INSTITUTIONAL ISSUES

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The chapter by Egan and Wenders is an articulate and comprehensive celebration of neoclassical economics as it presumably applies to markets for utility services. It can be added to the sustained drumbeat for the rush to deregulate telecommunications. I believe they carry the argument further than the facts support, they are unfair to state regulation in a number of respects, and their cynicism about public oversight is unwarranted. It is only a slight overstatement to say they argue that public utility regulators should go find gainful employment and get out of the way of the revealed and latent competitive forces in the telecommunications industry, the interplay of which will benignly redound to everyone's benefit. And if some residual regulation must persist, it is better that federal officials do it.

Specifically, Egan and Wenders: (a) decry any court decisions that favor state regulation; (b) dismiss virtually all regulatory decisions as obstructionist and ill-considered; (c) call for relegating commissions to a record-keeping, information dissemination role; (d) ascribe any resistance by state regulators to such a role redefinition as motivated by "loss of personal importance"; (e) worry a great deal about political mischief as harming social welfare with little acknowledgment that corporate mischief that harms social welfare motivated administrative regulation in the first place; and (f) see the impossibility of total deregulation of telecommunications as a political issue with no weight given to the possibility that there might be technical or policy reasons not to do so.

The Megdal chapter offers a more cautious approach and a fairer treatment of what she calls the "marbled structure" of public utility regulation. Measured against the four public policy goals she selects (and assuming away complete

deregulation), state commission regulation has a pretty good record. She finds that neither in theory nor in practice can one confidently say that, all things considered, federal regulation is superior to state telecommunications regulation.

Specifically, Megdal argues: (a) state regulators have responded to the need for regulatory reform; (b) in several instances state regulation was clearly ahead of FCC initiatives; (c) the experimental laboratory function of state regulation can be real and not merely a romantic vision; (d) ineffective (experimental) regulation does much less damage at the state than the national level; (e) competitive markets for some telecommunications services may not emerge as rapidly as some predict; and (f) the polity is not calling out for radical change in these institutions in our time-honored dual system of regulation.

I would like to add my own comments based on 35 years of experience in positions related to our system of dual regulation. To argue that there is not a rational division of regulatory authority between the states and counterpart federal agencies is not to say that there is an irrational division. Rather, it is to say (a) there is either a "nonrational" division in the sense that it just evolved without any coherent plan or underpinning of consistent reasoning, or (b) there are any number of divisions that can be argued for with equal or nearly equal sense. There is no single persuasive line of reasoning that leads to a neat "picket-fence" delineation between what should be federal and what should be state domain.

The Constitution does not specify clearly the state role. The Interstate Commerce Act, the Federal Power Act, and the Communications Act contain seemingly clear statements on this matter, but one-sided interpretations, taken together with the federal supremacy doctrine and the invoking of the Interstate Commerce clause, have largely turned these provisions into "double speak." Neither geography (state boundaries) nor function (such as rate design) as bases for dividing up regulatory jurisdiction has stayed the federal reach in the course of blurring the line of demarcation from *Attleboro* and *Colton* to *Narragansett* and *Pike County*. Nor have the questions of which level of government can do it more cheaply, or more efficiently, or more effectively been paramount in deciding jurisdictional issues.

It is difficult not to conclude that the division of authority favoring one arena or the other is mostly ad hoc and mainly dependent on the size of the issue, the inclinations of those sitting on the federal commissions, and general "mood" of the polity regarding centralization, the nature of the technology involved, the congeniality of the courts toward agency expansionism, and the power of the regulated industry to get what it wants. Guiding principles, theory, tight reasoning, or orderly thought have played virtually no role in these changing assignments.

U.S. FEDERALISM

As has been widely noted, the twin developments in recent 20th-century federalism are an expansion of the powers and functions of U.S. governments at all levels and a concomitant redrawing of authority in favor of the federal level.

Consideration of the shift of regulatory jurisdiction from state to federal in recent decades is best done against the backdrop of changes in federal–state relations generally. Specifically, is the alteration of regulatory authority proceeding faster, slower, or at about the same pace as centralizing forces elsewhere in the system? My answer is that telecommunications is proceeding at about the same pace.

The federal–state arguments are familiar. The virtues of federal solutions are uniformity and presumed horizontal equity; the virtues of state solutions are diversity and experimentation. As Justice Brandeis noted in his 1932 dissent to *New State Ice Co. v. Liebman*: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

In the 1980s, much presidential rhetoric seemed to favor a greater emphasis on state authority. But, when the passion of federal regulators for market competition ran up against their administration's predisposition for decentralization, federal deregulation with preemption was chosen every time.

As might be expected, there is a sharp divergence of viewpoints in the current literature on state performance and state policy laboratories. Leach (1970) wrote in *American Federalism*: "Succinctly put, the case against the states is that where action has been required they have too often been inactive; where change has been demanded, they have offered the status quo; where imagination and innovation have been needed, they have seldom come up with satisfactory alternatives" (p. 116). In contrast, Elazar (1974) concluded: "Today there is simply no justification for thinking that the states and localities, either in principle or in practice, are less able to do the job than the federal government" (p. 102).

Applying the themes of state performance, state inventiveness, and state responsiveness to the specific case of telecommunications regulation, I believe most objective observers would award state governmental experiences with high marks.

CAUSES OF CHANGING JURISDICTIONS

One important cause of changes in regulatory authority is the political stance of the regulated firms themselves. Different firms have supported different changes. Most, but not all, telecommunications firms now see FCC policies as more favorable to them.

A second factor is appointments to the regulatory commissions, as who the commissioners are is tremendously important. Appointees who are assertive and expansionist tend to push agency authority to the outer edges and perhaps beyond. When federal commissioners (and staff) with an activist regulatory philosophy

(and perhaps a lesser regard for the skills and visions of their state counterparts) feel there is a special mission to perform, such as deregulation, the state–federal jurisdiction boundaries are likely to be altered as opportunities present themselves.

A third factor is the differing role of the Congress in these industries. Congressional action in transportation and energy has never been matched in telecommunications, although there are hints of greater Congressional action in the near future.

Overall, the decline and fall of state regulation has been prematurely implied or predicted a number of times by practitioners and academics.

IMPLICATIONS

For a considerable range, the tension over spheres of jurisdiction can be healthy and constructive. Competition can be a useful force here as well. Eternal vigilance may not only be the price of liberty, but also an imperative if substantial regulatory turf and territory are to remain with the states. Despite all this, the demise of state commission regulation is surely not imminent.

Regulation in a sustained period of rising unit costs, lessened productivity gains, and fewer scale economies is more difficult. So is regulating in a fishbowl with highly skeptical and better informed consumers, many of whom have alternatives that were not available earlier. Deregulation and managing competition within a regulatory framework requires changes in mindsets that must approximate the adjustments we asked of electric and gas utility executives when conservation replaced consumption as the new goal. And, as we are experiencing in telecommunications, the task of managing our way through the transition from a fully regulated national network to a partially regulated, diverse system itself requires a concentration of regulatory authority, even if the result is a net diminution of regulation.

Finally, the combination of large and more expert staffs, together with enhanced budgetary and computer resources, has allowed state commissions to use quantitative analyses and proceed much more rapidly than in the past.

Looking ahead, it is clear that federalism needs to be more than a nostalgic recollection. Given the fact of states, it was not intended that they become merely regional implementation centers and complaint offices for federal government programs. In our excesses toward federal preeminence we seem to have lost our way, and, strangely, we are not engaging in much comprehensive or objective dialogue.

Happily, some recent court cases, such as *Louisiana* have partially restored the state role in telecommunications. Other compromise solutions of continued joint authority are possible and desirable. One possibility is regional, multistate regulation as a halfway house. Another is a requirement that federal agencies issue a "jurisdictional impact statement," akin to an environmental impact state-

ment, that would specify how states would be affected. More broadly, a comprehensive commission on federal–state relations might offer a vision of the future. In any case, it should be possible to craft an ongoing role for state telecommunications regulation that advances and does not interfere with important federal goals in this industry. Just because there may not be "one best way" does not mean that we can not forge a workable interaction, as we have in the past.