Staff Subcommittee on Telecommunications
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Panel III: Back to the Future... Or the Past: The Effect of a Broadband Reclassification
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Back to the Future…or the Past: The Effect of a Broadband Reclassification

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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.
  - 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.

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.
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

- 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

## Comparative Experiences Under Deregulatory Policies

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<tr>
<th>Transportation Carriers</th>
<th>Telecommunications Carriers</th>
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<tr>
<td>Sustainability problems with universal service programs</td>
<td>Sustainability problems with universal service programs</td>
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<td>Transition problems re scope of federal preemption of state claims</td>
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<td>Retain federal legal status as common carriers, but modify statutory obligations</td>
<td>Under TA96, retain federal legal status as common carriers, &amp; grant FCC forbearance power</td>
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<td>Since 2002, instability of federal legal status as common carriers =&gt; new problem.</td>
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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 19\textsuperscript{th} to early 20\textsuperscript{th} 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

- **Regulation in Interstate Commerce:**
  Congressional Legislation

- **Predating**

  **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

(Separable Common Carriage Transmission Component)

- To ESP’s
- To endusers

**Basic service: Common Carriage**

**Enhanced Service: Not regulated**

**Telecommunications Act of 1996**

- Retains CI-II Framework (Telecom v. Info Services)
- And gives FCC regulatory forbearance power


- 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)
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