

Answering Four Questions on the Anniversary of the Telecommunications Act of 1996

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Most legislation is doomed to obscurity, and, aside from the Fourth of July, it is unusual for Americans celebrate the anniversary of a government document. But the Telecommunications Act of 1996¹ is not just any law, and its twentieth anniversary on February 8, 2016 will be noted. It represents a rare attempt by Congress to overhaul an agency. It was an uncommon product of bipartisanship from a cutthroat partisan era. And its legacy is deeply contentious. Those who celebrate the Act claim that it brought competition and economic growth to the communications sector. Those who revile it blame it for all that ails the industry. Many have called for its rewriting, but little consensus exists as to what a new federal communications law should look like.

While countless books and articles have analyzed and chronicled the Act,² its twentieth anniversary offers an opportunity to reflect on its legacy and future. This Comment considers this controversial piece of legislation by exploring the following four questions:

- (1) What were the political conditions that enabled the passage of the Act?
- (2) To what extent was the implementation of the Act faithful to its intent?
- (3) How did the communications sector fare in response to the Act?
- (4) Is the Act due to be re-written?

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. One such effort is Harold Furchtgott-Roth's *A Tough Act to Follow? The Telecommunications Act of 1996 and the Separation of Powers* (AEI Press 2005), written on the occasion of the Act's tenth anniversary.

I. WHAT WERE THE POLITICAL CONDITIONS THAT ENABLED THE PASSAGE OF THE ACT?

The successful passage of a law often involves grandiose celebrations. The president signs a bill into law in a ceremony.³ Major laws have key Congressional supporters as witnesses to the signing ceremony, usually held at the White House.⁴ Smiles and photographers abound. Documents and pens are memorialized.⁵ The president and Congressional leaders say a few words about the lasting importance of the new law.⁶ Journalists dutifully report the event.⁷ And then, slowly over the years, amnesia sets in. Few remember; fewer remember accurately; and even fewer care.

Of course, the Congressmen, Senators, and staff will long cherish the mementos of the occasion. In many offices in Washington, one finds elegantly framed copies of signed bills and even a memorialized pen.⁸ These are the relics of the bill signing. They remain alive and animated for a year or two. By five years, the signatories have likely left office. By ten years, few remember what the purpose of the law. After twenty years, the relics appear more as prehistoric fossils unearthed in some obscure place many years ago.

If it were an ordinary law, the Telecommunications Act of 1996 would have been long forgotten. But it was born on a grander scale than most. The conditions that facilitated its passage were fortuitous and dramatic. The bill-signing was remarkable in its pompousness.⁹ And the Act's influence has pervaded the communications sector. But whether its passage is remembered accurately is a separate question.

The Telecommunications Act of 1996 was not the product of just the 104th Congress, but of at least the prior ten Congresses. Since the 1970's, Members of Congress recognized that the Communications Act of 1934 no longer reflected the technological landscape of the communications sector and thus attempted to reform federal communications law.¹⁰ They primarily sought to overhaul the AT&T monopoly, but also saw the need for greater

3. See Melissa Block & Jim Kratsas, *A History Of The Presidential Signing Pen*, NPR (Mar. 23, 2010), <http://www.npr.org/templates/story/story.php?storyId=125072298>.

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.*

9. See ANDREW RICH, THINK TANKS, PUBLIC POLICY, AND THE POLITICS OF EXPERTISE 120-21 (Cambridge U. Press 2004) (describing the "lavish" ceremony). A video of the Telecommunication Act's signing ceremony, preserved by the Clinton Presidential Library, is available online. See Clinton Presidential Library (ClintonLibrary42), *President Clinton Signing Telecommunications Act of 1996*, YOUTUBE (Nov. 19, 2013), <https://www.youtube.com/watch?v=z1EfL8xQ5Ok>.

10. See STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 385-86 (3d ed. 2012).

flexibility in market entry and ownership rules.¹¹ Legislators introduced bills and held hearings, but plans for comprehensive review were passed from Congress to Congress.¹²

By the 1990's, the longing for deregulation reached a boiling point. AT&T's divested companies hoped to escape Judge Harold Greene's rigid control in implementing the consent decree.¹³ Incumbent telephone companies sought to enter new lines of business.¹⁴ Long-distance companies such as AT&T and MCI wished to enter local telephone markets, and divested Bell companies wanted to enter the long-distance market.¹⁵ Cable companies wanted relief from the Cable Act of 1992.¹⁶ Broadcast media companies sought relief from onerous regulations, particularly ownership rules.¹⁷ States wanted state regulatory powers preserved.¹⁸ And practically everyone wanted to ensure that the Internet would escape regulation under the FCC's vague and catch-all "public interest" standard.

The pressing need for reform coincided with the vigor of the 104th Congress. This Congress was different from its predecessors in two major ways. The 1994 elections reflected a dramatic reversal in fortune for the political parties, with the Republicans sweeping to power in both Congressional chambers.¹⁹ The 104th was also an activist Congress, intent on revamping and deregulating government, dramatically reshaping welfare programs, and balancing the budget for the first (and last) time in generations.²⁰

11. See *id.* at 360, 386.

12. See *SBC Commc'ns, Inc. v. FCC*, 154 F.3d 226, 231 (5th Cir. 1998) (explaining that Congress "spent many long and contentious years in drafting a system of comprehensive telecommunications regulation to replace and supplement the MFJ").

13. BENAJAMIN ET AL., *supra* note 10, at 360-62 (discussing companies' attempts to alter, remove, modify, or waive, provisions of the MFJ leading up to 1996); see also *United States v. AT & T*, 552 F. Supp. 131 (D.D.C. 1982), *consent decree terminated sub nom.*, *United States v. W. Elec. Co.*, No. 82-0192, 1996 WL 255904 (D.D.C. 1996) (terminating consent decree *nunc pro tunc*, as of Telecommunications Act's Feb. 8, 1996, effective date); 47 U.S.C. §§ 271-76 (replacing MFJ with statutory scheme).

14. See BENAJAMIN ET AL., *supra* note 10, 431; see also 47 U.S.C. §§ 271-76 (governing Bell Operating Companies' line of business restrictions).

15. See BENAJAMIN ET AL., *supra* note 10, 385-86; see also 47 U.S.C. §§ 251, 271.

16. See BENAJAMIN ET AL., *supra* note 10, 385-86; see also Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at 47 U.S.C. §§ 521-555).

17. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(a)-(f), 110 Stat. 56 (directing FCC to modify its broadcast ownership rules contained in 47 C.F.R. §§ 73.658(g), 73.3555, 76.501).

18. See *T-Mobile S., LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 814-16 (2015) (explaining the 1996 Act's "cooperative federalism" structure) (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (Breyer, J., concurring)).

19 See Richard L. Berke, *The 1994 Elections: The Overview*, N.Y. TIMES (Nov. 9, 1994), <http://www.nytimes.com/1994/11/09/us/1994-elections-overview-gop-wins-control-senate-makes-big-gains-house-pataki.html?pagewanted=all>.

20. Jerry Gray, *104th Congress Falls Short of Revolution*, N.Y. TIMES (Sept. 30, 1996), <http://www.nytimes.com/1996/09/30/us/104th-congress-falls-short-of-revolution.html>.

The 104th Congress was also notable for its deep partisan acrimony. January 1996 marked the beginning of an election year and Republicans jockeyed for the chance to replace President Clinton. For his part, the President threw a wrench into the Republicans' pursuit of smaller government by vetoing bills that would have abolished or reduced the size of federal agencies.²¹ As a consequence of vetoing a Republican spending bill in 1995, the federal government was shuttered for 27 days.²²

But on the issue of communications law reform, Republicans and Democrats largely agreed. Given almost universal dissatisfaction with existing federal communications law,²³ and the desire to foment competition in the communications sector,²⁴ overwhelming majorities supported deregulation, and majority and minority leadership cooperated with each other. Indeed, few issues in Congress were less partisan than communications law.

Introduced by Senator Larry Pressler (R-SD),²⁵ it passed the Senate 81-18 on June 15, 1995.²⁶ Parallel legislation, sponsored by Representative Tom Bliley (R-VA),²⁷ passed the House on August 4, 1995 by a vote of 305-117.²⁸ After months of conference, the combined legislation passed both chambers by overwhelming majorities on February 1, 1996. The vote was 91-5 in the Senate.²⁹ The vote was 414-16 in the House.³⁰ With the exception of Senator John McCain (R-AZ), every Republican member of the Senate, all with deregulatory leanings, voted for the Act on final passage.³¹

21. See Norman Kempster, *Clinton Vetoes GOP's Bill to Overhaul Foreign Policy*, L.A. TIMES (Apr. 13, 1996), http://articles.latimes.com/1996-04-13/news/mn-58141_1_foreign-policy (discussing President Clinton's veto of a bill abolishing the United States Agency for Economic Development).

22. See CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 3 (2014).

23. See BENJAMIN ET AL., *supra* note 10, 385-86.

24. See Telecommunications Act of 1996, prmb1.

25. See S. 652, 104th Cong. (1995).

26. See Final Results for S. Roll Call Vote 268 on S. 652, 104th Cong. (June 15, 1995), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=104&session=1&vote=00268.

27. H.R. 1555, 104th Cong. (1995)

28. See Final Results for H. Roll Call Vote 635 on H.R. 1555, 104th Cong. (Aug. 4, 1995), <http://clerk.house.gov/evs/1995/roll635.xml>.

29. See Final Results for S. Roll Call Vote 268 on S. 652, 104th Cong., 2d Session (Feb. 1, 1996), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00008.

30. See Final Results for H. Roll Call Vote 25 on S. 652 Conference Rep., 104th Cong. (Feb. 1, 1996), <http://clerk.house.gov/evs/1996/roll025.xml>.

31. See Final Results for S. Roll Call Vote 268 on S. 652, 104th Cong. (June 15, 1995), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=104&session=1&vote=00268; see also Jerry Gray, *104th Congress Falls Short of Revolution*, N.Y. TIMES (Sept. 30, 1996), <http://www.nytimes.com/1996/09/30/us/104th-congress-falls-short-of-revolution.html> (describing deregulatory leanings of Republicans in the 104th Congress).

Public Law 104-104 was signed into law on February 8, 1996.³² It was not an ordinary bill-signing ceremony. The signing was held at the Library of Congress, rather than at the White House,³³ perhaps as an olive branch by the Clinton Administration towards Republican legislators. Both parties were weary of dispute, after all. It was the first law signed digitally in cyberspace and streamed live over the Internet,³⁴ in acknowledgment of the vast technological advancements since its 1934 predecessor, and contrary to historical revisionists who suggest that the Internet was unknown in 1996.

Bill-signings were typically brief, featuring only a short speech by the President.³⁵ The signing of the Telecommunications Act of 1996, however, boasted an entire lineup of speakers.³⁶ In addition to Vice President Gore, Congressional leaders of both parties, as well as rank-and-file members of both parties, spoke at the event.³⁷ Each speaker praised the legislation and forecast a great future of the communications sector.³⁸

As President Kennedy once said: “Victory has a thousand fathers; defeat is an orphan.”³⁹ At the signing, speaker after speaker claimed parentage of the Act. Those of us who had actually witnessed the legislative covenants knew that most of these extraordinary claims were false. But our lips were sealed out of concern for the legislation’s fate. Elected officials are granted latitude to assert responsibility for the good and deny responsibility for the bad; staff simply remain silent.

To be sure, the Act contains language inserted on behalf of multiple identifiable members and Senators.⁴⁰ But multiple parents and uncoordinated voices do not create a law. As anyone who has worked on the Hill understands, passing a bill is a Herculean effort, requiring careful orchestration behind the scenes. The Telecommunications Act of 1996 was no exception. Congress is a body with 535 egos, each self-important, each in search of something to gain, and each prone to taking offense. Despite bipartisan consensus communications law reform, successful passage was predicated on a fragile coalition.

32. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

33. See Guy Lamolinara, *President Clinton Signs Telecom Act at Library of Congress*, 55 LIBR. OF CONG. INFO. BULL., No. 3, at 1 (1996), <https://www.loc.gov/loc/lcib/9603/telecom.html>.

34. See *id.*

35. See Melissa Block & Jim Kratsas, *A History Of The Presidential Signing Pen*, NPR (Mar. 23, 2010), <http://www.npr.org/templates/story/story.php?storyId=125072298>.

36. See Lamolinara, *supra* note 33.

37. See *id.*

38. See *id.*

39. President John F. Kennedy, Remarks to the Press (Apr. 21, 1961), <http://www.presidency.ucsb.edu/ws/?pid=8077>.

40. See Amendments to S. 652, 104th Congress (1995-1996), <https://www.congress.gov/bill/104th-congress/senate-bill/652/amendments>; see also Amendments to H.R. 1555, 104th Congress (1995-1996), <https://www.congress.gov/bill/104th-congress/house-bill/1555/amendments>.

President Clinton seemed jovial at the Library of Congress signing, lingering long afterwards to shake hands with anyone willing. Perhaps he more than anyone else knew the rarity of the moment for the US government.

II. TO WHAT EXTENT WAS THE IMPLEMENTATION OF THE ACT FAITHFUL TO ITS INTENT?

The good feelings of February 8, 1996 did not last long. The Act effectively obliterated decades of regulations that stifled progress in the communications sector. The Telecommunications Act of 1996 required much work by the FCC to write new rules in a short period of time. The FCC set to work.

To the surprise of many, the FCC met all of its deadlines. It wrote all of the required rules—in more regulatory detail than almost anyone could have imagined. While the Act was written by a Republican Congress seeking to promote deregulation, it was implemented by a regulatory agency controlled by Democrats. The result in many cases was more, not less, regulation.

Claiming betrayal by the FCC, many supporters of the legislation turned into ardent opponents almost immediately.⁴¹ The orphanage of defeat—the second clause in President Kennedy’s quote—materialized. Once nearly universally popular, the Act became widely reviled and lawsuits against the FCC mounted throughout 1996 and 1997. Some courts sided with the opponents of the FCC, putting at risk not just specific regulations but the entire fabric of the Act.⁴²

The FCC was challenged on almost all of its rulemakings. While many cases bounced back and forth between the FCC and the courts, the Supreme Court’s ruling in *AT&T v. Iowa Utilities Board*,⁴³ set the tone for judicial deference to the FCC. Although it primarily concerned state regulatory powers and the FCC’s implementation of local telephone competition provisions,⁴⁴ *AT&T v. Iowa Utilities Board* was widely interpreted as imposing deference to the FCC in practically all matters under the 1996 Act.⁴⁵

In upholding the FCC’s regulatory powers in 1999, Justice Scalia, writing on behalf of Supreme Court majority, took Congress to task for the

41. Many parties, some of which had actively supported the legislation, filed suit against the FCC for its implementation of the Telecommunications Act of 1996.

42. See, e.g., *Iowa Utilis. Bd. v. FCC* 135 F.3d 535 (8th Cir. 1998) *rev’d sub nom.*, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999); *SBC Commc’ns, Inc. v. FCC*, 981 F. Supp. 996 (N.D. Tex. 1997), *rev’d*, 154 F.3d 226 (5th Cir. 1998).

43. *AT&T Corp. v. Iowa Utilis. Bd.*, 525 U.S. 366 (1999).

44. See *id.* at 379-96.

45. See, e.g., *WWC License, LLC v. Boyle*, 459 F.3d 880, 890 (8th Cir. 2006) (“we owe deference to the [FCC] based on the fact that Congress expressly charged the FCC with the duty to promulgate regulations to interpret and carry out the Act”); see also, e.g., *Verizon v. F.C.C.*, 740 F.3d 623, 650 (D.C. Cir. 2014); *All. for Cmty. Media v. FCC*, 529 F.3d 763, 773 (6th Cir. 2008).

vague wording of the Act.⁴⁶ He blamed the FCC's regulatory activism on ambiguous draftsmanship: "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."⁴⁷ Applying *Chevron* deference, Justice Scalia and lower courts gave the FCC wide latitude to interpret the Act⁴⁸ explaining, that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."⁴⁹

The court decisions sanctioning the FCC's interpretation of the Act have in many cases been misconstrued. After the Supreme Court issued its decision in *AT&T v Iowa Utilities Board*, then-FCC Chairman William Kennard claimed that the Supreme Court had endorsed the Commission's interpretation of the Act, saying that "[t]he Supreme Court has affirmed the most important components of the national blueprint for competition as designed by Congress and implemented by the FCC. It's time to stop investing in litigation and focus instead on opening local phone markets to competition."⁵⁰

But the Supreme Court did not affirm "the most important components of the national blueprint for competition as designed by Congress and implemented by the FCC," under the Act.⁵¹ The Supreme Court merely affirmed that the FCC had wide latitude to implement regulations under *Chevron* deference.⁵² As long as the FCC complied with administrative law, the courts deferred to the FCC's technical expertise.⁵³ For many judges, practically every word of the Telecommunications Act of 1996 involved technical matters, justifying wide discretion.⁵⁴

This extraordinary latitude was both a blessing a curse for the FCC. While the courts would rarely reverse FCC rules on statutory grounds,⁵⁵ it

46. See *Iowa Utilis. Bd.*, 525 U.S. at 397 (noting that the act's ambiguity "is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.").

47. *Id.*

48. See *id.* at 377-79; see also, e.g., *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 143 (D.C. Cir. 2010) ("The FCC has rulemaking authority to carry out the provisions of [the 1996] Act, . . . [and] the familiar principles of *Chevron* [deference] apply to the FCC's construction.").

49. *Iowa Utilis. Bd.*, 525 U.S. at 397 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984)).

50. See Press Release, FCC, Statement of FCC Chairman William E. Kennard on Today's Supreme Court Ruling on *AT&T Corp. v. Iowa Utilis. Bd.* (Jan. 25, 1999), <https://transition.fcc.gov/Speeches/Kennard/Statements/stwek906.html>.

51. *Id.*

52. See *Iowa Utilities Board*, 525 U.S. at 380-83.

53. See, e.g., *id.* at 377-79, 387 (finding Congress delegated broad rulemaking authority to implement the 1996 Act and deferring to FCC's reasonable interpretation of "network element").

54. See, e.g., *U.S. Telecom Ass'n v. F.C.C.*, 290 F.3d 415, 421 (D.C. Cir. 2002) ("We note at the outset the extraordinary complexity of the Commission's task.").

55. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998) (finding courts uphold agency interpretations of ambiguous statutes 89% of the time).

was nearly impossible to improperly implement the law, and the courts would permit future Commissions to rewrite rules as they saw fit.⁵⁶ Despite the permanence of statutory language, regulatory decision-making amounted to little more than the expert whim of the day.⁵⁷ Depending on the set of Commissioners in power, interpretation could vary wildly.⁵⁸

Although the FCC was subsequently led by various deregulation-driven chairmen, none has scaled back all of the regulation for the Telecommunications Act of 1996. Some regulations, once in place, are difficult to repeal.⁵⁹

III. HOW DID THE COMMUNICATIONS SECTOR FARE IN RESPONSE TO THE ACT?

Although economists usually associate high levels of regulation with slow economic growth, the communications sector has been a catalyst for substantial growth in the United States ever since the passage of the 1996 Act. Despite the regulatory morass, the law opened markets that were previously closed, and enabled the creation of countless new businesses.

The sector accounts for less than 5% of the American economy⁶⁰ but disproportionately accounted for more than 19% of economic growth between 1997 and 2002, and more than 9% of economic growth between 2002 and 2007.⁶¹ Even more optimistically, former FCC Chairman Reed Hundt, claimed in 2001 that “[i]n the last 5 years, this sector, while accounting for less than an eighth of the total economy, is responsible for one-third of all the economic growth in the economy.”⁶²

56. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“regulatory agencies do not establish rules of conduct to last forever and . . . an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.”) (internal quotation marks omitted) (citations omitted).

57. Cf. *id.* (explaining agencies are entitled to change regulatory decisions based on their expertise).

58. Compare, e.g., *Deployment of Wireline Servs. Offering Advanced Telecoms. Capability*, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 24012, paras. 3, 35–36 (1998), with *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, para. 41 (2002).

59. Cf. *State Farm*, 463 U.S. at 40–45 (explaining limits on agencies’ deregulatory power).

60. In 2014, the information sector accounted for \$824 billion in value added out of \$17.348 trillion of value-added GDP (all values in 2007 dollars). See *Gross-Domestic-Product-by-Industry Data*, BUR. OF ECON. ANALYSIS (2014), http://www.bea.gov/industry/gdpbyind_data.htm.

61. See Harold Furchtgott-Roth & J. Li, Hudson Institute, *The Contribution of the Information, Communications, and Technology Sector to the Growth of U.S. Economy: 1997-2007*, HUDSON INSTITUTE (August 2014), http://www.hudson.org/content/researchattachments/attachment/1425/m0810_2.pdf.

62. *The Telecom Act Five Years Later: Is It Promoting Competition*, Hearing before Subcomm. on Antitrust, Business Rights, & Competition of the S. Comm. on the Judiciary,

How much of the economic growth is actually attributable to the Telecommunications Act of 1996? It is impossible to identify the specific contribution of the statute, although it is likely to be substantial. Communications industries—local telephony, long-distance, cable, broadcast, etc.—faced extraordinary legal and regulatory challenges prior to 1996. No doubt, updating the law for these industries increased efficiency and economic activity.

On the other hand, much of the growth in the information sector in the United States was in the wireless and Internet segments, largely left unregulated under the Telecommunications Act of 1996. It is untenable to suggest the Act was responsible for all growth in the communications sector in the late twentieth century. After all, during the same time period, the communications sectors in other countries around the world also grew rapidly. Access to wireless services and to Internet services has been one of the great economic achievements for billions of people around the world, all since 1996.⁶³

Moreover, the FCC's implementation of the statute led to investment uncertainty and likely harmed growth.⁶⁴ By 2001, some publications called the implementation of Act disastrous and at least partly responsible for the dot-com bubble of 1998-2001: "Five years later, the telecom industry is a mess. For the first time, industrywide revenues are contracting. Profits are disappearing as prices for service plummet. . . . Such horrific news has investors fleeing the scene. At least a dozen upstarts, from PSINet Inc. (PSIX) to 360networks Inc. (TSIX), have filed for bankruptcy protection. Cash-starved companies have laid off 170,000 workers since January, more than any other sector of the economy, according to Challenger, Gray & Christmas and company announcements. And market forces are ripping apart industry giants."⁶⁵

A few months later, CNet observed: "About the only agreement among telecom companies, regulators and legislators is that the landmark Telecommunications Act of 1996 didn't quite work".⁶⁶

Over the past fifteen years, the communications sector has recovered, along with the reputation of the Telecommunications Act of 1996. Video, voice and data communication are no longer predominantly the domain of the companies regulated by the Act. Since so many communications companies born after 1996—including Google, Facebook,

107th Cong. (2001), <https://www.gpo.gov/fdsys/pkg/CHRG-107shrg77586/html/CHRG-107shrg77586.htm> (testimony of FCC Chairman Reed Hundt).

63. See Jerry A. Hausman, Remarks before the Hudson Institute's Center for the Economics of the Internet: A New Approach to Measuring the Standard of Living in Least Developed Countries (Nov. 19, 2013), <http://www.hudson.org/events/1045-a-new-approach-to-measuring-the-standard-of-living-in-least-developed-countries112013>.

64. See A TOUGH ACT TO FOLLOW, *supra* note 2.

65. *Eight Lessons from the Telecom Mess*, BLOOMBERG MAG. (Aug. 21, 2001), <http://www.bloomberg.com/bw/stories/2001-08-12/8-lessons-from-the-telecom-mess>.

66. See *Remaking the Telecommunications Act*, CNET (Mar. 22, 2002), <http://www.cnet.com/news/remaking-the-telecommunications-act/>.

Twitter, Netflix, and Uber— were left unregulated, the Act is now more a bystander to a communications sector. Other major companies, such as Apple, Microsoft, Cisco, Qualcomm, and Samsung, were much smaller in 1996 and largely escaped the Act's purview. Nor did the Act merely serve to protect incumbents: some of the largest communications companies in 1996—Worldcom, MCI, AT&T, Lucent, Compaq, no longer exist or were swallowed up by more successful competitors. The Act's aftermath involved massive new competition and the emergence of new firms in an entirely different and rapidly changing market.

However, this recovery should not be taken for granted. Even though the 1996 Act did not anticipate the current marketplace, the FCC has seldom been relegated to bystander status on account of statutory text. As we know from the FCC's zeal to regulate broadband, and tortured interpretations of section 706 of the 1996 Act, and of Title II of the 1934 Act, the Commission may very well find further ways to expand its authority to account for changing market conditions.

IV. IS THE TELECOMMUNICATIONS ACT OF 1996 DUE TO BE REWRITTEN?

Almost from the day it was signed into law, skeptics have sought to rewrite the Telecommunications Act of 1996. Rewriting the Act became particularly intense in 2001 and 2002 in the aftermath of the dot-com bust. Although the 1996 Act was expected to promote competition in the communications sector, lawmakers were concerned about the lack of competition in local phone and broadband markets. As CNet noted in 2002,

Newly appointed House Committee on Commerce Chairman Billy Tauzin, R-La., "would like to finish the work on the Act," said spokesman Ken Johnson. "The intent of the Act was to deregulate telecommunications, but we don't have competition in broadband."⁶⁷

Despite frequent murmurs of rewriting the Act, legislative efforts have not gone very far, primarily on account of the disparity between the current context and that of 1996.

Unlike in 1996, local telephone markets are no longer monopolistic. Gone are stovepipe regulations restricting firms from entering different markets and industries. Judge Greene's rigid court room is no more. Communications companies are not desperate to change the status quo, and have not lobbied for change to the degree they did in twenty years ago.

Unlike in 1996, moreover, bipartisan consensus is absent. Back then, everyone, regardless of political persuasion, wanted to leave the Internet unregulated. Today, Internet regulation is a hotly debated political issue, whether the question is one of tracking potential terrorists or collecting additional tax revenues. The division in approaches is increasingly partisan, with FCC commissioners voting primarily along partisan lines. For some,

67. *Id.*

the Internet has become too important to leave unregulated. For others, it is precisely on account of its importance that the Internet should remain unregulated.

Proponents of re-writing the Act point to vast technological changes since 1996. The Internet has turned the communications sector on its head. Instead of accessing video programming via cable and satellite TV subscriptions, consumers increasingly turn to the Internet and over-the-top video providers like Netflix and Hulu. Wireless communication has outpaced wireline telephony. And with technologies like Skype and Facetime, telephony is no longer the sole provider of voice communication.

It is natural that many would promote legislative reform to reflect this changed landscape. But technology continues to change so rapidly that the concept of regulation keeping pace is hard to believe. To the extent that communications technology undergoes further monumental change, re-writing the Act may be an exercise in futility.

Drafters of a new act should also keep in mind industry players' proclivity to develop technologies with the precise intention of circumventing regulation. Many have alleged that T-Mobile's Binge On service, which waives data caps for particular video content, was developed deliberately to sidestep the FCC's network neutrality rules.⁶⁸ Zero-rating services from Comcast and Verizon have been subject to similar criticism.⁶⁹ Regardless of whether the FCC ultimately outlaws these services, efforts to outpace the regulatory state through new technologies are bound to persist.

V. CONCLUSION

None of the drafters of the 1996 Act could have predicted the state of the communications sector on the occasion of its twentieth anniversary. And no one knows what the next twenty years will bring. But one thing is sure: the fate of the 1996 Act will remain contentious. Calls for a new statute will intensify as long as technology progresses at a feverish pace. The 1996 Act was a rare accomplishment by the 104th Congress. Whether a future Congress will be up to the task is yet to be determined.

68. See Tom Bradley, *Does T-Mobile Binge On Violate Net Neutrality?*, FORBES (Jan. 8, 2016), <http://www.forbes.com/sites/tonybradley/2016/01/08/does-t-mobile-binge-on-violate-net-neutrality/#2715e4857a0b5b903b753018>.

69. See Karl Bode, *FCC Presses Verizon, Comcast & T-Mobile about Zero-Rating*, DSL REPORTS (Dec. 17, 2015), <http://www.dslreports.com/shownews/FCC-Presses-Verizon-Comcast-T-Mobile-About-Zero-Rating-135911>

