



To: Interested Parties
From: Adam Kovacevich, CEO, Chamber of Progress
Re: **What the Election Results Mean for Tech Policy in 2023**
Date: November 10, 2022

Democrats performed much better than expected in the 2022 midterm elections, and seem to have defied the normal midterm curse.

It appears that Republicans are likely to narrowly capture control of the House, and that Senate control will remain a toss up for weeks. While the final results are still being tallied, the results mean that the focus of federal and state tech policy debates will shift somewhat in 2023.

With **Republicans taking the House**, their tech policy focus is likely to be on online speech and content moderation issues. The House is likely to build on their “Big Tech Accountability” platform, which will be heavy on oversight hearings, “jawboning” platforms to scale back their content moderation policies, and passing party-line bills that Senate Democrats will block. But areas like cryptocurrency, consumer privacy, and autonomous vehicles may be less headline-driven opportunities for bipartisan consensus.

Centrist House Democratic incumbents and challengers had a good election night; so far New Democrat challengers have flipped five seats from red to blue, and New Democrats are likely to see 70-plus members in the new Congress (including 14 New Democrat freshmen). The House will be closely divided, and centrist Democrats often have more influence as swing votes when Democrats are in the minority – as they can ally with Republicans on pragmatic, pro-growth issues.

A **closely divided Senate** will mean that even if Democrats are in the minority, moderate Democrats will continue to have a say in which bills pass. The re-election of key centrists including Senators Bennet and Hassan validated their governing records. And with Senate Democrats facing a more challenging map next cycle, Bennet and Hassan’s wins give Democrats a road map for purple-state success in 2024.

The question facing the **Biden Administration agencies** in 2023 is whether their high-profile lawsuits and rulemakings targeting the tech industry will succeed or flame out. President Biden is likely to advance his tech policy priorities through executive order

given a divided Congress. There's also an opportunity for the Administration to put more innovation points on the board in its next two years, particularly in expanding broadband access, devising privacy rules, and promoting autonomous vehicles.

In **state legislatures**, the deep blue states of California and New York are likely to introduce the most technology-adverse pieces of legislation. As in 2022, the states will see many bills that are the result of business vs. business disputes; most will fail. And Republican states will continue targeting the tech industry on speech and content moderation issues.

Members of Congress perpetually voice optimism that their stalled bills will move in the **lame duck sessions**, but the only bills that typically move are those that have nearly unanimous support. Think the consensus INFORM Consumers Act focused on e-commerce -- not the contentious AICOA tech antitrust bill. The House-passed antitrust merger fee + venue reform could advance in the Senate during the lame duck session, but only if Sen. Klobuchar relents in her insistence in AICOA advancing simultaneously. But the likely December 6 Georgia runoff increases the likelihood of a low-activity lame duck session.

Voters report in surveys that they support more tech regulation broadly, but don't rank it as top concern and aren't unified on which particular problems they want policymakers to solve, and how. That means the bills most likely to advance in 2022 will be the ones that have the clearest and most direct consumer benefit.

Here's what to expect in 2022:

Autonomous Vehicles

In 2022, congressional Democrats and the Biden DOT each publicly prodded the other branch to lead on AV policy, but not much progress was made. Organized labor, led by the Teamsters, adopted the position that no AVs should be allowed without a human driver in the vehicle. However, recent economic pressure on the AV industry – and the dissolution of AV company Argo – might increase the pressure on the federal government to take bolder steps to move AV regulation forward, at risk of the U.S. losing its edge to China.

House Republicans are likely to advance federal legislation paving the way for AVs, but the fate of that legislation in the Senate is less clear. Some **Senate Democrats** may be more reluctant to move legislation, but watch Commerce Committee Democrats from Mountain West states (Tester, Hickenlooper, Lujan, Rosen, and Sinema), all of which have growing AV industries creating jobs in their states.

In the **states**, New York is likely to see more debate in 2023 year on legislation authorizing AV testing and deployment, and California Gov. Newsom will face increased pressure to move forward with a DMV rule allowing autonomous trucking (which state law already mandates).

Competition

The Cicilline/Klobuchar AICOA bill banning big tech services from vertically integrating dominated tech policy headlines in 2021-2022, but its sponsors' unwillingness to address content moderation concerns doomed the bill's chances this year. Despite recent reports that the Biden White House will push it and app store legislation during the lame duck, the bill doesn't have enough Democratic votes in the House or Senate to move – especially with Democratic content moderation concerns unresolved.

The incoming **House Judiciary Committee** is likely to focus on FTC oversight – including Chair Khan's use of unpaid consultants. House Republican Leader Kevin McCarthy has opposed both AICOA and JCPA (the journalism cartel negotiation bill) making both bills nonstarters in the House. Senate Democrats would likely continue their past tech antitrust agenda, including AICOA, app store legislation, and JCPA. However, each of these bills faced Democratic criticism in 2022, and without meaningful substantive changes to the bills, they are unlikely to advance next year. Senate Republicans meanwhile would likely focus on changing antitrust venue rules, and potential ad tech legislation by Sen. Mike Lee.

A few high profile competition **lawsuits** will advance to the decision stage in 2023. Arguments will be heard in December in the FTC's challenge of Meta's Within VR acquisition, and next week in the appeal of Epic's antitrust case against Apple – the latter of which has stakes for all platforms' rights to set and enforce their own rules. Longer-gestating cases – including DOJ's case against Google's search syndication practices, and FTC's case against Meta's Instagram & Whatsapp acquisitions – will move closer to court rulings next year. As the competitive market continues to evolve – particularly with the continued runaway growth of TikTok - some of these cases will age poorly for the government.

In **state legislatures**, a lobbying effort by Spotify, Epic Games, and Match to pass app store legislation against Apple and Google will likely yield the reintroduction of bills in a dozen states; all of these bills failed in 2022 due to legislators' wariness of intervening in a business vs. business dispute. Meanwhile, a California state commission is analyzing the state's existing antitrust law, while New York and Minnesota are likely to again debate proposals to bring European Union antitrust standards to those states.

Content Moderation & Online Speech

Watch for this topic to dominate tech policy debates in 2023 - with the Supreme Court leading on substantive action and congressional Republicans leading on theatrics.

First up will be the **Supreme Court's** consideration of *Gonzalez v. Google*, focusing on whether platforms' ranking and recommendation algorithms have liability protection under Section 230. Separately, the federal circuit split on the Florida and Texas anti-moderation laws make it likely that those cases will be combined; that case will focus on platforms' First Amendment rights to moderate content.

House and Senate Republicans are likely to hold Section 230 hostage, threatening platforms with the law's repeal unless platforms reduce moderation of MAGA and extremist content. Expect an increase in letters and hearings from Republicans to platforms, challenging their decisions on individual content moderation decisions. Much like Senator Thune linked Republicans' complaints about Gmail spam filtering of fundraising emails to potential legislation regulating Google's algorithms, watch for Republicans to threaten regulatory punishments if platforms don't support Republican culture complaints.

Republican MAGA attacks on Section 230 may help remind **Democrats** of the virtues of 230, and spur them to defend how 230 incentivizes content moderation and healthy online communities. And Democrats are likely to continue jawboning platforms to moderate more content, and will potentially recycle transparency bills like PATA.

In **state legislatures**, watch for blue states to potentially consider their own versions of California's new "social media transparency" law, while California may again try to hold social media services liable for creating "addictive" services (that bill failed in 2022). Republican states could introduce copycats of Texas and Florida's anti-moderation laws, even as those laws are considered by the Supreme Court. Texas Republicans are also considering a potential bill banning social media for kids, and the overall topic of kids and social media could surface in bills in both red and blue states (as it did in Minnesota in 2022).

Cryptocurrency & Fintech

In **Congress**, cryptocurrency and fintech remain "pre-partisan" issues, with younger members of both parties expressing optimism and open minds.

2023 could see real movement of crypto legislation. Likely incoming House Financial Services chair Patrick McHenry has been an optimist on both crypto and fintech issues,

and is likely to promote both in his role – partnering with likely Ranking Member Maxine Waters on bipartisan stablecoin legislation, and with Democratic Reps. Jake Auchincloss, Josh Gottheimer, and Ritchie Torres on crypto issues generally. Expect to see the ranks of crypto-curious Members of Congress grow.

SEC Chair Gary Gensler has made headlines in 2022 for his “regulation by lawsuit” stance, and 2023 will reveal whether Gensler’s efforts will succeed – in both the SEC’s lawsuit against Ripple, and Grayscale’s protest lawsuit against the SEC. On fintech issues, watch for whether the CFPB follows a year of aggressive policy statements with aggressive enforcement action.

2023 is also likely to see more crypto legislation in **state legislatures**. California is likely to make another attempt at requiring a Bitlicense style registration, despite Gov. Newsom’s veto of such a bill this year. Watch for other blue states to eye crypto registration bills, while both Democratic and Republican states are likely to advance crypto task force and study bills, and bills empowering crypto for government payments and services.

E-Commerce & Delivery

The **federal INFORM Consumers Act** began as a Walmart effort to raise Amazon’s marketplace compliance costs, but compromise revisions in early 2022 led to the bill gaining broad political support from retailers, online marketplaces, and consumer groups. The Senate is leading an effort to attach the bill to the defense authorization package, but should that fail the bill is a good candidate for bipartisan agreement and movement in 2023.

On the other hand, the **SHOP SAFE bill** promoted by the fashion and IP industries – and widely opposed by tech – has much less consensus behind it. Nonetheless, Republican sponsor Rep. Darrell Issa is likely to promote the bill in the next Congress as much as Judiciary Chair Jerrold Nadler has.

In the **states**, nearly a dozen have adopted their own versions of the federal INFORM compromise. In other states watch for state retail associations to sponsor the reintroduction of the bill; state legislatures are likely to either reject those bills or align them with the federal INFORM compromise before passing them.

After Colorado’s adoption this year of a 30 cent **tax on all deliveries** (to make up for lost gas tax revenue due to increased use of electric vehicles, other states may assess the idea as well (keep an eye on Utah who is already considering it). Some cities and states will consider revised caps on **restaurant commission fees** for third party delivery services; San Francisco’s “restaurant opt-in for higher service” model is becoming a consensus

approach for many other cities (including New York). Both California and Oregon may consider statewide legislation on these commissions.

Privacy & Data

Despite some industry concerns, the emerging **bipartisan ADPPA consumer privacy bill** in 2022 was the closest Congress has come in years to action on the issue. Jurisdictional (not substantive) concerns from California's privacy enforcer led to opposition from California Democrats, which stopped the bill from advancing.

Will ADPPA see a revival in a Republican-controlled House? The bill represents a fragile bipartisan consensus and some Republicans may have less appetite for compromise on private right of action, or exempting Illinois' biometrics law from federal preemption. And while Senator Wicker was party to the ADPPA compromise, Senate Democrats aren't likely to support it without buy-in from Senator Cantwell.

At the agencies, watch for the **FTC** to continue moving its proposed "commercial surveillance" rulemaking forward. But given a likely increase in House (and potentially Senate) Republican oversight over the FTC, the final rules may be more likely to focus on areas of bipartisan consensus (including combatting discrimination, promoting data security, and requiring baseline consumer protections) – instead of more contentious ideas like banning targeting advertising.

Also watch for potential **CFIUS** action on TikTok – either a narrow agreement over data location and access, or perhaps a demand by the Biden Administration that TikTok divest to a U.S. owner in order to fully relieve data security, Chinese propaganda, and national security concerns.

At the **state level**, a handful of legislatures may pass their own consumer privacy laws, but all would likely rest within the existing spectrum between California's law and the Utah and Virginia laws. In particular, watch states that had a privacy bill pass out of one chamber last year: Wisconsin, Florida, Iowa, and Indiana. Meanwhile, the continued implementation of California's privacy law will examine contentious questions about opt-out signals.

Watch for California's new "**age appropriate design**" law to be replicated (and possibly expanded) as a bill in New York and elsewhere – even as the law faces a potential legal challenge in California. Maryland, Maine and other states will again consider their own copycats of Illinois' BIPA **biometrics** law. The recent state court rejection of Maryland's online advertising tax will likely deter copycat bills from advancing in blue states like Connecticut and New York.

Social Issues

Companies have become a major force for promoting social justice, diversity, inclusion, and opportunity. Yet some Republicans in states and Congress are likely to focus on punishing companies for speaking up for their users' and employees' rights (despite Republicans previously defending companies' free speech rights when companies agreed with Republicans). That said, expect companies to continue speaking up, encouraged by employees and customers.

Reproductive rights were clearly a big driver of the vote for Democrats this cycle, and will likely continue to be a hot topic in 2023. Watch for debates about:

- California's new laws forbidding in-state businesses from complying from abortion data requests, which is likely to put companies in the middle of legal and political conflict between red and blue state officials;
- Proposals to ban online speech about abortions and reproductive care, as included in the National Right to Life Committee's model bill; and
- Whether companies can continue offering employees in red states health care coverage for out-of-state medical procedures.

Congress is likely to vote during the lame duck session to protect **gay and interracial marriage**, which many companies have endorsed. And with the Supreme Court likely to overturn race-conscious admissions, watch for companies to reaffirm their commitment to having **diverse** workforces.

Workforce

By a margin of 61%-39%, Portland, Maine voters decisively rejected a ballot proposition (Question D) that would have **reclassified gig work drivers** as employees. This vote was consistent with California voters' rejection of a similar proposal in 2020, Prop 22, and solidifies a political consensus on the issue: voters generally respect most gig drivers' preference to remain independent contractors.

Historically whenever Republicans control Congress and Democrats control the Administration including the Department of Labor, **congressional Republicans** prioritize DOL oversight. Given that, House Republicans are likely to scrutinize the Department's proposed new independent contractor classification rules.

Once the **Department of Labor** finalizes its rules, they are likely to use them first against industries with widespread classification issues, such as construction and nursing. With Secretary Walsh having acknowledged in his public comments that many gig workers prefer to preserve the flexibility of independent contractor status – and with gig work

providing a lifeline for many against inflation and job cuts – it seems unlikely that the rules will force immediate changes in gig work. Recent data released by the Flex Association showed most gig drivers earn no more than 30% of their income from gig work, showing how it is a complement to other work.

The **FTC** also recently issued a policy statement on gig work, but given the Commission's full agenda on other topics – and the leadership of the Labor Department on worker issues – it is unlikely that the FTC will prioritize enforcement action on gig work.

The **states** are the places to watch as different approaches emerge. Washington's 2022 gig work compromise with Uber, Lyft, and the Teamsters may be considered by other Democratic states as a blueprint for compromise. If the pending California legal challenge to the Prop 22 gig work ballot initiative succeeds, watch for drivers, riders, and platforms to be faced with some tough choices.