Staff Subcommittee on Telecommunications

NARUC Summer Policy Summit

Staff Subcommittee on Telecommunications

Panel III: Back to the Future… Or the Past: The Effect of a Broadband Reclassification

NARUC Summer Policy Summit

Panel III
Back to the Future…or the Past:
The Effect of a Broadband Reclassification

Prof. Barbara A. Cherry
The Media School, Indiana University
NARUC Summer Policy Summit
2017

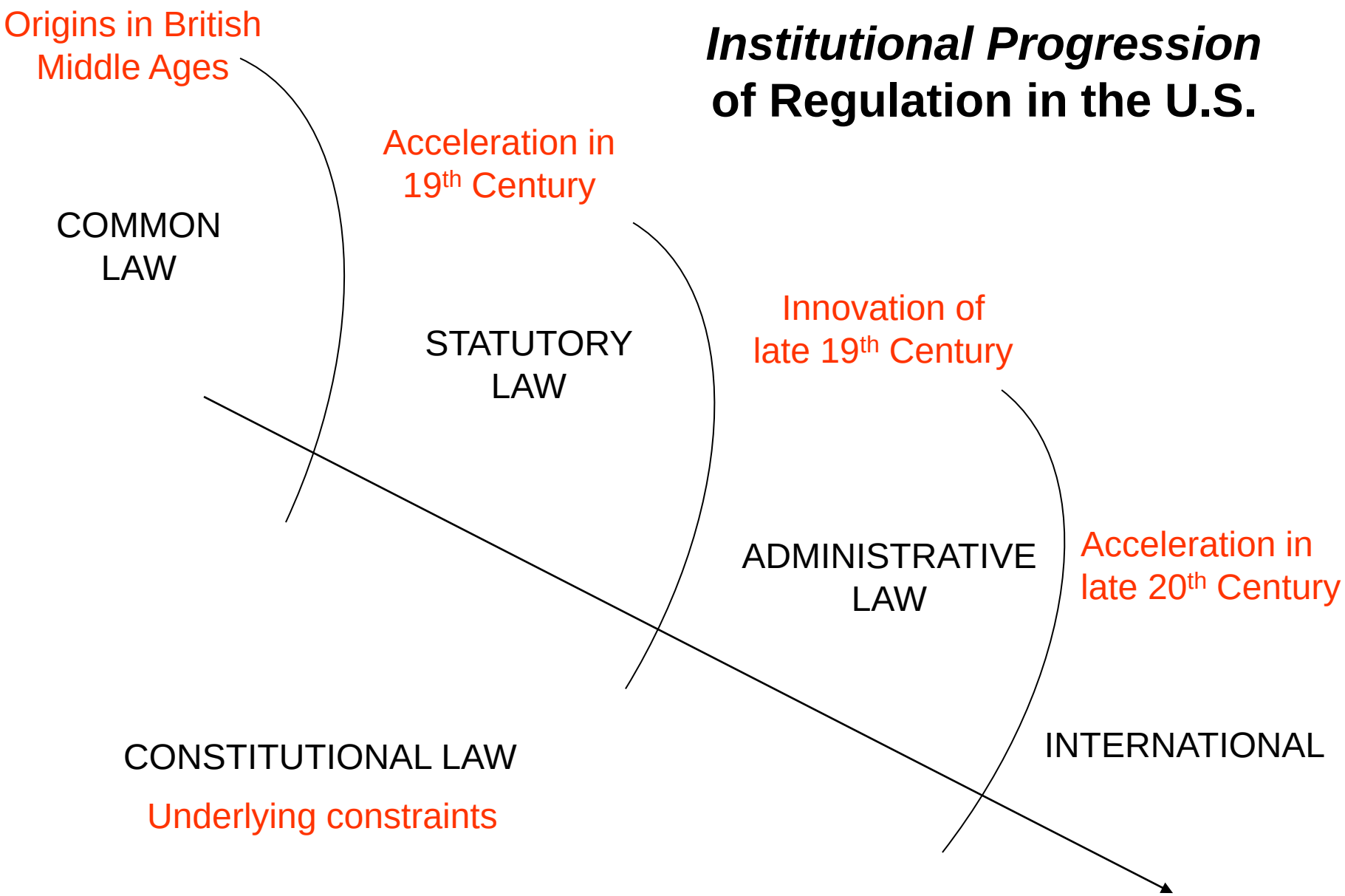
Need for a Systems Perspective

- Legal, political, economic, social, technological systems are co-evolving complex adaptive systems.

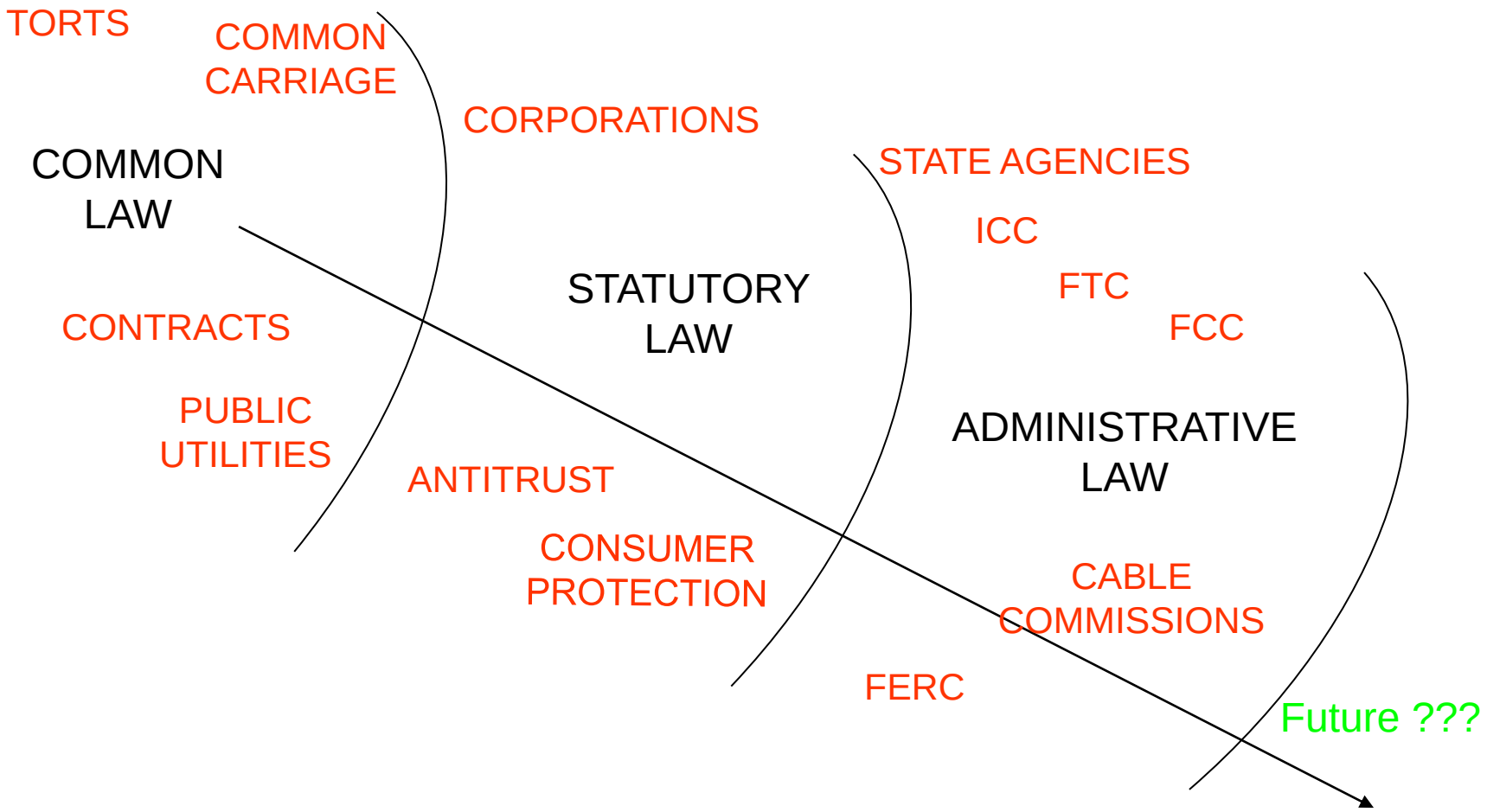
- Regulatory rules and governance – also a complex adaptive system -- emerges from this coevolution.

- Issues of further regulatory evolution need to be analyzed in light of the historical evolution.
  - Overarching system of constitutional federalism
  - Institutional progression of regulation: common law →statutory law → administrative law
  - Evolution of certain bodies of law
  - Evolution of coexisting, industry-specific and general business regimes

Institutional Progression of Regulation in the U.S.



Evolution of *Bodies of Law* In the U.S.



Common Carriage Law ≠ Public Utility Law

Common Carrier (common law)
- Based on the functionality of the service (market structure is irrelevant)

Public Utility (state common law)
- Based on govt grant of a franchise (may or may not be monopoly franchise)

Railroads, Telegraphy, Telephony
- Have dual legal status as common carriers & public utilities under the common law

Rise of corporate power

Under Federal and State Statutory Law
- Dual jurisdictional regulation

FCC (and ICC) interstate jurisdiction over common carriers

State intrastate jurisdiction over common carriers and public utilities

My “Back to the Future” Comparative Analysis (2008)

- Informed by systems perspective
- Compares U.S. deregulatory policies for transportation & telecommunications carriers, where former predates the latter
- Foreshadows deregulatory challenges for telecommunications
- Provides insights for common carriage service classification issue under federal law

Cherry, B. A. (2008), “Back to the Future: How Transportation Deregulatory Policies Foreshadow Evolution of Communications Policies,” 24 *The Information Society* 273-291.

Comparative Experiences Under Deregulatory Policies

Transportation Carriers

- Sustainability problems with universal service programs
- Transition problems re scope of federal preemption of state claims
- Retain federal legal status as common carriers, but modify statutory obligations

Telecommunications Carriers

- Sustainability problems with universal service programs
- Transition problems re scope of federal preemption of state claims
- Under TA96, retain federal legal status as common carriers, & grant FCC forbearance power
- Since 2002, instability of federal legal status as common carriers => new problem.

More Detailed Flowcharts:

- Evolution of U.S. telecommunications regulation
- Illustrating that disruption of service classification under federal law begin in 2002

Common Law Evolution of Common Carriage & Public Utility Law

Middle Ages

English Common Law of Common Carriage
- Based on tort law
- Legal status is based on the functionality of the service (market structure is irrelevant)

Late 18th Century

Federalism Under the U.S. Constitution

19th Century

New Technologies led to:
- New State Common Law of Public Utilities (Gov't grants franchises; may or may not be monopoly franchise)
- Rise of Corporations (Size & Scope)

Railroads, Telegraphy, Telephony
- Dual Legal Status (Common Carriers & Public Utilities Under Common Law)

Gas, Electric, Water
- Only Public Utilities Under Common Law

Statutory Evolution of Common Carriage & Public Utility Law

Late 19th to early 20th centuries

Economic Developments led to:

- Rise of Corporate Power, not sufficiently constrained by competition or common law remedies to protect customers

Regulation in Intrastate Commerce: State Statutes & Regulatory Agencies

predating

Regulation in Interstate Commerce: Congressional Legislation

State Jurisdiction Coexists with Federal Regulation

Industry-Specific Regulation of Common Carriers with Dual Federal/State Jurisdiction

- Interstate Commerce Act (1887) (Railroads)
- Applied to telegraph & telephony (1910); jurisdiction transferred to FCC in Communications Act (1934)

General Business Regulation

- Sherman Act (1890)
- FTC Act (1914) (Common carrier exception)

Mid 20th – early 21st Centuries

Communications Act (1934)

Further New Technologies

FCC Computer Inquiry Framework (1970-1980's)
(Separable Common Carriage Transmission Component)

Basic service: Common Carriage → To ESP's → Enhanced Service: Not regulated

Basic service: Common Carriage → To endusers

Telecommunications Act of 1996
- Retains CI-II Framework (Telecom v. Info Services)

And gives FCC regulatory forbearance power

FCC Universal Service Report (1998)
- Applies CI-II Framework to DSL

CI-II Dichotomy not followed by FCC
- Cable Modem Order (2002)
- Upheld by *Brand X* (2005)
- Wireline Broadband Order (2005)
- Enforcement problems under Sec. 706

CI-II Dichotomy Restored by FCC
- Open Internet Order (2015)

Reversal of Restored CI-II Dichotomy
- Proposed in NPRM (2017)

Staff Subcommittee on Telecommunications

NARUC Summer Policy Summit