Federalism in Wireless Regulation: A New Model for a New World

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FEDERALISM IN WIRELESS REGULATION: A NEW MODEL FOR A NEW WORLD

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Abstract: Rapid innovation and competition in the wireless sector specifically and the advanced communications market generally are challenging the regulatory assumptions of policy makers and regulators at every level of government. Indeed, much of the current regulatory approach was crafted and implemented in an intramodal world, where consumer choice was limited and providers offered only discrete services. Technological convergence, intermodal competition, and the deployment of next-generation networks have pushed the boundaries of regulation, forcing policy makers and regulators to rethink their approach. This Essay argues that as the wireless sector has evolved, regulation has not kept pace. Moreover, the federal-state regulatory balance needs to be recalibrated to reflect the reality of the current marketplace. Thus, for the reasons set forth in this Essay, a new regulatory paradigm is needed for the wireless sector, one that embraces the borderless aspects of wireless technologies while also addressing those consumer issues not addressed by the market. Specifically, a new model of federalism – one grounded in national consumer rules that would serve as both a “floor” and a “ceiling” – should be applied to the wireless sector. Such an approach will enhance consumer welfare and could prove instructive on how to grapple with the policy issues implicated by other technologies like VoIP.

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I. INTRODUCTION

States have traditionally played an important role in telecommunications regulation. During the days of monopoly telephone service, for instance, Congress implemented a dual regulatory approach whereby states were granted the authority to monitor, among other areas, intrastate telephone service, while interstate issues were delegated to the Federal Communications Commission (FCC). This original model of federalism reflected the physical nature of the public switched telephone network (PSTN), which allowed for the identification of intrastate and interstate aspects of service. Over the course of the next 70 years, Congress and the FCC delegated an increasing amount of regulatory authority to states as the telephone monopoly was gradually dissolved and competition in the wireline telephony market was brought to local markets.

Over the past decade, however, the market for voice services has fundamentally changed. The emergence of new technologies like wireless telephony and VoIP – inherently “national” technologies that lack clearly identifiable intrastate aspects – begs the fundamental question of what is the proper regulatory role for the states in this new world of intermodal competition? This Essay argues that services like wireless voice require a new model of federalism in telecommunications, one that reflects the interstate nature of the technologies and one that more consistently addresses consumer issues on a national scale.

The second part of this Essay examines the transformation of the telecommunications market from a sector dominated by intramodal competition to an advanced communications market characterized by vigorous intermodal competition and robust technological innovation. As technologies like wireless voice and VoIP are interstate, and increasingly international, in nature, traditional notions of state regulatory authority, forged during the monopoly era of wire-based plain old telephone service (POTS), are in need of reform.

Part three analyzes a variety of proposals that have been put forward for recalibrating the federalist paradigm to address wireless consumer issues. Some have argued that states should be preempted entirely from having any

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1 47 U.S.C. §152(b).

2 The 1996 Telecommunications Act, for example, delegated a large amount of regulatory authority to states in an effort to facilitate local telephone competition. See, e.g., 47 U.S.C. §§ 251-252 (referring to the interconnection provisions).
stake in the regulation of services like wireless. Others have argued that states should retain some level of regulatory independence in order to craft policies that are reflective of their individual constituencies. Still others argue that the current model of dual or “cooperative” federalism is sufficient to ensure continued consumer welfare gains. This last model is based on a set of federal standards that act as a “floor” for additional state action. It will be seen, however, that in light of the current market for voice services, none of these approaches is effective vis-à-vis wireless telephony and other emerging technologies.

The fourth part proposes a new model of federalism in the regulation of wireless telephony. This new model is based on a set of national consumer standards that would be both a “floor” and a “ceiling.” States would retain authority to enforce these standards as appropriate and would also be afforded a way to contribute to the initial formulation and periodic reassessment of these new rules. Properly implemented, this new regulatory paradigm for wireless telephony would assure continued consumer welfare gains and prevent the adoption of inconsistent state-by-state regulations that drive up costs for carriers and consumers. Moreover, this model would provide consumers with a local venue for resolving complaints and would leverage the expertise of state regulators or other state actors. As discussed in greater detail below, this is largely the model that has been recently adopted by two leading organizations that represent the interests of state government.

Policy makers at every level of government should acknowledge that new technologies and new services require new rules. The regulatory paradigm set forth in this Essay would allow state and federal government to foster a competitive advanced communications market, streamline the approach to wireless regulation, and set a precedent for adjusting regulation to accommodate the emergence of new communications technologies.

3 This was the position of the National Association of State Regulatory Commissioners (NARUC), a national nonprofit membership organization for state-level regulatory commissioners. However, NARUC recently adopted a resolution that calls for the formulation of “mutually agreed upon, uniform national wireless consumer protection standards coupled with an effective partnership of State and federal enforcement.” See Committees on Telecommunications and Consumer Affairs, Resolution Concerning the Communications Policy Statement (July 23, 2008), http://www.naruc.org/Resolutions/TC%20Communications%20Policy.pdf. Further explanation of NARUC’s position on federalism and telecommunications can be found in its white paper on the subject, adopted in July 2005, http://www.dps.state.ny.us/federalism_s0705.pdf [hereinafter NARUC Federalism].
II. **THE EVOLVING VOICE MARKET: THE DEVELOPMENT OF INTERMODAL COMPETITION AND ITS IMPACT ON REGULATORY ASSUMPTIONS**

The basic telephone dominated voice communications for the vast majority of the last century. Indeed, up until 2000 most consumers still used this wire-based service to make and receive the majority of their calls. However, over the last eight years, the number of traditional telephone lines has steadily decreased.\(^4\) The four largest incumbent providers averaged net losses of over two million telephone subscribers in each of the eight quarters to the end of 2007,\(^5\) and those losses continued throughout 2008.\(^6\) Yet consumer expenditures on voice services have remained relatively flat over the last two decades, suggesting that there has been a fundamental shift in consumer preferences for voice service, away from the traditional telephone and toward competitively priced substitutes, notably wireless telephony and, more recently, VoIP.\(^7\)

This section will detail the rise of wireless telephony and analyze its impacts on the current regulatory regime. The paradigm shift caused by this technology has exposed the current regulatory approach to telecommunications as ineffective for boundary-less technologies like wireless.

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\(^4\) Between December 2000 (when the number of telephone lines in service peaked) and December 2007, the total number of end-user switched access lines decreased by 17.7 percent. See FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2007*, at Table 1 (Sept. 2008).


\(^7\) FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, at page 3-1 (Feb. 2007) [hereinafter Telephone Trends].

The emergence of wireless telephony as a preferred method of voice communication has been swift and impressive. After overcoming a variety of legal and regulatory barriers, radio spectrum was finally allocated for use in voice communication in the early 1980s. In 1984, one year after the first mass-market cellphone was introduced\(^8\) the total number of wireless subscribers was just over 91,000.\(^9\) As consumers began to realize the many benefits and conveniences associated with mobile phones, and as carriers began to offer more robust service in more parts of the country, adoption of this new technology exploded. By 1990, subscription stood at 5.3 million; by 2000, it was 109 million.\(^10\) The current number of subscribers is over 262 million.\(^11\)

Unlike traditional wireline voice service, wireless voice service is not state-specific – it is interstate in nature.\(^12\) It began as a regional service but quickly became national in scope once the FCC began to auction off more swaths of spectrum. This allowed carriers to deploy national networks and take advantage of more efficient economies of scale. But greater availability led to more regulatory scrutiny. As a result, state-by-state regulation soon began to appear, which threatened to impose inconsistent layers of regulations on carriers and created barriers to entry and obstacles for growth.\(^13\)

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\(^10\) Id.


\(^13\) Id.
To ease the increasing regulatory burden on carriers, Congress in 1993 implemented a predominantly national regulatory framework for wireless service.\textsuperscript{14} States were effectively barred from regulating certain aspects of wireless telephony that pertained to the “entry of or rates charged by” wireless providers.\textsuperscript{15} However, a specific state reservations clause was adopted, protecting state authority over “terms and conditions” of service.\textsuperscript{16} As will be discussed in more detail below, the generic phrase “terms and conditions” has resulted in less clarity than was intended.\textsuperscript{17} But overall, the wireless market responded positively to the regulatory certainty of the national regulatory framework and has facilitated the wide adoption and use of mobile service by consumers across the country.

\textbf{B. The Various Impacts of Wireless Telephony on the Voice Market}

The rapid rise in adoption and use of wireless telephony has had four interrelated effects on consumers and on the voice market in general.

First, the enormous popularity of wireless service has created a more mobile culture. For many, wireless telephony has quickly gone from being a service used in addition to wireline telephony to a complete substitute for it. Consider that by the end of 2007 nearly 16 percent of all households had made the decision to “cut the cord” and rely only on wireless phones, a


\textsuperscript{15} Id.

\textsuperscript{16} Since the implementation of the national framework, there have been a number of cases and FCC opinions that have sought to clarify what constitutes a “rate” and what falls into the category of “other terms and conditions.” For a comprehensive overview of case law between 1993 and 1998, see Kennedy and Purcell, supra note 11. For a comprehensive overview of case law between 1998 and 2003, see Leonard J. Kennedy & Heather A. Purcell, Wandering Along the Road Toward Competition and Convergence – The Changing CMRS Roadmap, 56 Fed. Com. L. J. 489 (2004).

\textsuperscript{17} This phrase “terms and conditions” was originally intended “to include such matters as customer billing information and practices, billing disputes, other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state’s lawful authority.” However, the list was only “intended to be illustrative only and is not meant to preclude other matters generally understood to fall under ‘terms and conditions.’” H.R. Rep. No. 103-111, at 261 (1993).
number that stood at just over eight percent in 2005.\footnote{18} Moreover, it is expected that recent economic uncertainty will accelerate cord cutting and increase the number of wireless-only households to nearly 20 percent by the end of 2008.\footnote{19} Among those households that currently have both wireline and wireless phones, over 22 percent receive the majority of their calls on their mobile phones.\footnote{20} The average number of minutes used per month by wireless subscribers is well over 700,\footnote{21} up from about 250 in 2000.\footnote{22}

Second, since wireless telephones are more versatile than their wireline counterparts, and because wireless networks can deliver more services than the PSTN, consumers demand more from their wireless devices. To this end, consumers are increasingly using advanced data applications enabled by more sophisticated handsets. Text messaging has become the most popular of these new services. By June 2008, consumers were sending an average of 75 billion text messages a month, up from 12 million in June 2000.\footnote{23} Similar features, like photo and multimedia (MMS) messaging, are also being used more.\footnote{24}

The rising popularity of Smartphones, however, is perhaps most indicative of how sophisticated consumer preferences have become in the wireless sector. Smartphones deliver an array of broadband-enabled services, including faster Internet and email access, and streaming video. Sales of these devices have increased substantially over the last year,\footnote{25} with new offerings


\footnote{20} Wireless Substitution Survey, supra note 18 at 3.


\footnote{22} Telephone Trends, supra note 7 at Table 11.3.

\footnote{23} CTIA Wireless Facts, supra note 11.

\footnote{24} Twelfth CMRS Report, supra note 21 at para. 218.

\footnote{25} As of May 2008, Smartphones had a market share of 6.3 percent of all cell phones sold, compared to just 1.7 percent in early 2007. See Press Release, Rising Popularity of Smartphone Devices Drives Higher Wireless Mobile Phone Prices, J.D. POWER & ASSOCIATES, May 29, 2008,
like AT&T’s iPhone and T-Mobile’s G1 phone being among the most popular.\textsuperscript{26}

In response to consumer demand for these types of interactive services and devices, wireless carriers have invested billions of dollars to deploy next-generation networks that are capable of handling more texting traffic and that can deliver wireless broadband.\textsuperscript{27} According to the FCC, nearly 51 million consumers receive broadband via mobile wireless systems.\textsuperscript{28} Moreover, the FCC estimates that wireless carriers have deployed mobile broadband networks to areas of the country containing 82 percent of the population.\textsuperscript{29} Third-generation networks, which are capable of delivering broadband speeds to end users, are widely available across the U.S., while many carriers are already preparing to deploy fourth-generation network infrastructure.\textsuperscript{30}

Third, as a result of wireless service having become engrained in daily life for a growing number of subscribers, mobile telephony and advanced data services have become indispensable for most people, both in emergency situations and in professional endeavors. According to one study, the primary value of a cell phone to a majority of users is its availability in emergency situations.\textsuperscript{31} These types of situations range from reporting


\textsuperscript{27} The wireless industry invested over $21 billion in the year ending June 2008 to improve networks and other services. \textit{CTIA Wireless Facts}, supra note 11.


criminal activity to coordinating rescue efforts during and after disasters. Authorities have sought to leverage these positive aspects of wireless technology for the greater public good in dire situations. For example, the use of text messaging during and after recent tragedies like university shootings spurred the FCC and Congress to adopt a voluntary Commercial Mobile Alert System. This system will allow providers to blast presidential alerts, imminent threat alerts, and child abduction emergency or Amber alerts to those users who wish to receive such messages.

Wireless phones also have a demonstrable economic impact, both on individuals and on the broader economy. For lower-income users, cell phones enhance job searches, bolster business creation, and create efficiencies that result in net monetary gains. For other workers, cell phones allow for increased mobility and enhanced communications while traveling. Indeed, the wide availability of Smartphones with email capability is a key component of state and federal telework/telecommuting initiatives aimed at cutting costs and streamlining the business of government. On a more macro level, mobile phones are having a significant impact on the U.S. economy. A recent study found that mobile voice services produced annual productivity gains of over $150 billion, while similar gains enabled by mobile broadband services amounted to $28 billion per year.

Fourth, regulation has not kept pace with innovation. While the national regulatory framework that was implemented for wireless in 1993 provided regulatory certainty to facilitate continued innovation and network deployment, the inexactness of the grant of regulatory authority over “terms and conditions” to the states raises concerns regarding the possible development of an inefficient state-by-state patchwork of regulation. A reversion in regulatory philosophy to a more state-centric approach would

32 Id.
have negative effects on consumers and the wireless industry. Indeed, as one recent paper noted, “permitting unfettered state regulation of an industry characterized by extra-jurisdictional effects and spillovers may harm social welfare—even if states enact policies that maximize the welfare of their own constituents.”38 Thus, policy makers face a clear choice: reform the regulatory model for wireless in order to foster continued welfare gains or adhere to a status quo policy that is outdated and threatens ongoing consumer welfare gains in the wireless arena.

C. Policy at a Crossroads: Federalism and the New Voice Market

The consumer welfare gains associated with regulatory certainty cannot be over-emphasized. The implementation of a national regulatory framework allowed for the continued development of nationwide networks, which in turn allowed carriers to exploit economies of scale.39 Moreover, national networks allowed providers to offer consumers better coverage, more advanced services, and lower prices. Indeed, as networks were built out, and as the wireless penetration rate increased, the cost per minute of a phone call decreased significantly. Between 1993 and 2002, the cost per minute dropped from $0.57 to $0.12.40 Carriers were also able to offer more innovative and diverse pricing plans to better suit individual customer needs.41 As the FCC recently observed, the continued roll-out of differentiated pricing plans to this day is yet another indicator of a competitive market.42 Consumers have embraced and “approved” this national approach to wireless by using more minutes and more advanced services.43

Yet this framework is threatened by a new round of state-level wireless policy making initiated under the aegis of “terms and conditions” authority.


39 Twelfth CMRS Report, supra note 21 at para. 61.


42 Twelfth CMRS Report, supra note 21 at para. 112.

43 Federal Preemption, supra note 40 at 201.
Each year, hundreds of wireless consumer protection bills are introduced in state legislatures across the country. The possibility of having fifty different consumer standards for providers to comply with creates tremendous regulatory uncertainty among carriers and chills the marketplace. While each state may be acting in its own self-interest, the aggregate effect of these differing consumer protection bills would be a net negative impact on consumers – prices would increase as service providers increase expenditures to comply with a multitude of varying rules.44

As discussed in the next section, a number of regulatory frameworks have been proposed for the wireless sector. But, given the pace of innovation and the high levels of competition in the sector, none of these models is flexible enough to accommodate continued growth and innovation.

III. THE DIFFERENT PATHS FOR REFORM: PROPOSALS FOR A NEW APPROACH TO FEDERALISM IN WIRELESS REGULATION

The current regulatory framework for addressing wireless consumer issues has become strained for two primary reasons. First, the speed of innovation in the wireless industry has far outpaced the rate at which policy makers can craft and implement regulation. As a result, policy makers often rely on “default” or existing rules instead of new approaches. This dynamic often has the effect of replacing what might be more market-based solutions with a rigid set of rules that are largely inconsistent with the realities of the marketplace. Second, states have begun to invoke their “terms and conditions” authority to respond to a number of consumer concerns that have emerged in recent years.45 Both factors threaten to create regulatory

44 Economic Approach, supra note 38 at 6.

45 For example, there continues to be tension between state and federal regulatory authority over the issue of early termination fees (ETFs). CTIA – The Wireless Association, among many others, argues that an ETF is a “rate” and is therefore outside state regulatory authority. See, e.g., Ex Parte Communication, Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are “Rates Charged” Within 47 U.S.C. Section 332, WT Docket No. 05-194; Petition for Declaratory Ruling Filed by SunCom, and Opposition and Cross-Petition For Declaratory Ruling Filed by Debora Edwards, Seeking Determination of Whether State Law Claims Regarding Early Termination Fees Are Subject to Preemption Under 47 U.S.C. Section 332(c)(3)(A), WT Docket No. 05-193, http://files.ctia.org/pdf/Letter_CTIA_ETFExParteFiling.pdf. However, in July 2008, NARUC called upon the FCC to investigate the use of ETFs. See Resolution of the Consumer Affairs Committee, Resolution Calling on the FCC to Reexamine Wireless Carriers’ Early Termination Fees (July 18, 2007), http://www.naruc.org/Resolutions/CA-1%20Resolution%20Calling%20on%20the%20FCC%20to%20Reexamine%20Wireless%20Carriers%20Early%20Termination%20Fees_July07.pdf. In response to increased regulatory scrutiny
inconsistencies, which run a cumulative risk of producing consumer welfare losses, not gains.

Three models for regulation of the wireless market exist: the state extreme, which allows states to regulate as they please; the federal extreme, which relies on national rules and national enforcement; and a model of cooperative federalism, which tries to allocate regulatory authority and enforcement among the states and the federal government based on core competencies. This section analyzes each model and highlights the positive and negative aspects of each.

A. The State Extreme: States as Policy Laboratories

A state-centric model for wireless regulation provides states with broad authority to implement regulations, including policies that might clash or overlap with those in other states. The classic justification for this model comes from Supreme Court Justice Brandeis who wrote that “[i]t 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.”\(^{46}\) The primary virtue of such a model stems from this notion of policy experimentation – where appropriate, states are better equipped to craft more finely tailored and thus more effective policies to address local issues than the federal government.

Deciding when to adopt such a model, however, has often been problematic. Determining whether the good or service being regulated is intrastate or interstate in nature is critical to developing a proper regulatory framework. Regulation of services with purely intrastate characteristics should be delegated to the states while regulation of services with purely (or predominately) interstate characteristics should be delegated to the federal government.\(^{47}\) When implemented in the appropriate situation, a state-centric

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of ETF use, carriers have begun to adjust their policies. Beginning in 2006 with Verizon Wireless, most major carriers now pro-rate their ETFs,\(^{47}\) supra note 21 at para. 115. The market is also experimenting with a variety of solutions for avoiding ETFs. For example, a number of websites like Cellswapper.com offer consumers a conduit for trading cell phone contracts rather than canceling them. See Bob Tedeschi, With A Little Help, You Can Trade Yourself Free of Your Wireless Contract, N.Y. TIMES, Dec. 31, 2008.

\(^{46}\) New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

\(^{47}\) The seminal court case on this issue is A.L.A. Schecter Poultry Corp. v. U.S., 295 U.S. 495 (1935). In discussing the scope of federal authority to regulate interstate commerce, the Court found that “[t]he power of Congress extends, not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury,” at 544.
model allows states to act like firms, competing against each other to craft innovative policies that will attract businesses and residents. Moreover, this model can produce original policies that benefit the state, its residents, its businesses and, ultimately, interstate commerce. Conversely, a state-centric model could produce significant consumer welfare losses if implemented in the wrong situations.

When a state-centric regulatory model is used to govern a good or service that is national in nature, economic efficiencies are lost, commerce slows, and consumers are harmed. For example, in the 1980s a number of states considered implementing laws to regulate food labeling. The prospect of having to label the same good fifty different ways led policy makers and other stakeholders to realize that such a system would be inefficient and would ultimately increase costs to consumers. After a broad set of rules were drafted and vetted, “the advantages of uniformity tipped the scales in favor of national standards.”

When states are allowed to implement a patchwork of disparate regulations for a good or service that is national in nature, individual policy choices have a large aggregate impact on providers, the consequences of which inevitably trickle down to consumers, usually in the form of higher prices. For a national service like wireless, a state-centric regulatory approach would not be practical.

B. The Federal Extreme: Preemption of State Regulatory Authority

Federal preemption of wireless regulation describes a framework where states would have no authority to craft, implement or enforce any regulations regarding wireless service. While current federal law

But even this distinction is inexact. For a more thorough analysis of recent case law on this topic, see Robert A. Schapiro & William W. Buzbee, Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication, 88 Cornell L. Rev. 1199 (2003).

See Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 Iowa L. Rev. 243, 266-67 (2005), [hereinafter Interactive Federalism] (arguing that “[t]he possibility of people and businesses moving into or out of the state provides an incentive for the states to design the best packages. States in this sense compete for population and economic resources. This competition provides a kind of discipline that drives states to provide the basket of goods that best meets the needs of its citizens.”).

Federal Preemption, supra note 40 at 183-84.

Economic Approach, supra note 38 at 2; Interactive Federalism, supra note 48 at 267-68.
contemplates a role for state regulation under certain circumstances,\textsuperscript{51} a number of economic and policy reasons have been proffered to support a more nationalized approach to wireless regulation.

Central to arguments in favor of complete federal preemption is the efficiency gains likely to be achieved from this model. One of the most tangible economic benefits associated with the 1993 national regulatory framework for wireless was that it facilitated the deployment of nationwide networks, which ultimately led to lower prices and better quality of service for consumers as carriers were able to leverage vast economies of scale. Additional positive aspects associated with a national approach to regulation include the reduction of externalities or spillover effects associated with overlapping or inconsistent local regulations\textsuperscript{52} and the ability to leverage the specialized expertise of a central oversight agency (e.g., the FCC)\textsuperscript{53}. Thus, it has been argued that services that are national in scope require a national regulatory framework\textsuperscript{54}.

Wireless is indisputably a national service and would thus benefit from a uniform set of national consumer standards\textsuperscript{55}. However, in terms of crafting and enforcing these consumer standards, adopting a national approach that preempts state involvement remains a dubious proposition for two key reasons. First, from a purely administrative standpoint, removing the states entirely from the equation may not be practical. State “proceedings and enforcement actions generally can be completed more quickly than at any federal agency” because the federal government “will always lack the

\textsuperscript{51} As discussed above, Section 332 of the 1996 Telecommunications Act specifically grants the states regulatory authority over “terms and conditions” of wireless service, \textit{supra} note 14. Federal legislation would be required in order to amend this provision. In practice, courts have generally interpreted the federal grant of authority over wireless regulation narrowly. For example, in \textit{National Association of State Utility Consumer Advocates v. FCC}, 468 F.3d 1272 (11th Cir. 2006), the 11th Circuit struck down an attempt by the FCC to preempt the states from requiring or prohibiting the use of line-items in customer billing for cellular wireless services. The Court found that the FCC had exceeded its authority and that bill line-items fell squarely within the regulatory purview of the states.

\textsuperscript{52} \textit{Economic Approach}, \textit{supra} note 38 at 2.

\textsuperscript{53} Robert W. Hahn, Anne Layne-Farrar & Peter Passell, \textit{Federalism and Regulation}, \textit{REGULATION MAGAZINE}, vol. 26, no. 4, Winter 2003 at 49 [hereinafter \textit{Federalism and Regulation}].

\textsuperscript{54} \textit{Federal Preemption}, \textit{supra} note 40 at 178-179.

\textsuperscript{55} \textit{Infra}, section IV.
manpower to help all consumers in every state.” 56 Second, preempting states from participating in either the formulation of standards or the enforcement of them disregards a valuable set of core competencies that states have developed and honed over many years of consumer interaction. 57 Thus, a purely federal approach to the development, implementation, and enforcement of wireless consumer standards might not be beneficial for consumers or carriers.

C. The Current Model: Cooperative Federalism

As a result of the prior two models being at conflict vis-à-vis many aspects of telecommunications regulation, a model of “cooperative federalism” has been adopted to allocate responsibilities in the regulation of telecommunications. In a nutshell, cooperative federalism “involves the sharing of authority between federal and state agencies, often leaving state agencies with discretion to implement broad federal policy goals, binding criteria, or guidelines.” 58

This model has been used widely in the formulation of telecommunications policy. 59 Under this paradigm, the federal regulatory authority (here, the FCC) usually adopts regulations that act as a “floor” or a minimum standard above which states have room to experiment in crafting more restrictive or permissive regulations. 60 The lack of a “ceiling,” however, can be problematic. Indeed, the very nature of a “cooperative” model can encourage regulatory uncertainty. Even though this model in the non-wireless context has resulted in the development of policies that have generally benefited consumers, it lacks clearly definable limits on state experimentation above the “floor,” which can create tension between state and federal regulatory efforts. 61 The absence of a “ceiling” shifts the

56 See Larry Landis, Commissioner, Indiana Utility Regulatory Commission, Testimony before the FCC regarding Early Termination Fees (June 12, 2008) [hereinafter Landis Testimony].

57 NARUC Federalism, supra note 3 at 4.


59 Landis Testimony, supra note 56 at 1 (noting that a “cooperative federal-state approach” has been used in “tackling intercarrier compensation, universal service, and other issues.”).

60 Interactive Federalism, supra note 48 at 284.

61 Id. at 251 (“[C]ooperative federalism gives an incomplete specification of federal-state relations. Cooperative federalism blesses the voluntary interaction of state and national
cooperative model toward the state-centric model, which raises the possibility of states implementing a patchwork of disparate policies for a national service like wireless. This would likely lead to consumer welfare losses, not gains.

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Given that each of the three models described above is inadequate for the regulation of national technologies like wireless, a new approach to regulating these types of services is needed.

IV. Wireless Federalism for the 21st Century: A New Model for a New World

This section proposes a new model for the formulation and implementation of consumer standards for national communications services like wireless. This new framework draws on the strengths of each of the models discussed above and calibrates its scope to balance the core competencies of states on the one hand with the economic efficiencies gained from a national standards approach on the other. The five core elements of this model are:

- The development of national consumer standards that are both a “floor” and a “ceiling”;
- States have authority to enforce these rules;
- States have the opportunity to contribute to the formulation of the rules;
- The rules are periodically reviewed and updated; and
- When appropriate, the rules are extended to emerging technologies.

A. National Standards that are a “Floor” and a “Ceiling”

The ability of individual states to implement wireless consumer rules above a federal floor increases regulatory uncertainty, raises compliance costs, and ultimately decreases the benefits accrued by consumers. A model that allows the federal government to implement consumer rules that are
both a floor and ceiling would streamline the policy making process and ensure continued consumer welfare gains.

Properly defining the parameters of the federal “ceiling” is crucial to the successful implementation of this new model. A simplistic definition of a ceiling is that it is the opposite of a floor, meaning that it is the maximum level of regulation allowed by the federal government. Such regulations would not permit states to regulate above this standard or fill any perceived gaps, thus providing a renewed sense of certainty to the wireless providers that have to comply with these standards.

In addition, rules should be crafted and implemented under a narrow set of circumstances. When evaluating the need for a new national consumer standard, policy makers and stakeholders should address specifically:

- Whether the market has failed to address a specific item;
- Whether the market has ignored a critical mass of consumer complaints; or
- Whether the market has acted in such a way that overall consumer welfare has decreased.

Under these conditions, regulators should proceed and discuss the mechanics of implementing a national standard to address the specific issue. At a minimum, these discussions should include an analysis of the costs and benefits associated with implementing a standard.

The ultimate goal for a national consumer standards regime should be to enhance consumer welfare. As such, rules should not be crafted in a vacuum and should be considerate of their real world impact. Thus, there should be some threshold above which a standard is not adopted if the anticipated cost to carriers and consumers outweighs the perceived benefit of having that standard.

B. State Authority to Enforce

Providing states with the authority to enforce federal standards is the most efficient and consumer-friendly way to implement new rules. The FCC

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63 *Id.* at 1569.
simply lacks the manpower and physical resources for processing consumer complaints from each of the fifty states. Furthermore, such a geographically removed agency is unable to be responsive to consumers in a timely manner. Having state “cops on the beat” would help ensure the efficient resolution of those complaints that might not get resolved by the carrier directly.64 These local actors, be they state regulatory commissioners, consumer protection agencies or Attorneys General, have a real political incentive to act quickly in response to consumer complaints.

C. Meaningful State Participation in Crafting Consumer Standards

In addition to enforcement authority, states should be afforded a meaningful opportunity to contribute to the process of developing the national wireless consumer standards. States possess a well-developed set of core competencies that would prove invaluable to the deliberative process. Moreover, such federal-state collaboration is common in telecommunications policy making. A variety of federal-state joint boards and conferences have been established over the years to make recommendations for new policies.

Whether a formal joint board or conference should be established is something that would ultimately be left to federal policy makers. However, a body similar in organization and stature to the Federal-State Joint Board on Universal Service65 could allow states a meaningful role in the formulation of wireless consumer standards, so long as the FCC takes, or is compelled to take, seriously its obligation to act in concert with the state representatives. In addition, policy makers should also consider having stakeholders from the wireless industry and from consumer groups at the table. These groups would provide a variety of perspectives regarding the potential impacts of new national consumer standards and would allow regulators to access knowledge and experience on a number of issues beyond the scope of their expertise.

D. Periodic Review of Consumer Standards

Given the pace of innovation in the advanced communications market, rules forged today quickly become antiquated. Perhaps the most prominent cautionary tale against monolithic policymaking in the advanced

64 Landis Testimony, supra note 56 at 2.

65 The official Federal-State Joint Board on Universal Service can be found at: http://www.fcc.gov/wcb/tapd/universal_service/JointBoard.
communications sector is the 1996 Telecommunications Act. A little over a
decade old, many of its policies and assumptions have already become
outdated. Technological innovation, the rapid deployment of advanced
networks, convergence around the Internet Protocol, and insatiable consumer
demand for new products and services have made timely policy making a
difficult, if not impossible, task. A world characterized by instantaneous
communication has also created expectations for the timely resolution of
complaints. Thus, whatever consumer standards are adopted by the FCC and
enforced by the states must be reexamined on a regular basis. Specific
recommendations for how and when this might happen are beyond the scope
of this Essay, but the rulemaking process must be responsive to consumer
demand in order to assure continued welfare gains.

E. A Possible Model for Emerging Technologies When
Appropriate

Federal and state actors who participate in the standard-setting process
must also keep an open mind when considering whether and to what extent
this model ought to be applied to emerging technologies. For example,
supporters of VoIP could make a very strong case for why this technology
should be subject to the same regulatory treatment as wireless. Even though
the FCC has yet to officially classify all “flavors” of VoIP, it shares many
characteristics with wireless telephony, especially so-called “nomadic”
VoIP. Since it uses the IP protocol to route calls, it too is national in nature.
Indeed, the two technologies have already begun to converge. Moreover,
VoIP deployment and adoption have flourished in the absence of regulation.
The number of U.S. VoIP subscribers is estimated to have increased from
about 150,000 in the early 2000s to approximately 16 million by the end of
2007. It is projected that VoIP subscribership in the U.S. will reach 41 million

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66 In the Matter of IP-Enabled Services, WC Docket No. 04-36, FCC 04-28 (initially released by
the FCC on March 10, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-

67 “Nomadic” VoIP is voice service provided exclusively over the Internet by providers like
Vonage. The term “nomadic” refers to the inability to determine the exact location of the

68 T-Mobile recently announced a new service – HotSpot@Home – that allows for a user to
place calls over the carrier’s network or via T-Mobile Wi-Fi hot spots. This service leverages
the flexibility of VoIP and the ubiquity of Wi-Fi networks to extend T-Mobile’s coverage area
and bolster its data offerings. For more information, see http://www.theonlyphoneyouneed.com.

69 Press Release: VoIP Surges While IPTV Lags, eMARKETER, April 17, 2007,
by 2011. Thus, a more national approach to VoIP regulation would seem inherently reasonable in light of the preceding analysis for wireless.

F. State Leaders Adopt New Wireless Federalism Model

Within the last few years, a core group of state regulatory commissioners began a series of internal discussions regarding the effectiveness and efficiency of the current wireless regulatory regime. The culmination of those discussions was a resolution sponsored by Commissioner Rachelle Chong of California and a group co-sponsors to put the National Association of Regulatory Utility Commissioners affirmatively on record as supporting a regulatory model similar to the one offered here. The model was formally adopted by the association’s Board of Directors at its meeting in July 2008.

The National Conference of State Legislatures (NCSL), another leading association of state government officials, has moved in a similar direction. Recently, NCSL adopted a “Twenty-first Century Communications Policy Statement” that “urges state and federal policy makers to work together to ensure that industry targeted consumer protections can be applied within a national framework that ensures the continued ability of the state attorneys general to enforce such consumer protections.”

The willingness of two of the major state players in communications policy to advocate for a new model signals a shift towards a consumer-centric focus for states, as opposed to one merely defined by arguments over jurisdictional prerogatives. It remains to be seen whether the federal government will follow suit by legislating the change.

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This new regulatory model may contradict some of the assumptions and positions held by many policy makers and industry stakeholders. But, as the preceding discussion has outlined, a collaborative paradigm that leverages the expertise and resources of both state and federal government is the only framework that will be successful in the newly converged and

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70 Id.
71 Supra note 3.
increasingly global digital marketplace. A version of the model set forth above will ensure that consumers continue to reap the benefits of intermodal competition in the advanced communications market.

V. CONCLUSION

Regulators and policy makers have the opportunity to assure continued innovation and consumer welfare gains in the wireless sector by implementing one of three policy frameworks. Policy makers can continue with the status quo and risk the creation of inconsistent state-level regulatory regimes, adopt a federal regime that might be impossible to administer, or recast current notions of federalism to protect consumers and industry from the countervailing forces of inefficient government intervention. This Essay has endorsed the latter approach and has outlined a model whereby national consumer standards, developed by both state and federal policy makers, are enforced by the states.

This model protects consumers, enhances welfare gains, and can accommodate the emergence of new communications technologies like VoIP. Furthermore, adopting this model would provide continued regulatory certainty, which would send a signal to the market that regulators and policy makers at the state and federal levels will not unduly interfere with the organic market forces that have guided the advanced communications sector to its current levels of efficiency and productivity.

If policy makers do not act to address new technologies and new issues when they first emerge, competition will ebb and consumers will lose. Adopting the model set forth in this Essay is essential to ensure the continued success of our country’s vibrant advanced communications market.

About the ACLP at New York Law School

The ACLP is an interdisciplinary public policy program that promotes solution-focused dialogues among state and federal policy makers, industry, academe, consumers, and the financial community regarding changes to the state and federal regulatory regimes governing the advanced communications sector. For more information, please contact:

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