to focus 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 major components of the 1996 Act have faded over time, while other aspects regarded as minor ended

3. See, e.g., Statement on Signing the Telecommunications Act of 1996, 1 PUB. PAPERS 188, 188 (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 legalization he signed. Larry Pressler, *Politics and Telecommunications*, 58 FED. COMM. L.J. 555, 555 (2006).

4. 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).

up having more lasting importance, 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 and political quid pro quo as well as potential obstacles to closing such a deal.

II. THE TELECOMMUNICATIONS ACT OF 1996 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.⁵ 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.⁶ The quid pro quo aspects of the 1996 Act have all the makings of a classic political bargain.⁷

Like all major legislation, the 1996 Act was to some extent the product of 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.⁸ In

5. Statement on Signing the Telecommunications Act of 1996, *supra* note 3, 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.”).

6. CHARLES B. GOLDFARB, CONG. RSCH. SERV., RL 33034, TELECOMMUNICATIONS ACT: COMPETITION, INNOVATION, AND REFORM 10 (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 with one another and guidelines on intercarrier compensation rates).

7. This path has been paved by other scholars. *See, e.g.*, Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835 (1997); Furchtgott-Roth & Roth, *supra* note 4, 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).

8. *See* H.R. CONF. 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”). *See generally* Joseph P. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325 (1998) (characterizing the Telecommunications Act of 1996 as the archetypical example of the shift away from regulatory

addition, frustrations with Judge Harold Greene’s more than decade-long supervision of the decree that broke up AT&T helped fuel calls for legislative reform.⁹

These factors, while important, would not be sufficient to support the enactment of the Telecommunications Act of 1996 unless all the major segments of the industry received sufficient benefits to convince them to lend their backing. Although we cannot go into every detail of a statute that is 107 pages long,¹⁰ the outlines of the deal are relatively clear.

A. TELEPHONY

Perhaps the most important provisions of the 1996 Act were those relating to telephony.¹¹ The Act’s primary benefit to the local Bell Operating Companies was the authorization for them to begin selling long distance once they had opened their local telephone markets to competition.¹² At the same time, the Act authorized local telephone companies, (called local exchange carriers (LECs)), to begin offering cable television service by repealing the statutory provision prohibiting telephone companies from offering cable television service.¹³ It also

oversight toward competition and maximization of consumer choice across six industries: railroads, airlines, trucks, telecommunications, electricity, and natural gas).

9. For a representative example, see PETER W. HUBER ET AL., *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).

10. For overviews of the 1996 Act, see 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).

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

12. 47 U.S.C. § 271(c)(2).

13. 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.” *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*] (Rep. Rick Boucher). This provision simply codified a string of lower court decisions holding that the ban violated the First Amendment on which the Supreme Court had already heard oral argument when the 1996 Act was

preempted all state laws limiting competition in local and long distance telephone service¹⁴ and overturned the Supreme Court’s decision in *MCI Telecommunications Corp. v. AT&T Co.*¹⁵ by giving the FCC the flexibility to forbear from applying any unnecessary regulations.¹⁶

In return, LECs were subject to measures designed to open their markets to competition. Specifically, the Act imposed a regime of resale, number portability, dialing parity, and reciprocal compensation on all LECs.¹⁷ LECs providing service the day the 1996 Act was signed (called incumbent LECs (ILECs)) bore the additional obligations to interconnect and provide unbundled access to their network elements.¹⁸ The Act also codified for the first time the FCC’s longstanding “universal service” policy of promoting the extension of communications services to as many Americans as possible, expanding affordable nationwide telephone service to schools, health care providers, and libraries and specifying that it be funded by contributions from telecommunications carriers providing long distance telephone services.¹⁹ At the same time, the Act codified the FCC’s so-called Customer Proprietary Network Information privacy rules that the FCC developed during its Computer Inquiries to protect competition in local telecommunications, extending them to protect user privacy by expanding them to apply to small

passed. 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, and Privacy*, 1 J. FREE SPEECH L. 513, 543-44 (2021). The 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* that never amounted to anything significant. 47 U.S.C. § 571(a).

14. 47 U.S.C. § 253.

15. 512 U.S. 218 (1994).

16. 47 U.S.C. § 160.

17. *Id.* § 251(b).

18. *Id.* § 251(c).

19. *Id.* § 254(b)(6) & (d).

as well as large carriers.²⁰ It also required all LECs and other investor-owned utilities to provide others with access to their poles, ducts, conduits, and rights of way.²¹

B. CABLE

The deal was more complex for the cable industry, coming on the heels of a broad deregulation in 1984 followed by the re-imposition of regulation in 1992²² and with key parts of the deal emerging late in the legislative process.²³ The primary benefit to the cable industry was the enactment of a framework to deregulate the rates charged to consumers.²⁴ The Act also prohibited state and local governments from limiting cable operators' ability to provide telephone service.²⁵ The Act further allowed cable operators to own broadcast networks and increased their ability to own broadcast stations.²⁶

As noted earlier, one of the tradeoffs for these benefits was opening the local cable market to competition from local telephone companies.²⁷ Cable was also subject to greater restrictions on indecent programming, including larger fines for transmitting obscene programming;²⁸ the obligation to scramble sexually explicit programming and to scramble or block programming upon subscriber request;²⁹ and the authority not to carry obscenity,

20. *Id.* § 222.

21. *Id.* §§ 224, 251(b)(4). The prior statute enacted in 1978 did not require utilities to permit pole attachments, but it did regulate the rates for utilities that chose to permit them could charge for them. Pole Attachments Act of 1978, Pub. L. No. 95-234, 92 Stat. 35 (1978).

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

23. *Reflecting on Twenty Years*, *supra* note 13, at 52 (Sen. Larry Pressler).

24. 47 U.S.C. § 543.

25. *Id.* § 541(b)(3). The franchising authority may also not include telecommunications revenue to calculate the cable franchise fee. *Id.* § 542(b).

26. Sec. 202(f)(1), 110 Stat. at 111 (revising 47 C.F.R. § 76.501).

27. *See supra* note 13 and accompanying text.

28. 47 U.S.C. § 559.

29. *Id.* §§ 560-561.

indecenty, or nudity on public or leased access channels.³⁰ The Act also required cable operators to open their networks to set-top boxes provided by third parties³¹ and to provide closed captioning of public service announcements.³²

C. BROADCASTING

The broadcasting industry was a major beneficiary of the 1996 Act, particularly after then-Minority Leader Robert Dole put a hold on the version of the legislation passed by the House in 1994 on the correct expectation that both houses of Congress would flip to Republican control.³³ The most dramatic change was the liberalization of ownership restrictions for radio and television stations.³⁴ Regarding the digital television transition, the 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.³⁵ The Act lengthened the licensing term to eight years and revised the renewal process in ways that increased the likelihood incumbent licensees would be renewed.³⁶ It also removed the restriction barring broadcast stations from affiliating with more than one network.³⁷

The biggest burden taken on by the broadcast industry in return for these benefits is 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.³⁸ The Act further called for the creation of an FCC advisory committee to establish a rating system one year following

30. *Id.* § 532(c)(2).

31. *Id.* § 549.

32. *Id.* § 613.

33. *Reflecting on Twenty Years, supra* note 9, at 70 (Gerard J. Waldron).

34. Sec. 202(a)-(d), 110 Stat. at 110-11 (revising 47 C.F.R. § 73.3555).

35. 47 U.S.C. § 336(a)(1).

36. *Id.* §§ 307(c), 309(k).

37. Sec. 202(e), 110 Stat. at 111 (revising 47 C.F.R. § 73.658(g)).

38. 47 U.S.C. § 303(x).

enactment unless the industry voluntarily created one on its own.³⁹ Broadcasters must also transmit the rating of any video content that has received a rating.⁴⁰

D. INTERNET

For the most part, the 1996 Act almost entirely ignored the Internet.⁴¹ The sole exception is pornography, which Congress addressed by adopting the CDA criminalizing the use of an interactive consumer service to share content that depicts sexual or excretory activities to minors.⁴² These provisions grew out of legislation that Senator James Exon had submitted the previous year and had undergone extensive consideration, including opposition by the Justice Department, an adverse proposed amendment by Senator Patrick Leahy, and a frigid response from House Speaker Newt Gingrich.⁴³ CDA opponents backed a floor amendment by Representatives Cox and Wyden providing immunity to interactive computer service providers, with both provisions ending up in the final legislation.⁴⁴

39. *Id.* § 303 note.

40. *Id.* § 303(w)(2).

41. 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 Telecommunications Act of 1996. . . .”); accord *Reno v. ACLU*, 521 U.S. 844, 857 (1997) (“The major components of the [Telecommunications Act of 1996] have nothing to do with the Internet.”).

42. In the words of John Podesta, who served as Counselor to Senate Minority Leader Tom Daschle when the 1996 Act was passed and who to serve as White House Chief of Staff during President Clinton’s second term, “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).

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

44. *Id.* at 67-72, 91-92.

E. THE IMPACT OF THE 1996 ACT

Looking back at the 1996 Act from the vantage point of twenty-five years of history, what is perhaps most striking is the number of major provisions that ended up not having any enduring importance.⁴⁵

Perhaps the most widely accepted premise is that the 1996 Act's relaxation of the ownership rules led to greater concentration that in turn has reduced media diversity.⁴⁶ Both premises are more empirically complicated than generally believed. For example, Eli Noam's comprehensive study reported the levels of media concentration across various sectors from 1984 to 2005 in terms of the Herfindahl-Hirschman Index (HHI), which is now the measure of concentration most widely accepted in policy circles, which he then combined into aggregate measures.⁴⁷ Noam found certain mass media sectors remained unconcentrated,⁴⁸ others went from concentrated to moderately concentrated,⁴⁹ while still others had went from unconcentrated to moderately concentrated.⁵⁰ His weighted average of all twenty-seven mass media sectors included in his study had increased from unconcentrated to the low end of moderately concentrated levels from 1996 to 2005, with submeasures for content media industries and news media remaining unconcentrated.⁵¹ In terms of the impact of concentration on diversity, reviews of the literature find the empirical evidence to be mixed.⁵² The Supreme Court's recent decision

45. For a related argument, see Stuart Minor Benjamin, *Ships Passing in the Night: The Communications Act and the Convergence on Broadband*,

46. 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).

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

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

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

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

51. *Id.* at 317-18.

52. Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 699 & nn.126-130, 700 & n.136 (2005) (reviewing the empirical literature and finding it inconclusive); Daniel E. Ho & Kevin M.

upholding the FCC's 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 debate over media ownership.⁵³

Regarding telephony, long distance revenue withered even before voice over Internet Protocol and online video conferencing providers, such as Free World Dialup, Vonage, and Skype, rendered it largely worthless.⁵⁴ The telephony provisions failed to induce competition in local telephone service and have been abandoned.⁵⁵ Competition in local telephone service emerged not through entry induced by the 1996 Act but rather through the advent of cellular telephony (another technology almost entirely ignored by the 1996 Act).⁵⁶

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.⁵⁷ Somewhat ironically, empirical studies have shown that rate regulation actually caused quality-adjusted rates to increase.⁵⁸ 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,⁵⁹

Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 797-98 (2009) (same); Joel Waldfoegel, *Should We Regulate Media Ownership?*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 3 (Philip M. Napoli ed., 2007) (same). Notably, Ho and Quinn's study found that some mergers reduced diversity, while others increased it. Ho & Quinn, *supra*, at 833-60.

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

54. Yoo, *supra* note 22, at 893-94.

55. 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).

56. Yoo, *supra* note 22, at 896.

57. Yoo, *supra* note 52, at 685-87.

58. THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: THE ECONOMICS OF RATE CONTROLS 69-177 (1997).; Gregory S. Crawford, *The Impact of the 1992 Cable Act on Household Demand and Welfare*, 31 RAND J. ECON. 422, 444-45 (2000).

59. Yoo, *supra* note 22, at 898.

and is now giving way to over-the-top providers, such as Netflix, Amazon Prime, Disney+, HBO Max, Hulu, and Peacock.⁶⁰ The set-top box initiative has continued to languish.⁶¹

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, with full-power analog stations going dark by summer 2009,⁶² low-power analog stations outside of Alaska returning their second channels by July 13, 2021,⁶³ and the transition eventually being completed on January 10, 2022.⁶⁴ The V-chip remains largely unused.⁶⁵ The indecency restrictions proved to be short lived. The Supreme Court struck down the CDA in 1997.⁶⁶ It invalidated the cable indecency provisions three years later.⁶⁷

60. 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).

61. 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 Beard et al., *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).

62. 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 nighttime program were permitted to operate until July 12, 2009. Public Notice, Fed. Commc'ns Comm'n, FCC Announces Revised Participant List for Statutory Analog Nightly Program (June 11, 2009), 24 FCC Rcd. 7805 (2009).

63. Public Notice, 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 (July 6, 2021), <https://docs.fcc.gov/public/attachments/DA-21-786A1.pdf>.

64. State of Alaska Request for Waiver of Section 74.731(m) of the Commission's Rules – Low Power Television Analog Termination Date, Order, FCC 21-78 (June 21, 2021), <https://docs.fcc.gov/public/attachments/FCC-21-78A1.pdf>.

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

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

67. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000).

III. POTENTIAL BUILDING BLOCKS FOR A NEW COMMUNICATIONS STATUTE

Of the provisions considered major components of the 1996 Act, only universal service has had lasting importance. Three others, including telecommunications privacy, intermediary immunity under Section 230, and pole attachments, were not considered significant features of the Act but have continued to have unexpected and more lasting significance. In addition, three new issues have arisen that were not part of the 1996 Act. These include net neutrality, spectrum policy, and antitrust reform. Together, these seven issues have the potential to serve as the primary planks of 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 mention in President Clinton's signing statement.⁶⁸ Since that time, bipartisan support for extending Internet connectivity to more Americans has grown, with FCC Chairmen from both parties consistently regarding closing the digital divide as a top priority.⁶⁹ This has led to a series of reforms to the FCC's universal service programs.⁷⁰

68. Statement on Signing the Telecommunications Act of 1996, *supra* note 3, at 188.

69. See, e.g., William Kennard, Chairman, Fed. Commc'n Comm'n, 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), <https://abcnews.go.com/Technology/story?id=5614675> (quoting FCC Chairman Kevin Martin); Julius Genachowski, Chairman, Fed. Commc'n Comm'n, Connecting America: A Plan to Reform and Modernize the supra 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, Fed. Commc'n Comm'n); *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, Fed. Commc'n Comm'n).

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

Specifically, the Clinton Administration expanded the level of support and the geographic scope of the low income programs in 1997.⁷¹ The George W. Bush Administration broadened universal service to include wireless voice in 2008.⁷² The Obama Administration increased the level of support while cracking down on fraud and abuse in 2012⁷³ and began in 2016 to phase out support for voice in favor of broadband by December 2021.⁷⁴

The COVID-19 pandemic accelerated this conversation, as remote work and school became vital.⁷⁵ 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 implemented this mandate by subsidizing low income households up to \$50 per month and up to \$100 for one time purchases of a computer 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

For rural areas, the FCC created the High Cost Fund in 1997.⁷⁹ The American Recovery and Reinvestment Act passed during the opening days of the Obama Administration allocated

71. Fed.-State Joint Bd. on Universal Serv., Report and Order, 12 FCC Rcd. 8776, 8957, 8959-61, 8963 (1997).

72. Fed.-State Joint Bd. on Universal Serv. Tracfone Wireless, Inc., Order, 27 FCC Rcd. 6206, 6207, 6210, 6214-15 (2005).

73. Lifeline and Link Up Reform and Modernization, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656, 6659 (2012).

74. Lifeline and Link Up Reform and Modernization, Third Report and Order, Further Report and Order, and Order on Reconsideration, 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.

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

78. *Affordable Connectivity Program*, FCC, <https://www.fcc.gov/acp>.

79. Fed.-State Joint Bd. on Universal Serv., 12 FCC Rcd. at 8784 ¶ 10.

\$7.2 billion toward new construction.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 It also shifted focus from high-cost to unserved areas and used reverse auctions to allocate support.⁸² After ISPs declined \$285 million of the \$300 million offered during CAF Phase I and the CAF Phase II auctions allocated only \$1.5 billion out of the \$20 billion available, the Trump Administration replaced CAF with the new Rural Development 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 has recently enacted a number of measures to provide additional 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 includes \$65 billion for broadband deployment.⁸⁷ These contributions provide meaningful assistance, but they do not eliminate the need for ongoing support for annual operating costs in many areas.

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

81. Connect Am. Fund, Report and Order and Further Notice of Proposed Rulemaking, 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. *Id.* at 17723 ¶ 150, 17780-83 ¶¶ 321-329.

83. Rural Digital Opportunity Fund Connect America Fund, Report and Order, 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](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](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. Sec. 905(b), 134 Stat. at 2138.

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

Universal service reform thus already has significant momentum that may lead to additional funding in the next communications statute, and the influx of funding from the Broadband Infrastructure Framework came with a Congressional directive for the FCC to explore the future of USF funding.⁸⁸ That said, the funding mechanism for ongoing support represents a significant challenge. The statute provides that “[e]very telecommunications carrier that provides interstate telecommunications services” shall contribute, a classification that exempts “information service providers” from having to provide funding.⁸⁹ Taxes that artificially raise the price of incremental activity that is not completely inelastic 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 over the years, the contribution rate has increased steadily, rising from 5.7% in the second quarter of 2000⁹² to a peak of 31.8% in the third quarter of 2021⁹³ 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 sending content through the network or fund the program through congressional appropriations. The former approach is supported by FCC Commissioner Brendan

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).

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 10, at 165-66; Jerry Ellig, *Intercarrier Compensation and Consumer Welfare*, 2005 U. ILL. J.L. TECH. & POL’Y 97, 106-12 (2005).

91. Lyons, *supra* note 70, at 839-42.

92. Public Notice, Fed. Commc’ns Comm’n, Proposed Second Quarter 2000 Universal Service Contribution Factor (Mar. 7, 2000), <https://docs.fcc.gov/public/attachments/DA-00-517A1.pdf>.

93. Public Notice, Fed. Commc’ns Comm’n, Proposed Third Quarter 2021 Universal Service Contribution Factor (June 10, 2021), <https://docs.fcc.gov/public/attachments/DA-21-676A1.pdf>.

94. Public Notice, Fed. Commc’ns Comm’n, Proposed First Quarter 2022 Universal Service Contribution Factor (Dec. 13, 2021), <https://docs.fcc.gov/public/attachments/DA-21-1550A1.pdf>.

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 the support of then-FCC Chairman Ajit Pai.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 (although far from the most important) part of the 1996 Act, other provisions that were regarded as minor at the time have turned out to loom larger in current communications policy than expected. These 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 to ensure actors honor

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. Broadband Deployment Advisory Comm., Fed. Commc’ns Comm’n, State Model Code for Accelerating Broadband Infrastructure Deployment and Investment 30 (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].

97. Press Release, U.S. Senate 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>.

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), *available at* <https://docs.fcc.gov/public/attachments/DOC-369186A1.pdf>.

the representations made in 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 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 has been 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 regulation,¹⁰⁵ while still others have enacted legislation targeting ISPs.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 provide another aspect incorporated into the next round of major legislative reform.

99. 15 U.S.C. § 45(a)(1).

100. *Id.* § 45(a)(2).

101. Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5724-25 ¶¶ 283-284 (2015).

102. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Report and Order, 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. The California Privacy Rights Act (CPRA) amended the CCPA by referendum in November 2020. Cal. Proposition 24 (2020), https://oag.ca.gov/system/files/initiatives/pdfs/19-0021A1%20%28Consumer%20Privacy%20-%20Version%203%29_1.pdf.

105. See COLO. REV. STAT. §§ 6-1-1301 to -1313 (enacted July 8, 2021); VA. CODE ANN. §§ 59.1-575 to -.585 (enacted Mar. 2, 2021). Other general state privacy statutes preceded the CCPA. See DEL. CODE ANN. tit. 6, §§ 1201C-1206C (enacted in 2015).

106. See ME. REV. STAT. ANN. Tit. 35-A § 9301 (enacted June 6, 2019). Other state privacy statutes treating ISPs differently preceded the CCPA. See MINN. STAT. §§ 325m.01-.09 (enacted in 2002); NEV. REV. STAT. § 205.498 (enacted in 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>.

2. *Section 230 of the Communications Decency Act*

Although Congress had debated most of the major provisions of the 1996 Act for years, some provisions received considerably less consideration. For example, although Senator James Exon initially introduced the CDA as standalone legislation designed to curb indecency on the Supreme,¹⁰⁸ the Senate added it 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 to 4.¹¹¹ Although Section 230 was conceived as an alternative to the CDA, the final legislation included both.¹¹² The Supreme Court's invalidation of the provisions originating in Senator Exon's proposal meant that Section 230 emerged as the relevant 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 changed private actors' incentives to engage in self regulation by enacting "Protection for 'Good Samaritan' blocking and screening of offensive material."¹¹⁴ It did so by specifying that providers that host content not be considered as publishers and not be 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

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. *Force v. Facebook, Inc.*, 934 F.3d 53, 79 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part).

113. *Id.*

114. 47 U.S.C. § 230(c).

115. *Id.* § 230(c)(1), (2)(A).

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 liability for third party content¹¹⁶ The 2018 enactment of 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 as one of the most controversial aspects of the 1996 Act. While some advocates continue to 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 reform of Section 230 have come from the bench as well. Justice Thomas has encouraged the court to consider “[p]laring 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 for reforming Section 230 creates some possibility that it might form part of the next communications statute. The stark differences in the reasons the two parties

116. JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

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. 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. USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J., concurring).

121. See, e.g., Kiran Jeevanjee et al., *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>; 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/>.

support such reform may leave little room for agreement, however.¹²² Republicans generally believe that online platforms exercise too much editorial discretion.¹²³ Democrats are concerned that they exercise too little.¹²⁴

3. Pole Attachments

Another feature of the 1996 Act that was regarded as minor when it was enacted was the amendment of the Pole Attachment Act of 1978 requiring that utilities provide cable television systems and telecommunications providers with nondiscriminatory access to their poles, ducts, conduits and rights of way.¹²⁵ Although the requirement that utilities give cable television systems and telecommunications carriers nondiscriminatory access to their poles 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 known as 5G employs base stations that serve areas

122. 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>.

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 the interpretation of Section 230); 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), <https://www.npr.org/2021/07/22/1019346177/democrats-want-to-hold-social-media-companies-responsible-for-health-misinformation> (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. Statement on Signing the Telecommunications Act of 1996, *supra* note 1.

that are much smaller than those served by previous technologies (often known as small cells).¹²⁷ The need to locate base stations in more locations is leading 5G providers to invoke the Pole Attachment Act for the right to place them 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 or cooperatives or those that are subject to state regulation.¹²⁹ 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 entities providing broadband service¹³⁰ 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, all of which were largely upheld on judicial review.¹³¹ The need to facilitate the deployment of 5G and other new technologies through the use of small cells on pole attachments may create demand for a new communications statute that changes the formula for determining the reasonableness of pole attachment rates or broadens the access obligation to apply to facilities owned by municipalities and cooperatives.

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. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Report and Order, 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, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018), *denying the petitions for review in part and granting petitions for review in part sub nom.* City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020). “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. *Portland*, 969 F.3d at 1050.

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, the fact that certain provisions of the 1996 Act ended being more and less important than expected is unsurprising. Equally predictable is that new issues have arisen since 1996 that the 1996 Act failed to anticipate. These include three 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.

1. *Net Neutrality*

The debate over net neutrality has dominated communications policy for nearly the past two decades.¹³² 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.¹³³ President Biden's Executive Order calling on the FCC to revive net neutrality regulation guarantees that this issue will remain a central issue.¹³⁴

One of the central 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

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

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

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

nondiscrimination if they are classified as the former¹³⁵ but may do so if classified as the latter.¹³⁶ Supreme Court precedent dictates that the statute is ambiguous as to the proper statutory classification of last-mile broadband Internet access service and that the FCC's determination will receive *Chevron* deference.¹³⁷

The FCC has reclassified last-mile broadband Internet access service the last three times the White House has changed parties, and each time that action was upheld by the courts.¹³⁸ 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.¹³⁹ Moreover, seven states have responded to the most recent reclassification by enacting statutes regulating net neutrality, with nine additional states introducing similar legislation during their 2021 sessions.¹⁴⁰ Courts have thus far split on whether federal law preempts state attempts to regulate net neutrality.¹⁴¹ 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 including net neutrality as part of the next communications statute.

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

136. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 697-711 (D.C. Cir. 2016).

137. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 969 (2005).

138. *See id.* at 1003 (upholding the George W. Bush Administration's decision to classify last-mile broadband access as an information service); *USTA*, 825 F.3d at 744 (upholding the Obama Administration's decision to reclassify last-mile broadband access as a telecommunications service); *Mozilla Corp. v. FCC*, 940 F.3d 1, 86 (D.C. Cir. 2019) (upholding the Trump Administration's decision to reclassify last-mile broadband access as an information service).

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

140. *See* Casey Lide, *State 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>.

141. *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. Becerra*, 24 F.4th 1233 (9th Cir. 2022) (holding the opposite).

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.¹⁴² 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.¹⁴³ In addition, the Omnibus Budget Reconciliation Act of 1993 had mandated the use of auctions to allocate spectrum licenses starting on July 1, 1997.¹⁴⁴

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.¹⁴⁵ After resisting the idea of ratings for years, the industry quickly capitulated and agreed to create its own rating system.¹⁴⁶ 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.¹⁴⁷ Two months later, the FCC and the industry reached an agreement to impose quantitative requirements for children’s educational programming.¹⁴⁸ The major broadcast networks began making putatively voluntary commitments to more free air time for federal

142. *See supra* note 33 and accompanying text.

143. 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*].

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

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

146. 47 U.S.C. § 303 note.

147. Hazlett, *supra* note 145, at 940; Yoo, *Rise and Demise*, *supra* note 143, at 353; Yoo, *Rethinking Free, Local Television*, *supra* note 143, at 1700.

148. Policies & Rules Concerning Children’s Television Programming, Report and Order, 11 FCC Rcd. 10660, 10718-23 ¶¶ 120-29 (1996).

political candidates.¹⁴⁹ In the Balanced Budget Act of 1997, Congress explicitly forbade the FCC from auctioning digital television licenses.¹⁵⁰ The net result was to double the amount given to the only industry receiving spectrum for free without increasing the industry's competitiveness or diversity.¹⁵¹

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.¹⁵² 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.¹⁵³ Auctions also provide incremental revenue that can allow Congress to avoid the supermajority approval for all measures that are not budget neutral.¹⁵⁴ The FCC has successfully allocated several new spectrum bands to wireless broadband,¹⁵⁵ but continuing growth may require further legislative attention.

149. Hazlett, *supra* note 145, at 942.

150. 47 U.S.C. § 309(j)(2); *see also* Yoo, *Rethinking Free, Local Television*, *supra* note 143, at 1700.

151. Krattenmaker, *supra* note 10, at 163-64.

152. *See supra* notes 62-63 and accompanying text.

153. 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/>.

154. CONG. BUDGET OFF., BUDGETARY IMPLICATIONS OF THE BALANCED BUDGET ACT OF 1997, at 11-15 (1997), <https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/bba-97.pdf>.

155. *See* Press Release, Fed. Comm'n's 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. Comm'n's 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. Comm'n's 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. Comm'n's 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 over the past decade is with respect to digital platforms. At the time the 1996 Act was passed, these companies were flying below the radar. Amazon was a mere two years old, a year from going public, and sold only books.¹⁵⁶ Google was two years on the horizon,¹⁵⁷ and Facebook was eight.¹⁵⁸ Apple was in the midst of a severe slump, in the process of firing its CEO, and a year away from bringing back Steve Jobs.¹⁵⁹ The only established tech firm was Microsoft, which was confronted with a series of major antitrust suits.¹⁶⁰ The most significant player was America Online, whose merger with Time Warner would soon make it the target of antitrust scrutiny.¹⁶¹

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 2021.¹⁶² The federal government has brought antitrust cases against Google and Facebook and is investigating cases against Amazon and Apple.¹⁶³ During both the 2020 campaigns, both candidates endorsed

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

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

158. Christopher McFadden, *A Brief History of Facebook, Its Major Milestones*, INTERESTING ENGINEERING (July 7, 2020), <https://interestingengineering.com/history-of-facebook>.

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

160. *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).

161. *America Online, Inc.*, 131 F.T.C. 829 (2001).

162. 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>.

163. *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-tech-wins-two-battles-fight-with-us-antitrust-enforcers-2021-06-29/>.

vigorous antitrust enforcement against big tech companies.¹⁶⁴ 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 competition in major Internet marketplaces.”¹⁶⁵ He also appointed one of the leading advocates for more stringent antitrust scrutiny of big tech firms as head of the FTC.¹⁶⁶

Interest in antitrust enforcement against big tech has also been a hot topic on Capitol Hill. The House Judiciary Committee has conducted a July 2020 hearing at which the CEOs of Amazon, Apple, Facebook, and Google testified¹⁶⁷ as part of a sixteen-month investigation that produced a 449-page staff report.¹⁶⁸ 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 breaking up technology companies when necessary to eliminate conflicts of interest.¹⁶⁹ On the other side of

164. 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> (2020 campaign).

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

166. 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>.

167. *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), <https://www.govinfo.gov/content/pkg/CHRG-116hhrg41317/html/CHRG-116hhrg41317.htm>.

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

169. 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>.

the Capitol, Senators Klobuchar and Grassley have introduced antitrust reform legislation that would adopt positions similar to provisions included in the House bills.¹⁷⁰

House Judiciary Committee approval of these bills did not proceed down straight party lines: Some Republicans voted in favor, and some Democrats voted against,¹⁷¹ with lawmakers from California emerging as key opponents to the legislation.¹⁷² The Senate bill was cosponsored by five Democrats and five Republicans.¹⁷³ Opponents have argued that these proposals would hurt America's ability to compete with China, a contention that supporters of the legislation have disputed.¹⁷⁴ 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.

170. Press Release, U.S. 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].

171. Pozen, *supra* note 169, at 4.

172. 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.").

173. Klobuchar Press Release, *supra* note 170.

174. 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-ae4e-407c-97ef-8da09cb54b55.html>.

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 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, the 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 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

Another area where the interests of different industry segments largely overlap is universal service. 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;¹⁷⁵ Google's now defunct Loon and Station projects¹⁷⁶ and its much curtailed fiber project;¹⁷⁷ and initiatives to use low-earth orbit satellites to provide broadband, such as Amazon's Project Kuiper.¹⁷⁸

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.¹⁷⁹ Regarding rural support, the shift to reverse auctions and other reforms have made

175. Aljoscha Höhborn, *Facebook Goes Boring. Yes!*, N.Y. TIMES (June 28, 2021), <https://www.nytimes.com/2021/06/28/technology/facebook-internet-access.html>.

176. 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/>.

177. 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/>.

178. 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>.

179. 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/>.

large ISPs increasingly open to accepting universal service funding.¹⁸⁰ Large ISPs have also begun actively pursuing state grants issued under the Broadband Infrastructure Framework.¹⁸¹

A key priority for ISPs is to make sure 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.¹⁸² This strikes me as good policy: 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, those who lack service entirely would no doubt regard wishing for better connectivity as a distinctly high-class problem that they wish they had. 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.

180. AT&T and Verizon declined to participate in the first round of CAF Phase I in 2012. Joan Engebretson, *Verizon, AT&T Decline Broadband Connect America Funding*, TELECOMPETITOR (July 25, 2012), <https://www.telecompetitor.com/verizon-att-decline-connect-america-funding/>. They began to show greater receptivity during the second CAF Phase I round in 2013, in which AT&T accepted \$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>.

181. See, e.g., Diana Goovaerts, *Comcast, Verizon sang \$44.9M to help deliver universal broadband in Delaware*, FIERCE TELECOM (Mar. 18, 2022, 11:33 AM), <https://www.fiercetelecom.com/broadband/comcast-verizon-sang-449m-help-deliver-universal-broadband-delaware>.

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

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 currently dwindling more and more every year.¹⁸³ Clearly, suggestions to expand the current tax to include big tech firms providing services through the network run counter to the interests of Internet intermediaries.¹⁸⁴ 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.¹⁸⁵ Not only is funding universal service through general revenue better public policy¹⁸⁶; 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. Although big tech firms had been somewhat dubious about the prospect of federal privacy legislation, the prospect of facing a patch work regime that was the product of lobbying battles fought across all fifty states led them to become more amenable.¹⁸⁷ What is more interesting is the support that leading telephone-based and cable-

183. See *supra* notes 91-94 and accompanying text.

184. See *supra* notes 95-97 and accompanying text.

185. 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>.

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

187. 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.").

based ISPs have lent to the effort,¹⁸⁸ most likely to allow more diversified business models either because of mergers with content companies or planned attempts to gain a share of online advertising revenue.

Perhaps the biggest challenge facing these companies is the extent to which federal privacy legislation would preempt state law.¹⁸⁹ Although industry members would prefer a uniform federal standard, many members of Congress regard any federal legislation as a floor above which states would remain free to enact additional restrictions.¹⁹⁰ A complicating factor is the fact that some states have enacted privacy laws that apply only to ISPs, as noted above.¹⁹¹ Needless to say, ISP-specific measures are of greater concern to ISPs than to edge providers.¹⁹²

B. AREAS WHERE BIG TECH HAS MORE AT STAKE

Although the interests of various stakeholders align for federal privacy legislation and universal service, they diverge for a number of other key issues. Specifically, there are some

188. *Privacy*, AT&T, <https://about.att.com/csr/home/reporting/issue-brief/privacy.html> (last visited Aug. 26, 2021); 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).

189. 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/> (“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 et al., *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1798 (2019).

190. 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.”).

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

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

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

I. 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 are making tactical concessions to ensure that wholesale repeal of the statute is off the table.¹⁹³ At the same time, some ISPs have come out in support of Section 230 reform, contrasting intermediaries' freedom to moderate content with both the liability imposed on traditional intermediaries and the nondiscrimination mandates associated with net neutrality.¹⁹⁴ 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.¹⁹⁵

Differences in the reasons motivating Democrats' and Republicans' calls for Section 230 reform may leave little common ground for agreement,¹⁹⁶ although calls for greater transparency regarding the content of online platforms' content moderation policies may offer some basis for a

193. 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>.

194. Joan Marsh, *The Neutrality Debate We Need to Have*, AT&T PUB. POL'Y (Aug. 21, 2020), <https://www.attpublicpolicy.com/fcc/the-neutrality-debatewe-need-to-have/>.

195. 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>.

196. See *supra* note 122-124 and accompanying text.

compromise solution.¹⁹⁷ The takedowns that occurred in the aftermath of the enactment of SESTA and FOSTA¹⁹⁸ lend some credibility to predictions that limiting Section 230's scope would lead to less posting of Internet content.¹⁹⁹

2. *Antitrust Reform*

Big tech firms are facing a similarly challenging position with respect to antitrust, with Google, Facebook, Apple, and Amazon becoming targets of the antitrust reform movement.²⁰⁰ 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.²⁰¹

Although the 2020 House Staff proposed a number of general changes to antitrust that were not specific to big tech,²⁰² the current raft of proposals reported by the House Judiciary

197. 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 Senate Republican John Thune, which would require tech platforms to explain their content moderation practices).

198. 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>.

199. 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 . . . [T]he second immediate effect is likely that internet sites will become much more cautious about content.”).

200. 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/>.

201. 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/>.

202. CICILLINE REPORT, *supra* note 168, at 383-86, 390-404.

Committee on June 24, 2021, largely target “online platforms.”²⁰³ The lack of direct applicability to ISPs have led them to remain unsurprisingly silent about the legislation.

ISPs’ reticence to get involved does carry some risk. Logical consistency with network providers’ arguments in favor of technological neutrality when criticizing ISP-specific state privacy laws and net neutrality would support adopting a similar stance with respect to antitrust. Moreover, telecommunications firms have been active in merger markets in the past²⁰⁴ and have been the not-infrequent target of enforcement activity, evidenced most recently by AT&T’s short-lived acquisition of Time Warner.²⁰⁵ Criticisms from some quarters that the current proposals do not include ISPs²⁰⁶ 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 of these topics place them further from the public eye than the third. In each case, big tech’s interests are not completely opposed

203. Four of the five bills reported by the House Judiciary Committee apply only to *online platform*, which by definition can only be “a website, online or mobile application, 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).

204. 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.

205. *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).

206. 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>.

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.²⁰⁷

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 to 5G and are lobbying for additional allocations of licensed spectrum to support its deployment.²⁰⁸ 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.²⁰⁹

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

207. *See supra* note 153 and accompanying text.

208. Comments of CTIA at 1, Unlicensed Use of the 6 GHz Band, Report and Order and Further Notice of Proposed Rulemaking, 35 FCC Rcd. 3852 (2020) (ET Docket No. 18-295) (submitted Feb. 15, 2019), <https://api.ctia.org/wp-content/uploads/2019/02/190215-FINAL-CTIA-Comments-on-6-GHz-NPRM.pdf>.

209. 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>; Reply Comments of Comcast Corporation at 1, Use of the 5.850-5.925 GHz Band, First Report and Order, Further Notice of Proposed Rulemaking, and Order of Proposed Modification, 35 FCC Rcd. 13440 (2020) (ET Docket No. 19-138) (submitted Apr. 27, 2020), <https://ecfsapi.fcc.gov/file/104282788322240/200427%20Comcast%205.9%20GHz%20Reply%20Comments.pdf>.

attachment reforms that made it easier to deploy new network infrastructure.²¹⁰ Their position was initially supported by Google to facilitate its deployment of Google Fiber,²¹¹ 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.²¹²

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 firm's position is contingent on its construction plans. Cable was the primary beneficiary of the Pole Attachments Act during the industry's early years,²¹³ 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 of the debate. Big tech's relationship with net neutrality has been more complex. During the beginning years of the

210. *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. Comm'n's Comm'n (Sept. 11, 2017), <https://ecfsapi.fcc.gov/file/10911001404566/2017%2009%2011%20Verizon%20broadband%20deployment%20ex%20parte.pdf>.

211. Jon Brodtkin, *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/>.

212. Reply Comments of Comcast Corporation at 8-12, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling*, 33 FCC Rcd. 7705 (2018) (WT Docket No. 17-84) (submitted July 17, 2017), <https://ecfsapi.fcc.gov/file/107172337500722/Comcast%20Combined%20Infrastructure%20Reply%20Comments%20--%20Dkts%20No%2017-79%20and%2017-84%20--%20FINAL.pdf>.

213. *Nat'l Cable & Telecom. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330-31 (2002).

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.²¹⁴ Netflix took over as primary advocate during the debates leading up to the 2015 Open Internet Order.²¹⁵ 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.²¹⁶

Big tech companies have drawn frequent criticism for the tepidness of their support for net neutrality.²¹⁷ 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.”²¹⁸ The same conclusion was drawn by Tim Wu, the scholar credited with coining the phrase, net neutrality, and is currently serving as special advisor to the president for technology and competition policy, who has acknowledged that big tech companies “have mixed

214. 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.

215. 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>.

216. *Id.*

217. *Id.*; Karl Bode, *Google Lawyer Again Insists They Didn’t Sell Out on Neutrality*, DSL REPORTS (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?*, ATLANTIC (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/>.

218. Tony Room, *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>.

motives in their area” and now that they have achieved scale, “it’s to some degree to their advantage to climb up the ladder and pull it up after them.”²¹⁹

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.²²⁰ 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.²²¹ They have largely chosen to operate these as private networks, primarily to avoid the regulatory burdens of the type associated with net neutrality.²²²

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.

219. 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>.

220. 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/>.

221. Christopher S. Yoo, *Paul Baran, Network Theory, and the Past, Present, and Future of the Internet*, 17 COLO. TECH L.J. 161, 181-82.

222. 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/>.

First and foremost is the focus 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 America’s global standing.²²³ Aside from the inclusion of rural broadband 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.²²⁴ The Democrats’ majority in the House of Representatives is larger but sufficiently thin to limit the prospects for major legislative reform.²²⁵ 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 insuperable.

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

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

224. Jennifer Epstein et al., *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>.

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

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 components and potential paths that might lead to the passage of the next major communications statute.

Although predictions are hazardous, especially about the future,²²⁶ we will venture some thoughts on potential directions communications reform may take. In 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 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.

In our judgment, 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

226. 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/>.

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 a sufficient cross section of stakeholders to induce them to support such a proposal. Many parties that in the past were content with the status quo, or at least preferred sticking with it over assuming the risks that come with opening up the whole can of worms, now appear to have motivation that may make them more interested 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.