

WITHER THE STATES? COMMENTS ON THE DACA FEDERAL-STATE FRAMEWORK

PAUL TESKE*

INTRODUCTION.....	365
I. TELECOMMUNICATIONS REGULATORY POLITICS, POLICY, AND FEDERALISM	366
II. TELECOMMUNICATIONS REGULATION COMPARED TO OTHER INDUSTRIES.....	368
III. ADDRESSING THE DACA PROPOSALS	371
A. The State Regulatory Role	371
B. State “Social Policy”	374
C. Other State and Local Policy Roles	375
CONCLUSION.....	377

INTRODUCTION

When I started writing my doctoral dissertation 20 years ago on the topic of American state telecommunications regulation, I was not confident that my subject would outlive my study.¹ Like a former colleague who was one of the world’s experts on East German national politics, I feared that my attentions would have to move on to a subject with more staying power.

So, I am surprised that state-level regulation still exists in 2006, indeed that it shows signs of having an even longer life. Given that state telecommunications regulation is unlikely to disappear anytime soon and the substantial changes in the telecommunications landscape since the federal government’s last major foray into this topic, the Telecommunications Act of 1996 (1996 Act), the Digital Age Communications Act (DACA) project rightly proposes a more narrowly defined role for state regulation and policy in the future.² The DACA

* Professor of Public Affairs, Graduate School of Public Affairs, University of Colorado at Denver and Health Sciences Center.

1. See PAUL TESKE, *AFTER DIVESTITURE: THE POLITICAL ECONOMY OF STATE TELECOMMUNICATIONS REGULATION* (1990).

2. Kyle D. Dixon & Philip J. Weiser, *A Digital Age Communications Act Paradigm for Federal-State Relations*, 4 J. ON TELECOMM. & HIGH TECH L. 321 (2006).

report takes an incisive, but not too radical, step in calling for a changed relationship between the Federal Communications Commission (“FCC”) and state regulators, one that retains some flexibility for the states, but within a much more proscribed range. I agree that a diminished role for the states is appropriate. State-level regulation used to look more attractive because it created a more flexible forum for experimenting with novel policy solutions, even as it imposed some costly jurisdictional externalities and coordination concerns. However, these benefits of state-level regulation are diminished compared to ten years ago, even as the costs might have been diminished somewhat as well.

It is clear, at least in general terms, that America has been moving for many years towards a new telecommunications regulatory model, one that relies mainly upon open competition. Abstract models of perfect competition or complete monopoly produce well-understood and predictable outcomes. The economic in-between of partial competition that has characterized the telecommunications industry over the past 20 years is much harder to understand and does not lend itself to clear policy guidance. Given that the technology advances so rapidly, most analysts advocate a policy of fairly minimal regulation. They support oversight that is based more upon industry consolidation and actual firm practices in the marketplace than upon pre-determining which firms can enter which markets and charge what prices. As the DACA authors point out, this is more like an antitrust model, and more of a federally-driven framework for regulation. Thus, the more narrow state policy role advocated by the DACA authors is appropriate.

In the next section, I demonstrate how recent trends in the state-federal relationship in telecommunications have been shaped by politics and history, as much as by academic theories. Then, I show how analysts of telecommunications federalism can learn from the history of other regulated sectors that involve both federal policy and state implementation. In the fourth section, I assess in more detail the specific DACA proposals for the remaining state role. Finally, I conclude with some expectations about how the state role can be changed further in the future.

I. TELECOMMUNICATIONS REGULATORY POLITICS, POLICY, AND FEDERALISM

In retrospect, perhaps much of my worry about the states’ role disappearing was naïve. In subsequent research, I have become very much aware that intra-industry politics play an enormous role in determining whether federal or state regulators will hold sway over some parts of an industry. If powerful interests gain from state regulation, and want to keep it as part of the overall regulatory framework, state

regulation is likely to remain in place, even in the face of evidence that it is not beneficial. In reality, this political power tends to trump grand and well-meaning academic theories of federal-state jurisdictional authority. Thus, politics and positive theory shapes jurisdictional questions as much or more than pure normative theory.³ Certainly, even U.S. Supreme Court decisions rarely seem consistent on broad questions of federalism and national power, but appear to vary based upon the outcome hoped for by a majority of the jurists on a particular policy.⁴ Indeed, the “D2” combination of “Deregulation and Devolution” within the regulatory policy sphere has not always met the conservative policy goal of a smaller role for government involvement in the economy.

In telecommunications, some would argue that state regulation has served the interests of the major regulated incumbent firms, the former Baby Bells, quite well since divestiture.⁵ This is especially true since a few other them – SBC/AT&T (now merged, called “AT&T” again, and poised to merge with Bellsouth too), and Verizon in particular – are the strongest survivors of the industry battles of the last two decades and the two largest landline forces in the industry today. So, whether or not the state role will change substantially will depend partially upon how firms like these view their future prospects at the state versus the federal levels of regulation.

I have also observed the incredible “stickiness” of state regulation in a number of industry domains. State regulatory structures can remain in place years after their demonstrated value to anyone save for the most narrowly focused rent-seekers. For instance, state economic regulation of the trucking industry remained in about half the states for 15 years after the 1980 federal deregulation of interstate trucking regulation, until Congress finally preempted it out of business.⁶

And, looking beyond the trends in state telecommunications regulation, the whole arena of state regulation generally appears to be experiencing an upsurge. New York State Attorney General Eliot Spitzer has been at the forefront of renewed state enforcement actions in antitrust and financial regulation. More generally, the states have stepped up to play a more forceful balancing and “re-enforcement” role, in response to a federal government that has accelerated deregulation and “de-enforcement,” perhaps even more than a clear majority of citizens

3. AMERICAN REGULATORY FEDERALISM AND TELECOMMUNICATIONS INFRASTRUCTURE (Paul Teske ed., 1995).

4. JEFFREY SEGAL ET AL., THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM (2005).

5. See, e.g., John Dunbar, Former Bells Dial up Big Numbers in Statehouses (Sept. 29, 2005), <http://www.publicintegrity.org/telecom/report.aspx?aid=744>.

6. Paul Teske et al., *Federal Preemption and State Regulation of Transportation and Telecommunications*, 23 PUBLIUS 71, 78 (1993).

have wanted.⁷

But, it is also true and important that telecommunications is somewhat different and distinct from other areas of regulation. Many other industries could make an argument about the declining importance of what might be considered to be truly “intra state commerce” in their field, (e.g., insurance), suggesting that the role of states as central regulators of these activities should also be waning. However, the argument is even stronger for telecommunications, particularly given the industry’s central role in this country’s present and future economy. As the DACA report notes, it is now commonplace to point out that in the “digital age” of packet-switched, Internet protocol technology, standard spatial geography is increasingly irrelevant. Whether states should continue to make important regulatory decisions when the technology is flying way over their heads is a reasonable question to ask. This point is also demonstrated effectively in the challenges that states have faced in trying to figure out a fair and efficient mechanism for sales taxation of Internet purchases that are made in many taxing jurisdictions.⁸

Stacked against these compelling arguments for a diminished state role is the tradition of states as experimental laboratories for novel regulatory approaches. Such policies can be more easily adopted, imitated, or discarded than at the federal level. This has not been a trivial theoretical point in telecommunications. Many of the competitive ideas in the 1996 Act came from experimental evidence gathered in states like New York, Nebraska, Illinois, California, and others. But, given the rapid changes in competition within the industry, it is harder and harder to see the advantages of the experimental element of state regulation, while the slow speed and patchwork nature of multiple state oversight have become more apparent; indeed, it prompted this DACA project. While greater responsiveness to a more homogeneous group of consumers and firms has been offered in support of continuing state regulation, this also makes less sense in a competitive industry where consumer needs seem fairly similar across states.

II. TELECOMMUNICATIONS REGULATION COMPARED TO OTHER INDUSTRIES

Having already argued that telecommunications is somewhat distinctive, I do not want to belabor comparisons to other industries too much. Still, we can learn more about how and when state regulation can

7. See Paul Teske, *Checks, Balances, and Thresholds: State Regulatory Re-enforcement and Federal Preemption*, 38 PS: POL. SCI. & POL. 367 (2005).

8. Samuel J. Best & Paul Teske, *Explaining State Internet Sales Taxation: New Economy, Old-Fashioned Interest Group Politics*, 2 ST. POL. & POL'Y Q. 37-51 (Spring 2002).

play a useful role by assessing it in the context of other industries to gain a broader historical perspective. The federal government has not yet deregulated interstate telecommunications completely; indeed it took 15 years for total state preemption after the federal trucking industry was deregulated. With the specter of a similar lag time, it may not yet be time for state preemption of telecommunications regulation, politically and historically. Given the importance of telecommunications to our present and future economy, a stronger argument can be made for slower, more careful, and more incremental decision-making when compared to full and immediate deregulation.

Railroads were the first major industry that involved not only regulatory questions, but explicit federalism issues, starting in the 1870s. After interesting jurisdictional battles and questions about how much any level of government could actually regulate within Constitutional boundaries, the 1887 Interstate Commerce Act developed a hybrid federal-state framework.⁹ But, actual railroad shipping movements very quickly became largely interstate in nature. Many early 20th century legal cases gave prominence to federal regulation in this industry. Truly intrastate railroad carriage became a small part of freight delivery 100 years ago. Thus, intrastate regulation, faded from importance since the substantive domain over which it ruled was a quite small marketplace. By the time state economic regulation of the railroad industry was preempted in the 1980 Act (at the same time federal economic regulation was also largely deregulated), it simply was not that important to anyone any more.¹⁰ Thus, one lesson is that state regulation can be ceased fairly easily when it has already gradually faded away in substantive terms.

The pattern was different in trucking regulation, where delivery of most shipments was truly intrastate in nature. And, historically, trucking industry regulation had developed initially from the states up to the federal level, much more so than with the railroads. When federal economic regulation of trucking was substantially deregulated in 1980, the same year as railroad deregulation, the states were not preempted.¹¹ This was partly because of more intrastate activity in trucking, more state interest in maintaining regulation, and other necessary Congressional compromises to achieve passage of this legislation.¹² While several states chose, on their own, to deregulate after 1980, about half the states still had some important economic regulation in place in 1994. The states

9. See Eli Noam, *The Federal-State Friction Built into the 1934 Act*, in AMERICAN REGULATORY FEDERALISM AND TELECOMMUNICATIONS INFRASTRUCTURE 113 (Paul Teske ed., 1995).

10. See PAUL TESKE ET AL., DEREGULATING FREIGHT TRANSPORTATION: DELIVERING THE GOODS (1995).

11. *Id.*

12. *Id.*

were only preempted by Congress in 1994, when the United Parcel Service, Federal Express, and other major firms with growing interests in trucking decided to spend considerable lobbying money and capital to make the state economic role disappear. Thus, state economic regulation of trucking stayed around in half of the country for 15 years after the federal government had deregulated and very clear and strong evidence demonstrated the advantages to deregulation. Due to narrow, but strong entrenched rent-seeking interest groups, these states had to be forced out of part of the regulatory business. It is also important to remember that states still retain important, non-economic roles in regulating trucking heights and weights, driving time restrictions, and hazardous materials routing.

Electricity regulation has also followed the state-federal, intra/interstate pattern for many decades. Federal legislation and Federal Energy Regulatory Commission actions in the 1990s encouraged the states to deregulate partially, but did not force them to do so. Again, about half the states chose to adopt a deregulatory framework, though the details of such deregulation have varied substantially across states. Before many states got too far with actual deregulatory implementation, however, the California blackouts of 2001 led to questions about the desirability of further deregulatory implementation, which has generally stalled since then. Consumers largely do not have effective retail electricity choices, even as wholesale competition has taken hold in the industry. Due to such lack of competition, and the new politics surrounding it, state regulation remains a strong force in electricity.

The insurance industry illustrates yet another iteration of federal-state regulation. The federal government does not have any important regulatory role, because insurance was not even considered to be "commerce" by the courts until recent decades, and now is regulated by a patchwork of 50 states, who sometimes work together to share information and oversight.¹³ Insurance appears ripe for federal regulation to take a greater role, but historical path dependence may prove difficult to overcome, demonstrating how critical it can be in regulatory models, compared to theoretical models of jurisdictional responsibility.¹⁴

These industry comparisons yield several interesting conclusions. State telecommunications regulation may have lost much of its critical role, but may not be poised to fade away yet. Further, telecommunications as an economic infrastructure is much more important for most of these other industries. Rather than immediate deregulation, incremental reduction in regulation allows policymakers to

13. See PAUL TESKE, REGULATION IN THE STATES 97-108 (2004).

14. See DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL LEARNING, AND ECONOMIC PERFORMANCE (1990).

move with more certainty in the appropriate directions and more easily reverse direction, if necessary. Giving consumers time to adjust to new market realities, especially older consumers still locked-in to older technologies and older assumptions about how regulation might protect their interests, might make sense.

III. ADDRESSING THE DACA PROPOSALS

The DACA state-federal report addresses the two general alternatives of: (1) preempting the states completely, or (2) maintaining some minimal role for them. I agree with the DACA authors in focusing more attention upon the latter option, which comprises a more politically feasible and appropriate policy choice in 2006. The report then examines how to develop an integrated regime for regulating rates, competition, and consumer protection. Next, it turns to local and state issues, such as use of rights-of-way, video franchising rules, municipal entry, and taxation. I will address most, but not all, of these issues in the order of their presentation.

A. The State Regulatory Role

In considering the appropriate future role of the states, the report suggests that the decision concerning how much authority to delegate to states depends substantially upon judgments about comparative institutional competence and the ability to manage critical tasks. Part of that management involves the ability to make relatively objective decisions based upon evidence, which can be clouded by intense political pressure to regulate in a manner that favors some groups over others.

Such political pressure is probably more balanced and provides more pluralistic “rent-seeking activity” at the federal level, compared to more unbalanced political input at the state level. Rent-seeking activity cannot and will not be curtailed, so it is worth examining as a fact of life. Still, despite the relatively less balanced interest group pressure at the state level, econometric evidence suggests that state level rent-seeking and capture are not as egregious as some would suggest.¹⁵ Powerful groups often get favorable treatment from state regulatory processes, but the disparities are not as extreme as some appear to suspect, when they characterize state regulation as a “race to the bottom” that inevitably favors the most powerful.

State public utility commissions (PUCs) already spend a great deal of time engaging in appropriate and successful adjudicatory decisions in their normal daily activities. Because they are not exclusively rulemaking

15. See TESKE, *supra* note 13, at 195-200.

entities, and PUCs should manage a shift to a more “ex post” adjudication model reasonably easily. I believe that state PUC staffs are already more comfortable with this activity than the DACA report anticipates. Furthermore, state regulators and staffs have seen this writing on the wall for several years now, and all but the most stubborn will realize that a new era has dawned, and that their role, if there is to be one at all, needs to be different. Most states are ready to take on this new challenge.

There are some existing federal-state models of limited state flexibility under a general federal framework. The DACA report makes comparisons to the “cooperative federalism” mechanism of Medicaid waivers, as a process of state implementation based upon federal standards. While this provides a valuable conceptual lens, within the regulatory sphere there are even closer models of cooperation that are worth more attention. For example, the federal Environmental Protection Administration (EPA) and Occupational Health and Safety Administration (OSHA) set minimum federal standards for a number of regulated activities. States can choose to be the implementing authorities, using a state environmental or OSHA-like agency, or they can decide to let the federal government’s regional offices implement policy within their state.¹⁶ Such implementation is guided by a range of standards but usually includes some flexibility to match local conditions and problems. In addition, for environmental or worker safety issues not explicitly addressed by the EPA or OSHA, and particularly for those with a larger intrastate dimension, state agencies can experiment with other regulatory approaches beyond the federal framework. Thus, an integrated model in which state PUCs play a role akin to the role of state environmental agencies play relative to the EPA is certainly not without precedent in regulation. Historical path dependence represents a main difference that might actually influence implementation. The PUCs predated the FCC, while the state environmental and worker safety agencies were largely created, or absorbed, at the same time as the EPA and OSHA were created.

In addition to these comparative elements of federal and state institutional competence and capacity, it is worth noting the wide variations across the states. The “horizontal” management capacities of PUCs across the 50 states may vary as much as the “vertical” difference between the FCC and the average state PUC. Even if the staff size of a state PUC is a function of the number of consumers it must protect, there are large differences between states like California and New York versus Wyoming and Maine. This is likely to influence the capacity to

16. *See id.* at 89-96.

make general regulatory policy, if there is a size threshold or an economies of scale element to policy development. This variable potential for non-uniform PUC regulatory practices argues for a more mechanical enforcement role for the states, as an arm of the FCC, but with some flexibility to respond to more localized consumer concerns. The concept of minimal state rate regulation, perhaps only over basic local rates, makes sense in this context.

To present an argument for re-regulation, the DACA authors address the question of whether conditions might change in the future. By definition, the case for re-regulation is not easy to imagine, but it is possible if local rates shoot up. After deregulation in 1984, cable television rates increased greatly in the late 1980s, after which Congress responded in 1992 with a form of re-regulation, even undertaking their only override of then President Bush's veto.¹⁷ Though rate re-regulation is difficult and faces a high hurdle, this is probably the correct threshold at this point in the industry's competitive development. Or, if "unfair competition" emerges, the report notes that "ex post" regulatory mechanisms are available to address that problem, generally through federal antitrust enforcement actions.

While minimal rate regulation makes sense, I worry more than the DACA authors that the telecommunications consumer market is highly segmented and that some groups face problematic information asymmetries. The non-technology savvy consumers, which may include older, low-income, and other American groups, probably do not view cellular, VOIP, WiFi, CATV, or other communications alternatives as substitutes for their basic landline telephony, if they are even aware of them at all. Their basic rates could then rise, absent continuing rate regulation, and they would not necessarily seek alternative competitors' services. There is probably some ceiling price on this consumer inertia, but it might be a higher price than many would view as appropriate. Justifications of the price deregulation under the 1984 Cable Act included a "relevant markets" argument about regular TV, VCRs, movies at theaters, etc. were partial entertainment substitutes for cable, but unregulated cable rates still increased after the legislation was passed.¹⁸ Again, rather than immediate rate deregulation for basic local rates, the more moderate DACA proposal seems appropriate, with a more gradual phase-out of regulation of the basic local rate, especially as some of these rates are probably still below cost in some areas. This does not, however,

17. Thomas Hazlett, *Prices and Outputs under Cable TV Reregulation*, 12 J. REG. ECON. 173 (1997).

18. ROBERT CRANDALL & HAROLD FURCHTGOTT-ROCH, *CABLE TV: REGULATION OR COMPETITION?* (1996).

justify more aggressive, continuing rate regulation apart from basic rates. But it does raise one area of concern under the report's category of "social policy."

B. State "Social Policy"

In addressing "social policy," the DACA authors make an important distinction between economic and regulatory concerns versus other policy concerns in telecommunications regulation. I fear, however, that the term "social policy" is a poor choice for the concepts of interest. "Social policy" implies a focus upon welfare, equity, and related values, when the actual issues are consumer protection, firms' access to rights-of-way, antitrust policy, and homeland security. Even as they are somewhat distinct from economic regulation of price and competition, they do not seem to all fit under an umbrella term like "social policy." I would call them consumer and other protection issues. Calling them social policy also labels them in a certain way, pejorative for some observers, who would argue that "social policy" should be pursued through more direct subsidy means, rather than through any industry-specific policies or regulations.

Consumer protection also relates to antitrust law, which is very much the type of framework advanced quite explicitly in the DACA report. And, I agree that this is generally appropriate. It is also worth noting that an antitrust focus is also likely to be mainly a federal focus. Generally, state antitrust efforts are not supported in the report. Many analysts have supported a national, unified antitrust policy.¹⁹ But, it is undeniable that state attorneys general, like Spitzer, have used enforcement more than federal officials in recent years, and perhaps more appropriately in some cases. Many state attorney generals argue that states have a legitimate role to play in some antitrust issues, and the question is whether and how their role in telecommunications antitrust might be affected by this proposal. By proposing an FTC-like model, I believe the DACA argues for no state antitrust activity in this area. However, I would like to see a clearer argument from the DACA authors about whether the states would retain any antitrust role in this framework.

Another issue not addressed in the report is whether or not "rent-seeking" in the adjudicatory world has some problems that could bias outcomes. More "legal" forms of rent-seeking may be less problematic than in the world of regulatory rulemaking, but they are also probably not trivial. In other words, interested parties with deep pockets may be

19. See Robert Hahn, *Federalism in Antitrust*, 26 HARV. J. L. & PUB. POL'Y 878 (2003).

more likely to bring lawsuits and complaints to policy makers, hoping to win in some cases and perhaps forestall or freeze competitors in other cases. Especially under a regime where more frivolous suits could be dismissed easily and thus would not hold up the further development of competition, this would be a more minimal concern than legislative and agency rule-making types of rent-seeking. But, it certainly does beg the question of whether residential consumers would likely pursue what they might perceive as long and difficult adjudicatory processes to address market-power or competitive abuse questions, when they know of high barriers to entry to operating successfully in that process. At a minimum, in this adjudicatory role, both state PUCs and the FCC must recognize this concern.

Overall, in terms of rates, competition, and consumer protection regulation, it seems clear that the value of state experimentation is unquestionably less than it was in the recent past. I believe that most analysts seem to agree on a general model of relying mainly upon telecommunications competition to police the American marketplace wherever possible – they do not necessarily agree on all of the details, but on the basic goal and how to get there in a general way. So, both the costs and the benefits of state regulation appear to be less than they used to be a few years ago. State regulation is just less important on both sides of the coin. That may also be true of federal regulation, though the magnitude of impacts seem larger there. So, despite the handful of concerns I raised here, I agree with the DACA report's focus on a reduced and more narrowly prescribed state regulatory role.

C. Other State and Local Policy Roles

In addition to these direct regulatory questions of rates, competition, and consumer protection, a number of issues arose out of ambiguities in the 1996 Act which turn out to affect competition and telecommunications policy at both the state and local levels.²⁰ The DACA report is careful to address these as well, a few of which play out at the municipal level, and I add a few additional perspectives here.

In considering local issues in telecommunications, the DACA authors appropriately treat localities as “creatures of the state.” Access to and usage of rights-of-way (ROW) are some of the most important local issues in telecommunications. Local governments have sought to increase their revenues by charging higher than direct costs to firms for access to ROWs. The report would limit these revenues to actual costs, but since “actual costs” remain a potential murky area, I would encourage

20. Paul Teske & Andrey Kuljiev, *Federalism, Preemption, and Implementation of the 1996 Telecommunications Act*, 30 *PUBLIUS* 53 (2000).

states PUCs to develop a range of acceptable costs, based upon population density, usage, weather, and other engineering-related factors. In my experience, even if ROW payments are limited to economic costs, some localities will try to justify excessive cost calculations, a problem that could be mitigated by clear state guidelines.

Another important and controversial local telecommunications issue in recent years is municipal entry into wireless broadband services. Some cities have perceived that their local providers have moved too slowly to provide this service, and have sought to provide the service themselves. In turn, telecommunications firms have pressured some state legislatures to ban municipal entry or require taxpayer votes before cities develop such services. The concerns, generally, are that municipalities may waste taxpayer funds with inappropriate technology investments and that municipalities will become incumbent firms themselves. Should they become incumbents, they will have an incentive to limit other competitors. Rather than states placing legislative limits on this activity, my own preference is to allow local voters to address the first issue, directly or through representative democracy, and to allow competitive requirements to solve the second issue.

At both the state and local level, the DACA report also indicates concerns about “regulation-as-taxation,” and makes some points about direct taxation, as well. Telecommunications bills are increasingly made up of a series of taxes, fees, and charges (Subscriber Line Charges, access, etc.) that most consumers do not understand. Electric utilities and telephone companies have long been major, indirect tax collectors for state and local governments, and now cellular phone firms have also fallen into that category. While indirect taxation is not always transparent to those who pay the tax, it has some advantages in terms of being less objectionable (part of the costs of doing business) and it gets closer to a “user fee” structure that consumers can avoid if they choose.

Transparency is always a preferred public policy goal and a first-best solution to taxation issues. However, we already have a complicated system of cross-subsidies, hidden taxes, and obscured fees in telecommunications, so it is not the case that we are starting from scratch and can simply apply abstract principles. E-Rate, universal service, and other socially-oriented subsidies have some advantages, but they might not survive some types of cost/benefit assessments. They might also fall victim to political pressure in a more transparent environment. Hopefully, advancing technology, greater consumer learning, and falling costs will help minimize the need for any hidden taxes and subsidies in a more competitive environment.

Thus, while the DACA report mostly focuses upon the appropriate mix of federal regulation and state authority within a largely federal

framework, it also addresses other policy issues besides regulation. The report is consistent in emphasizing competitively-neutral solutions, where possible.

CONCLUSION

For many years after 1984, thoughtful analysts of American telecommunications policy bemoaned the lack of specific legislative guidance to address the important regulatory and other policy issues in this critical industry.²¹ A single unelected federal official, Judge Greene, oversaw the Modified Final Judgment implementation and other issues that emerged from AT&T's divestiture for more than a decade, while the FCC and state PUCs tried to develop new detailed competitive policies in a rapidly changing environment.²² Many saw the 1996 Act as a crucial statement of legislative priorities that would help guide regulatory and other policy concerns toward an inevitably competitive industry. The Act settled some issues, but many others emerged as Internet, wireless, and advanced video technologies expanded our notions of telecommunications well beyond traditional telephone regulatory models.

We have now experienced a decade of policy implementation under the guidelines of the 1996 Act. It seems clear that a new guiding document is necessary to more fully resolve many issues, including the role of federal and state policy makers in telecommunications. The DACA report takes a crucial step in calling for a changed relationship between the FCC and state regulators, one that retains some flexibility for the states, but in a much more narrow range. Given that the advantages of state experimentation are undervalued in today's more competitive environment, it is time for a diminished role for the states. But, it is not yet time for the states to have no role in telecommunications policy. The DACA report has properly threaded this needle on most of these critical questions.

If the DACA recommendations are implemented, a period of at least a few years will be required to observe the success of the model. If local residential rates do not rise too much or too quickly, competition expands, and consumer protections remain in place, it will be time to consider whether ongoing state economic regulation will be needed at all. Then, perhaps, if it no longer seems to matter much, the state role can finally fade away.

21. See generally Teske, *supra* note 7.

22. See TESKE, *supra* note 10.

