Staff Subcommittee on Telecommunications
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Panel I: FCC v. FTC – Privacy NOW!
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NARUC Summer Policy Summit
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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.
Historical Evolution of Regulation in the U.S.

- An overarching system of constitutional federalism (coevolution within and among federal and state/local systems)

- Institutional progression of regulation: common law $\rightarrow$ statutory law $\rightarrow$ administrative law

- Evolution of certain bodies of law

- Evolution of coexisting, industry-specific and general business regimes
Unique Properties of Federalism

Federalism is a decision making algorithm – known as a patching algorithm – with important adaptive properties for both experimentation (states) and stability (federal preemption).

Policies of federal preemption and deregulation (i.e. no federal/state jurisdiction) should be pursued with caution as they disable some adaptive properties.

Forces Driving Regulatory Change

- \( \Delta \) TECHNOLOGY
- \( \Delta \) INSTITUTIONAL ENDOWMENT
- \( \Delta \) ECONOMIC RELATIONSHIPS
- \( \Delta \) NEW USES & SERVICES
- \( \Delta \) POLICY ISSUES & GOALS
- \( \Delta \) SOCIAL EFFECTS
- \( \Delta \) REGULATION DESIRED

 PRIOR POLICY CHOICES
Forces Driving Regulatory Change

- **Δ TECHNOLOGY**
- **Δ ECONOMIC RELATIONSHIPS**
- **Δ SOCIAL EFFECTS**
- **Δ POLICY ISSUES & GOALS**
- **Δ REGULATION DESIRED**

- **NEW USES & SERVICES**
- **EXISTING ECONOMIC RELATIONSHIPS**
- **PRIOR POLICY CHOICES**
- **INSTITUTIONAL ENDOWMENT**

Cherry 2017
Institutional Progression of Regulation in the U.S.

Origins in British Middle Ages

Acceleration in 19th Century

Innovation of late 19th Century

Acceleration in late 20th Century

Underlying constraints
Evolution of *Bodies of Law* In the U.S.
Future Evolution of Law
In the U.S.?
How Might Regulatory Regimes Further Evolve?
## How Might Regulatory Regimes Further Evolve?

<table>
<thead>
<tr>
<th>Basic Issues of Further Regulatory Evolution</th>
<th>Possible Options</th>
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</table>
| What should be the presumptive institutional source of law? | - Common law  
- Statutory Law  
- Administrative Law  
- New governance innovation? |
| What should be the presumptive legal principles governing the provider-customer relationship? | - Common law -- Tort or Contract?  
- Statutory (e.g. consumer protection) |
| What should be the presumptive legal principles governing the provider-provider relationship? | - Contract  
- Statutory rules (e.g. interconnection)  
- Antitrust |
| Should any industry-specific regulation remain, and what are its limitations? | - Common law  
- Statutory law  
- Constitutional law |
| Should administrative agency regulation remain, and of what type and powers? | - Industry-specific (e.g. FCC, PSC)  
- General business (e.g. FTC)  
- Alter combined powers (Furchtgott-Roth)? |
| What should be the allocation of federal and state powers? | - Federalism  
- State or federal preemption  
- Deregulation |
Appendix:
Recent Analyses of Challenges of U.S. Separation of Powers
Social Acceleration of Time: Effect on Separation of Powers

<table>
<thead>
<tr>
<th>Branch of Government</th>
<th>Temporal Presupposition</th>
<th>Temporal Misfit of Social Acceleration of Time</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative</td>
<td>Slow, deliberate &amp; future-oriented</td>
<td>Difficult to predict future trends or to remain stable</td>
<td>Motorized legislation</td>
</tr>
<tr>
<td>Executive</td>
<td>Expeditious, present-oriented</td>
<td>Pressure to augment power to increase responsiveness</td>
<td>Rise of administrative state</td>
</tr>
<tr>
<td>Judiciary</td>
<td>Retrospective, past-oriented</td>
<td>Pressure to be forward-looking</td>
<td>Conflation with legislative function</td>
</tr>
</tbody>
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William E. Scheuerman (2004), *Liberal Democracy and the Social Acceleration of Time*
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