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# STILL "AIN'T NO GLORY IN PAIN"[1]: HOW THE TELECOMMUNICATIONS ACT OF 1996 AND OTHER 1990S DEREGULATION FACILITATED THE MARKET CRASH OF 2002

*andré douglas pond cummings*[2]

1. TUPAC SHAKUR & OUTLAWZ, *Still I Rise*, *on* STILL I RISE (Death Row/Interscope Records 1999).

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## I. INTRODUCTION

The stock market collapse of 2001-02 devastated the U.S. capital markets and wreaked havoc on the lives of millions of American investors.[3] Over the past several years, a steady drumbeat of scholars have laid blame for large portions of the market crash at the feet of Congress and its shortsighted deregulatory legislation of the mid-1990s.[4] Specifically, these critics have exposed the "Republican Revolution" Congress (the 104th Congress)[5] and its passage of several congressional

3. *See* Justin Lahart, *The Crash of 2002: Dow Hits Lowest Level in Nearly Four Years as Crisis of Confidence Worsens; J&J Latest Casualty*, CNN MONEY, July 19, 2002, *available at* http://money.cnn.com/2002/07/19/markets/markets_newyork/index.htm; *see also* Kate Berry, *Global Crossing Top Brass May Get Off Hook in Civil Suits: Will Justice Be Served?*, L.A. BUS. J., Aug. 25, 2003, at 1 (explaining that a consequence of market collapse "[f]ormer employees, shareholders and bondholders of Global Crossing Ltd. are nearing a broad settlement of all civil litigation filed against the bankrupt telecommunications firm, its co-founder, Gary Winnick, and 32 former officers and directors." In addition, "[t]he amount of the potential settlement represents a fraction of the money lost by investors and employees when Global Crossing filed for Chapter 11 bankruptcy protection in January 2002."); *infra* notes 96, 156 (describing the value loss of the capital markets in the wake of the 2002 crash).

4. *See* andré douglas pond cummings, "*Ain't No Glory in Pain*": *How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 NEB. L. REV. 979, 1044-59 (2005); *see also* Ernest E. Badway & Jonathan M. Busch, *Ending Securities Industry Self-Regulation As We Know It*, 57 RUTGERS L. REV. 1351, 1358-76 (2005); Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 AM. U. L. REV. 621 (2006); Joseph F. Morrissey, *Catching the Culprits: Is Sarbanes-Oxley Enough?*, 2003 COLUM. BUS. L. REV. 801 (2003); Joseph M. Schwartz, *Democracy Against the Free Market: The Enron Crisis and the Politics of Global Deregulation*, 35 CONN. L. REV. 1097 (2003); Stuart A. Shorenstein & Lorna Veraldi, *Symposium: Are New Media Really Replacing Old Media? Broadcast Media Deregulation and the Internet: Defining The Public Interest In Terms of Regulatory Necessity*, 17 ST. JOHN'S J. LEGAL COMMENT. 45, 60-61 (2003); Jacqueline Lang Weaver, *Can Energy Market Be Trusted? The Effect Of The Rise and Fall of Enron On Energy Markets*, 4 HOUS. BUS. & TAX L.J. 1, 11-16 (2004); William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders: The Rise of the New Corporate Kleptocracy*, 8 STAN. J.L. BUS. & FIN. 69, 76-85 (2002).

5. cummings, *supra* note 4, at 980. The Republican party swept into power in 1994:

> This election sweep shifted control of the Congress from the Democrats to the Republicans for the first time in forty years. The still-faintly-echoing mantra that

enactments, including the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[6] the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"),[7] the Telecommunications Act of 1996,[8] and the Commodities Futures Modernization Act ("CFMA")[9] amongst others, as responsible in part for the crushing collapse of 2002.[10]

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> reverberated in the halls of the Capitol as those newly elected congresspersons took their revolutionary seats was that of 'deregulation.' As a cornerstone of its 1995 agenda for change, the 'Revolution Congress' made deregulation, particularly deregulation of corporate America, one of its primary objectives. Indeed the Revolution Congress's leadership felt that the nearly sixty years of 'big government' reign, namely federal regulation, as initiated by President Franklin Delano Roosevelt, and buttressed by the United States Supreme Court since 1937, had finally run its course and the time for complete regulatory rollback and reversal had arrived. Many of the Revolution Congress's leaders believed that extensive federal regulation - of all industries - was an evil that necessarily had to be eradicated.

*Id*. at 980-83.

6. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

7. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112. Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.).

8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

9. Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

10. *See* cummings, *supra* note 4, at 1029 (stating that "the bubble burst in a spate of malfeasance, fraud, and deceit. One enduring legacy of the PSLRA and 1990s Revolution Congress deregulation will be the market crash of 2002. 'Simply put, Congress reduced the incentives against committing fraud.'") (citing Abner J. Mikva, *Share and Shares Alike: Now Let's Fix the "Reform" of our Securities Laws*, LEGAL TIMES, Apr. 8, 2002, at 50); *see also* Schwartz, *supra* note 4, at 1101. Professor Schwartz writes:

> The deeper, radical truth is that Enron epitomizes the dangers of the speculative 'free market' mania that has resulted in deregulation and the gutting of the public sector in favor of the fool's quest for short-term profit. The other side of speculative profit is speculative bust, the costs of which fall on small investors and workers rather than on corporate executives routinely rescued by government bailouts and 'golden parachutes.'

*Id*.; Reed Hundt, *Ten Years Under the 1996 Telecommunications Act*, 58 FED. COMM. L.J. 399, 400 (2005). Hundt suggests that:

> Regulatory policy flip flops at the FCC in 2001 and 2002 played a big role in the outcome. Strategic blunders by AT&T, corruption at MCI, and wise moves at (then) SBC and Bell Atlantic were more important than any rule of law in determining the outcomes. But at all times, the more likely result was not the tottering seesaw balance imagined by some in Congress but a winner-take-all result in which either the local firms or the long-distance firms emerged after competition as winners, measured by return to shareholders and economic profits.

*Id.*

While the media and politicians have increasingly and almost singularly blamed dishonest corporate insiders for the market crash of 2002,[11] mounting evidence has shown that far more than simple "bad apple" executive corporate fraud was at play during the historic collapse.[12] Studies have shown that the PSLRA, SLUSA and other deregulatory initiatives in the mid-1990s enabled an environment that almost *invited* the fraud that spun out of control in the corporate fiascos

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11. *See* Robert Sheer, *Bush Overplays the Terror Card*, L.A. TIMES, June 25, 2002, *available at* http://www.robertscheer.com/1_natcolumn/02_columns/062502.htm (providing that "[w]hen even Martha Stewart is ethically suspect and her company's stock has plummeted—though not quite to the depths of Enron, Global Crossing, Tyco, Dynegy, Wal-Mart and Rite Aid—it is time to return to the wisdom of Franklin Delano Roosevelt, the Depression-era president who saved capitalism from itself"); *see also* Amy Feldman, *Surviving Sarbanes Oxley*, INC. MAG., Sept. 2005, *available at* http://www.inc.com/magazine/20050901/surviving-so.html ("Everyone knew accounting problems were rampant. From 1997 through 2004, approximately 2,160 companies corrected errors in their financial statements, according to Glass Lewis & Co., a San Francisco-based research firm. Clearly, plenty of companies needed to take a second look at their books."); Francine Knowles, *Faith in Corporate America Crumbles*, CHI. SUN-TIMES, June 27, 2002, at 6 ("And the scandals continue to wreak havoc on investor confidence in stocks, particularly given that some sectors of the U.S. economy remain weak . . . ."); Kevin Maney, *WorldCom CFO Driven to Win: Once Respected, Scott Sullivan Is Now at the Center of Controversy*, CHI. SUN-TIMES, Aug. 27, 2002, at 39 ("WorldCom fired CFO Scott Sullivan in late June after the accounting misdeeds were unearthed."); *see generally* Catherine E. Vance & Paige Barr, *The Facts and Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361, 365 (2003) ("Corporate and accounting reforms stem, of course, from the scandals that came to the public's attention beginning with the collapse of Enron."); 148 CONG. REC. S7350-04, at S7360 (daily ed. July 25, 2002) (statement of Sen. Schumer) Senator Schumer stated:

> They were talking about the Ken Lay's, Bernard Ebers' [sic], the Andrew Fasdow's [sic] of the corporate world. White collar criminals who ran giant corporations and used tricky gimmicks to rob investors of not only their hard money but also their confidence in the strongest and fairest markets in the world. They are the investment giants: Enron, Arthur Andersen, Adelphia, CMS Energy, Reliant Resources, Dynegy, Tyco International, and now Xerox and WorldCom[;] . . . [i]t is no secret that greed played a major role in our markets rapid decline and slow demise.

*Id.*

12. *See* Ho Young Lee & Vivek Mande, *The Effect of the Private Securities Litigation Reform Act of 1995 on Accounting Discretion of Client Managers of Big 6 and Non-Big 6 Auditors*, 22 AUDITING: J. PRAC. & THEORY, Mar. 2003, at 93-105; *see also* cummings, *supra* note 4, at 1003-04; Schwartz, *supra* note 4, at 1097-98 (describing the corporate scandals of the late 1990s and early 2000s as far more than "political insider trading" but part of a "starker systemic reality" influenced largely by a "global neo-liberal model of deregulation").

of Enron, WorldCom, Tyco, Adelphia, ImClone and Global Crossing.[13] Unquestionably, corporate executives like Bernard Ebbers,[14] Kenneth Lay,[15] Scott Sullivan,[16] the Rigas family,[17] Dennis Kozlowski,[18] Martha

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13. *See* Lee & Mande, *supra* note 12, at 99-105 (documenting the instantaneous decrease in audit quality of the Big Six accounting firms following adoption of the PSLRA as evidenced by the prevalence of increasing discretionary accruals); *see also* cummings, *supra* note 4, at 988-89: cummings stated that:

> The success of the Revolution Congress in discarding or eliminating significant segments of federal regulation from crucial industries was accompanied simultaneously by a wild bull market that saw the U.S. market indicators soar to record heights never before attained. The late 1990s and early part of 2000 saw unabashed speculation that the U.S. capital markets could potentially continue the meteoric climb that had become almost expected by U.S. investors.

*Id.*; *see also* Morrissey, *supra* note 4, at 855. Professor Morrissey writes:

> [T]he PSLRA and the SLUSA combine to force plaintiffs in securities fraud cases to bring their suits in federal court and to follow strict pleading requirements. Further, discovery is limited until after motions to dismiss or motions for summary judgment are adjudicated - making it difficult for plaintiffs to establish the facts necessary to fulfill the strict pleading requirements. In addition, recovery possibilities are limited both for the plaintiffs and for their attorneys, while penalties for defendants are reduced. These provisions were supposedly designed to limit strike suits from plaguing corporate America. *In fact, the evidence shown indicates that corporate America is and, even at the time the PSLRA was passed was, suffering far more from fraud, deception and lack of ethical fiber than it is or was from strike suits.*

*Id*. (emphasis added).

14. *See* Associated Press, *Ebbers Sentenced to 25 Years in Prison*, July 13, 2005, *available at* http://www.msnbc.msn.com/id/8474930 (explaining that "Ebbers was convicted of overseeing the $11 billion WorldCom fraud—much of it a pattern of chalking up expenses as long-term capital expenditures, which are classified as assets").

15. See Paul Davies & Kara Scannell, *Guilty Verdicts Provide 'Red Meat' To Prosecutors Chasing Companies,* WALL ST. J., May 26, 2006, at A1; John R. Emshwiller, *Will Enron Probe Spawn Further Criminal Cases?—Flush With Conviction Victories, Prosecutors Have Possible Targets But May Be Set to Wind Down*, WALL ST. J., June 6, 2006, at C1; Gary McWilliams & John R. Emshwiller, *Executives on Trial: Lay Defends His Business Practices at Enron Trial*, WALL ST. J., May 3, 2006, at C4.

16. *See* Jennifer Bayot & Roben Farzad, *WorldCom Executive Sentenced*, N.Y. TIMES, Aug. 12, 2005, *available at* http://query.nytimes.com/gst/abstract.html?res=F30A1EF73F5A0C718DDDA10894DD404482 ("Federal Judge Barbara S. Jones sentenced Scott D Sullivan, former chief financial officer who acknowledged his leading role in WorldCom's $11 billion accounting fraud, to five years in prison.").

17. *See* Roben Farzad, *Jail Terms for 2 at Top of Adelphia,* N.Y. TIMES, June 21, 2005, *available at* http://query.nytimes.com/gst/abstract.html?res=FA0A1FFA385F0C728EDDAF0894DD404482.

18. *See* Associated Press, *Ex-Tyco CEO Kozlowski found guilty: Kozlowski, former finance chief face 30 years if appeals fail*, MSNBC.com, June 17, 2005, *available at*

Stewart,[19] Jeffrey Skilling,[20] Richard Scrushy,[21] Sam Waksal[22] and a host of other bad corporate actors deserve significant blame for ushering in the market collapse of 2002; but now, evidence has shown that these executives existed in a deregulated corporate environment that very nearly green-lighted their ribald behavior.[23]

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http://www.msnbc.msn.com/id/8261018 ("[A] jury convicted [Dennis Kozlowski] and another executive of looting the company of $600 million.").

19. *See* Krysten Crawford, *Martha: I Cheated No One*, CNN MONEY, July 20, 2004, *available at* http://money.cnn.com/2004/07/16/news/newsmakers/martha_sentencing/?cnn=yes ("[Martha Stewart] was sentenced to five months in prison and two years' probation Friday for lying to investigators about her sale of ImClone Systems stock in late 2001.").

20. *See* Associated Press, *Status of High-Profile Corporate Scandals*, Mar. 15, 2005, *available at* http://www.latimes.com/business/investing/wire/sns-ap-corporate-scandals-glance,1,62511.story?coll=sns-ap-investing-headlines; *see also* Bloomberg News, *Skilling says Enron evidence 'insufficient,'* CHI. TRIB., June 21, 2006, at 4; John R. Emshwiller et al., *Lay's Legacy: Corporate Change—But Not the Kind He Expected,* WALL ST. J., July 6, 2006; Simon Romero, *A Verdict Interrupted*, N.Y. TIMES, July 6, 2006, at C1.

21. Richard Scrushy was controversially acquitted by an Alabama jury of accounting fraud in July 2005. *See Business Digest*, N.Y. TIMES, July 14, 2005, *available at* http://query.nytimes.com/gst/health/article-page.html?res=9A05EFD81230F937A25754C0A9639C8B63. Scrushy was convicted of paying bribes in order to secure for himself a position on an Alabama regulatory panel. *See* Valerie Bauerlein, *Scrushy Is Convicted in Bribery Case*, WALL ST. J., June 30, 2006, at A3, noting:

> HealthSouth Corp. founder Richard M. Scrushy was convicted of paying $500,000 in bribes in return for a spot on a state regulatory panel, a victory for the federal government a year and a day after it failed to pin a massive accounting fraud at the health-care company on him.

*Id.*

22. *See* Chris Adams, *ImClone Ordered Two Shredders The Same Month Probe Started*, WALL ST. J., Sept. 16, 2002, at C10; Leslie Eaton, *The Ghost of Waksal Past Hovers Over the Stewart Trial*, N.Y. TIMES, Feb. 17, 2004, at C1; Holman W. Jenkins Jr., *Business World: Lies of the Post-Bubble*, WALL ST. J., July 17, 2002, at A17; Peter Loftus, *ImClone Plans to Go It Alone, Saying Takeover Bids Too Low—Analysts See Darker Side, Calling Stock Overvalued Amid Competitive Threats*, WALL ST. J., Aug. 11, 2006, at A14; Andrew Pollack & David Cay Johnston, *Former Chief of ImClone Systems Is Charged With Insider Trading*, N.Y. TIMES, June 13, 2002, at C1; Matthew Rose, *Martha, Martha, Martha—With Her Name Emblazoned On All Her Wares, Stewart Could Put Company at Risk*, WALL ST. J., June 19, 2002, at B1; Ben White, *Hill Panel Seeks Records On ImClone Stock Deals*, WASH. POST, July 24, 2002, at E01.

23. *See* cummings, *supra* note 4, at 1038 (describing how many opponents predicted that passage of deregulation legislation would lead corporate malfeasors to perpetrate fraud):

> The California State Association of Counties on Friday elected a new president—San

While many of the corporate executives noted above have been sued, indicted, prosecuted and even found guilty in some instances,[24] Congress continues to escape significant and meaningful blame for its role in enabling the market fiasco of 2001-02.[25] In light of the guilty

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> Mateo County supervisor Mike Nevin—whose first action was sending a letter to President Clinton opposing the Securities Litigation Reform Act. CSAC, a nonprofit corporation that promotes the interests of California's 58 counties before the state legislature and Congress, contends the [PSLRA] will severely hinder local governments' ability to recover losses related to securities fraud . . . . The letter to Clinton was signed by 106 county and other local government officials . . . . 'Local governments are victims of securities fraud; they need access to the courts to recover their losses,' [said Steve Szalay, executive director of CSAC]. Orange County, on behalf of 187 independent California governments, is suing to recover about $1.5 billion on the grounds that the investments made on its behalf were unsuitable and violated the California constitution and statutes. This bill makes it very difficult for local governments and taxpayers to recover their losses in securities fraud cases, and *it will give wrongdoers a green light to commit more fraud*, Szalay said.

*Id*. (emphasis added) (citing Joe Bel Bruno, *California Counties Ask Clinton To Veto Securities Bill,* The Bond Buyer, Dec. 5, 1995, at 11).

24. Davies & Scannell, *supra* note 15, at A1; Emshwiller, *supra* note 15, at C1; McWilliams & Emshwiller, *supra* note 15, at C4; Associated Press, *Count by Count*, N.Y. TIMES, May 25, 2006 at C1; Megan Barnett et al., *Not a Good Thing*, U.S. NEWS & WORLD REPORT, Mar. 15, 2004, at 55; Ken Belson, *Ex-Chief of WorldCom Is Found Guilty in $11 Billion Fraud*, N.Y. TIMES, Mar. 16, 2005, at A1; Aimee Deeken, *Stewart Sentenced to Five Months in Prison*, MEDIAWEEK.COM, July 16, 2004; Jayne O'Donnell & Greg Farrell, *Ebbers guilty on all 9 counts*, USA TODAY, Mar. 16, 2005, at 1A; Mark A. Stein, *From Top of the Corporate World to Appeals Court*, N.Y. TIMES, May 27, 2006, at C2; Chad Terhune, *Executives on Trial: Scrushy Avoids Perjury Retrial, Officially Ending Criminal Case*, WALL ST. J., July 14, 2005, at C3; Chad Terhune & Dan Morse, *Why Scrushy Won His Trial And Ebbers Lost*, WALL ST. J., June 30, 2005, at C1.

25. *See* Robert Kuttner, *Cant and Recant Milton Friedman's Latest Research on the Federal Reserve Challenges Key Assumptions of a Very Prominent Economist: Milton Friedman*, THE AM. PROSPECT, Jan. 2006, *available at* http://www.prospect.org /web/page.ww?section=root&name= ViewWeb&articleId=10795. Kuttner writes:

> [S]elf-regulation obviously failed investors in the multiple insider-trading, self-dealing, and stock promotion scandals of the late 1990s that in turn led to the stock-market bubble. Insiders ripped off investors by cooking corporate books, misallocating trillions of dollars of investment capital. The misrepresentations went on for a decade. But as Friedman sees things, it was the market that ultimately brought down Enron and the rest, not Eliot Spitzer or the SEC. And what of the industry lobbying that led the Republican Congress, as part of the Contract with America, to weaken the laws that allowed defrauded investors to sue and virtually invited abuses?

*Id*.; *see also* Jeff Madrick, Economic Scene; *Bush is talking tough on corporate ethics,* verdicts handed down in the Kenneth Lay and Jeffrey Skilling Enron prosecution,[26] some commentators are even suggesting that this chapter in U.S. history, marking the capital market collapse of 2002, should now be closed.[27] In so arguing, such commentators continue to perpetuate

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*but where is the regulatory bite?*, N.Y. TIMES, July 11, 2002, at C2 ("At bottom, President Bush's speech on Tuesday reflects the belief that the current corporate scandals are merely the handiwork of a few bad apples."); David E. Sanger & David E. Rosenbaum, *Corporate Conduct: Washington Memo; White House Moves to Limit Corporate Scandals' Fallout*, N.Y. TIMES, July 25, 2002, at A1. *But see* Robert L. Borosage, *Conservatives Created the Corporate Scandals*, NEWSDAY, July 10, 2002 (claiming that Newt Gingrich's "Contract With America," aimed at securities reform in 1995, shielded outside accountants and law firms from liability for false corporate reporting, making it more difficult for shareholders to bring suit against fraudulent reporting and consequently a flood of corporate misstatements followed soon thereafter); Gary D. Halbert, *Is There A Bottom In Stocks?*, PROFUTURES, July 26, 2002, *available at* http://www.profutures.com/article.php/69/ (blaming Congress for the recent accounting scandals and the market failures of 2001 and 2002); Editorial, *Not Just Bad Apples*, WASH. POST, May 26, 2006, at A20 (noting that "bad apples" were not the only reasons for the market collapse).

26. *See* John R. Emshwiller et al., *Symbol of An Era: Lay, Skilling Convicted of Fraud*, WALL ST. J., May 26, 2006, at A1; *see also Showdown With the Crooked 'E,'* WASH. POST, May 28, 2006, at F02; Alexei Barrionuevo & Kurt Eichenwald, *The Enron Case That Almost Wasn't*, N.Y. TIMES, June 4, 2006, at C11; Editorial, *And Justice For All*, N.Y. TIMES, May 26, 2006, at A20; Carrie Johnson, *Enron Leaders Found Guilty; Massive Fraud Pinned to Lay, Skilling*, WASH. POST, May 28, 2006, at A01; Nathan Koppel & Peter Lattman, *The Enron Verdicts: Reversal Could Be Long Shot, Legal Experts Say*, WALL ST. J., May 2, 2006, at A9.

27. *See* Brooke A. Masters & Carrie Johnson, *White-Collar Crime's New Milestone*, WASH. POST, May 26, 2006, at D01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/25/AR2006052501940.html?referrer=emailarticle ("The fact that significant and highly credible companies engaged in misconduct of the rankest sort, pulling the wool over the eyes not just of investors but of analysts, journalists and regulators, is a very sorry chapter in our history, and one that deserves the right type of burial.") (statement of Harvey Pitt, former chairman of the Securities and Exchange Commission); *see also* Editorial, *Guilty as Charged; Lay, Skilling Convicted in Enron Collapse*, CHI. TRIB., May 26, 2006 at 3 ("The jury's verdicts help to close a notorious chapter in the history of America's publicly traded companies . . . . Appeals aside, the end of the trial will mark the end of a dark era.") (statement of Rep. Michael Oxley); *see also* Editorial, *. . . And the Beltway Version*, WALL ST. J., May 26, 2006, at A10 ("Some are calling [the] Enron verdicts the end of the corporate scandal era . . . ."); Shaheen Pasha & Jessica Seid, *Lay and Skilling's Day of Reckoning*, CNNMONEY, May 25, 2006, *available at* http://money.cnn.com/2006/05/25/news/newsmakers/enron_verdict/index.htm (asserting that the verdicts for Lay and Skilling mark "the end of one of the most scandalous chapters in the history of corporate America"); *see generally* David

the myth that this dark scandal-ridden hour in U.S. history is attributable still to only a few overreaching corporate executives.[28] This argument continues to perplex in light of mounting evidence to the contrary.[29]

Strong evidence exists that the deregulatory hysteria that gripped the Revolution Congress—and its shortsighted enactments—is in part responsible for the corporate malfeasance that rocked Wall Street in 2001 and 2002.[30] This ripe-for-fraud corporate environment existed because a flurry of deregulatory activity by Congress in the mid-1990s set out to eliminate the regulatory environment that existed nationally

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Callaway, *Endgame begins in Enron scandal*, MARKETWATCH, Oct. 3, 2002, *available at* http://www.marketwatch.com/News/Story/Story.aspx?guid=%7BE7C6145C-7D18-43C2-9629-26B36D5FE06D% 7D&print=1&siteid=mktw. *But see* R. Jeffrey Smith, *Lobbying Firm Underreported Income*, WASH. POST, July 6, 2006, Page A04, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/07/05/AR2006070501656_pf.htmlaff (describing how the Enron verdict does not conclude an era of corporate scandal and deception); David Greising, *Reform is Alive and Well*, CHI. TRIB., May 26, 2006, at C1. *But see* Gretchen Morgenson, *Are Enrons Bustin' Out All Over?*, N.Y. TIMES, May 28, 2006, at C1 (forecasting that other scandals are likely to occur despite the Enron verdict).

28. *See* Geoffrey Colvin, *The Key To Healing Our Psyches? Justice.*, FORTUNE, Feb. 9, 2004 at 56 (declaring that "[w]ith the right trials and the right outcomes, we can finally put them behind us and move on"); Editorial, *The Enron Verdicts . . .*, WALL ST. J., May 26, 2006, at A10 ("We think these convictions of individuals—some 30 in the Enron case alone—will do more to deter future corporate crime than anything in Sarbanes-Oxley. *At the same time, the U.S. economy has snapped back nicely, meaning that assertions of widespread corporate fraud back in 2001 and 2002 were way overblown*.") (emphasis added). *But see* Gretchen Morgenson, *The Big Winner, Again, Is 'Scandalot,'* N.Y. TIMES, Jan. 1, 2006, at C1. Morgenson writes:

> Same stuff, different year. That's one way to look at 2005, the fourth consecutive year in which corporate chicanery loomed large. But while business titans' transgressions may have lacked creativity last year [2005]—there was unusual hubris, greed, and accounting tricks to prop up stock prices—at least the cast of 'Scandalot 2005' involved a few new characters . . . .
>
> Greed was on display throughout 2005 as throngs of executives pocketed pay that was even greater than the previous year's. To hear them talk, they deserved the amounts because—are you sitting down?—they enhanced shareholder value. Never mind that many of their companies' stocks ended the year lower than where they began it.

*Id*.

29. *See supra* notes 4-12 and accompanying text.

30. *See* cummings, *supra* note 4, at 1028. Strong evidence indicates that both accounting firms and telecommunication companies took advantage of the deregulated economy to defraud and deceive millions of investors and ruin hundreds of thousands of employees. *See* Lee & Mande, *supra* note 12, at 99-105; *see also* Schwartz, *supra* note 4, at 1097.

since the New Deal and the Great Depression.[31] Congress passed the PSLRA in 1995, the Telecommunications Act in 1996, the SLUSA in 1998, and the CFMA in 2000. Each of these legislative enactments played a sizeable role in creating an environment that fulminated in "Enronitis"[32] and the market crash of 2002.[33]

Specifically, recent legal scholarship has harshly criticized the PSLRA as a primary progenitor of the 2002 market crash.[34] The

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31. *See* cummings, *supra* note 4, at 993-94 ("President Roosevelt, the New Deal Congress, and the drafters of the 1933 Securities Act believed that required disclosure of pertinent and crucial business information, including profits, debts, earnings, and potential profitability, would give the investing public protection and—perhaps most importantly—knowledge.").

32. *See* Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 COLUM. BUS. L. REV. 773, 774-75 (2004) ("Enronitis. (n., neologism derived from Enron, a large company that went bankrupt amid allegations of market manipulation, phony accounting, looting, and other corporate misbehavior.)"). Professor Greenwood goes on to offer two meanings for the definition of Enronitis:

> 1. A malfunction of corporate governance in which top managers become extraordinarily wealthy while misleading shareholders, creditors, employees and the general public about the company's prospects and practices, eventually resulting in share price collapse, loss of jobs, and, in extreme cases, the corporation's bankruptcy. Thought to have characterized a non-trivial portion of the American corporate economy in the "bubble economy" around the turn of the twenty-first century. Often accompanied by sudden collapse of the reputations of seemingly upstanding corporate citizens who turn out to have been routinely lying, not only to shareholders, but to their own board members, employees, tax authorities, etc. . . . .
>
> 2. A malfunction of corporate governance in which corporations in the pursuit of profit, manipulate markets, deceive consumers, create unsafe or polluting conditions, lobby to change the regulations meant to keep them operating in socially productive ways, commit human rights violations abroad or otherwise act in anti-social, dangerous, or socially inefficient manners. Particularly referring to instances in which corporate actors justify the firm's anti-social behavior or anti-republican political interventions by appealing to the norm of profit maximization.

*Id*. at 794.

33. *See* cummings, *supra* note 4, at 1029-33; *see also* Morrissey, *supra* note 4, at 804-07; *infra* notes 34-45 and accompanying text.

34. *See* cummings, *supra* note 4, at 1032. Professor cummings states:

> [T]he removal of specific regulatory protections gave corporations and firms carte blanche control over the information that they revealed to investors with no fear of reprisal or disincentive for dishonesty. The PSLRA (1) "raised the burden of proof for lawsuits against corporations that mislead shareholders—weakening an important deterrent against corporate fraud;" (2) may have "made accounting firms and law firms 'sue proof' for aiding and abetting securities fraud;" (3) provided "protection for baseless earnings projections," particularly enabling Silicon Valley and the dot-com industry to explode and then collapse based on artificial value; and (4) sent a strong signal to the U.S. capital markets and the global economy that "neither the regulators

PSLRA essentially made it significantly more difficult for victims of investor fraud to sue corporations and the corporate executives that foist such fraud on the unsuspecting investing public.[35] In an effort to curtail perceived lawsuit abuse and investor strike suits, Congress debated and enacted the PSLRA over a President Bill Clinton veto in 1995.[36] Whether the PSLRA met its intended goal of curtailing lawsuit abuse has been the subject of much academic debate.[37] That the PSLRA made

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> nor Congress has been looking out for investors.

*Id.*; *see also* Lerach, *supra* note 4, at 88-89 n.61. Lerach writes:

> As the court noted in *In re OfficeMax Securities Litigation*, in dismissing a lengthy and very detailed complaint alleging substantial financial falsification of the company's books; "The Court notes that it is the PSLRA, and not this Court, that imposes such high pleading standards upon Plaintiffs. While this Court has certainly found in earlier opinions that those pleading requirements are not insurmountable, they nonetheless remain high, even inordinately so. While recent events have called into question the passage of the PSLRA—with its attendant protections for corporations, their officers, and their auditors—it remains the law by which this Court must be guided when assessing the adequacy of Plaintiffs' Complaint."

*Id.* (quoting "*In re* OfficeMax Sec. Litig., No. 1:00-CV-2432, slip op. at 12 n.2 (N.D. Ohio July 26, 2002)).

35. *See* cummings, *supra* note 4, at 1032-33.

36. *See id*. at 1034-35. Professor cummings states that:

> President Clinton vetoed the PSLRA, returning the legislation with stark warnings that the Act would have a deleterious effect on the securities markets and on U.S. investors. President Clinton's veto was motivated in large part by the Revolution Congress's efforts to place unprecedented pleading standard requirements on victims of securities fraud, while promulgating numerous provisions that foreclose securities fraud plaintiffs from gaining access to their constitutionally assured day in court.

*Id.*

37. *See generally* Morrissey, *supra* note 4, at 826-27; Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 929-36 (2003); Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438, 439 (1994); Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711, 713-15 (1996); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1476-99 (2004); Stephen J. Choi, Jill E. Fisch, & A.C. Pritchard, *Symposium: Mutual Funds, Hedge Funds, And Institutional Investors: Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869 (2005); Shaun Mulreed, Comment, *Private Securities Litigation Reform Failure: How Scienter Has Prevented The Private Securities Litigation Reform Act of 1995 from Achieving Its Goal*s, 42 SAN DIEGO L. REV. 779 (2005). According to recent studies, filings of securities fraud class actions have dramatically dwindled in the past several years. *See* Joseph A Grundfest, *The Class-Action Market*, WALL ST. J., Feb. 7, 2007, at A15, *available at* http://online.wsj.com/article_print/SB117082270114300590.html ("[F]ew policy makers or scholars seem aware that a highly controversial component of the litigation market—the class-action securities fraud litigation business—is shrinking

it exceedingly more difficult for defrauded investors to bring securities fraud class action claims is now clear.[38] Congress, in effectively removing this deterrent, provided a clear avenue for corporate executives to engage in wildly dishonest behavior with little fear of professional or legal repercussion.[39]

Curiously, several leading architects of the PSLRA are currently under indictment for other questionable and even illegal conduct occurring after passage of the PSLRA.[40] Some argue that the politicians

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faster than a polar icecap."). Grundfest bases his claim that securities fraud litigation has shrunk dramatically on:

> [D]ata collected by Stanford Law School and Cornerstone Research, the number of companies sued in plain vanilla class-action fraud claims has averaged about 193 per year from 1996 through 2005, not much different from pre-reform levels. But halfway through 2005 filing activity took a sharp drop, and in 2006 only 110 companies were named as defendants in securities-fraud class actions . . . . A closer look at the data suggests that the decline is even more remarkable because 20 of these lawsuits allege options backdating activity. Backdating is a one-time event, and if we subtract these 20 cases we arrive at a 'core' litigation rate of 90 companies per year.

*Id.*; *see also* Jonathan Peterson, *Critics Fear SEC Chief is Seeking to Limit Investors' Ability to Sue: Cox Says He Wants to Prevent 'Abusive Litigation.' But Recent Events Raise Questions About His Intentions*, L.A. TIMES, Feb. 20, 2007, at 1. The L.A. Times reports that:

> The discussion of investor lawsuits is taking place at a time when the number of such cases has been falling steadily. According to Stanford University and Cornerstone Research, 110 cases were filed in 2006, down from 178 filings the year before. Overall, the 2006 figure was 43% below the 10-year average of 193 cases, researchers said last month.

*Id. But see* Stephen J. Choi & Robert Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1496-97 (2006) (claiming that securities class action filings have not decreased in the decade following passage of the PSLRA).

38. *See supra* notes 34, 36 and accompanying text.

39. *See* Lerach, *supra* note 4, at 103-04, stating:

> While the recent arrests or indictments in ImClone, WorldCom, Enron, Adelphia, and RiteAid have made a lot of headlines, I must remind you that, of the billions and billions of dollars of highly questionable, if not illegal, insider-trading profits of corporate insiders that have been exposed in recent years, so far as I know, not one dollar has yet been disgorged! Remember—when crime pays, you get a lot of crime. Simply put, the behavior of many—*not just a few*—corporate executives has been abominable.

*Id.*

40. Former Republican House leader Tom DeLay, a vociferous advocate of deregulation and proponent of the PSLRA, was indicted on charges leading to his ultimate resignation from the House of Representatives. *See* Bill Dawson & Carl Hulse, *DeLay Quietly Surrenders to a Texas Sheriff*, N.Y. TIMES, Oct. 21, 2005, at A19; *see also* Editorial, *The DeLay Indictment*, WASH. POST, Sept. 29, 2005, at A22; Anne E.

currently under indictment engaged in much of the same wildly dishonest behavior that the 2002 market crash corporate executives did.[41] Recently resigned and indicted Congressman Tom DeLay was an

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Kornblut, *How a Tested Campaign Tool Led to Conspiracy Charges*, N.Y. TIMES, Sept. 29, 2005, at A26; Mark Leibovich, *News Flash; DeLay Indictment Hits the Hill Like An Energizing Bolt of Lightning*, WASH. POST, Sept. 29, 2005, at C01; Philip Shenon, *DeLay Goes on Radio and TV to Proclaim Innocence*, N.Y. TIMES, Sept. 30, 2005, at A26; R. Jeffrey Smith & Jonathan Weisman, *DeLay's Felony Charge Is Upheld; But Texas Judge Dismisses Some Conspiracy Counts*, WASH. POST, Dec. 6, 2005, at A01. Former Congressman DeLay is not alone in his indiscretions. *See* Brody Mullins, *Federal Influence-Peddling Inquiry Casts Wider Net—Four Lawmakers' Dealings With Lobbyist Are Studied; Low Threshold for Bribery?*, WALL ST. J., Nov. 25, 2005, at A1. The Wall Street Journal notes that the:

> Prosecutors in the department's public integrity and fraud divisions—separate units that report to the assistant attorney general for the criminal division—are looking into Mr. Abramoff's interactions with former House Majority Leader Tom DeLay of Texas, Rep. Bob Ney (R., Ohio), Rep. John Doolittle (R., Calif.) and Sen. Conrad Burns (R., Mont.), according to several people close to the investigation.

*Id.*; *see also* Philip Shenon, *Trial Nears for Ex-Official Tied to Lobbyist*, N.Y. TIMES, May 22, 2006, at A17 ("The testimony could be uncomfortable for members of Congress and others who have been closely tied to Mr. Abramoff, especially for Representative Bob Ney, an Ohio Republican whose former chief of staff is expected to testify for the government."); Joel Haveman, *Ney Gets 30 Months in Corruption Case*, L.A. TIMES, Jan. 20, 2007, at 19 ("DeLay, once one of Washington's most powerful Republicans, . . . resigned from the House last year because of ethics controversies [while] DeLay is fighting charges in Texas that he violated state campaign finance laws."); Philip Shenon, *Ex-Congressman Is Sentenced to 2  Years in Abramoff Case*, N.Y. TIMES, Jan. 20, 2007, at A8 ("Former Representative Bob Ney, the only member of Congress to admit guilt in the Jack Abramoff lobbying scandal, was sentenced Friday to two and a half years in prison . . . ."); Valerie Sullivan & Jack Torry, *Ney Ordered to Report to W.Va. Prison on March 1*, COLUMBUS DISPATCH, Feb. 11, 2007, at A8; Associated Press, *Abramoff Reports to Prison in Md.*, CHARLESTON GAZETTE, Nov. 16, 2006, at A7 ("[Jack Abramoff] will serve a six-year sentence for a fraudulent Florida casino deal. . . . From prison, Abramoff is to continue cooperating with the Justice Department, helping explain how he manipulated government decisions and who else was involved."); Evan Thomas, *Decline and Fall*, NEWSWEEK, Nov. 20, 2006, at 60.

41. *See* Dan Balz, *Troubled Year Gets Worse for the GOP*, WASH. POST, Sept. 29, 2005, at A01; *see also* Ralph Blumenthal & Carl Hulse, *Court Upholds 2 of 3 Charges Faced by DeLay*, N.Y. TIMES, Dec. 6, 2005, at A1; Editorial, *Hammer Time*, WALL ST. J., Sept. 29, 2005, at A18; Editorial, *Tom DeLay Behind the Curtain*, N.Y. TIMES, Sept. 29, 2005, at A32; Glen Justice, *With Indictment, a Fund-Raising Machine Will Slow*, N.Y. TIMES, Sept. 30, 2005, at A28; Philip Shenon & Carl Hulse, *DeLay is Indicted in Texas Case and Forfeits G.O.P House Post*, N.Y. TIMES, Sept. 29, 2005, at A1; R. Jeffrey Smith & Christopher Lee, *DeLay Booked in Houston on Money-Laundering, Conspiracy Charges*, WASH. POST, Oct. 21, 2005, at A05; Robin Toner, *For*

*Republicans, a Swelling Sea of Troubles*, N.Y. TIMES, Sept. 29, 2005, at A1. With the indictment of DeLay and a sea of additional charges of malfeasance, Democrats in Washington, D.C. have appointed the credo of "a culture of corruption" to the Republican leadership. *See* John M. Broder, *Lawmaker Quits After He Pleads Guilty to Bribes*, N.Y. TIMES, Nov. 29, 2005, at A1 ("'This offense is just the latest example of the culture of corruption that pervades the Republican-controlled Congress, which ignores the needs of the American people to serve wealthy special interests and their cronies,' said Congresswoman Pelosi."); Holli Chimela, *A Vulnerable Republican*, N.Y. TIMES, Apr. 9, 2006, § 14NJ, at 6 ("Ms. Stender is one of nearly a dozen women whom Democratic leaders here are rallying behind in an effort to convey the need for change and to offer an alternative to what they describe as the Republican 'culture of corruption' and the 'good old boys in Washington.'"); Raymond Hernandez, *Democrats Try to Tie Upstate Congressman to Washington G.O.P. Scandals*, N.Y. TIMES, Jan. 31, 2006, at B5 ("The Democrats who have attacked Mr. Sweeney in newspaper interviews, news releases and a satirical Internet advertisement are arguing that his actions reflect a larger culture of corruption that has enveloped Washington under Republican rule."); Sheryl Gay Stolberg, *Democrats Sense Chance In Ohio for '06 Elections*, N.Y. TIMES, Dec. 3, 2005, at A16 ("[Mary Jo] Kilroy decried the Republican 'culture of corruption' and called Congress a 'rubber stamp.'"); Jonathan Weisman & Jeffrey H. Birnbaum, *Scandals Alone Could Cost Republicans Their House Majority*, WASH. POST, Nov. 2, 2006, at A01 ("For more than a year, Democrats have tried to gain political advantage from what they called 'a culture of corruption' in Republican-controlled Washington. Republican campaign officials insist the theme has not caught on with the public, but even they concede that many individual races have been hit hard."); Kate Zernike, *Democrats Vote to Force Jefferson Aside*, N.Y. TIMES, June 16, 2006, at A28 ("The entire Republican caucus condoned, enabled and benefited from the culture of corruption, and that is what I will continue to rail against.") (statement of former minority leader Mrs. Nancy Pelosi (D-CA)). As predicted, the culture of GOP corruption led to a stunning rebuke from U.S. voters in the historic 2006 mid-term election wherein majority power swung to the Democrats for the first time in twelve years. *See* Dick Armey, *End of the Revolution*, WALL ST. J., Nov. 9, 2006, at A14 ("If there was still any doubt, the Republican Revolution of 1994 officially ended Tuesday night with the loss of at least 28 seats and majority control of the House of Representatives."); *see also* David D. Kirkpatrick, *Senate Passes Vast Overhaul In Ethics Rules*, NY TIMES, Jan. 18, 2007, at A1. Kilpatrick notes:

> Interpreting the results of the Nov. 7 election as a reaction to corruption scandals when Congress was under Republican control, the Senate has joined the House in adopting broad new rules that go beyond the proposals Republicans introduced last year, the ones that Democrats campaigned on, or the extensive changes House Democrats recently passed.

*Id.*; Lyndsey Layton, *Hill Pensions for the Convicted May End; House Passes Bill to Deny Payments in Future Cases*, WASH. POST, Jan. 24, 2007, at A04. Layton states:

> For at least a decade, Congress has been kicking around bills to block pensions for convicted lawmakers. . . . [T]he issue resonated following last year's influence-peddling scandal involving convicted lobbyist Jack Abramoff and the midterm elections, when the Democrats grabbed corruption as a campaign theme and used it to

integral part of the deregulation movement that gripped Congress following the historic 1994 election.[42]

Several scholars have now written that the PSLRA was a politically motivated, shortsighted, and poorly executed Congressional enactment.[43] The PSLRA has been criticized for a variety of reasons, with scholars and politicians even calling for its reversal.[44] Congress, in

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> win control of Congress.

*Id.*; Molly McDonough, *D.C. Firms Gear Up for a New Congress: With Prospects for Increased Oversight, Lawyers Scramble to Prepare*, ABA J., Dec. 15, 2006, *available at* http://www.abanet.org/journal/ereport/d15memo.html.

42. *See* cummings, *supra* note 4, at 1072 n.7 ("DeLay led the stampede to free corporations from virtually all regulations . . . . [He] was so anxious that 'he could not wait to start on what he considered the central mission of his political career: the demise of the modern era of government regulation.'") (citing Michael Weisskopf & David Maraniss, *Forging an Alliance for Deregulation: Rep. DeLay Makes Companies Full Partners in the Movement*, Wash. Post, Mar. 12, 1995, at A1); *see id.* at 1072 n.10 (stating that "Representative DeLay was so eager to begin his deregulatory crusade that 'even before the new Congress convened . . . [he] assembled a coalition called 'Project Relief.' The Project brought together more than 100 groups (and their lobbyists) behind a very narrow cause: stopping federal regulations of business.'") (citing Weisskopf & Maraniss, *supra* note 42, at A1).

43. *See* cummings, *supra* note 4, at 1037-39. cummings writes that:

> Despite a veto from President Clinton, strong opposition from state and local governments and municipalities, serious opposition from dozens of editorializing newspapers and magazines, stout opposition from leading Congresspersons with expertise in the corporate arena, a sharply worded letter of opposition signed by the Attorneys General of eleven different states, heavy opposition from the AFL-CIO, grave opposition from the Fraternal Order of Police, and somber warnings of future capital market devastation, the Revolution Congress passed the PSLRA, with a significant assist from corporate executives and their lobbyists. The market crash of 2002 has undoubtedly curbed any joy felt in the corporate world at the time the PSLRA was enacted. Certainly, no glory can be found in the PSLRA when the pain of employee and investor losses from the market collapse of 2002 is so fresh.

*Id.*; *see also* Morrissey, *supra* note 4, at 800; Lerach, *supra* note 4, at 76-85; Lee & Mande, *supra* note 12, at 93-105.

44. *See* cummings, *supra* note 4, at 1065; *see also* Shareholder and Employee Rights Restoration Act of 2003, H.R. 636, 108th Cong. (2003) (legislation originally introduced to reverse many of the PSLRA provisions); Morrissey, *supra* note 4, at 855-56; Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1080-93 (1999). Professor Ramirez argues that:

> Any argument in favor of the PSLRA garners no support from the record of the securities industry over the past ten or fifteen years. Although empirical evidence on this score is hard to come by, most commentators agree that the business of issuing, selling, or buying securities has not advanced to such an ethical and fair level that traditional regulatory strictures should be relaxed. In fact, many believe the contrary

the wake of the market crash of 2002 and despite harsh criticism of the PSLRA, refused to address the larger problems ushered in by that legislation and other deregulation. Instead, Congress hurriedly passed the Sarbanes-Oxley Act, which failed to address many of the problems perpetuated by the PSLRA.[45] Today, the PSLRA continues to shield bad corporate actors from legitimate shareholder class action claims, and remains an obstacle to corporate fraud enforcement activity.

In recent months, the Bush administration and the SEC have surprised U.S. investors and investor protection advocates by mounting a campaign to further curtail securities class action lawsuits.[46] This investor affront has been quietly perpetuated[47] despite mounting

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> to be the case.

*Id*. at 1089.

45. *See* cummings, *supra* note 4, at 1059-65 ("In a typical rush to legislate, the 107th Congress, still teeming with hundreds of holdovers from the Republican Revolution and devotees of the arguably failed 'Contract with America,' passed the toothless and too-weak Sarbanes-Oxley Act in startlingly rapid fashion.").

46. *See* Stephen Labaton, *S.E.C. Seeks to Curtail Investor Suits*, N.Y. TIMES, Feb. 13, 2007, *available at* http://www.nytimes.com/2007/02/13/washington/13sec.html?hp&ex=1171429200&en=9115f646a6caae56&ei=5094&partner=homepage ("The Securities and Exchange Commission has begun to take steps . . . to protect corporations, executives and accounting firms from investor lawsuits that accuse them of fraud."). The N.Y. Times reports that critics of this new deregulation movement are "alarmed":

> Institutional investors and some analysts expressed alarm at the developments, noting that the number of shareholder lawsuits was declining significantly. "It is clear from these actions that this is a commission intent on reversing seven decades of rulemaking, by Democrats and Republicans, that have protected investors and opposed shielding auditors . . . ."

*Id*. (quoting Lynn E. Turner, a former chief accountant at the SEC); *see also* Peter Lattman, *The SEC: Peeling Back Post-Enron Investor Protections?*, THE WALL STREET JOURNAL ONLINE, WSJ.com, *available at* http://blogs.wsj.com/law/2007/02/13/the-sec-peeling-back-post-enron-investor-protections/ (last visited Mar. 12, 2007).

47. *See* Labaton, *supra* note 46 at C1 ("Last Friday, the commission filed a little-noticed brief in the Supreme Court urging the adoption of a legal standard that would make it harder for shareholders to prevail in fraud lawsuits against publicly traded companies and their executives . . . ."). Labaton further reports that:

> The S.E.C. brief in the case, Tallabs Inc. v. Makor Issues and Rights Ltd., said that the appeals court set too low a threshold and that the law required investors to show by evidence 'a high likelihood' that the defendant possessed the intent to violate the law. The brief, which was also signed by the Justice Department, said judges ought to weigh any facts that provided for an innocent explanation of the conduct of the company and its executives.

*Id*.; *see also* Brief for the United States as Amicus Curiae Supporting Petitioners at 7, Tellabs, Inc. v. Makor Issues & Rights, Ltd., No. 06-484 (7th Cir. Feb. 9, 2007). In a evidence that the PSLRA allowed significant investor injury and continues to positively injure U.S. investors and workers.[48] Further, the Treasury Department is trending toward attempted elimination of certain Sarbanes-Oxley protections in the name of capital formation,[49] based on

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brief filed in this case, the SEC and the Department of Justice argues that the 7th Circuit misinterpreted the PSLRA's heightened pleading standard:

> Congress enacted the Private Securities Litigation Reform Act of 1995 in order to curtail abusive practices that undermine the beneficial purposes of private securities litigation. As part of that effort, Congress amended the Securities Exchange Act of 1934 to require that a securities fraud complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." The court of appeals erroneously diluted that requirement by holding that a securities fraud plaintiff need only "allege[] facts from which, if true, a reasonable person could infer that the defendant acted with the required intent."
>
> Before the enactment of the Reform Act, numerous lower courts, applying Rule 9(b) of the Federal Rules of Civil Procedure, held that it was insufficient for a securities fraud plaintiff merely to allege state of mind generally, and some courts held that a securities fraud plaintiff was required to allege facts that gave rise to at least a reasonable inference of the requisite mental state. The Second Circuit, however, went further and held that a securities fraud plaintiff was required to allege facts that gave rise to a *strong* inference of scienter. In enacting the Reform Act, Congress intended to impose a uniform and heightened pleading standard that built upon the Second Circuit's 'strong inference' terminology.
>
> In evaluating whether a plaintiff has alleged facts that "giv[e] rise" to a "strong inference" of scienter, a court should determine whether, taking the conclusion that the defendant possessed scienter follows from those facts . . . . The standard applied by the court of appeals in this case does not appear to differ materially from the "reasonable" inference standard that it (and other courts of appeals) had applied *before* the enactment of the Reform Act. Congress plainly rejected that approach in favor of a more demanding standard. In determining whether an inference of scienter is "strong" for purposes of the Reform Act, a court will necessarily have to consider whether the facts alleged in the complaint leave open a range of non-culpable explanations for the defendant's conduct.

*Id*. (internal citations omitted).

48. *See supra* notes 13, 34.

49. *See* Interim Report of the Committee on Capital Markets Regulation, Committee on Capital Markets Regulation, Nov. 30, 2006 (on file with author). The Committee on Capital Markets Regulation concluded that:

> [F]our factors are responsible for loss of U.S. competitiveness to foreign and private markets: (i) an increase in the integrity of and trust in major foreign public markets resulting from more transparency and better disclosure; (ii) a relative increase in the liquidity of foreign and private markets, thus making it less necessary to go to the U.S. public equity capital markets for funding; (iii) improvements in technology, making it easier for U.S. investors to invest in foreign markets; and (iv) differences in the legal rules governing the U.S. public markets and the foreign and private alternatives. There is little public policy can do to reverse the impact of the first three factors . . . . There are opportunities, however, to make adjustments to our regulatory and litigation framework so that public markets are less burdensome. . . . The average costs of

arguments that U.S. regulation is forcing capital formation out of the U.S. markets and onto more attractive foreign markets.[50] Perhaps most surprising in this new movement toward even further regulatory rollback is the curious refusal of rollback proponents to engage the growing research and still emerging scholarship finding that the market devastation of 2001-02 has been inextricably linked with the failed

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> [Sarbanes-Oxley] Section 404 in 2004, its first year of implementation, were $4.36 million for an average company. Although these costs are down, new entrants into the U.S. public markets still will face these large initial costs. These costs can be especially significant for smaller companies and foreign companies contemplating entry into the U.S. market. . . . Companies are attracted to list in the market that provides them the best valuation—that is, the best multiple of their cash flow (or earnings). The magnitude of this multiple is determined by two factors: (i) the cost of capital and (ii) the risk that current and/or future cash flow will be reduced by market-specific regulatory actions. Recent studies have shown that the U.S. markets have a cost of capital advantage. But the positive difference in the multiples has declined in recent years, especially relative to developed markets. Excessive regulatory costs and risk of litigation are the most likely causes of this decline.

*Id.*; *see also* Anita Hawser, *The Cost of Compliance*, GLOBAL FINANCE, Jan. 1, 2007, vol. 21, issue 1. Hawser reports:

> Steve Bartlett, president and CEO of the Financial Services Roundtable (FSR), which comprises representatives from 100 of the largest financial services companies in the United States, summed up the general disdain for the rule, stating, "Section 404 [of SOX] compliance costs remain high, and its certification requirements are diverting management time and talent from running the company." The FSR has called for the revision of Section 404 and for the SEC to conduct a more comprehensive study of the costs associated with Section 404 compliance. In a November speech, US Treasury secretary Henry Paulson added further salt to the wound, drawing links between SOX and what he depicted as the declining fortunes of US capital markets, which he said "face significant challenges."

*Id.*

50. *See supra* note 49 and accompanying text; *see also* Geoffrey Colvin, *Keep America's Edge*, FORTUNE, Dec. 25, 2006, at 99. Colvin reports:

> The premise is simple: America's capital markets are the envy of the world but are losing their preeminence. Non-U.S. companies are increasingly listing their stocks, IPOs, and otherwise raising money elsewhere. For the sake of the U.S. economy, we need to fight back and make our capital markets more attractive.

*Id.*; Deborah Soloman and Kara Scannell, *Financial-Rule Overhaul Hits A Nerve*, WALL ST. J., Dec. 1, 2006, at C3 ("[B]usiness groups and former regulators urged the Securities and Exchange Commission and Congress to move forward with several of the suggestions, saying existing rules and laws are handicapping U.S. financial markets."); Dale A. Osterle, *The High Cost of IPOs Depresses Venture Capital in the United States*, 1 ENTREPRENEURIAL BUS. L.J. 369-80 (2006) (arguing that although "[t]he fundamental reason for the small number of IPOs is, of course, the reluctance of public investors to buy IPO stock" due to the technology bubble burst in 2000, "[t]he higher ongoing costs are a significant bone of contention, particularly with the implementation of Section 404 of the Sarbanes-Oxley Act of 2002").

deregulation of the mid to late 1990s.[51]

The failed deregulation of the mid-1990s was handcrafted by the 104th Congress. Likely giddy with its success in passing the PSLRA in 1995, the Revolution Congress in 1996 turned its attention to deregulating the telecommunications industry. Congress enacted the Telecommunications Act in that same year. Following the 2002 crash, scholars pointed out the PSLRA's deleterious impact on the U.S. capital markets that led to the devastation of investor confidence and employee life savings. The Telecommunications Act turned out to be just as injurious to U.S. investors and workers as has the PSLRA.

To further perpetuate its deregulatory agenda, Congress passed the Commodities Futures Modernization Act in 2000. Here, rather than deregulate a safely regulated corporate trading area like it did with the PSRLA and the Telecommunications Act, Congress refused the opportunity to regulate a trading area very much in need of regulatory oversight.[52] The CFMA failed to place careful regulatory oversight onto the over-the-counter trading of commodities and futures.[53] This decision to refuse to regulate commodities futures trading proved problematic, as energy commodities trading ran amok at the turn of the century, allowing the fraudulent commodities trading engaged in by Enron and other corporate malfeasors.[54]

This article will examine the role that the Telecommunications Act and the Commodities Futures Modernization Act played in the market collapse of 2002 (together with PSLRA and SLUSA).[55] First, Part II will briefly examine the recent Enron guilty verdicts against Lay and

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51. *See* Labaton, *supra* note 46 ("'This administration [George W. Bush] and this agency [SEC.] are very pro-business and anti-investor.'") (quoting Lynn E. Turner, former chief accountant of the SEC). Further, securities law professor Jill Frisch stated that:

> [A]fter reading the brief, one has to wonder if the S.E.C. is now on the side of the defense bar. . . . This does not read like an S.E.C. brief since it does not articulate anything about the commission's experience in the area. It reads, instead, like a litigant's brief.

*Id*.

52. *See infra* notes 196-198 and accompanying text.

53. *See infra* Part III.

54. *See infra* Part II.B; *see also* ENRON: THE SMARTEST GUYS IN THE ROOM (Magnolia Pictures 2005).

55. Careful examination of the PSLRA and SLUSA have been undertaken previously. *See* cummings, *supra* note 4, at 1059-65. Further painstaking review of the PSLRA and SLUSA are beyond the scope of this article.

Skilling and will detail corporate commentators' misguided call for closing the book on the scandals that erupted in 2001 and 2002. Further, Part II will illuminate the recent appeals from Wall Street to roll back regulations promulgated in Sarbanes-Oxley and new SEC efforts to further hinder plaintiff class action securities lawsuits. Part III will introduce the Telecommunications Act and describe how the Act changed and deregulated the telecommunications industry. Part III will also describe the arguments made in opposition to, and the forces that opposed, passage of the Telecommunications Act and the warnings echoed by such opposition. Part IV will describe the CFMA and explain how the Act changed commodities trading. Part IV will also discuss how passage of the CFMA allowed the fraudulent commodities trading that enabled Enron, Global Crossing and Adelphia, among others, to engage in the deceptions that each did. Part V will propose regulatory efforts that Congress needs to consider and enact in order to bring calm and investor protection back into these frontier-like trading arenas.

## II. CLOSING THE CHAPTER?

This article begins with an examination of Enron and the trial of its executives. More than five years after Enron's spectacular fall from grace, evidence continues to emerge detailing its astonishing fraud. As detailed below, such examination is appropriate because Enron's deception *needed* the newly deregulated environment created by both the Telecommunications Act *and* the CFMA in order to spin its deceit. Absent passage of the Telecommunications Act and the CFMA, it is very unlikely that Enron could have woven its trail of fraud, deceit and ultimate damage. In a much publicized Houston, Texas federal securities fraud trial, Kenneth Lay and Jeffrey Skilling, the former Chief Executive Officers and architects of the Enron Corporation, and the principal progenitors of Enron's downfall, were found guilty for their rolls in capsizing the once proud company.[56] Curiously, Skilling and

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56. *See* Johnson, *supra* note 26, at A01; Associated Press, *Guilty as Charged; Lay, Skilling convicted in Enron Collapse*, CHI. TRIB., May 26, 2006, at 3; Alexei Barrionuevo, *2 Enron Chiefs are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1; Kim Clark & Marianne Lavelle, *Guilty As Charged!*, U.S. NEWS & WORLD REP., June 5, 2006, at 44-45; Sheila McNulty & Ben White, *Lay and Skilling guilty in Enron case *Former Executives Could Spend Rest of Lives in Prison*, May 26, 2006, FIN. TIMES (London), at 1; *Kenneth Lay and Jeffrey Skilling are Also Found Guilty of Conspiracy in a Scandal that Brought Down the Company and Cost*

Lay defended themselves against the alleged securities law violations and fraud charges in a unique and risky way.[57] Lay and Skilling's defense team, rather than argue that the former CEOs' were unaware of the fraud and violations, argued that they simply did nothing wrong, and that the company was vibrant until outside forces torpedoed it.[58] Lay and Skilling preferred to blame Andrew Fastow, Enron's former Chief Financial Officer, for all of the corporate malfeasance that led company's implosion.[59] The jury, while admitting that they quite liked

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*Investors Billions*, L.A. TIMES, May 26, 2006, at 1; Cathy Booth Thomas et al., *The Enron Effect; The Bosses Take the Fall for a Criminal Corporate Flameout. What has Changed, and Why it Will Never, Ever, Ever Happen Again. Maybe*, TIME, June 5, 2006, at 23.

57. *See* Gary McWilliams, *Enron Defense Is Set to Present 'No Crime' Tack*, WALL ST. J., Mar. 29, 2006, at C1. The Wall Street Journal reported that Lay and Skilling's defense attorneys offered an unusual defense theory:

> As the prosecution rested its case yesterday against former Enron Corp. top executives Kenneth Lay and Jeffrey Skilling, the defense is gearing up to present its argument that essentially no crimes occurred at the one-time energy giant, which collapsed into bankruptcy in 2001.
>
> Defense attorneys, who are scheduled to begin their case when the trial resumes on Monday, signaled before the proceedings began at the end of January [2006] that they planned to argue the Enron was a vigorous and growing company that was felled by outside forces.
>
> Such an approach is unusual in the recent annals of big-time corporate-crime cases.

*Id*.

58. *See* John R. Emshwiller & Gary McWilliams, *Lay Says 'Classic Run on Bank' Ruined Enron*, WALL ST. J., Apr. 25, 2006, at C1. Emshwiller and McWilliams report that, during the Enron trial, Kenneth Lay:

> [B]lamed Enron's December 2001 collapse on deceitful underlings, hostile stock traders and damaging news coverage by The Wall Street Journal. Those forces collided to provoke what he called a 'classic run on the bank' that set the stage for the company's bankruptcy filing. He also portrayed himself as a man still somewhat stunned by his fall from a pinnacle where he used to rub shoulders with world leaders and other corporate titans.

*Id*.

59. *See* Peter Elkind & Bethany McLean, *Judgment Day; Poster Boys for Corporate Corruption, Former Enron CEOs Ken Lay and Jeffrey Skilling are Finally Getting Their Day in Court: The Trial in Houston Will be a Milestone in American Business History*, FORTUNE, Jan. 23, 2006, at 58 ("Like Skilling, Ken Lay has presented himself publicly as both clueless and blameless. And like Skilling, he has insisted that, except for Fastow's criminal misdeeds, there was nothing really wrong at Enron."); *Jury Hears That Skilling Fretted At a Meeting, 'They're On to Us,'* WALL ST. J., Mar. 3, 2006, at C1 ("In his opening arguments, Michael Ramsey, Mr. Lay's lead attorney, dismissed Mr. Fastow as a 'crook,' a 'liar' and a 'pitiful guy.'"); John R. Emshwiller &

Lay and Skilling and believed both to be very smart men,[60] still found the defendants' stories and defenses implausible. Both men were found guilty of violating federal securities laws and engaging in outright fraud.[61] Skilling and Lay, facing the prospect of long-term imprisonment, predictably planned to appeal the guilty verdicts.[62]

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Gary McWilliams, *Lay Says 'Classic Run on Bank' Ruined Enron—Ex-Chairman Uses Debut on Stand To Depict Charges as 'Ludicrous,' Blames Fastow, Media, Traders*, WALL ST. J., Apr. 25, 2006, at C1; Susan Schmidt, *Fastow Silent on His Role, but Others Aren't*, WASH. POST, Feb. 8, 2002, at A01; James B. Stewart, *Common Sense: Enron Defense Wins the Award For Year's Worst*, WALL ST. J., May 31, 2006, at D3.

60. *See* Matt Krantz & Greg Farrell, *How Jurors Reached the Decision*, USA TODAY, May 26, 2006, at 3B (Juror Wendy Vaughan "came to the trial having had 'admired' former CEOs Ken Lay and Jeff Skilling. 'I thought they were brilliant.' She said she 'wanted very, very badly to believe what they were saying.'"); Bethany McLean & Peter Elkind, *The Guiltiest Guys In The Room: In the End, Ken Lay and Jeff Skilling Couldn't Escape Their Own Lies—And That's Good For Corporate America*, FORTUNE, June 12, 2006, at 26 ("Rather than demonize Skilling and Lay—or even the company—they correctly viewed the two CEOs as gifted, albeit flawed, men."); *see also* Allan Turner, *Enron Juror Learns to 'be Truthful'; He Warns a Class Not to Become Corrupt Working in Corporate U.S.*, HOUS. CHRON., June 10, 2006, at B1.

61. *See* Greg Burns*, GUILTY; Why the jury didn't believe Lay and Skilling in fraud case*, CHI. TRIB., May 26, 2006, at 1; *Enron's Lay, Skilling Found Guilty, Face Prison*, MEGAWATT DAILY, May 26, 2006, at 1; *see also* Vikas Bajaj & Kyle Whitmire, *'I Didn't Know' Did Not Sway Houston Jury*, N.Y. TIMES, May 26, 2006, at A1; John R. Emshwiller, Gary McWilliams & Ann Davis, *Symbol of an Era: Lay, Skilling Are Convicted of Fraud—Jurors Reject Defense Claim That Enron Was Clean; Question of Credibility—Two 'Very Controlling People,'* WALL ST. J., May 26, 2006, at A1; *see also 'How Could They Not See It?'; Jurors say they became convinced that Lay and Skilling had to have known about the fraud that was occurring at the company they ran*, L.A. TIMES, May 26, 2006, at 14; Carol Rust, *Defendants Sunk by Their Testimony*, Wash. Post, May 26, 2006, at A01.

62. *See* Nathan Koppel & Peter Lattman, *The Enron Verdicts: Reversal Could be Long Shot, Legal Experts Say*, WALL ST. J., May 26, 2006, at A9 ("For former Enron Corp. executives Kenneth Lay and Jeffrey Skilling, overturning yesterday's [(May 25, 2006)] guilty verdicts will be a long shot, legal specialists say."). The Wall Street Journal further reports that:

> Mr. Lay was found guilty in a Houston federal court of conspiracy, securities fraud and wire fraud. He was also found guilty of bank fraud and misrepresentation in personal loans in a separate trial. Mr. Skilling was found guilty of conspiracy, securities fraud, making false statements and insider trading. Mr. Skilling was acquitted of some other insider-trading counts.
>
> Sentencing was set for September 11. Mr. Lay, 64 years old, faces a maximum penalty of 45 years in prison in the main trial, and he could get from zero to six months for each of the four separate bank charges; Mr. Skilling, 52, faces a maximum penalty of 185 years in prison. However, sentencing experts say that the actual

However, Kenneth Lay passed away shortly after the guilty verdicts were handed down.[63] Now Skilling alone faces a long prison sentence.[64]

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> sentences are likely to fall in the 12-to-25 year range.
>
> The two are expected to seek reversals in the Fifth U.S. Circuit Court of Appeals in New Orleans, which lawyers say is one of the more pro-government benches in the nation. It also would likely be the last stop for Messrs. Skilling and Lay, since the U.S. Supreme Court agrees to hear very few cases.

*Id.*; Greg Burns, *Guilty: Why the Jury Didn't Believe Lay and Skilling in Fraud Case*, CHI. TRIB., May 26, 2006, at C1

> Lay's charges carry a maximum penalty of 45 years in prison for the corporate trial and 120 years in the personal banking trial . . . . Skilling's charges carry a maximum penalty of 185 years. Much discretion rests with U.S. District Judge Sim Lake, a no-nonsense jurist who has a history of imposing lengthy terms. The likely sentences easily could stretch for two decades . . . .

*Id.*; Bethany McLean, *The End of Ken Lay's Quest*, CNN MONEY, July 5, 2006, *available at* http://money.cnn.com/2006/07/05/news/newsmakers/enron_blog_lay.fortune/index.htm ("Both men [(Skilling and Lay)] were expected to serve at least fifteen years in jail . . . ."); Carrie Johnson, *Enron's Lay, Skilling Face Uphill Battle on Appeal*, WASH. POST, May 27, 2006, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052601855.html?referrer=emailarticle (discussing the difficulties of an appeal).

63. *See* Kurt Eichenwald, *Enron Founder, Awaiting Prison, Dies In Colorado*, N.Y. TIMES, July 6, 2006, at A1 ("Kenneth L. Lay, who as founder of the Enron Corporation rose to peaks of influence in business and politics, only to fall into disgrace amid scandal, died early yesterday morning in Aspen, Colo., while awaiting a judge's sentencing this fall that could have sent him to prison for decades."); *see also* Henry Allen, *Ken Lay's Last Evasion; To Some, CEO Is Cheating Them One More Time*, WASH. POST, July 6, 2006, at C01 ("But now that he's died of a heart attack in the luxury of his Colorado getaway while awaiting sentencing for his crimes, none of his victims will be able to contemplate that he's locked away in a place that makes the Baltimore Harbor Tunnel look like Hawaii . . . ."); Vikas Bajaj & Kurt Eichenwald, *Kenneth L. Lay, 64, Enron Founder and Symbol of Corporate Excess*, N.Y. TIMES, July 6, 2006, at C7. The authors report that:

> Mr. Lay's sudden death—family and friends say he did not have a history of heart disease—came six weeks after he was convicted of 10 charges of conspiracy, fraud and lying to banks and almost four months before he was to be sentenced for those crimes. He faced years in prison.

*Id.*; Editorial, *Ken Lay's Final Act*, N.Y. TIMES, July 6, 2006, at A20; Kurt Eichenwald, *Enron Founder, Awaiting Prison, Dies In Colorado*, N.Y. TIMES, July 6, 2006, at A1; John R. Emshwiller et al., *Lay's Legacy: Corporate Change—But Not the Kind He Expected*, WALL ST. J., July 6, 2006, at A1; Ashby Jones & John R. Emshwiller, *Moving the Market: Quirk of U.S. Law Exonerates Lay, Possibly Hindering Asset Seizure*, WALL ST. J., July 7, 2006, at C23. Jones and Emshwiller report in the Wall Street Journal that:

> The rule, widely referred to as *abatement ab initio*, dictates that when a defendant dies before he has the chance to appeal a conviction, the conviction essentially gets wiped away. Everything "associated with the case is extinguished, leaving the defendant 'as

Seemingly moments after the guilty verdicts were read in Houston, TX, corporate commentators and pundits immediately began writing and prognosticating that the Enron guilty verdicts finally put to bed the last remnants of the corporate scandals that ripped the U.S. capital markets just five years ago.[65] Some even argued that Skilling and Lay represented the last of the "bad apple" corporate executives who ran

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> if he had never been indicted or convicted,'" wrote the U.S. Court of Appeals for the Fifth Circuit in a 2004 opinion that is a recent articulation of the principle.

*Id.*; Thomas S. Mulligan & Miguel Bustillo, *Death Puts Lay Conviction in Doubt; Since the Enron Founder Can't Appeal, Criminal Charges May Be Voided*, L.A. TIMES, July 6, 2006, at 1; Reuters, *Lay Autopsy Finds Severely Clogged Arteries*, WALL ST. J., July 20, 2006, at A11; Simon Romero, *A Verdict Interrupted*, N.Y. TIMES, July 6, 2006, at C1.

64. *See* Jones and Emshwiller, *supra* note 63 ("His death isn't likely to have tremendous impact on the remaining Enron criminal cases, including Mr. Skilling's upcoming sentencing, set for Oct. 23."); *see also*; Alexei Barrionuevo, *U.S. Wants Ex-Enron Chief To Pay Lay's Share, Too*, N.Y. TIMES, Aug. 15, 2006, at C3 ("Federal prosecutors say Jeffrey K. Skilling, the former Enron chief executive, is liable not only for his own ill-gotten gains but also for those of the late Kenneth L. Lay."); Associated Press, *Ex-Enron President Pondered Suicide; Skilling Says Company's Woes Made Him Depressed*, CBS NEWS, June 17, 2006 (describing how Skilling, then 52, suffered from depression once he was charged with conspiracy, fraud, and insider trading); John R. Emshwiller, *Skilling Gets 24 Years in Prison*, WALL ST. J., Oct. 24, 2006, at C1 ("The 52-year-old Mr. Skilling didn't show emotion as he stood with his lead attorney . . . in court yesterday and received the 292-month sentence from Judge Sim Lake . . . ."); Associated Press, *Skilling Bound for Minnesota Prison; Enron's Former CEO Will Begin His Term Next Month. His Remaining Assets will Be Liquidated*, L.A. TIMES, Nov. 17, 2006, at C3 ("The former executive will be eligible to shave as many as 54 days a year off his sentence for good behavior in prison. Skilling also will undergo alcohol and mental-health counseling. Successful completion of that treatment would reduce his sentence a year."); Carrie Johnson, *Skilling Gets 24 Years for Fraud*, WASH. POST, Oct. 24, 2006, at A01 (Skilling "was ordered to serve 24 years and four months in prison . . . after an emotional court hearing in which he watched a series of former employees blame him for the fraud at the heart of the company's collapse.").

65. *See supra* notes 27-28 and accompanying text; Associated Press, *Guilty as Charged; Lay, Skilling Convicted in Enron Collapse*, *supra* note 56, at 3 ("'The jury's verdicts help to close a notorious chapter in the history of America's publicly traded companies' said Rep. Michael Oxley, (R-Ohio), co-author of the Sarbanes-Oxley legislation. 'Appeals aside, the end of the trial will mark the end of a dark era.'"); Emshwiller, McWilliams & Davis, *supra* note 61, at A1 ("Its fall marked a dramatic end to the stock-market boom and the beginning of a wave of corporate and regulatory reforms, including the 2002 Sarbanes-Oxley law."); Allen Sloan, *Laying Enron to Rest*, NEWSWEEK, Jun. 5, 2006, at 30 ("The convictions of Lay and Skilling write *finis* to that delusional era. The convictions have a feeling of closure about them (even though you never know what will happen on appeal.").

wild in the go-go 1990s.[66]

While blaming the 2002 market crash on a few corporate wrongdoers is enticing and simple, engaging in such a blame game is dangerous. If U.S. investors and workers are convinced that guilty verdicts in the WorldCom and Enron trials mark a successful conclusion to the scandal investigations undertaken in the wake of the market collapse, then careful examination into the myriad other causes and reasons for the collapse will be ignored or undervalued. To wit, Congressional passage of the Telecommunications Act must be examined to determine what blame lay rightfully at the feet of Congress and the telecom industry for the market crash of 2002, and what actions Congress should or should not take to ensure that U.S. investors, consumers, and employees are protected.

Perhaps even more dangerous than the attempt to pass off the market crash as the work of a few corporate wrongdoers is the current temperament at the Department of the Treasury and the SEC. New pleas are emanating from SEC leadership and the Treasury Department calling again for increased deregulation.[67] In November 2006, a committee of

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66. *See supra* notes 27-28 and accompanying text; *Not Just Bad Apples*, *supra* note 25, at A20 ("In the wake of Enron's bankruptcy, some argued that the problems of corporate America were the work of a few bad apples."); Editorial, *Accounting Scandals and Bankruptcies*, NPR NEWS, July 23, 2002, *available at* http://www.rohan.sdsu.edu/faculty/dunnweb/rprnts.NPR.html ("We need to keep in mind that we're talking about a small number of more than 17,000 publicly traded U.S. companies. We very much believe that it's a few bad apples but one is too many."); Masters & Johnson, *supra* note 27, at D01. The Wall Street Journal reports:

> The convictions of Enron founder Kenneth L. Lay and former chief executive Jeffrey K. Skilling cap the Justice Department's five-year battle to hold top executives responsible for a flood of accounting fraud and corporate failures that undermined investor confidence, put tens of thousands of people out of work and hit the savings of millions of ordinary people.

*Id.*

67. *See supra* note 49 and accompanying text; *see also* Greg Ip, Kara Scannell, and Deborah Soloman, *Panel Urges Relaxing Rules For Oversight*, WALL ST. J., Nov. 30, 2006, at C1. The Wall Street Journal reports:

> The Committee on Capital Markets Regulation's report, to be released publicly today, is one of the most high-profile efforts to date to address concerns that excessive regulation—much of it a response to recent corporate scandals—is adding to corporate costs, stifling the public securities markets and causing the U.S. markets to lose business to foreign competitors. . . . Treasury Secretary Henry Paulson is likely to welcome the report; the former chief executive Goldman Sachs already is advocating many of its recommendations and recently called for a broad re-examination of regulations and laws . . . . The report makes 32 recommendations, of which six relate to easing the application of Section 404 of the 2002 Sarbanes-Oxley

Wall Street insiders supported by Treasury Secretary Henry Paulson issued a voluminous report finding that capital formation is dwindling in the United States because U.S. regulation is so stringent that corporations are fleeing to foreign markets to raise capital.[68] This

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Act governing internal company-financial controls.

*Id.*; Floyd Norris, *Panel of Executives and Academics to Consider Regulation and Competitiveness*, N.Y. TIMES, Sept. 13, 2006, at C3. The N.Y. Times reports:

> A committee filled with business leaders and academics was created yesterday to consider changes in the Sarbanes-Oxley Act and other laws and regulations governing securities markets and companies, with the intention of improving competitiveness for American markets . . . The group, called the Committee on Capital Markets Regulation, has no official standing but the announcement of its creation included praise from Treasury Secretary Henry M. Paulson Jr., who said that the issue of American competitiveness "is important to the future of the American economy and a priority for me."

*Id.*; David Reilly, *Panel Seeks Cap on Liability Of Accounting Firms*, WALL ST. J., Nov. 30, 2006, at C3. Reilly argues that:

> Congress should consider curtailing the liability accounting firms face from auditing public companies either by capping their potential courtroom damages or by creating special protections for some auditing activities, according to a report due today from a committee weighing the competitiveness of U.S. capital markets . . . . The report . . . is also calling for U.S. authorities to curb contentious audit requirements related to checks on companies' internal controls as called for by the Sarbanes-Oxley Act.

*Id.*

68. *See* Interim Report of the Committee on Capital Markets Regulation, *supra* note 49. The committee report asserts that a growing number of companies are choosing to raise capital in foreign markets in part because of higher U.S. regulatory compliance costs:

> The capital markets are important to the nation's economic growth and the creation of well-paying jobs, both across the country and in regional financial centers. But the evidence presented here suggests that the United States is losing its leading competitive position as compared to stock markets and financial centers abroad. A key measure of competitiveness, one particularly relevant to the growth of new jobs, is where new equity capital is being raised—that is, in which market initial public offerings (IPOs) are being done. The trend in so-called "global" IPOs, *i.e.*, IPOs done outside a company's home country, provides evidence of a decline in the U.S. competitive position. As measured by the value of IPOS, the U.S. share declined from 50 percent in 2000 to 5 percent in 2005. Measured by the number of IPOs, the decline is from 37 percent in 2000 to 10 percent in 2005.
>
> The loss of U.S. public market competitiveness compared to global public markets results from a number of factors: foreign markets have closed the technology, investor confidence, and liquidity gaps that traditionally favored U.S. markets; significant pools of capital around the world have developed (more money is now raised outside than inside the United States); and the ease with which investors can invest abroad has increased. Even so, certainly one important factor contributing to this growing trend is the growth of U.S. regulatory compliance costs and liability risks compared to other developed and respected market centers.
>
> Stated a bit differently, for much of the 60 years since the end of World War II,

development necessitates, according to the Committee Report, a stripping of the securities markets of even further regulation, beyond the already dramatic deregulation perpetuated by the PSLRA.[69] Subsequent reports indicate that the findings of the unofficial Committee Report are overstated and politically motivated.[70] Without so much as

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> firms raising capital did not so much choose to come to the United States, they came *naturally*. Today, the forces at work are increasingly different. Firms must *choose* to come to the United States to raise capital: they do not have to come. U.S. financial markets need to *attract* business that has a choice, and therefore how our markets are regulated by rules and laws really does matter today.

*Id*. (emphasis in original); *see also* Editorial, *Capital Flight*, WALL ST. J., Dec. 2, 2006, at A8. Opining on the information contained within the interim report, the Wall Street Journal notes:

> Mr. Niemeier [Public Company Accounting Oversight Board member] also argued that U.S. capital costs are lower than elsewhere in the world, implying that investors are still willing to pay a premium for companies that subject themselves to U.S. regulations. And U.S. capital costs *are* lower than elsewhere. But as the new report documents, that premium has been shrinking. What's more, it's been shrinking faster vis-à-vis other developed countries—such as Japan and the U.K.—than it has against developing-world markets. This suggests that it is stiff competition from relatively well-regulated markets, not from shifty, nontransparent Third World markets, that is taking the biggest toll. This could mean that overseas regulation is improving, not that U.S. regulation is getting more onerous. But even if this were the case, it would not change the main point: Global capital markets are becoming more competitive, and the U.S. is now more likely to be punished for over-regulation than it was in the past.

*Id*.

69. *See supra* notes 13, 23, 30, 33-35, 38 and accompanying text; *see also* Floyd Norris, *Winds Blow for Rollback of Regulation*, N.Y. TIMES, Dec. 1, 2006, at C1 ("[M]any business leaders are hopeful that at least some of what they see as post-Enron excesses can be rolled back, with a battle cry of making America more competitive."). Norris reports that U.S. "[c]ompanies complain that auditors spend too much money and time auditing internal controls. Wall Street argues that it is such rules—and not higher investment banking or listing fees—that keep foreign stocks from listing in New York." *Id*.

70. *See* Jenny Anderson, *Sharply Divided Reactions to Report on U.S. Markets*, N.Y. TIMES, Dec. 1, 2006, at C8. Anderson reports:

> Response to the report fell along predictable lines: state regulators and consumer advocates characterized the report as a one-sided attempt to roll back regulation at a time when corporate scandals like the backdating of stock options abound, while pro-business groups either praised the findings or suggested that they did not go far enough.

*Id.*; *see also* Greg Farrell, *Group: Sarbanes-Oxley Needs to Loosen up; Today's Plea to Focus on USA's Ability to Compete*, USA TODAY, Nov. 30, 2006, at 1B ("Jack Coffee, an expert in securities law at Columbia who consulted on the project, doesn't think over-regulation has scared away foreign issuers. Instead, he says, the threat of getting sued in U.S. courts is more of a concern."); Carrie Johnson, *Report on Corporate Rules* acknowledging the academic literature criticizing the deregulation and problems perpetuated by the PSLRA, corporate insiders[71] are once again[72] loudly demanding governmental "assistance."[73]

As the Committee Report drew support and criticism, the SEC and Department of Justice quietly filed an amicus brief in a pending securities class action lawsuit urging the adoption of an even stricter pleading standard for securities fraud complaints than was adopted in the PSLRA.[74] Commissioner Cox, citing "fraudulent lawsuits" and

*Is Assailed; Panel's Business Ties Spark Outcry*, WASH. POST, Dec. 1, 2006, at D01 ("SEC commissioner Roel Campos, a Democrat, warned yesterday that rolling back a system of regulation that has protected U.S. investors for decades could have profound and costly consequences if it went too far."); Jonathan Peterson, *Market Panel Issues Call for Relaxing Rules; Post-Enron Regulation Has Hurt Competitiveness of U.S. Firms, a Business and Academic Study Says*, N.Y. TIMES, Nov. 30, 2006, at C1 ("The combination of developments has become a concern for shareholder-rights activists who have applauded an array of post-Enron measures and until now have been able to rely on bipartisan congressional support to uphold them.").

71. *See* Andrew Stoltmann, *We Risk Another Enron if Investor Protections Are Removed: The Proposals Would Invite Future Corporate Implosions*, CHI. SUN-TIMES, Dec. 25, 2006, at 27 (reporting on the Interim Committee members' Wall Street insider status). Stoltmann indicates that:

> As for the committee, it consists of 22 corporate chieftains, including the chief legal officer of a brokerage firm, the head of a hedge fund, the CEO of an accounting firm, and the former chairman and CEO of the NASD. This lineup of industry insiders, touted as disinterested and objective, deserves serious scrutiny. Barbara Roper, director of investor protection at the Consumer Federation of America, accurately asserted that the committee preordained its conclusions and carefully selected statistics to make its case that more companies were listing their stocks on foreign markets because of burdensome U.S. rules.

*Id.*; *see also* Deborah Soloman and Kara Scannell, *Financial-Rule Overhaul Hits a Nerve*, WALL ST. J., Dec. 1, 2006, at C3 (detailing the political funding of the Interim Committee). The Wall Street Journal reports:

> The committee was financed with about $500,000 from the Starr Foundation, a wealthy nonprofit chaired by Maurice R. 'Hank' Greenberg, former chairman of American International Group Inc. Mr. Greenberg resigned from AIG amid a state and federal investigation into improper accounting at the insurance giant. . . . Another initial contribution of about $500,000 came from Wilbur Ross, a private investor who is also a committee member, and Kenneth Griffin, who heads Citadel Investment Group LLC, a large hedge-fund group. Mr. Ross, who has made a fortune buying distressed businesses on the cheap, restructuring them and then selling the companies off at a premium, said he decided to back the committee because he believes some regulation has gone too far and he wanted to help spark debate.

*Id.*

72. *See* cummings, *supra* note 4, at 1033-40.

73. *See infra* note 75 and accompanying text.

74. *See supra* note 47; *see also* Associated Press, *SEC Backs Raising Bar in*

"professional plaintiffs," argues that the Seventh Circuit should adopt the strictest possible pleading standard making it more difficult for a plaintiff to survive summary judgment in a class action securities fraud case.[75] Cox's argument mirrors identically the same argument posited during legislative debate when the PSLRA was being contemplated and ultimately passed.[76] Apparently, despite strong evidence to the contrary,[77] corporations in the U.S. are still being unacceptably tormented by "strike suits" and "professional plaintiffs" and cannot survive in the current regulatory environment.[78] While securities class action lawsuits have decreased significantly in recent years, due arguably in part to the PSLRA, Cox, Paulson and CEOs nationwide continue to agitate for a less regulated market.[79] In light of significant

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*Shareholder Suits*, NEWSDAY, Feb. 14, 2007. Newsday reported that:

> The SEC filed a brief last Friday in a case before the Supreme Court . . . supporting the adoption of more stringent legal hurdles for shareholders to win in litigation alleging securities fraud and seeking damages from companies and executives. . . . The SEC's brief in the case refutes a January 2006 ruling by a federal appeals court, maintaining that it set the legal bar too low for the investors in terms of demonstrating the company's intent to violate securities laws.

*Id.*; Peterson, *supra* note 37, at 1 ("The SEC early this month filed a brief in a Supreme Court case arguing that a stricter standard should have been used to decide whether a manufacturer of fiber-optic equipment had knowingly broken the law . . . ."). Peterson states that:

> The SEC and the Justice Department submitted their brief in a Supreme Court case . . . . The agencies said the 1995 law required a 'strong inference' that the defendant company knowingly intended to break securities laws and deceive shareholders, rather than the weaker test that 'a reasonable person could infer' that executives had such an intent. . . . Under the higher threshold supported by the SEC, judges have broad latitude to consider matters that exonerate the defendant company, lawyers said.

*Id.*

75. *See supra* note 47 and accompanying text; *see also* Labaton, *supra* note 46, at C1 (noting that after the SEC filed a brief in a Seventh Circuit securities fraud case and after the agency's chief accountant told a conference that the SEC was considering ways to shield accounting firms from large damage awards, "Christopher Cox, the chairman of the [SEC], said . . . that both efforts were in the best interests of investors because they aimed at preventing the accounting industry from further consolidation and at limiting what he called 'fraudulent lawsuits,' including some he said were filed by 'professional plaintiffs'").

76. *See Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. On Securities of the Senate Comm. On Banking, Housing, and Urban Affairs*, 103d Cong. 104-05 (1993).

77. *See supra* note 37 and accompanying text.

78. *See* Grundfest, *supra* note 37.

79. *See supra* notes 47, 74; *see also* Peter Lattman, *As the Regulatory Pendulum*

studies suggesting otherwise, this Congress may yet again debate the merits of further deregulation. Indeed, arguments abound that the corporate corruption of the early 2000s is at an end, case and chapter closed. This is dangerous terrain. Dangerous because the last time that corporate interests, lobbyists and Wall Street insiders called upon Congress to deregulate, the resulting legislation was the PSLRA, the Telecommunications Act, SLUSA and the CFMA. As will be unpacked below, both the CFMA and the Telecommunications Act, enacted in response to the deregulatory call, led to consumer injury, industry concentration, higher rates, investor damage, emboldened corporate malfeasants and deregulated industries in shambles.

## III. THE TELECOMMUNICATIONS ACT OF 1996

According to Congress, the 1996 Telecommunications Act was enacted "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[80] In an effort to stimulate

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*Swings . . .*, The Wall Street Journal Online, WSJ.com, *available at* http://blogs.wsj.com/law/2007/03/01/as-the-regulatory-pendulum-swings-2/ (last visited on March 8, 2007). Observing SEC Chairman Cox's recent anti-regulatory agitations, Lattman reports:

> Investor advocates and some securities law experts point to several Cox initiatives that indicate a more pro-business stance: (1) his not pushing for tighter regulation of hedge funds; (2) urging the Supreme Court to adopt a tougher standard for investors in lawsuits; and (3) his decision to appear at the Chamber of Commerce in two weeks just as it is to issue a report criticizing the Bush administration and the SEC for being too hard on companies.

*Id*. (emphasis in original).

80. *See* 142 CONG. REC. S.652 (daily ed. Jan. 3, 1996). The actual language of the statute promotes the Telecommunications Act, as enacted in 1934, as a tool promulgated:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall

competition in the telecommunication services sector, the Act ended restrictions on the Bell companies: permitting entry into the long-distance, manufacturing and entertainment-video distribution businesses, deregulating the cable television industry, freeing cable television from severe price controls, and deregulating the telecom industry to such a degree that any company would be able to compete freely.[81]

"The Telecommunications Act of 1996 was the first major overhaul of communications legislation in the U.S. since the passage of the Communications Act of 1934."[82] At its core, Congress's vision for the 1996 Act was "to provide for a pro-competitive, deregulatory 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."[83] Of course, the motivation for the new provisions of the Act was deregulation.[84] The Telecommunications Act was established to encourage low rates for consumers and to promote "creativity and innovation in the industry. The new telecommunications law abandons virtually all of the federal regulations that have traditionally defined and directed activity in the communications industry."[85]

Congressional statements "made in support of the 1996 Act very much mirrored the deregulatory rhetoric preceding the trucking, air, and

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> be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 151 (2002).

81. *See* Lawrence Gasman, *Regulation: The Telecommunications Act of 1996*, THE CATO REVIEW OF BUS. AND GOV., *available at* http://www.cato.org/pubs/regulation/reg19n3d.html (last visited Mar. 16, 2007) ("Of course the act was more than due for an overhaul. In 1934 there was no television, telephones were scarce, and technological wonders such as the World Wide Web had not been dreamed of by even the most speculative science fiction writers.").

82. Johannes M. Bauer et al., *The State of Telecom: Realities, Regulation, Restructuring*, 2003 MICH. ST. DCL L. REV. 531, 531-32 (2003).

83. *Id.* at 539; *see also* Nicholas Economides, *The Telecommunications Act and Its Impact*, N.Y.U. Center for Law and Business 2 (1998), *available at* http://ssrn.com/abstract=81289.

84. *See* Catherine Cook, *Legislative Summary: The Telecommunications Act of 1996*, 6 DEPAUL-LCA J. ART & ENT. L. & Pol'y 237 (1996).

85. *Id*. at 237 ("Specifically, the Act provides 'that the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunication service' so long as the activity is just and reasonable, the consumer is protected and the public interest is maintained.") (citing § 401 (a)(1)(2)(3)).

railroad statutes, and Congress drew explicitly on these precedents and on the earlier development of competition in long-distance."[86] The House Report declared that the bill "promotes competition and reduces regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies."[87]

Since its inception, the Telecommunications Act has drawn significant academic attention both in infancy[88] and in recent years.[89]

86. *See* James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1091 (2004).

87. *See id.* at 1091 (quoting H.R. REP. No. 104-204, at 47 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 10, 11).

88. *See generally* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123 (1996); *see also* Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenaker*, 29 CONN. L. REV. 217 (1996); Michael I. Meyerson, *Ideas of a Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251 (1997); John D. Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093 (1996); Charles Bierbauer, *How Will the Telecommunications Bill and the Information Superhighway Affect America?*, 41 S.D. L. REV. 502 (1996); Kenneth L. Parker & Tania A. Hricik, *A Selected Bibliography on the Telecommunications Act of 1996*, 49 FED. COMM. L.J. 771 (1997).

89. *See generally* Speta, *supra* note 86, at 1091; J. Gregory Sidak, *The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 YALE J. ON REG. 207 (2003); Michael T. Osborne, *The Unfinished Business of Breaking Up "Ma Bell:" Implementing Local Telephone Competition in the Twenty-First Century*, 7 RICH. J.L. & TECH. 4 (2000); Richard D. Cudahy, *Whither Deregulation: A Look at the Portents*, 58 N.Y.U. ANN. SURV. AM. L. 155 (2001); Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?*, 81 WASH. U. L.Q. 1 (2003); Jim Chen, *Standing in the Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, 71 U. COLO. L. REV. 921 (2000); Mark C. Bannister, *Virginia Cellular and Highland Cellular: The FCC Establishes a Framework for Eligible Telecommunications Carrier Designation in Rural Study Areas*, 57 FED. COMM. L.J. 511 (2005); Ray G. Besing, *The Intersection of Sherman Act Section 2 and the Telecommunications Act of 1996: What Should Congress Do?*, 13 COMMLAW CONSPECTUS 1 (2005); Kyle D. Dixon & Philip J. Weiser, *Digital Age Communications Law Reform: A Digital Age Communications Act Paradigm for Federal-State Relations*, 4 J. ON TELECOMM. & HIGH TECH. L. 321 (2006); Nicholas Economides, *Vertical Leverage and the Sacrifice Principle: Why the Supeme Court Got Trinko Wrong*, 61 N.Y.U. ANN. SURV. AM. L. 379 (2005); Jerry Ellig, *Costs and Consequences of Federal Telecommunications Regulations*, 58 Fed. Comm. L.J. 37 (2006); Jerry Ellig & James Nicholas Taylor, *What Did the Unbundled Network Element Platform Cost?*, 14 COMMLAW CONSPECTUS 1 (2005); Douglas C. Sicker, *The End of Federalism in*

Since 1996, legal academics, politicians and other commentators have debated whether the Telecommunications Act would be successful in spurring competition, and whether deregulating the telecom industry would prove ultimately successful.[90] Wildly divergent views debating whether the Telecommunications Act has in fact been an abject failure[91] or mildly successful with the potential for some upcoming success have been forwarded and printed in recent years.[92] Perhaps most famously, the U.S. Supreme Court weighed in on the disappointing side by writing the following about the Telecommunications Act:

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*Telecommunication Regulations?*, 3 NW. J. TECH. & INTELL. PROP. 130 (2005); Henry E. Smith, *Governing the Tele-Semicommons*, 22 YALE J. ON REG. 289 (2005); Rachel M. Stilwell, *Which Public? Whose Interest? How the FCC's Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape from the Swamp*, 26 LOY. L.A. ENT. L. REV. 369 (2005/2006); Ross Wecker, *The Telecommunications Act of 1996 and the Internet: Reciprocal Compensation or Irreconcilable Compensation?*, 6 J. HIGH TECH. L. 291 (2006).

90. *See supra* notes 88-89.

91. *See* Stephen Labaton, *Phone Start-Ups Win the Latest Round in Court*, N.Y. TIMES, May 14, 2002, at C1. Labaton explains in the New York Times that:

> While experts agree that the telecommunications act has failed to fulfill its promise of leading to more vibrant and competitive markets, there is widespread disagreement as to the causes. Some have attributed the failure to the problems of the law and the way it has been applied. Critics have also said it has promoted a wave of corporate consolidation that is anticompetitive. And some have attributed the failure of deregulation to the regional Bell companies, which have moved slowly in opening their markets and repeatedly challenged provisions and regulations and created a climate that has discouraged greater investment by challengers.

*Id.*; *see also* Seth Schiesel, *At F.C.C. Confirmation Hearings, Emphasis Will Be on Competition,* N.Y. TIMES, Sept. 29, 1997, at D1 ("The telecommunications reform act has been over-all a failure . . . . 'We've got rising cable rates, rising long-distance rates, mergers instead of competition, failure of parts of the telecommunications industry to get into others.'") (statement by Senator John McCain).

92. *See* Dibadj, *supra* note 89, at 54-55 (claiming that the failures in the Telecommunications Act have come because of poor FCC rulemaking rather than Congressional ambiguity or short-sightedness); *see also* Speta, *supra* note 86, at 1108 ("Lest I be thought too harsh on Congress, let me be clear that there is much that is good in the 1996 Act, and indeed, some features of the Act do advance intermodal competition."); T. Randolph Beard, et. al., *Pursuing Competition in Local Telephony: The Law and Economics of Unbundling and Impairment*, Telepolicy Working Paper, *available at* http://ssrn.com/abstract=422525 ("The Telecommunications Act of 1996 is an ingenious piece of legislation, incorporating specific mandates that address the underlying economics of the local exchange market into its pro-competition framework for the purpose of 'uprooting the monopolies' presently serving that market.") (citations omitted).

> 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. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.[93]

Despite the academic and pundit debate that continues to simmer regarding the propriety and value of the Telecommunications Act, one point seems beyond debate: the Telecommunications Act led to a destabilized industry, enabling a precarious bubble to form and then implode, causing severe injury to investors and employees alike.[94] Whatever intent Congress had in proudly passing the Telecommunications Act swiftly on the heels of the PSLRA, the outcome of this legislative enactment has been controversial and damaging.[95]

While the Revolution Congress's leadership must have been energized by previous PSLRA deregulation opponents President Clinton and Vice President Gore joining them in supporting passage of the Telecommunications Act, none seemed able to foresee the demoralizing consequences passage would bring:

> Before the ink was even dry on the Telecommunications Act of 1996, a telecom bubble larger than that of its dot-com sister was quickly beginning to form. With the deregulation of the telecom

93. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

94. *See supra* notes 89-91 and accompanying text; *see also* Dionne Searcey & Peter Lattman, *Ex-Telecom CEO Fields 'Black Box' Trial Defense*, WALL ST. J., March 16, 2007, at A1 (detailing the ongoing insider trading case against former Qwest CEO Joseph Nacchio). The Wall Street Journal describes:

> Qwest sprang up in the mid-1990s formed by railroad magnate Philip Anschutz, who in 1997 put Mr. Nacchio in place as CEO to take the business public. Qwest soon took over a Baby Bell, US West, and set out to build a fiber-optic network to carry Internet traffic world-wide. But many others had the same idea, spending billions to string fiber, and when demand didn't match their dreams, the telecom bubble burst and start-ups hit hard times.
>
> Amid their woes, they sometimes pumped up revenue by swapping fiber-optic capacity and interpreting accounting rules so they could recognize revenue for the capacity they swapped. Amid exposure of this maneuver and the general telecom slump, Qwest nearly slipped into bankruptcy court. Mr. Nacchio resigned in 2002 and the next year Qwest restated two years of results, eliminating $2.48 billion of revenue for 2000 and 2001.

*Id*. at A10; *infra* Part III.A-B.

95. *See supra* notes 10, 89, 91 and accompanying text; *see also infra* notes 96-99, 132 and accompanying text.

> industry finally complete, the race was on; and what ensued was nothing less than a financial hit and run, which left the telecommunications industry in shambles and investors broke—but made the broadbandits who led this charge rich beyond their wildest dreams.[96]

Indeed, what ensued was not the competition that proponents had trumpeted, but the creation of an environment ripe for fraud: an environment that generated a powerful temptation for entrepreneurs to create telecommunication companies that would rise and fall with little consumer interest, flush with the fraudulently-induced cash of investors duped by projections containing no real value.[97] Passage of the Telecommunications Act enabled the rise and calamitous falls of WorldCom, Adelphia, and Global Crossing, amongst dozens of others.

> It can now be said that the birthday of the telecom bubble was February 8, 1996. On that day, with the stroke of a pen, President Bill Clinton turned the normally staid world of telecommunications into the Wild West. The new Telecommunications Act—the handiwork of, among others, a Democratic vice president, Al Gore,

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96. OM MALIK, BROADBANDITS: INSIDE THE $750 BILLION TELECOM HEIST (2003). Om Malik, in Broadbandits, exposes the causes and motivations behind the 2002 collapse of the telecom industry, and describes the net effect of the collapse as precipitated by the Telecommunications Act:

> Poof—$750 billion gone! With over 100 companies bankrupt and an equal number that have shut shop, as many as 600,000 telecom workers are now without a paycheck. WorldCom is bankrupt, Global Crossing is decimated, PSINet has been sold for peanuts, and Genuity, a company as old as the Internet, sold its assets for a mere $250 million, a fraction of its one time worth. These are the staggering numbers for an industry that accounts for a sixth of the U.S. economy.

*Id*. at ix.

97. *See* Sidak, *supra* note 89, at 227-33 (describing WorldCom's breathtaking deceit in misleading investors, government regulators and competitors by fraudulently projecting massive growth in connection with future fiber-optic capacity needs). Professor Sidak reports that "WorldCom's claim that Internet traffic was doubling every one hundred days misled government officials and the business press" so much so that competitors such as Qwest, Global Crossing, Sprint and eventually even Enron redoubled efforts to build up fiber-optic networks to supply expected demand. *Id*. at 228; *see also infra* notes 200, 262 (indicating sources detailing Enron's eventual entrance into telecommunications fiber-optic network capacity competition); *see generally* MALIK, *supra* note 96, at xii-xiv, 10-16, 18-22, 27-30, 51-61, 132-36, 164-71, 173-77, 179-80 (describing creation of an environment that caused CEOs, CFOs, analysts, bankers, lawyers and the media to create, empower, report and engage in fraudulent valuations and potential earnings of worthless companies, thereby duping the U.S. investing public).

> and a Republican house speaker, Newt Gingrich—promised to unleash competition in the erstwhile closed phone industry, help create new phone companies, and create a world in which high-speed Internet access would be a norm, not an anomaly.[98]

These promised benefits never fully materialized.[99] But an implosion of the telecom industry can be identified as one byproduct of the Telecommunications Act.

### *A. How the Telecommunications Act Changed the Industry*

The Telecommunications Act abolished many of the cross-market barriers that had prohibited dominant telecom players from one communications industry, such as cable, from providing services in other industry sectors, such as telephone.[100] The Act made "sweeping" changes to the previous federal regulatory scheme of the telephone industry. Most notably, the Act lifted restrictions on the regional Bells, thus allowing each to begin to offer long-distance telephone service for the first time since the break up of AT&T.[101] Further, the Act allowed long-distance companies and cable operators to provide local exchange

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98. MALIK, *supra* note 96, at 163-64.

99. *See* Jim Chen, *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUS. L. REV. 1311, 1316 (2007) ("A decade after comprehensive legislative reform of telecommunications, all three significant segments of the industry are highly concentrated."); *see also* Nicholas Economides, *Telecommunications Regulation: An Introduction*, NET INSTITUTE, THE NETWORKS, ELECTRONIC COMMERCE, AND TELECOMMUNICATIONS INSTITUTE Working Paper No. 04-20, at 31-35 (2004), *available at* http://ssrn.com/abstract=465020 (describing the failure of the Telecommunications Act to spur competition and instead leading to a frenzy of merger activity); *see U.S. Policy: Telecommunications Act of 1996*, The Museum of Broadcast Communications (on file with author); MALIK, *supra* note 96, at x-xv, 116, 164, 176-79.

100. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 2. Proponents of the new Telecommunications Act trumpeted that:

> New mergers and acquisitions, consolidations and integration of services previously barred under FCC rules, antitrust provisions of federal law, and the 'Modified Final Judgment,' the ruling governing the 1984 'break-up' of the AT&T telephone monopoly, will be allowed for the first time, illustrating the belief by Congress that competition should replace other regulatory schemes as we enter a new century.

*Id*. This proved to be a tragic belief.

101. *See id.*; *see also* 47 U.S.C. § 271(b)(2) (2000) ("(2) Out-of-region services: A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.").

services in direct competition with the regional Bell operating companies.[102] The Act decisively preempted all regulations in the Telecommunications Act of 1934 (and subsequent amendments) that restricted or limited competition in telephone services for long-distance and local services.[103]

In order for the regional Bells to qualify to provide long-distance service outside its regional areas, they had to implement a series of reforms that were designed to open competition in the local areas.[104] Also, local exchange carriers ("LEC's") had to interconnect new telecom service providers and "unbundle" their networks to provide access by other carriers seeking to gain entry into the local exchange market.[105] LEC's, when unbundling to open competition, were mandated to provide number portability, essentially allowing its customers to maintain their telephone numbers when switching to a different local provider.[106] The regional telephone companies were allowed to enter the telephone equipment manufacturing market, but only after the Federal Communications Commission ("FCC") approved the company as a provider of long-distance services.[107]

The Telecommunication Act, in the context of telephone services, acted to eliminate barriers that had been in place since 1934—barriers that prohibited companies in one telecom industry, like telephone, from providing services in another industry, like cable.[108] Mergers, acquisitions, consolidations and integrations, carefully prohibited prior

102. *See generally U.S. Policy: Telecommunications Act of 1996*, *supra* note 99.

103. *See* 47 U.S.C. § 253(a) (2000) ("§ 253. Removal of barriers to entry. (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

104. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99. In order to break up the regional Bell's stranglehold on local telephony, the Telecommunications Act removed all barriers that prohibited the Bell's from entering long distance telephony. *See id*. To incentivize this transition, Congress mandated that local service carriers open or "unbundle" their lines allowing lease of those lines to competitors hoping to enter local competition. Once unbundled to the FCC's satisfaction, the local carriers could enter long distance competition. *Id*. Thus, Congress and the FCC hoped to spur competition by removing barriers but at the same time maintaining some regulatory control over how and when such competition could be entered.

105. *See id*.; *see also* 47 U.S.C. § 251 (2000).

106. *See* 47 U.S.C. § 251(b)(2) (2000).

107. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99.

108. *See id.*

to passage of the Telecommunications Act, were now freely available under the justification that competition would replace government regulation.[109] Thereafter, a wild merging, acquiring, and consolidating spree of integrating and combining was entered into by most major telecommunication giants as well as those that aspired to such status, and the industry caved in upon itself, as described below.[110]

The Telecommunications Act also dramatically changed rate structures and oversight in connection with the cable television industry, in an attempt to provide new opportunities and flexibility, as well as new competition for cable service providers.[111] The Telecommunications Act mandated that uniform rate structures for cable operators would no longer be required once effective competition had arrived from other

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109. *Id.*; *see also* Chen, *supra* note 99, at 1318, 1322, 1357.

110. *See* Chen, *supra* note 99, at 1313 (describing the merger flurry following enactment of the Telecommunications Act). Professor Chen, describing the whirlwind of merger activity in the telecom industry following enactment of the Telecommunications Act, quotes Senator John McCain:

> In announcing 1999 hearings on "why the Act has promoted mergers instead of competition," Senator John McCain treated the record of telecommunications mergers as conclusive evidence of the Act's failure: "The 1996 Telecommunications Act has failed miserably and has left us with results that are the exact opposite of what was intended . . . . Rather than promoting competition in the industry, the Act has led to a flood of megamergers.

*Id.*; *see also infra* Part III.B. In his book *Broadbandits*, Malik describes the pre-implosion build up of the telephone industry as follows:

> In 1996, telecommunications was the new Wild West, thanks to a booming stock market and a series of coincidences.
>
> The Telecommunication [sic] Act of 1996 had just been approved. It was a million-word-long piece of legislation that promised to unleash competition in the once-closed telephone industry and helped create new AT&Ts. This would result in an excess of bandwidth, where high-speed Internet access would be the norm, not an anomaly. The Federal Communications Commission (FCC) wanted to break the chokehold of the Baby Bells on the local market. Deregulation provided new opportunities for entrepreneurs—and so did the Internet.

MALIK, *supra* note 96, at xii. Despite this brave new telecom world, deregulation and the leaders of the major telecom companies at the time of the 1996 deregulation marched the industry straight into its now historic melt down:

> In stark contrast to the dot-com bust and the implosion of Enron, which unraveled with alarming speed, the disaster in the telecommunications industry arrived stealthily. What seemed like an endless demand for bigger and faster networks created a buildup of excessive proportions and a glut of capacity, the result being 600,000 jobs eventually evaporating into thin air. All this from an industry that at one point had a value of $2 trillion!

MALIK at x.

111. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 4.

service providers, such as the telephone company, multi-channel video, direct broadcast satellites and wireless cable systems.[112] Further, state and local franchise authorities were barred under the Telecommunications Act from "setting technical standards, or placing specific requirements on customer premise equipment and transmissions equipment."[113]

Congress attempted to "spur competition" between LEC's and cable operators by providing incentives for cable operators to compete with local telecommunications companies.[114] "Under the act, cable systems operators are not required to obtain additional franchise approval for offering telecommunications services."[115] These efforts to deregulate the cable television industry and motivate competition within the local telephone industry have failed spectacularly.[116]

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112. *See id.* at 5; *see also* 47 U.S.C. § 543(a) (2000).

113. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 5. ("Common carriers and other operators that utilize radio communications to provide video programming will not be regulated under cable rules if the services are provided under a common carriage scheme.").

114. *See id*. at 5; *see also* 47 U.S.C. § 572 (2000).

115. *U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 5.

116. *See* cummings, *supra* note 4, at Part IV.B.; *see also Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, Consumers Union: Publisher of Consumer Reports, Feb. 2001, *available at* http://www.consumersunion.org/telecom/lessonsdc201.htm [hereinafter *Lessons from the 1996 Telecommunications Act*]. The publisher of Consumer Reports stated that:

> [i]t is evident that the Telecommunications Act of 1996 has failed to produce the consumer benefits policy makers promised because competition has failed to take hold across the communications industry. The Act's failure is not because, as some have suggested, the Federal Communications Commission (FCC) was overly regulatory in seeking to create conditions ripe for competition. The fundamental problem is that the huge companies that dominate the telephone and cable TV industries prefer mergers and acquisition to competition. They have refused to open their markets by dragging their feet in allowing competitors to interconnect, refusing to negotiate in good faith, litigating every nook and cranny of the law, and avoiding head-to-head competition like the plague.

*Lessons from 1996 Telecommunications Act* at 1; Jim Chen, *The Magnificent Seven: American Telephony's Deregulatory Shootout*, 50 HASTINGS L.J. 1503, 1521 (1999).

> The most vociferous critics of telecommunications deregulation argue that the Act has produced nothing but a cascade of megamergers. . . . Implicit in this cry is the assumption that the telecommunications mergers that have occurred since 1996 have done little or nothing to reduce prices, spur innovation, or otherwise enhance consumer welfare.

*Id.*; *supra* notes 99, 110 and accompanying text.

The Telecommunications Act also sought to provide broadcasters with substantial regulatory relief by incorporating numerous changes to the rules dealing with radio and television ownership.[117] The Telecommunications Act also lifted broadcast ownership limits on television stations, whereby group owners were empowered to purchase television stations with a maximum service area cap of 35 percent of the U.S. population as compared to the previous cap of 25 percent.[118] Limits on the number of radio stations that may be commonly owned were lifted completely, although restrictions remained on the number of licenses that may be owned within specific markets or geographical areas.[119] The loosening of ownership limits on television and radio stations, and new rules regarding station affiliations and cross ownership, have proven to be highly controversial since the inception of the Telecommunications Act.[120]

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117. *See* 47 U.S.C. § 303 (2000); *see also U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 2 ("Notably broadcasters have substantial regulatory relief from old and sometimes outmoded federal restrictions on station ownership requirements.").

118. *See* 47 U.S.C. § 303 (2000).

119. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 2.

120. *See Critics Want New Media Rules Delayed*, N.Y. TIMES, Aug. 21, 2003, *available at* http://www.nytimes.com/aponline/national/ap-media-ownership.html ("Critics of new broadcast ownership rules said the Federal Communications Commission should have studied how stations can best serve their local communities *before* allowing companies to buy more radio and television stations.") (emphasis added). Responding to former FCC Chairman Michael Powell's initiative aimed at ensuring broadcasters serve the communities in which they operate, Senator Byron Dorgan, D. North Dakota, claimed: "It's a curious approach to pass a rule that's going to allow much more concentration in broadcasting and then decide the effect this will have on the localism . . . . It's a classic case of putting the cart before the horse." *Id.* Recent evidence has shown that greater concentrations of media ownership hurts local stations and television new coverage. *See* John Dunbar, *Lawyer Says FCC Ordered Study Destroyed,* FREEPRESS, Sept. 14, 2006, *available at* http://www.freepress.net/news/17682. According to several sources, the FCC sought to hide these findings from the public. *See id*. Freepress reports:

> The Federal Communications Commission ordered its staff to destroy all copies of a draft study that suggested greater concentration of media ownership would hurt local TV news coverage, a former lawyer at the agency says . . . . In a letter sent to [FCC Chairman Kevin] Martin Wednesday, [Sen. Barbara] Boxer said she was "dismayed that this report, which was done at taxpayer expense more than two years ago, and which concluded that localism is beneficial to the public, was shoved in a drawer" . . . . The report, written by two economists in the FCC's Media Bureau, analyzed a database of 4,078 individual news stories broadcast in 1998 . . . . The analysis showed local ownership of television stations adds almost five and one-half minutes of total news to broadcasts and more than three minutes of "on-location"

With respect to radio and television broadcasting ownership rights, the Telecommunications Act allowed broadcasters to own cable television systems for the first time in the long regulation of the telecom industry.[121] However, television licensees were still prohibited from owning newspapers in those same markets.[122] Although radio and television broadcasters won new freedoms with the Telecommunications Act regarding licensing and ownership, the broadcasters were also required to develop a ratings system to classify violent, sexual and indecent or other objectionable material in programming.[123] The Telecommunications Act originally included Title V, called the Communications Decency Act of 1996; however, this portion of the Telecommunications Act was eventually deemed unconstitutional.[124] Nevertheless, some members of the broadcast industry voluntarily developed and implemented a ratings system.[125] The Telecommunications Act, in an effort to shield objectionable material from minors, required that all televisions larger than thirteen inches have a V-chip installed in them, such V-chip being programmable to block

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> news. The conclusion is at odds with FCC arguments made when it voted in 2003 to increase the number of television stations a company could own in a single market. It was part of a broader decision liberalizing ownership rules.

*Id.*; *see also* Stilwell, *supra* note 89, at 369. Stilwell argues:

> The Federal Communication Commission's ("FCC") laissez-faire policies toward deregulation of radio station ownership have led to oligopolistic control over radio since 1996. In turn, consolidated corporate radio has paved the way for payola-like practices, killed off local programming, stifled viewpoint and programming diversity, and on occasion, endangered public safety. The current law governing these issues remains in disarray.

*Id.* While this particular debate over broadcast ownership rights and the appropriateness of the Telecommunications Act's deregulation of Radio and Television broadcasting, coupled with the appropriateness of new FCC rules dealing with Radio and Television broadcasting ownership rights, is as divisive as ever, analysis of such is beyond the scope of this Article.

121. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 3 ("The act affirms the continuation of local marketing agreements (LMAs) and waives the previous restrictions on common control of radio and television stations in the top fifty markets, the one-to-a-market rule.").

122. *See id*.

123. *See id*.

124. *See* Communications Decency Act of 1996, Pub. L. No. 104-104, § 501 (repealed 1997); *see also* Reno v. ACLU, 521 U.S. 844 (1997) (finding the Communications Decency Act of 1996 unconstitutional).

125. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 3.

broadcasts that include inappropriate material.[126]

In connection with Internet and online computer services, the Telecommunications Act refused to establish common sense regulation over a market that promised to burgeon, but instead attempted to regulate objectionable and obscene material transmitted through cyberspace with specifically aimed provisions of the Communications Decency Act.[127] Certain provisions of the Communications Decency Act, as they pertain to Internet and on-line computer services, have been struck down as unconstitutionally vague and overbroad, while the internet in general was left wholly unregulated by an oblique Revolution Congress.[128]

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126. *See* 47 U.S.C. § 303(x) (2000). The Section provides:

> (x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to Section 330(c)(4) of this title.

*Id.*; s*ee also U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 3 ("In conjunction with the establishment of a ratings system, the Telecommunications Act requires television set manufacturers to install a blocking device, called the V-chip, in television receivers larger than 13 inches in screen size by 1998.").

127. *See* 47 U.S.C. §§ 230-231 (2000) (consisting of § 230(a)-(f) Protection for Private Blocking and Screening of Offensive Material and § 231(a)-(e) Restriction of Access by Minors to Materials Commercially Distributed by Means of World Wide Web that are Harmful to Minors); *see also* Chen *supra* note 116, at 1511. Chen describes Congress's lack of foresight:

> The Act took little or no account of a new telecommunications medium that was only beginning to take shape in 1996: the Internet. Beyond passing the Communications Decency Act, Congress had little to say about the Internet, but soon even that legislative effort lay in ruins. The early stages of implementing the Telecommunications Act have exposed Congress's shortsightedness in this regard.

*Id.* (internal citations omitted).

128. *See* Communications Decency Act of 1996, *supra* note 124, at § 501; *see also* Chen *supra* note 116, at 1360. In detailing the Revolution Congress's failures, Professor Chen notes:

> Legislative shortsightedness bears much of the blame. *The 1996 Act notoriously ignored the Internet*, except as a transmission vector for pornography. . . . Having failed to anticipate "the fastest growing medium of all time" and "the information medium of first resort for its users," the Telecommunications Act gave the FCC no tools for responding cogently to VoIP or any other Internet application that might affect the traditional work of the Common Carrier Bureau.

*Id*. (emphasis added) (citations omitted). In depth analysis of the Communications Decency Act of 1996 and the constitutionality of its provisions is beyond the scope of this Article.

Staunch supporters of the Telecommunications Act ironically hailed the legislation as a federal law that would spur immense job creation and would overwhelmingly lower telecommunications costs.[129] These hopes eventually faded following passage of the Act, as promised job creation and lower costs never materialized.[130]

That the Telecommunications Act failed to protect consumers is clear. Just months after its passage, telecom providers began merging, acquiring and concentrating in a way that served to hurt consumers, raise costs and benefit corporate interests to the detriment of the public good. The way that the Telecommunications Act facilitated the market crash of 2002 is less obvious, but just as deleterious. As described above, the Telecommunications Act refused in any recognizable way to regulate the Internet or regulate the prophesied exponential "rise" of Internet traffic. Internet use and traffic then, remained carefully unregulated under the Telecommunications Act. This decision by the Revolution Congress to refuse to regulate internet traffic was the origin and the temptation that felled the industry.

Immediately following passage of the Telecommunications Act, WorldCom executives began floating fraudulent statistics describing the projected explosion of Internet growth and traffic. This breathtakingly false information was relied upon by telecom competitors and the FCC itself in decisions as to how much fiber optic network to build and what types of policies to implement. Following an astonishing five year build-up of fiber optic network and a frenzy of telecom mergers and acquisitions to meet the fraudulently projected explosion, capacity demand did not even come close to meeting the projections that telecommunications giants spent billions building up to meet. A bubble formed in the telecom industry based on breathless investors pouring millions of dollars into telecom companies based on hollow capacity promises by both upstart and traditional telecom corporate executives. With a bubble firmly in place and with billions of dollars of unused fiber optic capacity sitting idle, corporate executives at firms like WorldCom, Qwest, Global Crossing and Adelphia began scrambling to cover projected revenue and growth. This scramble led directly to the

129. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 3.

130. Hundreds of thousands of jobs have been lost in the telecom industry in 2002 and 2003 alone. *See* MALIK, *supra* note 96, at ix. Telecom costs, particularly in the cable television and the Internet industry have skyrocketed since passage of the Telecommunications Act. *See Lessons from 1996 Telecommunications Act supra* note 116, at 1.

fraudulent swap transactions engaged in by telecom malfeasors. In 2002, leveraged, desperate and panicked, the telecommunications bubble burst forcing WorldCom, Qwest, Global Crossing, and Adelphia, amongst other, to disclose illegal swap transactions, restate billions of dollars of fraudulently booked revenue and declare bankruptcy in many cases. Employees, investors and consumers were decimated by this fraud as detailed below.

## *B. Telecommunications Act's Effect on the Industry*

In 2002, the Los Angeles Times reported:

> The telecommunications industry is awash in red ink and tens of thousands of jobs have been lost. Some analysts believe that bankruptcy filings of WorldCom and Global Crossing, two of the most aggressive new companies to arise during deregulation, presage more to come. Since their peak in March 2000, telecommunication stocks, as measured by the American Stock Exchange index of 16 North American companies, have fallen more than 74%.
>
> The meltdown has occurred under the legal structure set up by the Telecommunications Act of 1996.[131]

Many economists, investors and scholars agree that "[t]elecom deregulation from '96 until now has been an abysmal failure."[132]

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131. Michael A. Hiltzik & James E. Peltz, *Did Telecom Reformers Dial the Wrong Number?: Deregulation: A 1996 Landmark Law May be at the Root of the Industry's Meltdown*, L.A. TIMES, July 24, 2002, at 1-1 ("As the wreckage of once-highflying telecommunications companies such as WorldCom Inc. and Global Crossing Ltd. piles up, attention is turning to whether the root of the disaster lies in the sweeping deregulation set in motion in the mid-1990s that was expected to usher in a golden age of competition.").

132. *Id*. (quoting Gene Kimmelman, director of the Washington office of Consumers Union, publisher of Consumer Reports magazines). Economists and legal scholars have been particularly biting in their criticism of the Telecommunications Act. *See* Nicholas Economides, *Vertical Leverage and the Sacrifice Principle: Why the Supreme Court Got Trinko Wrong*, NET INSTITUTE, THE NETWORKS, ELECTRONIC COMMERCE AND TELECOMMUNICATIONS INSTITUTE, Working Paper No.05-05, at 10, *available at* http://ssrn.com/abstract=797142 ("[T]he Telecommunications Act failed miserably to create competition in local telecommunications. Additionally, as a result of the poor implementation of the Act, existing competition in long distance is likely to diminish."); *see also* George S. Ford & Lawrence J. Spiwak, *Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets*,

Not only did the Telecommunications Act set the stage for the staggering corporate collapses of WorldCom,[133] Adelphia,[134] Global

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PHOENIX CENTER POLICY PAPER SERIES, Phoenix Center for Advanced Legal & Economic Public Policy Studies, No. 18 (2003), *available at* http://ssrn.com/abstract =487464 (arguing that the FCC began using an "abstract" approach to its deregulatory policies since the 1996 Act rather than a grounded, realistic consumer welfare model, noting that "[indeed], policies implemented by relying exclusively on textbook notions of competition and regulation in an industry with traits incompatible with such naïve theories fails to satisfy the Commission's statutory mandate"); Jonathan E. Nuechterlein & Philip J. Weiser, *First Principles for an Effective Rewrite of the Telecommunications Act of 1996*, JOINT CENTER: AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, Working Paper No. 05-03 (2005), *available at* http://ssrn.com/abstract=707124 ("The problem with the 1996 Act, moreover, is not just that it hedges on the topics it addresses, but that it fails to address the central telecommunications policy challenge of our time: how to rationalize the regulatory treatment of different communications platforms in an age of radical technological advances."); Sidak, *supra* note 89, at 227 ("The government thus contributed to the hype that caused tens, if not hundreds, of billions of dollars to be invested in long-distance fiber optic networks that go unused."); Chen, *supra* note 116, at 1504 ("The Telecommunications Act of 1996 promised the world. It has delivered considerably less."); Stilwell, *supra* note 89, at 384. Stilwell notes:

> This hypocrisy was indoctrinated over a span of twenty years, and by the late 1990s, massive radio oligopolies began to form. Examination of the FCC's policies behind the deregulation of media ownership . . . demonstrates that the FCC systematically created and relied upon false premises, which today continue to result in an unsound rationale favoring the deregulation of media ownership.

*Id.*; Chen, *supra* note 99, at 1314 ("Among the gauges by which critics have weighed the Telecommunications Act of 1996 and found it wanting, the record of mergers among telecommunications firms since the law's passage figures prominently as evidence of the legislative failure."). Economist Economides concludes:

> In summary, the Telecommunications Act failed miserably in two of its main objectives. First, it failed to create competition in local telecommunications. Second, the Telecommunications Act was supposed to guard against RBOCs leveraging their monopoly power in local telecommunications to the long distance market. It completely failed in this too. The failure of the Act was mainly in its implementation. The Act did not impose punishments and penalties for delays in implementation; it harbored the seeds of its own destruction.

Economides, *supra* at 18-19.

133. *See* Davies & Scannell, *supra* note 13, at A1 ("Messrs. Lay and Skilling now join a list of once-high-flying executives brought low. Among them: . . . former WorldCom Inc. CEO Bernard Ebbers."); *see also The Enron Verdicts . . .*, *supra* note 28, at A10 (explaining that "WorldCom CEO Bernie Ebbers is now facing 25 years"); *see also* Morgenson, *supra* note 28, at 1 ("Some C.E.O. sinners from previous years got ready for their close-ups in 2005. L. Dennis Kozlowski, formerly of Tyco International, and Bernard Ebbers, late of WorldCom, sat for mug shots, donned orange jumpsuits and toddled off to jail.").

Crossing,[135] and Qwest,[136] amongst dozens of others,[137] but the Act failed to bring about the promised competition, opening of markets,

134. *See also The Enron Verdicts . . .*, *supra* note 28, at A10 (comparing "John and Timothy Rigas of Adelphia Cable [who face] 15 and 20 years [in prison] respectively"); *see also* Bloomberg News, *Bank Seeks to Foreclose on a Rigas Condo,* N.Y. TIMES, Sept. 2, 2004, at C8; *see also* Chad Bray, *Executives on Trial: Adelphia Ex-Executive Avoids Jail for False Report*, WALL ST. J., Mar. 4, 2006, at B4; *see also* Peter Grant & Christine Nuzum, *Adelphia Founder And One Son Are Found Guilty—Jury Remains Deadlocked On Second Son, Acquits Former Assistant Treasurer*, WALL ST. J., July 9, 2004, at A1.

135. *See* Almar Latour & Dennis K. Berman, *Global Crossing, SEC Deal Expected*, WALL ST. J., Mar. 22, 2004, at A8 ("A $325 million securities class-action settlement for former shareholders and employees of Global Crossing Ltd. helps pave the way for a settlement deal between the telecom company and the Securities and Exchange Commission over alleged accounting fraud."). The Wall Street Journal reports that Global Crossing's executives:

> Under the settlement announced Friday [March 19, 2004], shareholders and employees who lost billions in the troubled telecommunications company will receive $325 million from Global Crossing's former officers, directors and outside lawyers. Company founder and former Chairman Gary Winnick will pay a total of $55 million, while insurance companies for former officers and directors agreed to pay roughly $280 million. The company's former law firm, Simpson, Thatcher & Bartlett LLP, which was not a defendant and did not admit to any wrongdoing, agreed to pay $19.5 million.

*Id.*; *see also* Lynnley Browning, *U.S. Says Tax Shelter Client May Be Paying Ex-KPMG Partner's Legal Bills*, N.Y. TIMES, Mar. 7, 2006, at C4.

136. *See* Searcy and Lattman, *supra* note 94; *see also* Shawn Young et al., *Qwest Engaged in Fraud, SEC Says—Regulator Claims Misdeeds Were Led by Top Officials; Firm to Pay $250 Million*, WALL ST. J., Oct. 22, 2004, at A3 ("Qwest Communications International, Inc. engaged in pervasive fraud led by top management that extended to almost every part of its business, according to a complaint by the Securities and Exchange Commission."). The Wall Street Journal reports that the SEC alleges:

> [T]he telecommunications company was riddled with accounting fraud between 1999 and 2002. The fraud included generating phony revenue through sham transactions, booking inflated results from its phone-directory business and even the way Qwest accounted for employee vacation time, according to the complaint. The SEC said Qwest fraudulently recognized more than $3.8 billion in revenue and excluded $231 million in expenses as part of a multifaceted accounting scheme.

*Id.*; *see also* Tom Zeller Jr., *Qwest Goes From the Goat to the Hero*, N.Y. TIMES, May 15, 2006, at C5 (This article indicates that former Qwest CEO Joseph Nacchio has been charged with 42 counts of insider trading, and is currently awaiting trial. Further, Quest "settled a Securities and Exchange Commission fraud inquiry in 2004 for $250 million. An additional $400 million was agreed to in October as partial settlement with angry investors.").

137. *See generally* Jacob M. Schlesinger, *The Deregulators: Did Washington Help Set Stage for Current Business Turmoil?*, WALL ST. J., Oct. 17, 2002, at A1.

creation of jobs and furtherance of the projected growth explosion of "The Information Superhighway."[138] In reality, in light of the ten years that have passed since the Telecommunications Act was enacted, and in light of the Crash of 2002, each of the projected Telecommunications Act benefits have proven false or failed to fully materialize. Competition has never genuinely materialized in any of the sectors predicted, jobs that may have been created in the telecom industry have now been lost and then some, and the growth explosion has simply not mushroomed as widely prophesied.[139]

Competition in the telecom industry has failed to materialize.[140] Although provisions of the Telecommunications Act were earmarked specifically to promote competition, these provisions have instead contributed to a continued monopolistic hold on the industry by powerful telecom players.[141] New cable television companies have been able to gain only one percent of the market since the passage of the Telecommunications Act, as the major cable providers have refused to "invade each others' service areas."[142] Through the use of timely mergers, acquisitions and consolidations, the major cable companies have caused cable television rates to burst upward to almost three times

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138. *See* Chen, *supra* note 99, at 1313-17; *see also* MALIK, *supra* note 96, at 161. In President Bill Clinton's remarks at the signing ceremony of the Telecommunications Act on February 28, 1996, the President touted the new legislation as groundbreaking:

> Today, with the stroke of a pen, our laws will catch up with out future. We will help to create an open marketplace where competition and innovation can move as quick as light. An industry that is already one-sixth of our entire economy will thrive. It will create opportunity, many more high-wage jobs and better lives for Americans.
>
> The Interstate Highway Act literally brought Americans closer together. That same spirit of connection and communication is the driving force behind the Telecommunications Act of 1996. The Vice President [(Al Gore)] in many ways is the father of this legislation because he's worked on it for more than 20 years, since he first began to promote what he called, in the phrase he coined, "The Information Superhighway."

*Id*.

139. *See generally infra* notes 140-57, 159-70.

140. *See* Economides, *supra* note 99, at 46-47. *But see* Speta, *supra* note 86, at 1097-1108 (describing a few emerging competitive telecom fields).

141. *See Lessons from 1996 Telecommunications Act*, *supra* note 116, at 1; *see also* Ken Belson, *Justice Dept. Approves Two Big Telecom Deals*, N.Y. TIMES, Oct. 28, 2005, at C4 ("SBC and Verizon will together control 56 percent of that $135 billion market, according to Yankee Group estimates. The next largest competitor will be Qwest Communications with 7 percent, followed by BellSouth and Sprint with 6 percent each."); *supra* notes 99, 116 and accompanying text.

142. *See Lessons from 1996 Telecommunications Act, supra* note 116, at 1.

the rate of inflation.[143] Further defeating competition in the cable television industry, these newly merged, acquired and consolidated cable television conglomerates have effectively closed down broadband Internet to competition because they refuse to provide nondiscriminatory access to independent providers, as called for in the Telecommunications Act.[144]

Local telephone competition has also failed to appear because of the Regional Baby Bell's refusal to appropriately open their networks to small entrepreneurial companies forced to rely upon the monopolies to provide local service.[145] The Regional Baby Bells have combined forces via mergers, acquisitions and consolidations which have created a "small number of dominant national firms with regional monopolies," making it difficult, if not impossible, for new companies to compete.[146]

Several systems that Congress projected would seize portions of the communications markets have failed to develop. First, wire-to-wire competition for cable television service has failed to fully materialize.[147] The open video systems that were supposed to challenge the cable companies have not been developed, nor has satellite television been able to compete as seriously as expected with basic cable television service.[148] In local telephone service, wire-to-wire competition has also

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143. *See id.* (indicating that when cable television rates were completely deregulated, the rates increased by 71 percent over a seven-year period, about 2.6 percent the rate of inflation).

144. *See id.*; *see also* Chen, *supra* note 116.

145. *See Lessons from 1996 Telecommunications Act*, *supra* note 116; *see also supra* note 104 and accompanying text.

146. *See id.*; *see also* Bauer et al., *supra* note 82, at 550. Bauer et al. note that:

> Since the passage of the Act, several major mergers have reduced the number of potential and actual competitors. Mergers between SBC, Pacific Telesis and Ameritech, as well as between Bell Atlantic and NYNEX to form Verizon, reduced the seven RBOCs established after the break-up of AT&T to four. Verizon also merged with the largest independent telephone company GTE. SBC incorporated several smaller telephone companies such as Southern New England Telephone (SNET). U.S. West merged with Qwest Communications, an upstart carrier's carrier. The now bankrupt WorldCom expanded market share through a strategy of aggressive takeovers and mergers, most visibly with MIC Communications.

*Id.*; Economides, *supra* note 99, at 48.

147. *See Lessons from 1996 Telecommunications Act*, *supra* note 116, at 1.

148. *Id*. Satellite television continues to cost more than cable and thus is still only a small competitor, holding just 16 percent of the market. *See id*. Even then, a large number of satellite subscribers still also subscribe to cable television, so satellite only households only make up 12 percent of the market. *See id*. Rather than enter into the satellite television market to continue to compete, cable television purveyors simply

failed. Local exchange carriers have gained less than seven percent of the local telephone lines in the United States.[149] Wire-to-wire competition has been able to account for about one percent of the total number of telephone lines in the U.S., which makes it clear that the monopolist companies still have a stranglehold on local telephone service.[150]

It is clear that the aim of true competition has failed badly in the local telephone industry and the cable television industry. Additionally, the monopoly model still in place for cable television and telephone companies, despite passage of the Telecommunications Act, is now being felt in other telecom industries, such as Internet access.[151] In 2000, cable television companies held a market share of cable Internet service of at least 75 percent in the residential market.[152] Just as cable television consumers are paying large fees for service, Internet users have also been affected by "abusive practices."[153] Any aim for true competition in the Internet access arena has failed dismally as well. One key to solving the problems the Telecommunications Act has foisted upon the telecom industry is "ensur[ing] that the local market[s] [are] effectively open to competition."[154]

Job creation has not been realized in any meaningful way since inception of the Telecommunication Act. The bold proclamations that the Telecommunications Act would create both incredible job growth and jobs with higher-wages have been flatly ameliorated by the Crash of 2002 and the complete disappearance of more than 600,000 jobs in the telecom industry.[155] In many instances, while investors have lost billions of dollars because of the collapse of the telecommunications

increase prices on their services. *See id*. Since passage of the Telecommunications Act, revenue gained by cable companies from existing customers exceeds the revenue lost to all satellite subscribers by almost three to one, and to new satellite-only subscribers by almost four to one. *See* Editorial, *Latest Step in Deregulation*, SUN-SENTINEL, Jan. 7, 2003, at 16A.

149. *See Lessons from 1996 Telecommunications Act*, *supra* note 116, at 1.

150. *See id*.

151. *See id*.; *see also* Chen, *supra* note 99.

152. *See Lessons from 1996 Telecommunications Act, supra* note 116.

153. *Id*.

154. *Id*.

155. *See* MALIK, *supra* note 96, at ix ("With over 100 companies bankrupt and an equal number that have shut shop, as many as 600,000 telecom workers are now without a paycheck.").

industry,[156] it is the employees of these fraudulent companies that have suffered, and will likely suffer, the most.[157]

Now, it is clear that Congress, its advisers, lobbyists, and the FCC made serious tactical blunders and erroneous assumptions in drafting, debating, conferencing, passing and rulemaking the Telecommunications Act.[158] The principal blunder Congress committed

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156. *See id*. ("Poof—$750 billion gone . . . . WorldCom is bankrupt, Global Crossing is decimated, PSINet has been sold for peanuts . . . .").

157. *See id*. Malik describes the challenges facing former employees of the telecom industry:

> These are staggering numbers for an industry that accounts for a sixth of the U.S. economy.
>
> But they aren't as staggering as the amounts of money that hardworking employees at these companies have lost. After 31 years of relentless work, Lenette Crumpler, a former employee of Rochester, New York-based Frontier Communications, is without a job. As much as $86,000 of her 401(k) money went up in flames, through no fault of her own. Garry Winnick's Global Crossing bought Frontier and ruined most of Frontier employees' saving like Crumpler's savings. Or take the case of Paula Smith, who worked most of her life at US West and then lost her entire life's savings of $400,000 after Qwest took over US West and, by extension, her 401(k) retirement plan. How will Kelsey and Ali, her daughters, go to college? And what about the 50-plus-year-old former telecom engineers who are now working part-time at Home Depot selling drills?
>
> Even as they were cashing out their own holding, the executives at these broadband companies encouraged employees to put their 401(k) dollars into company stock. And since the employees had nary a clue about these shenanigans, they complied and are now ruined. Now Crumpler, Smith and the almost 600,000 other people in their situation face the figurative dole, while the robber barons of the information age sit in their Florida mansions, their Bel-Air palaces, and enjoy life on board their multimillion dollar yachts. The robber barons of a century ago at least created industries of lasting value. But the modern-day robber barons used bankruptcy protection laws, lined their pockets, and walked into the sunset—just like two-bit bandits.

*Id*.

158. *See* Hiltzik & Peltz, *supra* note 131, at 1-1. The Los Angeles Times reports that Congress made at least three "fundamentally wrong" assumptions that "underlay" the Telecommunications Act:

> Three key assumptions underlay the law. The first was that the lucrative prize for most competitors would be long-distance service. The drafters reasoned that local phone companies—General Telephone and the seven Baby Bells created by the 1984 breakup of AT&T—would be so eager to move into long-distance that they would willingly open their local monopolies to competition to earn the right to offer it to customers.
>
> The drafters also assumed that the Baby Bells would jump at the chance to compete for local customers in one another's markets, triggering even more consumer savings. Finally, they assumed that falling prices would lead to an explosion in telecommunications traffic.

was assuming that all telecommunications traffic, including cable, Internet, and telephone, would expand and mushroom to previously unheard of levels.[159] This assumption has proven to be fundamentally

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> *All these assumptions turned out to be fundamentally wrong.*
>
> The long-distance market, which had been deregulated earlier, was already experiencing ferocious price competition, with per-minute rates dropping and profit margins shrinking by the day. Instead of the Baby Bells wanting to get into long-distance, companies such as MCI and AT&T were desperate to start providing local service. But the local phone companies, often supported by their state public utilities commissions, resisted opening their markets . . . .
>
> Instead of invading one another's turf as expected, the Baby Bells simply merged with each other. Within a year after the act's passage, Texas-based SBC took over Pacific Telesis, the California-based Baby Bell. Even more disturbing to observers, however, was the 1997 merger of Philadelphia-based Bell Atlantic with Nynex, the Baby Bell serving neighboring New York and New Jersey . . . .
>
> The deal's approval by the Justice Department's antitrust division and the Federal Communications Commission heralded a trend of consolidating local Bell companies. The country had eight local phone companies in 1996; today [(July 2002)] it has four—SBC Communications Inc., Verizon Communications Inc., BellSouth Corp. and Qwest Communications International Inc.
>
> Before 1996, the largest four local companies served 48% of all the phone lines in the country; today these four companies serve more than 85% according to a study by Consumers Union.

*Id*. (emphasis added); *see also* Dibadj, *supra* note 70, at 47, 54-55 (detailing all of the poor regulatory rules enacted by the FCC following passage of the Telecommunications Act).

159. *See* Hiltzik & Peltz, *supra* note 131, at 1-1 ("Still in retrospect the most dangerous assumption behind the deregulation bill [(Telecommunications Act)] by far was that communications traffic would mushroom at unprecedented rates."); *see also* MALIK, *supra* note 96, at xii-xiv, 9-16 (detailing the communications traffic myths that were being perpetuated by certain telecom insiders and that were responsible for the unrealistic expectations that communications traffic would explode in the near future). Malik painstakingly describes the genesis of what he calls the "urban legend" of "Internet traffic doubling every 100 days" that perpetuated and supported the telecom run up of the late 1990s and was relied upon by Congress in developing the Telecommunications Act:

> On May 1, 1996, UUNet was sold. Sidgmore and O'Dell still had solid reputations. They had become the gurus of the broadband world, and their words—"Internet traffic is doubling every 100 days"—became the gospel of the new economy. *Even the U.S. government quoted their line in its reports*.
>
> Think of "Internet traffic doubles every 100 days" as an urban legend . . . [one that] convinced executives, analysts, venture capitalists, and retail investors to pour billions of dollars into telecom companies. The belief in this legend resulted in the mad rush of money into new start-ups, be they makers of telecom equipment, cable modems, broadband service providers, or even book retailers such as Amazon.com. Even otherwise conservative venture capitalists poured billions into broadband companies. Wall Street also got into the act and sold bad business ideas to the unsuspecting masses . . . .

wrong, and ultimately irreversibly damaging.

The telecom highway is now littered with the failures of telecommunications corporations, as their shareholders and employees have been wronged by (a) the Telecommunications Act, (b) the dishonest dealings of investment bankers, stock analysts, lawyers and investment bankers, and (c) the reprehensible behavior of dozens of corporate executive malefactors. These include WorldCom,[160] Global Crossing,[161] Adelphia,[162] Qwest,[163] Lucent,[164] Dynegy,[165] Genuity,[166]

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> But Andrew Odlyzko, a research scientist for AT&T Labs in Florham Park, New Jersey, didn't buy it. In 1997, Odlyzko and his colleague, Kerry Coffman, decided to undertake an academic exercise to analyze data available from AT&T and other major Internet providers such as MCI and BBN Planet. Odlyzko and Coffman spent almost a year analyzing the traffic patterns on the Internet and wrote a paper, "The Size and Growth of the Internet," which was released to the public in October 1998. Their finding proved that the whole notion of Internet traffic doubling every 100 days was hogwash. The duo found that Internet traffic was only about doubling each year, or, more precisely, that it was growing at between 70 and 150 percent a year.

*Id*. at 12-14 (emphasis added). While the report was received poorly, Odlyzko set about trying to track down the inflated rumors of "Internet traffic doubling every 100 days" and reported that:

> [o]ver the years, every time I tried to trace the rumors of "Internet traffic is doubling every three or four months" to their source, I was always pointed at folks from WorldCom, typically [Bernie] Ebbers or [John] Sidgmore. They, more than anyone else, seemed to be responsible for inflating the Internet bubble [until it collapsed on them].

*Id*. at 14. Unbelievably, executives at WorldCom were setting the pace and establishing the playing field for Internet traffic delusions and the unrealistic assumptions that Congress, Wall Street, analysts and the U.S. investing public were relying. *See* Sidak, *supra* note 89, at 227-33.

160. *See supra* note 133.

161. *See supra* note 135.

162. *See supra* note 134.

163. *See supra* note 136.

164. See Associated Press, *Judge Orders Lucent to Pay $224 Million*, N.Y. TIMES, Dec. 23, 2005, at C10; *see also* Ken Belson, *S.E.C. Considers Suing Ex-Lucent Officers*, N.Y. TIMES, Nov. 9, 2004, at C4; Simon Romero, *Lucent Reaches Accord With S.E.C. to End Inquiry*, N.Y. TIMES, Feb. 28, 2003, at C4; Andrew Ross Sorkin & Ken Belson, *Talks for Lucent May Signal End For 90's Symbol*, N.Y. TIMES, Mar. 24, 2006, at A1; Shawn Young & Dennis K. Berman, *SEC Staff Recommends Penalty Against Lucent of $25 Million*, WALL ST. J., Mar. 18, 2004, at B5.

165. See Associated Press, *Executives on Trial: Two Linked to Dynegy Scheme Are Given Shorter Prison Terms*, WALL ST. J., Jan. 6, 2006, at C3; *see also* David Barboza, *Dynegy to Pay $3 Million In Settlement With S.E.C.*, N.Y. TIMES, Sept. 25, 2002, at C6; Paul Beckett & Jathon Sapsford, *Size and Timing Of Dynegy Trades Draw Scrutiny—SEC Widens Its Probe Of Big Energy Company*; *'Not the Same as Enron*,' WALL ST. J.,

PSINet[167] amidst so many others.

Attempting to open the telecom market to competition has turned out to be a painful process: "[i]n the past two years, telecom [share] prices have plummeted. WorldCom's bankruptcy filing in July [of 2002] was only the most recent of two dozen by publicly traded telecom firms this year [(2002)]."[168] Based on the false assumptions that growth would meet wild expectations, as inflated by the very purveyors of the fraud, "the financial community anticipated a huge increase in demand that would be never-ending."[169] This projection has proven to be false. Worse, Congressional reliance on foolish and unsupported telecom growth expectation reports; on similarly unfounded expectations that

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May 9, 2002, at A1; Peter Behr, *2 Plead Guilty to Fraud in Dynegy Case*, WASH. POST, Aug. 6, 2003, at E03; Bradley Keoun, *Dynegy Settles Shareholders' Suit; Houston Power Wholesaler Agrees to Pay $468 Million*, WASH. POST, Apr. 16, 2005, at E02; Jonathan Weil & Jathon Sapsford, *Leading the News: Dynegy to Pay $3 Million Fine to Settle SEC Civil-Fraud Case*, WALL ST. J., Sept. 25, 2002, at A3.

166. See Associated Press, *GENUITY INC.: Bankruptcy filed*; *Level 3 to take over*, CHI. TRIB., Nov. 28, 2002, at 2; Saul Hansell, *Technology Briefing E-Commerce: Genuity To Seek Bankruptcy Protection*, N.Y. TIMES, Nov. 27, 2002, at C3; Seth Schiesel & Simon Romero, *Genuity Faces Bankruptcy As Verizon Ignores an Option*, N.Y. TIMES, July 26, 2002, at C2.

167. See Dina ElBoghdady, *PSINet Consulting Unit Files Chapter 11*; *Firm Was Acquired For $2 Billion*, WASH. POST, Sept. 11, 2001, at E05; Ellen McCarthy, *After the Glamour, A Modest Return*; Schrader, *Like Tech Industry, Is Focused on Profits,* WASH. POST, July 18, 2005, at D01; Yuki Noguchi, *PSINet Sales to Recover Millions for Creditors*, WASH. POST, Apr. 18, 2002, at E05; Henny Sender, *Telecom Special: In Bankruptcy, PSINet Gets '90% Off' Tag*, WALL ST. J., Nov. 27, 2001, at C1.

168. *See* Schlesinger, *supra* note 137 at A1; *see also* Celia Viggo Wexler, *The Fallout From the Telecommunications Act of 1996*, COMMON CAUSE EDUCATION FUND, May 9, 2005, at 3, *available at* http://www.commoncause.org/atf/cf/%7bfb3c17e2-cdd1-4df6-92be-bd4429893665%7d/fallout_from_the_telecomm_act_5-9-05.pdf ("Industries supporting the new legislation predicted it would add 1.5 million jobs and boost the economy by $2 trillion. By 2003, however, the telecommunications' companies' market value had fallen by about $2 trillion and they had shed half a million jobs.").

169. *See* Hiltzik & Peltz, *supra* note 131, at 1. The authors quote Reed E. Hundt, FCC Chairman from 1993-1997, and now consultant at McKinsey & Co:

> [T]hose rates inspired a historic investment spree. From 1996 to 2000, telecom companies assumed more than $1.5 trillion in bank debt and issued $600 billion in bonds. "There were too many people throwing too much essentially free money at the industry," said Tom Evslin, chief executive of ITXC Corp., a wholesaler of international phone capacity.

*Id.*; *see also* Sidak, *supra* note 89, at 227-34 (describing the enormous negative impact the WorldCom fraud had on the telecom industry and the capital markets).

new competition would drive the freshly deregulated telecom markets rather than self preservation and the frenzied blocking of competition by market players; and on the testimony and word of telecom insiders who have proven fraudulent and fallacious, was thoroughly misguided and ill-advised.

Deregulation proponents have begrudgingly recognized that the Telecommunications Act was problematic: noted Cornell University economist Alfred Kahn has flatly stated that "deregulation deserves a good deal of the blame for the telecommunications problems."[170]

As unpacked above, the Telecommunications Act facilitated the market crash specifically in at least two ways. First, the Act failed to regulate the internet and its growth. This led to WorldCom's audacious fraud in connection with internet growth and the frenzied fiber optic network build out that wasted billions and tempted telecom giants into fraudulent swap transactions and the need to hide losses based on unused capacity. Second, the Act removed barriers to competition in local and long distance telephony, but required unbundling by the regional bells in order to enter long distance competition. This led to a frenzy of merger activity where rather than unbundle local lines to spur competition, the local telecom companies preferred to merge with long distance carriers, leading to the period of megamerger activity and serious concentration. Because many of the companies engaging in this merger frenzy (Adelphia, Qwest, WorldCom) could not sustain the debt each had undertaken in its rapid-fire merger activity, bankruptcy and disaster followed.

Congress, in its rush to deregulate, again whiffed badly with the Telecommunications Act, just as it had with the PSLRA and its federal securities deregulation.[171] Following an unprecedented five-year run up of the capital markets (1995 to 2000), the bubble burst in a spate of

170. Jay Hancock, *Deregulation Pioneer Kahn Still Favors It But Sees Its Warts*, BALT. SUN, Oct. 20, 2002, at 1C. Professor Kahn claimed that government attempts to thoroughly deregulate the telecom industry were unwise because "you have to have a regulated transmission network which plays a crucial role in balancing demand, in getting prices right, in ensuring system reliability." *Id*.

171. *See* cummings, *supra* note 4, at 1041 ("Passage of the Telecommunications Act, following hotly on the heals of the passage of the PSLRA, further deregulated segments of corporate America, creating an environment ripe for corruption and easy deception of the investing public.").

malfeasance, fraud and deceit.[172] One enduring legacy of the Telecommunications Act and 1990s Revolution Congress deregulation will be the market crash of 2002.[173]

## *C. Examination of Legislative History in Opposition*

Those opposed to passage of the Telecommunications Act decried its provisions, predicting that its influence would harm investors and that its terms were not carefully constructed to meet the changing needs of the global telecom industry.[174]

> Critics of the act claim its extensive deregulatory provisions coupled with relaxed restriction on concentration of media ownership dilute the public responsibility guarantees built into the Communications Act of 1934 and tilt the preference in favor of private market forces. Critics claim that [there are] many areas of the country which are not likely to see real competition, the cost of telecommunications and video services are likely to rise dramatically.[175]

Many argued in 1996, and now an entire chorus of detractors would join, that Congress and the President lacked vision and foresight in enacting the 1996 version of the Telecommunications Act.[176]

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172. *See supra* note 10 and accompanying text.

173. *See supra* notes 11, 94-99 and accompanying text; *see also infra* notes 214-16 and accompanying text.

174. *See* Warren Sirota, *The Telecommunications Act of 1996: A Commentary on What is Really Going on Here*, Westchester Alliance for Telecommunications and Public Access, *at* http://www.watpa.org/telcom.html (last visited Aug. 31, 2003). Sirota correctly predicted following passage of the Telecommunications Act that no real competition would emerge, rather a "consolidation trend" would emerge and that "many jobs" would be lost. *Id*. Further, Sirota correctly predicted that "[c]able TV rates will rise," that "[l]ocal telephone rates for consumers will stay the same or rise" and that "[t]here will be a consolidation among the large players in their traditional segments." *Id*. Sirota concluded:

> Beyond that, *the crystal ball is clouded by Congress' lack of vision and obfuscation of the important issues*. The bottom line is that real competition and new innovative services will not arrive for many years. When they do, very large carriers will be the only service providers. Innovative services and price competition in the consumer segment will first occur in markets that are upper and middle class on the socio economic scale.

*Id*. (emphasis added).

175. *See U.S. Policy: Telecommunications Act of 1996*, *supra* note 99, at 3.

176. *See* Benjamin Douglas Arden, *Competition versus Regulation: "Mediating Between Right and Right" in the Wireless and Wireline Telephone Industries*, 57 FED.

Admittedly, Congressional opposition to passage of the Telecommunications Act was not nearly as strong as that in opposition to the PSLRA.[177] While the Act had prominent critics,[178] few opponents emerged from the U.S. Congress.[179] The conference version of the Telecommunications Act was approved by the U.S. Senate on February 1, 1996 by a vote of 91 Yeas, 5 Nays and 3 Not Voting.[180] Most senators hailed the legislation as landmark.[181] Indeed, most supporters

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COMM. L.J. 107, 122-23 (2004). Arden argues:

> The existing regulatory framework was ill-equipped to bring about the new policy goals driving the telecommunications industry. While the government had been able to ensure the creation of a uniform, reasonably priced system, things like innovation and maximization of existing resources are typically the fiat of the open market. This was essentially the contention of the Progressive Era economists; they knew that the market was quite capable of, if not ideal for, spurring the development of new products and finding economic efficiency. The market, however, was scarcely able to take into consideration the social benefit of any particular product.

*Id.*; *see also* Gregory M. Prindle, Note, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 305, 322-25 (2003) ("Although the Telecommunications Act of 1996 intended to open up competition, the deregulation of ownership limits has led to an increased concentration of ownership. This increased concentration resulted in anti-competitive behavior, undermining Congress' intent for a competitive marketplace."); Sirota, *supra* note 174 ("Beyond that, the crystal ball is clouded by Congress' lack of vision and obfuscation of the important issues."); *see generally* MALIK, *supra* note 96; cummings, *supra* note 4; Hiltzik & Peltz, *supra* note 131; Schlesinger, *supra* note 137; *supra* note 132.

177. *See generally* 142 CONG. REC. S686-721 (daily ed. Feb. 1, 1996); *see also* cummings, *supra* note 4, at 1033-40 (detailing the vociferous opposition to the PSLRA by various U.S. Senators prior to its passage).

178. *See supra* notes 120, 174-76; *see also infra* notes 184-91 and accompanying text.

179. *See infra* notes 184-85, 187, 189 and accompanying text.

180. 142 CONG. REC. S720 (daily ed. Feb. 1, 1996).

181. 142 CONG. REC. S698 (daily ed. Feb. 1, 1996) (statement of Sen. Lott). Senator Lott stated:

> I believe we will pass this conference report overwhelmingly in a few minutes, and I venture to say right now there will not be a bigger, more important piece of legislation that passes the Congress this year and probably not one in the last decade in terms of the impact this is going to have in the creation of jobs and bringing legislation out of the Edsel era of the 1934 Communications Act into a modern Explorer because that is what this legislation is going to do—open up tremendous horizons for our people.

*Id.*; *see also* 142 CONG. REC. S691 (daily ed. Feb. 1, 1996) (statement of Sen. Stevens). Senator Stevens explained:

> I think this is among one of the most significant days I have been here on the floor of the Senate. The 1934 Communications Act has served this Nation well. It brought us from a country with a fledgling communications system to the age of

of the legislation expected incredible increases in competition and job creation.[182] Despite such widespread congressional optimism, the Telecommunications Act has proved to be a disappointment, both in competition and job creation, as carefully outlined above.[183]

A few congressional leaders, clearly in the minority, stood out in their criticism of the Telecommunications Act by forecasting its shortcomings.[184] Senator Byron Dorgan (D-ND) argued on the Senate Floor that the elimination of television ownership caps would have a deleterious effect on television competition:

> I do not want to oversell this piece of legislation either. There are deficiencies in it. There is one which gives me enormous pause and almost persuaded me to continue voting against it. This report makes some serious steps toward concentration in broadcasting by eliminating the television ownership cap.
>
> We now say you can own no more than 12 television stations covering no more than 25 percent of the population of the country. This report says, "By the way, we've changed that; you can own as many television stations as you want covering up to 35 percent of the population of this country." I guarantee you, if that stands, a dozen years from now we will have six, maybe eight major companies owning most of the television stations in America. That is not a march toward competition: that is a march backwards towards concentration. It makes no sense.[185]

While Senator Dorgan argued that the new rules would concentrate television ownership instead of inspiring competition, he nevertheless

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> telecommunications. And now, with the advent of digital communications becoming universal, this bill is absolutely necessary to assure the expansion of these industries that depend upon telecommunications.

*Id.*

182. *See supra* notes 179, 181 and accompanying text.

183. *See supra* notes 140-157, 159-175 and accompanying text. *But see* Lawrence J. Spiwak, *The Creeping Tide of the Gathering Storm*, Perspectives: Phoenix Center for Advanced Legal and Economic Public Policy Studies, Nov. 2004, at 1-2 (noting that while "de-regulation is always a tricky business" that over time the Telecommunications Act has led to some consumer savings and job growth).

184. 142 CONG. REC. S686-721 (daily ed. Feb. 1, 1996) (statements of Sen. Dorgan, Sen. Kerrey, Sen. Wellstone).

185. 142 CONG. REC. S690 (daily ed. Feb. 1, 1996) (statement of Sen. Dorgan). Senator Dorgan claimed that he "almost voted against the bill because of that defect." *Id.* Recent evidence indicates that, in fact, concentration has increased in radio and television ownership, to the detriment of the consuming public. *See* Stilwell, *supra* note 89; *see also* Dunbar, *supra* note 120.

relied upon the same erroneous assumptions that the rest of Congress did in voting to enact the Telecommunications Act. Namely, Congress anticipated substantial growth of the Internet, and that the Regional Bells would eagerly enter the long distance markets.[186]

Perhaps in a prescient moment, Senator J. Robert Kerrey (D-NE) recognized that the clarion call for reformation of the communications laws were not U.S. citizens, but in fact corporations—companies complaining bitterly of the intensely restrictive nature of the telecommunication regulations:

> I will observe, as I did on a number of occasions during the debate earlier on the bill, that this is a very unusual piece of legislation in that the demand for it is not coming from the citizens; it is really coming from corporations, the whole range of corporations—I do not mean the RBOC's; I mean RBOC's, long-distance, cable, broadcast; all of them are in this business—that feel the current law, which does not allow them to do a variety of things, is too restrictive. *And they say, if you change the law and allow us to do these things, you are going to generate a lot of new economic activity and create new jobs. We have heard all kinds of representations about all the good things that are going to happen*.[187]

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186. *See supra* Part III.B.

187. 142 CONG. REC. S696-697 (daily ed. Feb. 1, 1996) (statement of Sen. Kerrey) (emphasis added). Senator Kerrey continued in his warning that relying too much on the representations of corporate interest could come back and haunt the enacting congressional leaders:

> It must be said, Mr. President, that that requires a substantial amount of courage at the beginning. It is not my intention to come here and say that Members who are enthusiastic about this change are under the influence of special interest money. That is not my point at all. I am not trying to say that any Member has been bought out or anything like that. The problem, though, when you once cross the line, is saying OK, we are going to try to do something that is good for the people. It seems to me that you have to do, in an irrationally cold-blooded way, an analysis of what the impact is going to be . . . . So, when we radically alter the landscape, as we are with this legislation, it seems to me appropriate to sort of ask ourselves: What is the consumer going to get out of it?

*Id.*; *see also* Chen, *supra* note 99, at 1337. Chen, in discussing the damaging concentration that has entered the telephony industry since passage of the Telecommunications Act, quoted Congressman Henry Hyde as warning against adoption:

> During the legislative debates leading to passage of the 1996 Act, Congressman Henry Hyde asserted that "public interest review by the FCC simply is not a strong enough tool to prevent [telecommunications] giants from destroying competition and recreating a monopoly system through a series of megamergers.

Apparently, Senator Kerrey was very uncomfortable foisting an all-inclusive, comprehensive, sweeping telecommunications reform bill upon the U.S. public when corporate interests, not the public, were clamoring for such change. In hindsight, Senator Kerrey's concerns were well-placed and warranted, as major telecom industry players have subsequently used the new laws and the deregulated telecom arena to foist spectacular frauds upon both the U.S. investing public and their own employees.[188]

Senator Paul Wellstone (D-MN) harshly criticized Congress for adopting legislation that did not offer concrete consumer protections and relied solely upon the telecommunications corporations to keep promises to operate fairly and protect consumers in a newly deregulated world:

> What disappoints me the most is that this bill did not go far enough to assure competition and therefore does not go far enough to protect consumers . . . . I was hoping that at least we could build in more protection for consumers and more guarantees that there would in fact be the competition that we all talk about.
>
> I ask my colleagues, after you remove the protections against huge rate increases, against monopoly, against service just for the privileged, what would you replace them with? Words, Mr. President. Promises, guarantees, reassurances that this time, although many of these companies have misbehaved in the past, and have been fined repeatedly for violating promises to protect consumers, that this time the corporations promise to behave themselves and to conduct themselves in the consumer's best interest.
>
> *Mr. President, I have said it before, and I will say it again. I do not buy it.*[189]

Clearly, little credence was given to Senator Wellstone's warnings back in 1996. Recall these were heady days—when deregulation hysteria gripped the Revolution Congress upon the launch of its Contract with America.[190]

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*Id.*

188. *See supra* Part III.B.

189. 142 CONG. REC. S700-701 (daily ed. Feb. 1, 1996) (statement of Sen. Wellstone).

190. *See supra* notes 42-43 and accompanying text (detailing how Congressional leaders such as Tom DeLay (R-TX) and Newt Gingrich (R-GA) drafted and passed deregulation legislation that was startlingly drafted by lobbyists and industry insiders while sitting in Congressional offices); *see also* Molly Ivins, *There Are Reasons for Regulation*, CHARLESTON GAZETTE, Sept. 1, 2001, at P4A. Ms. Ivins states:

Senator Wellstone offered a solution that would have made him far more comfortable with the Telecommunications Act:

> I would rather put my trust in solid protections, written in law, to make sure that rates remain affordable, services are available for everyone, and no one is left behind in the stampede for corporate profits. Protections that ensure affordability, fairness, and access in local and long distance phone service and cable TV.
>
> Mr. President, the need for continuation of consumer protections and antitrust circuit breakers is clear . . . . I think we are making a mistake if we pass this piece of legislation. I will therefore, vote against it.[191]

Unfortunately, neither the Senate nor the House of Representatives heeded Senator Wellstone's calls for protections and demands that honorable corporate behavior be written into the law. Senator Wellstone tried to look into the future in 1996, and the future that he saw was not nearly as attractive as the one seen by many of his colleagues on both sides of the Congressional aisle.[192] Senator Wellstone was able to correctly guess that the telecommunications companies would not keep their promises "to behave themselves and to conduct themselves in the consumer's best interest."[193]

The Revolution Congress miscalculated badly in passing many provisions of the Telecommunications Act. Looking back over the carnage that was the telecom industry in 2001-2004 and its investors and former employees, the message is crystal clear: There can be no glory in

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> Telecommunications deregulation: As per usual, we were promised lower rates, greater choice, the magic of the marketplace, and milk and honey for all. What we got was more telephone marketers calling during dinner. Cable rates have risen 33 percent, three times the inflation rate, since the 1996 telecom dereg debacle . . . . Scholars will recall the [Telecommunications] bill was heavily influenced and indeed partly written by the industry's lobbyists, part of the pattern with dereg. Cable customers continue to be gouged by local monopolies; there is almost no head-to-head competition. Ditto local phone competition. Prices are up 12 percent, not down at all; the companies that were supposed to compete against the regional Bells are in bad shape, as is competition in the long distance field. Calls for re-regulation already abound.

*Id*.

191. 142 CONG. REC. S701 (daily ed. Feb. 1, 1996) (statement of Sen. Wellstone).

192. *See supra* note 181 and accompanying text (detailing the hailing of the Telecommunications Act of 1996 as landmark legislation by many Congressional leaders).

193. *See supra* note 189 and accompanying text.

so much pain.[194]

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194. This reference is specifically targeted at the Senators that spent page after page of Senate floor time congratulating each other about the wisdom, foresight, magnitude and direction of the Telecommunications Act of 1996. *See generally* 142 CONG. REC. S686-721 (daily ed. Feb. 1, 1996); *see also id*. at S706 (statement of Sen. Helms). Senator Helms boasted:

> Mr. President, I am pleased that the Senate finally is going to pass this important telecommunications bill . . . . There have been many attempts down through the years to reform the telecommunications law, and I am happy that the Republicans have been able to get the job done this year.

*Id.* So much congressional glorying has subsequently led to so much pain. *See generally supra* notes 3, 135, 157 (describing the tragic economic consequences that have befallen former employees and stockholders of the corporate malfeasors). *But see* Editorials, *Telecom Reform—Now*, WASH. TIMES, Mar. 10, 2005, at A22 (opining that the movement in the telecom industry since 1996 has been "impressive" and calling on Congress to further deregulate the telecommunications industry). The Washington Times editorializes:

> Although decried by consumer advocates, the announcements that SBC Communications had bought AT&T . . . and Verizon had acquired MCI have opened up one of the first real opportunities [to further deregulate]. Since 2000, for example, SBC and other Bell giants like Verizon have been pushing for elimination of a provision in the telecom act that prohibited them from offering long-distance service until they opened up their regional phone markets. . . . Now, with AT&T out of the game, industry insiders are looking keenly on longtime AT&T Republican loyalists to join with their conservative peers to support deregulation. . . .
>
> Despite the gridlock, it's impressive how far the telecom industry has advanced since 1996. Consumers now have options that were unthinkable 10 years ago. But more needs to be done on the federal front. With major political obstacles now removed, it's up to Congress to get to the business of reform.

*Id.*; *but see* Karen Alexander, *The Perils of Your Company's Stock*, N.Y. TIMES, Apr. 12, 2005, at G8 (statement of Stephen Vivien, lead plaintiff in lawsuit against WorldCom) ("I thought it was a good investment and I believed in the future of the company . . . . I was in disbelief. I was torn between trying to take action, being busy at work, hoping for the best and thinking that my retirement was many years away."); Associated Press, *Explaining the Enron bankruptcy*, CNN.COM, Jan. 13, 2002, *available at* http://archives.cnn.com/2002/US/01/12/enron.qanda.focus. The Associated Press noted:

> Enron, which had 20,000 employees, barred them from selling Enron shares from their retirement accounts last fall as the stock price plunged, saying the accounts were being switched to a new plan administrator. Many longtime employees, including those who worked for energy and utility companies that Enron acquired, had their life savings wiped out.

*Id.*; John R. Emshwiller, *Skilling Gets 24 Years in Prison—Enron Ex-CEO Faced Longer Term For Fraud, Conspiracy Conviction; Victims Fund to Get $45 Million,* WALL ST. J., Oct. 24, 2006, at C1. The Journal reported that:

> Judge Lake allowed several former Enron employees and shareholders to speak, sometimes tearfully, about the damage they suffered as a result of Enron's collapse.

The market crash of 2002 has undoubtedly curbed any merriment that was attendant in the corporate world and amongst the Revolution Congress at the time the Telecommunications Act was enacted. Unfortunately for U.S. investors and employees, the Telecommunications Act, the PSLRA and the SLUSA were not the only deregulatory efforts undertaken by the Revolution Congress. Soon after passing the PSLRA, the Telecommunications Act, and the SLUSA, Congress turned its deregulation attention toward the energy, electricity and derivatives industries, once again acting improvidently.

## IV. THE COMMODITIES FUTURES MODERNIZATION ACT

Essentially, under the CFMA, over-the-counter derivatives trading in most cases will not be subject to any type of regulation.[195] For the first time in the history of commodity futures trading, the CFMA made it permissible to trade outside the regulated markets under certain

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> They talked of lost jobs, lost retirement savings and a loss of faith in a company they loved. Some urged that Judge Lake give Mr. Skilling a very long prison sentence.

*Id.*; Kathryn Kranhold & Mitchell Pacelle, *About Those Big Enron Bonuses*, WALL ST. J., June 12, 2002, at C1; Gretchen Morgenson, *Outrage Is Rising as Options Turn to Dust*, N.Y. TIMES, Mar. 31, 2002, at C1. Ms. Morgenson described the plight of one worker:

> Ms. [Kimberly] Smith, who is now 37, did not know it at the time, but her dream was about to become a nightmare. Less than two years later, she had lost her $1.1 million nest egg. A stock market neophyte, she said she was pushed by a Salomon Smith Barney broker in an Atlanta office to exercise her options, hold her WorldCom stock and borrow from the firm to pay for the transactions. When WorldCom and other technology stocks collapsed in 2000, she was left with margin loans and taxes that had destroyed her life savings.

*Id.*; Eve Samples, *Ex-Enron Employees Feel Vindicated By Guilty Verdicts*, PALM BEACH POST, May 26, 2006, at 1D; L. M. Sixel, *Playing The Employment Game; Looking for a job is hard work; Ex-Enron employees hit upon a few offers, but at lower salaries*, HOUSTON CHRON., Dec. 15, 2001, at 1; Howard Witt, *Lay says he is much poorer—and misunderstood*, CHI. TRIB., July 9, 2004, at 18; Allen Sloan, *Laying Enron to Rest*, NEWSWEEK, June 5, 2006, at 25-26 (describing "crying Enron employees whose jobs and life savings both vaporized when Enron melted down, taking their 401(k) accounts with it" during the trial).

195. *See* Schlesinger, *supra* note 137, at A1; *see also* Thomas Lee Hazen, *Disparate Regulatory Schemes For Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling and Insurance*, 24 ANN. REV. BANKING & FIN. L. 375, 388-95 (2005) (describing the significant deregulatory changes the CFMA effectuated in the commodities and derivatives trading markets).

conditions, essentially providing no regulation for commodity futures trading.[196] The CFMA's legislative enactment was controversial and ultimately reckless:

> In the wake of the breakdown of Congressional efforts to deregulate the electric power industry, Brooksley Born, the then-head of the Commodity Futures Trading Commission ("CFTC") proposed in 1998 that she "explore whether more regulation was needed for over-the-counter derivatives." The value of the over-the-counter derivatives market "had grown fivefold to $29 trillion in the six years since [federal] regulators had last considered regulating the financial instruments" in 1992. While Director Born met with early resistance from the Treasury Secretary and the Federal Reserve Board Chairman, she feared that "leaving the derivatives unregulated . . . carried huge risks." Director Born's fears were justified in that:
>
> > Over-the-counter derivatives were traded directly between companies, away from regulated futures exchanges. Because they weren't subject to rules that applied to other securities, little was disclosed about the transactions. That made it easier for traders to take big risks, or fraudulently manipulate deals. Derivatives had contributed to some spectacular blowups, including the bankruptcy of Orange County, California, and the demise of 233-year-old Barings PLC, which went belly up in 1995 after a rogue trader lost $1 billion in unauthorized derivativestrades.
>
> Determined to provide a safe haven for investors and shareholders, Director Born and the CFTC conducted and released a study, styled a 'concept release,' that raised questions as to the integrity of the over-the-counter derivatives trading market and the lack of federal regulation appurtenant thereto. U.S. financial leadership, together with the SEC, "rushed out a statement" within hours of the release of the CFTC's 'concept release' that expressed "grave concerns" about the study.
>
> Ultimately, Director Born was quashed by Congress. Under a dizzying lobbyist barrage, led by energy giant Enron, amongst others, the corporate interests convinced Congress in 2000 to pass the Commodity Futures Modernization Act ("CFMA"). The CFMA

196. *See* DAVID L. RATNER & THOMAS LEE HAZEN, SECURITIES REGULATION: IN A NUTSHELL 96 (7th ED. 2002).

> introduced the most dramatic and sweeping changes in commodity futures market regulation since the trading phenomenon began seventy-eight years earlier, but it failed therein to regulate over-the-counter derivatives trading. Such failure to regulate over-the-counter derivatives trading allowed an environment to exist whereby energy and telecom companies such as Enron and Global Crossing were able engage in wildly speculative over-the-counter trading of derivatives.[197]

In light of the Enron debacle, the California energy crisis and the frontal assault upon shareholders and employees of energy companies, particularly those trading in over-the-counter derivative markets, one legacy of the CFMA will be the market crash of 2002.

### *A. How the CFMA Changed the Industry*

Certain provisions of the CFMA essentially enabled Enron to trade in speculative energy derivatives left unregulated under the CFMA—thereby allowing Enron to deftly hide, manufacture and fraudulently disguise various expenditures in sham corporate structures.[198] Under the newly enacted CFMA:

> [t]here is virtually no regulation for off-exchange principal-to-principal transactions between sophisticated and wealthy investors that fall within the statutory concept of eligible contract participants ("ECPs"), consisting of institutional and highly accredited customers. ECPs include financial institutions, insurance companies, registered investment companies; corporations, partnerships, trusts, and other entities having total assets exceeding $10,000,000, employee benefit plans subject to ERISA that have total assets exceeding $5,000,000; governmental entities, as well as some categories of investors . . . .
>
> *The Commodity Futures Modernization Act of 2000, abolished the former contract market monopoly for commodities futures and options contracts, which prohibited the trading of those contracts other than on an organized exchange. The Act thus permits for the first time over-the-counter markets for commodities futures and options*. The Act also introduced a new category of futures markets for certain commodities-based products. This new category of commodities market is open not to retail investors generally (unless participating through a registered futures commission merchant) but

197. *See* cummings, *supra* note 4, at 1042-44.

198. *See* Hazen, *supra* note 195, at 440-41; *see also* cummings, *supra* note 4, at 998-99, 1044-48.

> rather is only to specified qualified investors or other investors who trade through a futures commission merchant.[199]

Following its expensive lobbying campaign to ensure that over-the-counter commodity derivative trading remained unregulated, the Enron executives went to work creating myths of value and earnings by fraudulently trading in energy derivatives.[200] Enron was not alone in using the over-the-counter derivatives market to consummate controversial transactions that seriously injured investors and employees.[201]

The Commodity Exchange Act ("CEA"),[202] enacted in 1974 and substituting the title "Commodity Exchange Act" in place of "The Grain Futures Act," was amended by the CFMA in 2000. Section 103 of the

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199. *See* HAZEN & RATNER, *supra* note 196, at 96 (emphasis added).

200. *See* Frank Partnoy, *Enron and Derivatives*, Testimony Before the United States Senate Committee on Governmental Affairs, Jan. 24, 2002, *available at* http://ssrn.com/abstract=302332 (last visited March 17, 2007). Professor Partnoy, while testifying before the U.S. Senate told Senators:

> And, let me repeat, the OTC derivatives markets are largely unregulated. Enron's trading operations were not regulated or even recently audited, by U.S. securities regulators, and the OTC derivatives it traded are not deemed securities. OTC derivatives trading is beyond the purview of organized, regulated exchanges. Thus, Enron—like many firms that trade OTC derivatives—fell into a regulatory black hole. . . . [I]n March 1997, the Commodity Futures Trading Commission began considering whether to regulate OTC derivatives. But its proposals were rejected, and in December 2000 Congress made the deregulated status of derivatives clear when it passed the Commodity Futures Modernization Act. *As a result, the OTC derivatives markets have become a ticking time bomb, which Congress thus far has chosen not to defuse*.

*Id.* (emphasis added); *see also* cummings, *supra* note 4, at 1044-48; Richard D. Cudahy, *Judges' Forum No. 2: Whither Deregulation: A Look At The Portents*, 58 N.Y.U. ANN. SURV. AM. L. 155 (2001); Hon. Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)regulation After The Rise And Fall of Two Energy Icons*, 26 ENERGY L.J. 35, at 87 (2005) (noting that Enron "embarked upon a lavish public relations effort designed to educate consumers (and voters) on the virtues of electricity deregulation").

201. *See infra* notes 258-61 and accompanying text.

202. *See* 7 U.S.C. §§ 1-2 (2000). The CEA has been described as:

> The principal legislation governing the trading of commodities and futures in the United States. This act, as amended, establishes the Commodities Futures Trading Commission ["CFTC"]; sets out the circumstances under which the CFTC regulates, or can exempt from regulation, transactions in physical commodity and financial futures contracts; and incorporates the Shad-Johnson Agreement which describes the division of authority and responsibility for regulation of financial contracts between the CFTC and the Securities and Exchange Commission.

CFMA 2000 adds Section 2(d) to the CEA and serves to exclude from most provisions of the CEA certain transactions in "excluded commodities."[203] The term "excluded commodity" is generally defined in the 1933 Securities Act as a financial commodity, index or contingency.[204] Futures and commodity options transactions in excluded commodities are traditionally regulated under the CEA "*unless they are traded on an unregulated exchange or in an unregulated OTC transaction*."[205] The 1933 Securities Act provides that the CEA does not apply to transactions "in an excluded commodity if the parties to the contract are eligible contract participants and if the contract is not executed or traded on a 'trading facility.'"[206]

> A 'trading facility' is defined in Section 1a(33) of the CEA, to be 'a person or group of persons that constitutes, maintains or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids and offers made by other participants that are open to multiple participants in the facility or system.' The definition excludes: simple systems that enable participants to negotiate and enter bilateral transactions; trading by a government securities broker or dealer in government securities; and facilities in which bids and offers and the acceptance of bids and offers are not binding.[207]

Simply stated, when Congress enacted the CFMA, it carefully and particularly refused to regulate the over-the-counter derivatives trading market, despite pleas and warnings from the Director of the CFTC,[208] by safely removing from regulation futures and commodity option transactions that are "traded on an unregulated exchange or in an unregulated OTC transaction."[209] Further protecting Enron and a dozen

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*Glossary: Commodity Exchange Act*, Riskinstitute.ch: IFCI Risk Management, *available at* http://risk.ifci.ch/00010807.htm (last visited Sept. 29, 2003).

203. *See* 7 U.S.C. § 2(d) (2000); *see also* CHARLES EDWARDS ET AL., COMMODITY FUTURES MODERNIZATION ACT OF 2000: LAW AND EXPLANATION 26 (CCH) (2001).

204. *See* CHARLES EDWARDS ET AL., *supra* note 203, at 24.

205. *Id*. at 24, 26 (emphasis added).

206. *Id*. at 26.

207. *Id*.

208. *See* cummings, *supra* note 4, at 1042-44 (detailing the attempts of Commodities Futures Trading Commission Director Brooksley Born to introduce needed regulation into the over-the-counter derivatives trading market).

209. *See id*.; *see also* CHARLES EDWARDS ET AL., *supra* note 203, at 26; Jerry W. Markham, *Super Regulator: A Comparative Analysis of Securities and Derivatives*

other fraudulent energy traders, Congress ensured that derivative energy trading would remain unregulated if the contract is not executed or traded on a "trading facility."[210]

The CFMA also provided enabling legislation for Global Crossing and Qwest Communications, when Congress excluded "swap transactions" from regulatory protections of the CEA under certain conditions.[211] "An agreement, contract or transaction in a commodity other than an agricultural commodity is excluded if it is entered into between eligible contract participants, is subject to individual negotiation by the parties, and is not executed or traded on a trading facility."[212] Global Crossing and Qwest Communications liberally used unregulated "swap transactions" to trade valueless access to certain of its cable and infrastructure, thereby recording income and value for worthless swaps and trades.[213]

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*Regulation in the United States, The United Kingdom, and Japan*, 28 BROOKLYN J. INT'L L. 319 (2003) ("Among other things, the [CFMA], through what in part is sometimes called the 'Enron amendment,' exempted most over-the-counter derivatives from regulation as long as the parties were large institutions or wealthy individuals.").

210. CHARLES EDWARDS ET AL., *supra* note 203, at 26. Edwards, et al. state that:

> The Act provides that the CEA does not apply to transactions in an excluded commodity if the parties to the contract are eligible contract participants and if the contract is not executed or traded on a 'trading facility.' This exclusion is designed to allow financially sophisticated institutions and individuals to enter into transaction in financial instruments on the over-the-counter market.

*Id.* The CFTC retained authority to take action against individuals who manipulated or attempt to manipulate the market price of a commodity or who willfully make false or misleading statements in any registration application filed with the CFTC. *See* Allan Horwich, *Warnings to the Unwary: Multi-Jurisdictional Federal Enforcement of Manipulation and Deception in the Energy Markets After the Energy Policy Act of 2005*, 27 ENERGY L.J. 363, 375 (2006). To date, the CFTC has taken action against El Paso, Enron and Dynegy amongst others. *See id*. at 376-78.

211. *See* CHARLES EDWARDS ET AL., *supra* note 203 at 27-28; *see also* 7 U.S.C. § 2(g) (2001).

212. *See* CHARLES EDWARDS ET AL., *supra* note 203, at 27.

213. *See* cummings, *supra* note 4, at 1000; *see also* Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work),* 35 CONN. L. REV. 915, 932-34 (2000). Cunningham notes that:

> Qwest teamed up with, among others, Global Crossing to create gimmick transactional accounting during the telecom boom. Both were providers of local telephone services in the United States. Capacity swaps were a leading trick used by Qwest. The companies developed telecommunications capacity, incurring costs. Each then swapped that capacity with capacity of other telecom companies, including each other.

*Id.*

## *B. CFMA's Effect on Energy Industry and Economy*

Unregulated over-the-counter energy derivatives trading ended up being the primary culprit for Enron's massive deception against the U.S. investing public. "Enron used derivatives to mask balance-sheet problems."[214] In truth, Enron's deceit and subsequent revelations that rival energy traders used similar derivatives schemes in controversial transactions have prompted investors and shareholders to lose confidence in the largely unregulated energy trading sector, causing losses of more than $200 billion in the total market value of a dozen energy companies over the past several years.[215] Massive market value was lost, shareholders lost billions, and numberless jobs disappeared, yet most of this damage could have been prevented: "Ms. Born [former Director of the CFTC], these days practicing law in Washington, [D.C.], says that if she had succeeded four years ago, regulators would have been more likely 'to detect misuse of derivatives by entities such as Enron.'"[216]

Most reports and commentators agree that Enron stunned corporate America and initiated the market crash of 2002, and that WorldCom and Global Crossing clarified that Enron was not one "bad apple" in a bushel of good, as corporate executives countrywide came under new fire.[217]

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214. *See* Schlesinger, *supra* note 137, at A1.

215. *Id.*

216. *Id.* at A1 ("But Mr. Greenspan still believes in the value of an unregulated derivatives market. Those instruments, he said in a speech in September [(2002)], 'have effectively spread losses from defaults by Enron, Global Crossing' and others, cushioning the blow to the economy.").

217. *See generally* Greg Hitt, *Bush Takes Cues From a Bull Moose: President Echoes Teddy Roosevelt's Tough Tone on Corporate Ethics, but Keeps Reaganite Faith*, WALL ST. J., July 8, 2002, at A4. Hitt reported in 2002:

> The battery of corporate scandals during the past year is forcing an evolution in Mr. Bush's presidency. The Texas Republican rode into the White House as a philosophical heir to Ronald Reagan, promising tax cuts, less regulation and limited government. He embraced big business – raising more in campaign contributions than any American politician in history and filling several cabinet seats with chief executives. But circumstances (Enron Corp., WorldCom, Global Crossing Ltd.) are forcing Mr. Bush to sound more like Teddy Roosevelt, the progressive Republican president who took on corporate America a century ago . . . .
>
> Of course, this apparent metamorphosis goes only so far. Mr. Bush's administration is still decidedly friendly to business concerns and business executives. His heightened rhetoric seems designed at least in part to sound tough enough so he can defuse calls for new regulations.

*Id*.

Enron's fraud was the precursor to the market tumble of 2002. Furthermore, a deregulating Congress that imprudently passed the CFMA enabled Enron's fraud. Enron stood ready to take advantage of Congress's lapse in judgment—a lapse in judgment that failed to protect U.S. investors.[218]

### C. Examination of Legislative History in Opposition to the CFMA

The CFMA was passed in 2000 as part of an omnibus appropriations bill.[219] The Republican Congress has been accused of burying major commodity deregulation legislation in an appropriations bill that was introduced during "the chaotic days after the Supreme

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218. *See* Mark Mills & Peter Huber, *Deregulation Will Survive Enron*, WALL ST. J., Dec. 6, 2001, at A20. Mills and Huber describe Enron's movement from a traditional energy provider to a sophisticated (and fraudulent) derivatives trading machine:

> Enron got one thing right. New technology is dramatically changing the energy business, especially electricity. Unfortunately for its investors, the new technology isn't the one Enron championed.
>
> In fact, Enron didn't champion energy technology at all. To be sure, it was once an energy company that pumped real gas to real customers. But Enron's genius, while it lasted, was to get out of the still-regulated market for energy and into the largely deregulated market for contracts.
>
> The company moved into commodities trading—gas in 1989, electrons in 1994, and bandwidth in 1999. The profits on the trades—of cubic feet of gas it didn't extract or burn, of kilowatt-hours it didn't generate, and of fiber-optic lines it didn't light—sent Enron's revenues soaring. The company extended its trading operation into pulp and paper, plastics and metals, too. Dynegy was interested in buying Enron mainly for what it saw as the company's 'crown jewel'—EnronOnline.
>
> EnronOnline's trading floor was a sophisticated dot-com, basically, engaged in commodity barter and arbitrage. It was a trading house, a mercantile exchange, a broker, and a part-time bank. But as such institutions sometimes do, it ended up writing new paper faster than it inspired new trust.

*Id*.

219. *See* Richard A. Gephardt, *Drive to Deregulate: GOP Congress Paved the Way for Enron and Other Corporate Misdeeds*, Special Report, DEMOCRATIC POLICY COMMITTEE, July 11, 2002, at 8. Referring to enactment of the Commodity Futures Modernization Act, Representative Gephardt wrote:

> In 2000, as part of the omnibus appropriations bill, Republicans included the Commodities Futures Trading Commission (CFTC) Modernization bill that deregulated energy trading. Specifically, the bill expanded and codified the CFTC decision to exempt energy contracts from oversight while also exempting online trading. According to the Wall Street Journal, this "provision was sometimes referred to by Capitol Hill staff as the 'Enron Point.'"

*Id*. (citations omitted).

Court issued its ruling sealing George W. Bush's victory in the disputed 2000 presidential election."[220] The legislative history of the CFMA certainly indicates that precious little debate was held prior to the passage of a federal legislation that made sweeping changes to the regulation of commodities trading, derivatives trading, and swap transactions.[221] The stated purpose of the CFMA was to:

> [R]eauthorize appropriations for the CFTC for five additional years and would reform the CEA in three primary ways. First, it would incorporate the unanimous recommendations of the President's Working Group . . . . Second, it would codify the regulatory relief proposal of the CFTC to ensure that futures exchanges are appropriately regulated and remain competitive. Third, this legislation would reform the Shad-Johnson jurisdictional accord, which sought to establish jurisdictional boundaries between the agencies and banned the trading of single stock futures 18 years ago.[222]

The CFMA did so much more (and so much worse) than Congress had hoped and predicted. For instance, in the Senate Committee Report recommending passage of the CFMA, and in compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the recommending committee issued the following evaluation of the impact of the CFMA:

> The entire futures industry in the United States would be directly affected by this legislation. Its impact would be one of lower cost both to the businesses and to the individuals in the futures markets due to the expanded market opportunities opened under the bill and the decrease in the cost of implementing the regulations under the legislation. As for the record keeping requirements under the bill, the records that futures exchanges are required to keep are less circumscribed and therefore the cost will be lower for the futures exchanges. This cost savings will result in lower transaction costs to individuals and businesses trading on the exchanges.
>
> The securities industry would likewise be affected as they would have new business opportunities opened to them with the repeal of the ban on single stock futures. Firms in the financial services business would experience a growth in opportunities as would individuals trading futures on these markets. Individuals and

220. *Id*. (citing Public Citizen, a public interest group).
221. S. REP. NO. 106-390 (2000).
222. *Id.* at 1-2.

> businesses in the securities markets would be better situated to manage their risk.[223]

Clearly, the enacting Congress held a far brighter prediction for the positive impact the CFMA would have on the Nation's economy than it actually did. Enron's use of the CFMA to collapse the energy market and devastate the economy certainly blindsided this deregulating Congress.

## V. PROPOSALS FOR RE-REGULATION

The picture of malfeasance painted above is certainly bleak and gloomy. Undoubtedly, the "deregulators" of the Revolution Congress believed that the corporate executives and industry insiders would behave in a fundamentally fair and honest fashion when given the reins to the most deregulated modern economy and industry in U.S. history. Unfortunately for the "deregulators," massive fraud, astonishing dishonesty and economic misfortune were the waiting rewards for hastily deregulating crucial U.S. industries.

Federal regulation in several sectors and industries must be returned in order to once again protect the U.S. consumer and investor. The Sarbanes-Oxley Act simply does not provide enough meaningful regulatory protections.[224]

### *A. Re-regulation Must Occur to Protect Investors and Ensure the Integrity of the Capital Markets*

#### *1. The 1996 Telecommunications Act*

Repairing the damage done by the Telecommunications Act will be extremely difficult. As outlined above, because of severe miscalculations in technology growth and corporate desire for competitive entrance into the long distance telephone markets, Congress created a law that was and continues to be largely unworkable.[225] While

223. *Id.* at 16.

224. *See* cummings *supra* note 4, at 1059-64 ("In truth, SOX, which has been criticized as doing little more than attempting to assuage the conscience of U.S. investors, has accomplished little or nothing where investor protections are concerned.").

225. *See* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 34-49 (1996); s*ee also supra* notes 94-98 and accompanying text.

complete repeal of the PSLRA is appropriate to mend the enormous problems in corporate governance,[226] simple repeal of the Telecommunications Act will not effectuate the necessary re-regulation that must occur in the telecom industry. Congress miscalculated when it deregulated a telecom industry where no competition existed in certain sectors, and competition would not emerge for a significant period of time.[227]

Many consumer advocates and economists believe that re-regulation must occur before any further deregulation should be attempted, such that true competition is well established.[228] Professor Eli Noam, an economics professor at Columbia University, recognized that deregulation of the telecom industry led to unfortunate results.[229] Professor Noam has proposed that Congress "regulate today in order to deregulate tomorrow."[230] Noam believes that the best approach toward repairing the negative effect of the Telecommunications Act is to hope for an oligopoly and "seek replacement" of the Telecommunications Act with other ideas.[231]

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Professor Krattenmaker, while providing a useful analysis of the Telecommunications Act shortly after it was enacted in 1996, proclaims the legislation to be good, bad and ugly—with the ugly component prominently displayed:

> First, I think it is downright shameful to pretend to enact a procompetition policy, while continuing to preserve the worst features of our old spectrum allocation policies; while exacerbating the anticompetitive, antiefficiency effects of universal service policy; and while steadfastly refusing to ask (or require the FCC to ask) real questions about real competitive conditions in real markets. My objection is not simply to the inelegance or intellectual shallowness of these policies, but to the real harms they threaten to the goal of competition: serving consumers efficiently. No one of these failings is likely to cause 'pretend competitive' markets to perform badly, but in combination they may do much harm.

*Id*. at 48.

226. *See supra* notes 44-45 and accompanying text.

227. *See* Hancock, *supra* note 170, at 1C (quoting deregulation pioneer Alfred Kahn as criticizing Congress for initiating the Telecommunications Act without ensuring that "potentially effective competition" existed before it deregulated the telecom industry).

228. *See Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, *supra* note 116, at 1; *see also* Eli Noam, *Regulating in Order to Deregulate*, FIN. TIMES, May 22, 2002, *available at* http://www.ft.com (last visited Mar. 14, 2007).

229. *See generally* Noam, *supra* note 228.

230. *See id.*

231. *See id.* In 2002, economist Eli Noam wrote:

> The 1996 Telecom Act was built on the fundamental assumption that competitive markets will emerge. Today it seems the best we can hope for is an oligopoly. Given this and similar lessons, it is perhaps time to take a realistic look at the Act (and

If re-regulation is in fact the answer to the Telecommunications Act's failures, then several lessons have undoubtedly been learned, and must now be heeded when seeking re-regulation: (1) "unregulated monopolies (like the cable industry) abuse consumers"; (2) "effective competition can produce substantial benefits"; and (3) "regulators must force the monopolists to open their markets if consumers are ever to benefit from competition."[232]

With these lessons in mind, Congress should take immediate action and seek to enact common sense regulation that will repair the telecom industry, protect investors and employees involved in the telecom industry, and learn from its mistakes in seeking to deregulate industries prior to genuine competition being inevitable.

Several factors must be addressed when considering re-regulating the telecom industry: (a) the telecom industry is organized around two, non-competing networks (telephone and cable); (b) wire-to-wire competition has failed because the major industry players have consolidated and merged to continue control over core markets; (c) wireless technology, as of today, has failed to be able to compete for communications services; and (d) high speed Internet service is fast becoming its own "telecommunications product space," which must soon be regulated.[233]

First, Congress must recognize and legislate with the understanding that telecommunications technology is converging.[234] Citizens of the global economy are "witnessing a convergence of devices accompanied by a plethora of transmission paths. The telecommunications receiver is a radio, computer, television, telephone, VCR, and fax machine all rolled into one. We can get information to such devices by broadcast, microwave, satellite, tape or disk, copper wire, or optic fiber."[235]

Congress must legislate in a forward thinking manner, regulating telecom industries that require regulation and promoting competition in

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similar laws elsewhere) and seek its replacement by other approaches.
*Id.*

232. *See Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, *supra* note 116; *see also* Eli Noam, *Too Weak To Compete*, FIN. TIMES, July 17, 2002, *available at* http://www.ft.com (last visited Mar. 14, 2007) ("A stench of scandal is hanging over the Telecommunications industry.").

233. *See Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, *supra* note 116.

234. *See* Krattenmaker, *supra* note 225, at 6.

235. *Id*.

telecom industries that allow such.[236] When the 1934 Telecommunications Act was passed, it likely seemed sensible to allow carefully regulated monopolies to provide telephone service, as only "one wire" was needed to go into each subscribing home.[237]

The cable industry, ostensibly deregulated in the 1990s with little positive attendant deregulatory results such as greater competition and lower costs to consumers,[238] may well be an industry suited to the concept of a "natural monopoly."[239] Krattenmaker, when examining the Telecommunications Act, specifically in connection with the cable television provisions, contended:

> Here, too, I believe Congress labored mightily and brought forth a mouse. I think there is some, but not much reason to believe that cable can be provided competitively. Probably, it is a natural monopoly, so consumers are unlikely to be able to protect themselves by switching to another cable company in their neighborhood.[240]

As discussed above, the deregulation of cable television has failed

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236. *See generally id*.

237. *See id*. at 5. Professor Krattenmaker explains:

> Thus, when Morse, Bell and Marconi invented the telegraph, telephone, and wireless transmitter, respectively, each pushed us further along a path already trod. What they added to the process of information transfer was the use of electrical energy to drive the system.
>
> All this was comparatively new when Congress wrote the Communications Act of 1934. Everything seemed much simpler then. Electronic communications moved through either the air or wires. The market for communications through wires was a natural monopoly—who ever heard of two communications wires going into the same house?—and so the telephone and telegraph (after which the monopolist AT&T was named) were to be regulated as common carriers.

*Id*. (citation omitted). Krattenmaker further explains that in many instances when a "natural monopoly" exists, it should be allowed to exist in a carefully regulated environment. *See id*. at 32-33. In other instances, removal of regulation in a monopolistic environment is appropriate when a market can logically permit viable competition for a consumer's business. *See id*.

> Perhaps, due to economies of scale and scope, it is cheaper to have just one telecommunications wire going into each and every home. If so, it might be wise to let one firm build and operate those wires (and their attendant switches and interconnection points) without being able to sell services to businesses and consumers (that is, without having the ability to prey in allied markets).

*Id*. at 32-33.

238. *See supra* notes 80-87 and accompanying text.

239. *See* Krattenmaker, *supra* note 225, at 34.

240. *Id*. (citation omitted).

in two major ways: competition has not followed and cable rates have ballooned.[241] A Denver, Colorado report indicates:

> In the Denver area, rates for expanded basic cable service have increased on average 43 percent since 1996 and 12 percent since 1999, according to numbers supplied by AT&T Broadband . . . .
>
> Competitive pricing was a key goal of the hard-fought Telecommunications Act. But the Consumers Unions says that hasn't happened, in part because cable companies have tried to edge out competitors like satellite television.
>
> The group, which bills itself as an unbiased consumer service, called on Congress to shift oversight of cable companies to local regulators, much like telephone companies.
>
> "When you look at the price hikes and the broken promises to compete, it is clear that there needs to be stricter public accountability in the cable industry," said Gene Kimmelman, director of Consumer Union's office in Washington.[242]

Congress needs to repair its cable television miscalculation by re-regulating the industry; not by returning to the regulatory structure in place prior to the Telecommunications Act, but by imposing sensible new regulation in a way that the consumer and investor will once again be protected. Originally, the FCC imposed rate regulation upon cable television at Congress's direction, eschewing the traditional rate-of-return regulation[243] in favor of imposing "price caps"[244] on all cable systems.[245] The "imposition of price caps on cable systems rendered

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241. *See supra* notes 121-35 and accompanying text; Laurie Kellman, *Cable TV Rates Far Outpace Inflation, Activists Report*, ROCKY MTN. NEWS, July 25, 2002, at 13B. This report shows that:

> Cable rates have shot up far more than inflation despite government's effort to deregulate the telecommunications industry and foster competition, consumer and industry groups say. Consumer Union, which publishes Consumer Reports magazine, says rates have risen 45 percent since the 1996 passage of the Telecommunications Act, which ordered the deregulation of the cable industry.

*Id.*

242. Kellman, *supra* note 241, at 13B.

243. Rate-of-return regulation is in play when a government agency monitors all costs associated with the regulated industry and chooses an acceptable additional rate of return. *See* Krattenmaker, *supra* note 225, at 31.

244. Price caps are at play when a governmental agency, like the FCC, sets a limit or cap on the regulated firm's prices, prohibiting the company from charging a higher price than the cap. *See* Krattenmaker, *supra* note 225, at 3. A firm is, of course, free to lower prices below the cap as much as it wishes.

245. *See* Krattenmaker, *supra* note 225, at 31.

them almost powerless to increase consumer satisfaction by offering subscribers better quality, albeit at a higher cost."[246] In enacting the Telecommunications Act and deregulating the industry by removing the price caps, Congress and proponents promised an increase in competition for the consumer's business in the cable industry, which would result in an increase in quality, customer service, and a much-hyped decrease in the costs related to subscribing to cable television.[247] These promised benefits have simply not come to pass.

Congress must consider re-regulating the cable television industry by imposing a new traditional rate-of-return regulation upon those monopolies currently running the industry. The past ten years have proven that, given the opportunity to compete and serve customers with better quality and lower price, the cable television companies hunkered down, refusing to compete or open their markets to competition, and have refused the opportunity to provide high quality at low costs by instead choosing the corporate chase of increasing revenue.[248] "It is most likely that running a telecommunications wire to the home is a natural monopoly and so one ought to concentrate on regulating that monopoly or mitigating its ill effects."[249]

In the period of the deregulation frenzy that followed the Revolution Congress, dozens of telecom companies, including telecom giant (and cable provider) Adelphia, used the stage to mislead investors, burn consumers, bury employees and devastate the economy.[250] The removal of important portions of federal oversight from the Telecommunications industry has proved destructive, harmful, and injurious to the average U.S. consumer, investor, and employee.

Additionally, Internet use, subscription, and growth were left largely unregulated by the Telecommunications Act. Congress must address this oversight in a fair and equitable manner by introducing new regulation into the Internet sector. Again, Internet connectivity, 75 percent of which is provided through cable modem,[251] bumps up against the category of a natural monopoly. Those industries that appear to be a natural monopoly need to be regulated by Congress through the imposition of some form of rate regulation. Otherwise, the monopolists

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246. *Id*.
247. *See supra* notes 80-87 and accompanying text.
248. *See supra* notes 13-23 and accompanying text.
249. *See* Krattenmaker, *supra* note 225, at 35.
250. *See supra* notes 13-23 and accompanying text.
251. *See* Krattenmaker, *supra* note 225, at 34.

will disadvantage the consumer, as was recognized and feared by opponents of the Telecommunications Act.[252]

Congressional action to repair the damage caused by the Telecommunications Act, and to begin to heal the wounds inflicted upon U.S. investors by the Revolution Congress, needs to focus clearly on re-regulating various industries deregulated by that Congress.

### *2. The Commodities Futures Modernization Act*

As discussed at length above, Congress in 1998 greeted the over-the-counter derivatives trading concerns of CFTC director Brooksley Born with disdain.[253] Born's proposal to explore whether regulation was necessary for the over-the-counter derivatives trading market was met by a firestorm of disapproval.[254] Director Born worried and feared that "leaving the derivatives unregulated . . . carried huge risks."[255] Determined to provide safe haven for investors and shareholders, Born and the CFTC published a "concept release" that raised questions as to the integrity of the over-the-counter derivatives trading market and the lack of federal regulation appurtenant thereto.[256] In hindsight, Director Born was right on track—worrying about the potential manipulation of the over-the-counter derivatives trading market—while the Congress that quashed Born was, once again, decidedly off track.

In light of the Enron debacle[257] followed by revelations of similar fraud at El Paso,[258] Dynegy[259] and Halliburton,[260] and in light of the

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252. *See supra* Part III.C.

253. *See supra* notes 197, 208 and accompanying text.

254. *See* Schlesinger, *supra* note 137, at A1.

255. *Id*.

256. *Id*.

257. *See supra* Part V.A; *Enron's Links to Bush Team Raise Questions*, CNN.com, http://www.cnn.com/2002/US/01/11/enron.facts/index.html. This report mentions that:

> Facing a possible conflict of interest, Attorney General John Ashcroft and a top aide withdrew . . . from any connection to the Enron criminal investigation, a move that came on the same day the White House revealed contacts between two Cabinet secretaries and the company's chairman before the giant energy corporation filed for bankruptcy last year.

*Id.*

258. *See El Paso Corp., California Settle*, WASH. POST, June 27, 2003, at E02. The POST reports:

> El Paso Corp., owner of the biggest U.S. natural gas pipeline system, reached a $ 1.6 billion settlement with California, which said the company manipulated natural gas prices in 2000 and 2001. The deal calls for El Paso, which admitted no wrongdoing,

> to pay $ 78.6 million upon signing. Among other things, El Paso will pay $45 million a year for 20 years.

*Id.*; Neela Banerjee, *Ex-Executive Of El Paso Is Indicted Over Gas Data*, N.Y. TIMES, Dec. 5, 2002, at C3 ("A former vice president of the El Paso Corporation, the country's largest natural gas pipeline company, has been indicted in Houston on charges of falsely reporting 48 gas trades last year, according to a statement released yesterday by federal prosecutors."); David Barboza, *Suit in Texas Says El Paso Contrived Energy Trades*, N.Y. TIMES, Nov. 22, 2002, at C3 ("The lawsuit, filed by Oscar S. Wyatt Jr., one of El Paso's largest shareholders, says the company engaged in what are commonly referred to as wash trades to drive up the value of El Paso's stake in a new online trading platform called the Intercontinental Exchange."); Nancy Rivera Brooks, *Former El Paso Trader Indicted; The Executive is Charged with Reporting Phony Natural Gas Trades to Boost Prices and Profit*, L.A. TIMES, Dec. 5, 2002, at 1 ("A former El Paso Corp. energy trader was indicted for allegedly reporting fictitious natural gas transactions to an industry publication in an effort to boost prices and company profit."); Chip Cummins, *Leading the News: El Paso Ex-Trader Indicted Over Energy Reports*, WALL ST. J., Dec. 5, 2002, at A3; Dow Jones, *Business Brief—El Paso Corp.: Former Trader of Natural Gas Pleads Not Guilty to Charges*, WALL ST. J., Dec. 10, 2002, at A14; Russell Gold, *El Paso Corp. to Pay $20 Million in Settlement—CFTC Is Still Investigating 25 Other Energy Firms In Price-Fixing Probe*, WALL ST. J., Mar. 27, 2003, at C3. The Journal reported that:

> El Paso and California officials agreed to a proposed settlement to resolve allegations the company withheld substantial natural-gas capacity, driving up prices and contributing to the state's energy crisis. The company will pay $100 million in cash and $125 million in stock immediately as part of a settlement package valued at about $1.1 billion.

*Id.*; Reuters, *Feds Allege Pricing Conspiracy at El Paso Corp.; Prosecutor Says Bogus Gas Trades Reported for Publication Involved Several Employees*, L.A. TIMES, Jan. 14, 2003, at 3.

259. *See Ex-Dynegy Execs Plead Guilty*, CNN Money, http://money.cnn.com/2003/08/05/news/companies/dynegy.reut/index.htm ("Two former executives at energy company Dynegy Inc. pleaded guilty Tuesday [(Aug. 5, 2003)] to one count of conspiracy to commit securities fraud in a 2001 scheme dubbed "Project Alpha" to burnish the company's finances.").

260. *See SEC Launches Probe Into Halliburton's Accounting*, Dallas Bus. J., May 29, 2002, http://dallas.bizjournals.com/dallas/stories/2002/05/27/daily13.html. The Dallas Business Journal reported that:

> The Securities and Exchange Commission has launched a preliminary investigation of Halliburton Co's accounting treatment of cost overruns on construction jobs. The Dallas-based oil services giant, which was headed by Vice President Dick Cheney from 1995 to August 2000, said in a press release late Tuesday that it expects to receive a formal request for documents or a subpoena in the next few days.

*Id.*; *Cheney May Still Have Halliburton Ties*, CNN Money, Sept. 25, 2003, *available at* http://money.cnn.com/2003/09/25/news/companies/cheney ("A congressional report concludes that, under federal ethics standards, Vice President Dick Cheney still has financial interest in Halliburton, the energy services company he used to run.").

frontal assault upon shareholders and employees of energy companies—particularly those trading in over-the-counter derivative markets—one legacy of the CFMA will be the market crash of 2002. Congress must correct the mistakes that it made in 1998 and 2000 when it refused to provide direct regulation over the same market that enabled Enron to run amok: Congress must strengthen regulation of the over-the-counter derivative and futures trading markets.

The CFTC is currently in place and regulates the trading of commodities and futures in various markets with care and caution. The private trading of commodities between select corporations that effectuate such trading "off market" must now come within the grasp of the CFTC and federal oversight. When the 106th Congress enacted the CFMA, it granted a free regulatory pass to corporations engaging in "off-exchange principal-to-principal transactions between sophisticated and wealthy investors that fall within the statutory concept of eligible contract participants ("ECPs"), consisting of institutional and highly accredited customers. ECPs include financial institutions, insurance companies, registered investment companies; corporations, partnerships, trusts, and other entities having . . . assets exceeding $10,000,000 . . . ."[261] Further, the CFMA essentially "abolished the former contract market monopoly for commodities futures and options contracts, which prohibited the trading of those contracts other than on an organized exchange. The Act thus permits for the first time over-the-counter markets for commodities futures and options."[262]

Passage of the CFMA also allowed Congress to carefully and particularly refuse to regulate the over-the-counter derivatives trading market, despite pleas and warnings from the Director of the CFTC, by safely removing from regulation futures and commodity option transactions that are "traded on an unregulated exchange or in an

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261. *See* HAZEN & RATNER, *supra* note 196, at 96.

262. *Id.*; *see also* Frank Partnoy, *Lessons From Enron, How Did Corporate and Securities Laws Fail? A Revisionist View of Enron and the Sudden Death of "May"*, 48 VILL. L. REV. 1245, 1264 (2003). Professor Partnoy explains that:

> [T]he regulatory exemptions applicable to certain types of derivatives (e.g., the Commodity Futures Modernization Act) and the limited disclosure requirements associated with accounting pronouncements related to derivatives . . . will continue to permit companies to avoid disclosure even in the face of market pressure. There has not been much pressure since Enron's collapse to reverse the CFMA exemptions for OTC derivatives.

*Id.*

unregulated OTC transaction."[263] Congress ensured that derivative energy trading would remain unregulated if the contract is not executed or traded on a "trading facility," further protecting Enron and a dozen other fraudulent energy traders.[264]

Congress, through the CFMA, also provided enabling legislation for Global Crossing and Qwest Communications by excluding "swap transactions" executed under certain conditions from regulatory protections of the CEA.[265] "An agreement, contract or transaction in a commodity other than an agricultural commodity is excluded if it is entered into between eligible contract participants, is subject to individual negotiation by the parties, and is not executed or traded on a trading facility."[266] Global Crossing and Qwest Communications liberally used unregulated "swap transactions" to trade valueless access to certain parts of its cable and infrastructure, thereby recording income and value for worthless swaps and trades.[267]

Congress must simply grant the CFTC regulatory oversight of those markets it specifically excluded when enacting the CFMA. Off-exchange principal-to-principal ("ECP") transactions between sophisticated or wealthy investors must now face governmental

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263. *See* CHARLES EDWARDS ET AL., *supra* note 203, at 27.

264. *See id*. at 26. Scholars argue that deregulation of derivatives trading led to Enron's collapse and warn that re-regulation of the non-securities derivatives markets are in order. *See* Hazen, *supra* note 195, at 440. Professor Hazen reminds that:

> Some of the securities law re-regulation [Sarbanes-Oxley] may well be an overreaction to events in the news. On the other hand, it seems more likely that this was a necessary wake-up call and that a similar reaction is warranted with respect to the non-securities derivatives markets . . . . Lest we forget, one of the major corporate failures was Enron, which resulted not only from aggressive accounting practices that were addressed by the Sarbanes-Oxley Act, but also Enron's heavy involvement in derivatives transactions.
>
> *The deregulation of the non-securities derivatives markets leaves gaps that may provide openings for additional failures*. It would be wise to reconsider the deregulation of the non-securities derivatives markets before having to reactivate re-regulation in the wake of new major scandals. There would be obvious opposition to re-regulation of the derivatives markets from those observers and commentators who generally favor free unregulated markets.

*Id*. (emphasis added); *see also* Partnoy, *supra* note 200, at 32 ("Congress also must decide whether, after ten years of steady deregulation, the post-Enron derivatives markets should remain exempt from the regulation that covers all other investment contracts. In my view, the answer is no.").

265. *See* CHARLES EDWARDS ET AL., *supra* note 203, at 27.

266. *Id*.

267. *See supra* notes 211-12 and accompanying text.

regulation. Over-the-counter trading of commodities, like energy or futures and derivatives, particularly those not executed or traded on a trading facility, must be confronted with oversight and CFTC regulation. New regulation will quell the chaos visited upon the U.S. capital markets by Enron and the host of other corporate energy criminals. Such regulations will eventually allow the confidence of investors to return, and once again believe in the integrity of those that govern U.S. corporations.

Establishing dozens of accounting oversight boards simply does not address the primary evil of the Enron/Dynegy/Halliburton/El Paso problem—that of dangerous, unregulated trading of commodities in over-the-counter derivative transactions. Sarbanes-Oxley simply does not fully address or resolve the issues and deceptions perpetrated by the corporate criminals responsible for the crash of 2002.

## VI. CONCLUSION

Today, despite improvement in a few key economic areas, deep wounds still remain from the market crash of 2002.

> The Revolution Congress's clarion call of 'deregulation' and reform that accompanied the revolution class into power in 1995 is nothing now if not a faint reminder of the abject failure of most of the 104th Congress's deregulatory efforts. A stark token of the 104th's efforts are: a telecommunications industry in chaos; collapsed U.S. capital markets that continue to struggle to right themselves, despite five years of Administration calls that all is well; a derivatives trading industry that enabled the greatest corporate collapse in U.S. history; disbelieving investors with no confidence in corporate executives; disenfranchised U.S. employees; a jobless rate that refuses to decline; and, absent the tragic distraction of 9/11, a complete joylessness in corporate, blue collar, and inner-city America.
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> Despite quick passage of the weak Sarbanes-Oxley Act, despite a war effort—that has traditionally been a harbinger of better economic times, despite continued assurance by politicians that the economy is improving, and despite the arrest and jailing of several of the corporate criminals implicated in the crash of 2002, things simply are still amiss. 1990s deregulation must be deserted. The PSLRA has failed to protect anyone, other than corporate misfeasors. The Telecommunications Act has failed to provide competition, jobs, and the promised economic upsurge. The CFMA, in a costly refusal to regulate has given the U.S. investor 'Enron' as a common curse word for corporate excess and all that is wrong with current protections for corporations.

> The regulations that were abandoned a decade ago need to be returned to the citizens of the United States. The PSLRA must be rejected, so that private investors once again can wield a realistic sword of an impending class action against offending and offensive corporate executives. Certain of the repealed regulations under the Telecommunications Act must be returned—so that true competition can be generated between those monopolists in the industry—before any dream of true deregulation can be entertained. The commodity derivatives trading industry, particularly derivatives trading amongst private parties, must come under new regulation imposed through the Commodity Futures Trading Commission. Perhaps then will the pain of the market collapse of 2002 be averted in the future.[268]

The deregulatory failures of the 1990s teaches that when corporate interests, business lobbyists and Wall Street insiders aggressively press the agenda to deregulate, whether it be telecommunications, plaintiff securities lawsuits or commodities trading, disappointing if not disastrous consequences can follow. Congress and the executive would do well to remember that it was corporate insiders, not consumer advocates or investor protectionists that pushed aggressively for deregulation of the telecom industry, deregulation of the futures and derivatives trading markets and fought to make it more difficult for plaintiff's to bring lawsuits against corporate miscreants.

As this article goes to press, corporate interests, lobbyists and Wall Street insiders are, once again, mounting a forceful campaign to deregulate important areas that serve to protect investors and consumers.[269] Sarbanes-Oxley protections, just four years old, are

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268. cummings, *supra* note 4, at 1071-72.

269. *See* Stephen Labaton, *Bush Aides and Business Meet on Shift in Regulation*, N.Y. TIMES, Mar. 13, 2007, *available at* http://www.nytimes.com/2007/03/13/business/13regulate.html?ex=1331438400&en=6f5279b249d1ca27&ei=5088&partner=rssnyt&emc=rss. The New York Times reports that:

> Bush administration officials began a series of high-level discussions . . . with top executives from Wall Street, corporations and the major accounting firms . . . . [T]he executives have urged the rollback of laws passed in the wake of the Enron and WorldCom scandals as well as limits to liability from . . . shareholder lawsuits.

*Id.*; *see also* Kara Scannell, *Proposals Seek to Boost Allure of U.S. Market: Private Panel Urges Revamp of SEC, End to Earnings Guidance*, WALL ST. J., Mar. 12, 2007, at A1; Editorial, *Business Leaders, Washington Aim to Fix Wall Street's Ailment*, WALL ST. J., Mar. 10-11, 2007, at A2 ("Regulation and private litigation are steering companies away from the U.S., prompting the U.S. to lose its prominence as the financial capital of the world."); Deborah Solomon, *Regulators' Hedge-Fund Aproach: Hands Off*, WALL ST. J., Feb. 23, 2007, at C1 ("The group decided against calling for more hedge-fund disclosure. That is a shift from 1999, when the group—then under the subject to calls for repeal while securities class action lawsuits are again under assault.[270] This article should serve as a cautionary tale to those that would indiscriminately heed corporate insiders' calls for less regulation and greater protections from consumer and investor lawsuit. The PSLRA, the Telecommunications Act and the CFMA have each individually caused severe distress for investors, consumers and the U.S. capital markets. Congress, the SEC, and other rulemaking agencies must tread lightly and carefully in coming months, as hasty deregulatory legislation, spurred entirely by corporate interests and lobbyists, can cause unnecessary injury and damage. The protection of investors and consumers should be at the forefront of any new deregulatory debate.

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Clinton administration—said that 'more frequent and meaningful information on hedge funds should be made public.'").

[270] *See* Labaton, *supra* note 269 ("The business interests have sought to overhaul the regulatory system, reduce the impact of the laws and rules adopted after the spate of corporate scandals, and limit the liability of companies and accounting firms."); *see also supra* notes 67-79 and accompanying text.