The Law of Unintended Consequences

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Whether intentional or not, the 1996 Telecommunications Act ("1996 Act") was transitional legislation, focused largely on the constituencies that battled before Congress at the time of its passage, with compromises to address historic realities. Many provisions central to the 1996 Act were carrots extended to the major players to support (or at least not to oppose) the legislation.[1] And Congress failed to seize that unique opportunity to fundamentally restructure our communications systems in light of the Internet. That was probably a good thing, given the law of unintended consequences.

To be sure, the 1996 Act has lofty, enduring principles—competition deregulation and universal service—but the tough choices that would underpin achievement of those principles were intentionally left vague as Congress punted to the Federal Communications Commission ("FCC") to resolve those sticky issues.

Congress intended the 1996 Act to be a catalyst for the expansion of competition in the telecom and cable services markets, both of which had a

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1. For example, broadcasters won greater media consolidation and the possibility of an exclusive second channel for digital conversion. The Regional Bell operating companies ("RBOCs") were freed from the shackles of the *Modification of Final Judgment* ("*MFJ*"), United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, 460 U.S. 1001 (1983), providing a path or date certain to enter businesses precluded under the Department of Justice consent decree and also were authorized to compete in the distribution of video programming. The competing phone companies secured a regime that was intended to ease their entry into the local phone business, and the cable operators received relief from rate regulation for all but their basic tier service. The wireless industry was left alone, free of state jurisdiction, to continue its deregulated expansion under the 1993 amendments, and the states were given an adjudicatory role in determining RBOC entry into long distance.

history of monopoly providers. The efforts to induce competition in the telecom sector by opening up the RBOC monopoly network to its competitors were valiant and expensive, but largely ineffectual. The provisions freeing the RBOCs to offer video services under their choice of regulatory silos—cable, wireless, common carrier, or a new open video system—produced very few video systems, and most of those that were created were later shut down or sold by the RBOCs merging with their siblings.

The 1996 Act was beneficial in some respects. Telecommunications prices dropped, and the variety of services available to consumers expanded. It created the mechanism—the universal service provisions[2]—through which over ninety percent of the classrooms in the Nation's schools have been connected to the Internet. And to speed deregulation, the 1996 Act gave the FCC new tools, including forbearance, regular comprehensive regulatory reviews, and preemption of state regulation.

The 1996 Act was also flawed, both as drafted by Congress and implemented by regulators and the courts. The statute was riddled with ambiguities,[3] and many courts failed to give appropriate deference to reasonable interpretations by the expert agency, thereby leading to years of unnecessary litigation.[4] It did not adequately anticipate the popularity and uses of the Internet, leaving many tricky structural issues for much later resolution.[5] It went too far in loosening traditional constraints on media consolidation, especially radio ownership. Its mandatory biennial review of all broadcast rules imposed an impossible regulatory burden on the agency,[6] requiring the FCC to revisit its rules before the ink had dried on earlier changes. And it failed to provide the clarity of vision and corresponding legal authority for the FCC to take ownership of the digital television transition.

In some respects, the 1996 Act is given too much credit for things that were happening with or without this legislation. It was a 1993 statute that led to the allocation of spectrum for Personal Communications Services and the auctions that followed, raising billions of dollars for the U.S.

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2. Telecommunications Act of 1996, 47 U.S.C. § 254 (2000).

3. "It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999).

4. *See, e.g.*, People of the State of Cal. v. FCC, 124 F.3d 934 (8th Cir.), *rev'd by*, 525 U.S. 366 (1999).

5. *See, e.g.*, Nat'l Cable Telecomm. Ass'n v. Brand X Internet Servs., 125 S.Ct. 2688 (2005).

6. Comments by Chief Judge Harry Edwards during oral arguments on Fox challenge to the 1999 Biennial Review of broadcasting rules. Congress subsequently doubled the timeframe to every four years.

Treasury and—more importantly—triggering the wireless competition that has driven a sevenfold increase in the number of subscribers in just ten years.[7] It was the authorization of direct broadcast satellite ("DBS") a decade earlier that, in the late nineties, made the two leading satellite providers established competitors to cable companies. And it was technology and the Internet, not the 1996 Act, that accelerated the rollout of Wi-Fi and Wi-Max, as well as the use of mobile phones, MP3s and other personal entertainment devices to compete with broadcasting, broadband access, and wireline telephony.

By the same token, the 1996 Act too often is blamed for developments it did not cause. The decline of long distance as a discrete service was already underway by the time of the 1996 Act, and it was hastened by the demise of both WorldCom and AT&T for very different reasons.[8] Economics and technology, not laws or regulatory decisions, probably are the main reasons that telephone companies have been slow to enter the video business and cable companies have been slow to enter the phone business. (That did not stop the companies from trying to pin the blame for their foot-dragging on the FCC.)

Nonetheless, the 1996 Act is by any measure a landmark:

- Even though the Internet was scarcely understood, Congress wisely established a national policy that it should be "unfettered by Federal or State regulation."[9]
- Congress eliminated the *MFJ*, allowing the RBOCs to enter businesses from which they had been barred since 1984.[10]
- For the first time, the FCC was given explicit power to forbear from regulations, and even to eliminate statutory requirements, but only those that apply to telecommunications services and telecommunications carriers. It was also required to conduct periodic reviews of broadcast and telecommunications regulations, but not cable or wireless, and to eliminate those that are no longer necessary in the public interest.
- The FCC was empowered to include broadcasters in the digital transition by assigning them temporary second

7. There are 195 million wireless subscribers in the United States—more than there are wired subscribers.

8. Sadly, the 2005 mergers of MCI into Verizon and AT&T into SBC eliminated competitors that were also the most persistent voices challenging the Bell monopolies.

9. 47 U.S.C. § 230(b)(2) (2000).

10. Congress probably did not imagine that within a decade, the seven "Baby Bells" would combine into four, that one of those would absorb (and take the name of) its estranged parent, AT&T, and that one would absorb its long-time nemesis, MCI.

channels to begin digital transmissions.

- Consumers were given the right to install satellite dishes and other reception equipment through the Over-the-Air Reception Devices ("OTARD") provisions, thereby enhancing competition in the multichannel video market.
- The rate regulation regime that had stalled cable for several years was jettisoned, facilitating capital investment in cable plant for digital channels, video-on-demand, and high-speed Internet.

One of the most promising features of the 1996 Act was the provision dealing with schools and libraries. Thanks to Senators Snowe, Rockefeller, Exon, and Kerrey, as well as President Clinton and Vice President Gore, schools and libraries across the nation were rescued from being technological backwaters, where even plain old telephones ("POTs") were in short supply. Today, cutting-edge technology can be found in inner-city schools, remote Alaskan libraries, and pretty much every community in the United States, something that would not have happened without the "e-rate" discounts. Outrageously, but perhaps predictably, given the size of the program, some funds were wasted through fraud or mismanagement. But the value of the e-rate program will endure, as our students emerge from school better prepared to compete in a global economy. Still to be fulfilled, however, is the promise of the rural health care benefits of the Snowe-Rockefeller provisions.

One of the biggest flaws of the 1996 Act was the political compromise that led to the rapid consolidation of media ownership. The changes in the rules governing radio were especially ill-advised. Radio was transformed from a very agile, competitive industry with deep local roots to a sector dominated by a handful of national players and drained of its spontaneity. Local news was gutted. While some additional market consolidation made economic sense, the ability of a single owner to control more than a thousand stations was probably never contemplated by Congress or the American public. Technology, in the form of digital satellite radio and digital audio players, now provides a competitive alternative to terrestrial radio, and broadcasters are scrambling to respond.

Another unintended consequence of the 1996 Act is the way in which the prolonged Digital Television ("DTV") transition has delayed freeing up spectrum vitally needed by first responders. Public safety matters. The 1994 bombing in Oklahoma City taught us that public safety agencies needed more spectrum and greater system interoperability. Seven years later, September 11 taught us the same lesson. Unfortunately, the spectrum set aside for public safety remains hostage to the digital transition.

In addition, Congress failed to grasp that for digital television to transition, multiple industries would simultaneously have to engage in their own, very different digital transitions. Cooperation among the consumer electronics, cable, DBS, broadcasting, and Intellectual Property ("IP") and PC industries has been strained by statutory ambiguities and lack of legislative guidance on the significant issues that divide these sectors. Congress did not assign the mandate or the power to the FCC to take the tough steps necessary to secure a speedy and smooth transition. Market forces were wholly inadequate to get the job done, and consumers today remain confused or unaware of the transition underway.

Looking back, I can see many lessons that should be learned and applied to the development and implementation of any successor legislation.

Judicial review should be centralized in a single forum, hopefully one with a healthy respect for the judgment calls that must be made by an expert agency. Local phone competition surely would have been introduced much faster had the Eighth Circuit not been assigned the initial appeals of our rulemaking. It took three long years before the Supreme Court righted that wrongly decided opinion. It took more time still before a second Eighth Circuit opinion could be reversed by the Supreme Court. And eleven days after that a D.C. Circuit opinion, which took insufficient account of what the Supreme Court had just said, dealt another major blow to the regime governing the telephone companies' duty to provide their competitors with unbundled network elements ("UNE").[11]

Facilities-based competition is preferred over resale and similar arrangements, both because it allows for greater differentiation in service offerings and because competitors fare better when they control their own destinies. But as we ruefully learned, a detailed regime of wholesale regulation is virtually impossible to administer in the face of determined resistance from incumbent providers.[12] The UNE regime for telephone competition was carefully designed by Congress and conscientiously implemented by the FCC and the state commissions. It has consumed vast quantities of time and energy over the past decade. But it has done little for consumers. Meanwhile, innovation has produced other ways of getting us where we need to go. Mobile wireless has grown more competitive with Plain Old Telephone System ("POTS"), and unlicensed wireless is a promising example of facilities-based competition. Voice over Internet Protocol ("VoIP") offers another alternative, albeit, relying on an

11. *See* 47 U.S.C. § 251(c)(3) (2000).

12. Even to the point where the RBOCs challenged the constitutionality of the very deal they had negotiated in the 1996 Act.

accessible cable and RBOC plant to connect with customers. Municipal provision of pure broadband may be one way to insure that telephone companies and cable interests do not charge content providers monopoly rents to reach the consumer.

Deregulation works—provided it is accompanied by competition. The only thing worse than a monopoly provider is a deregulated monopoly provider. Deregulation of wireless in 1993, which shielded the wireless industry from state and rate regulation, sparked massive investments, and consumers reaped the benefits. Of course, it helped that Personal Communications Service ("PCS") was introduced with four to six licensees per market, and a temporary cap was placed on the maximum mobile wireless spectrum a company could hold.

Even in a robustly competitive marketplace, there are social policies like localism, privacy, disability access, emergency service, and universal service that should be addressed. The marketplace will not do it alone. For those regulations that are retained, ongoing regulatory oversight and enforcement cannot be shortchanged.

Sometimes, watching and waiting is a good way to go. For example, at the time of the AT&T/TCI merger and the FCC's first Section 706 report, some wanted the FCC to impose a detailed regime of wholesale access for Internet Service Providers ("ISPs"). The FCC decided to hold back to see how the nascent cable modem service would develop. Investment and innovation followed and business models changed. Now consumers are probably better off than they might have been under an artificial regulatory scheme.

Sometimes, inaction is not nearly so healthy. Intercarrier compensation was a hot issue when I left the FCC in 2001. We knew it made no sense to have a regime where the amount one provider pays another to terminate a call depends on whether it is a neighboring incumbent local exchange carrier ("ILEC"), a competitive local exchange carrier ("CLEC"), an ISP, a commercial mobile radio service ("CMRS") carrier, or an interexchange carrier ("IXC"). We knew this would create regulatory distortions and gamesmanship. Yet, several years later, nothing has been done. Similarly, universal service reform remains a critical issue with a funding mechanism based on revenues from only interstate carriage, which defies marketplace reality.

Do not pick winners and losers. Technological and competitive neutrality should be the goal. We do not have different regulatory regimes for wireless depending on whether a given provider uses Global System for Mobile Communications ("GSM"), time division multiple access ("TDMA"), or code division multiple access ("CDMA")—or Evolution-Data Optimized ("EV-DO"). Technology changes too fast to base

regulation on a specific technology, and regulators should not skew outcomes anyway.

Think, and think again, before imposing regulatory restrictions. Many of the things that seem important when lobbyists are pressing their case turn out to be inconsequential within the not-too-distant future.

And finally, keep the public in the forefront of the debate. That is not always easy to do, but it is crucial.

The future of U.S. communications is bright. Consumers will continue to insist on even greater freedom to communicate—to access their data, their music, their pictures, their video—no matter where they are or what they are doing. And they are going to want to be able to access these things seamlessly from multiple platforms.

Looking at the marketplace today and the changes that are underway, we finally have the facilities-based competition between the RBOCs and cable providers for voice, video, and data services that the authors of the 1996 Act had hoped for. We also have the real possibility of multiple providers, using multiple platforms, and competing to deliver the services that consumers want. At home, depending upon their geographic location, consumers eventually may be able to pick and choose among a telephone company, a cable company, an overbuilder, several wireless companies, satellite companies, a broadband over powerline company, and municipal and other Wi-Fi or Wi-Max providers. If that vision comes to pass, then the "law of unintended consequences" may be adjudged to have succeeded after all.