

Staff Subcommittee on Telecommunications

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**Panel I: FCC v. FTC – Privacy
NOW!**



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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.



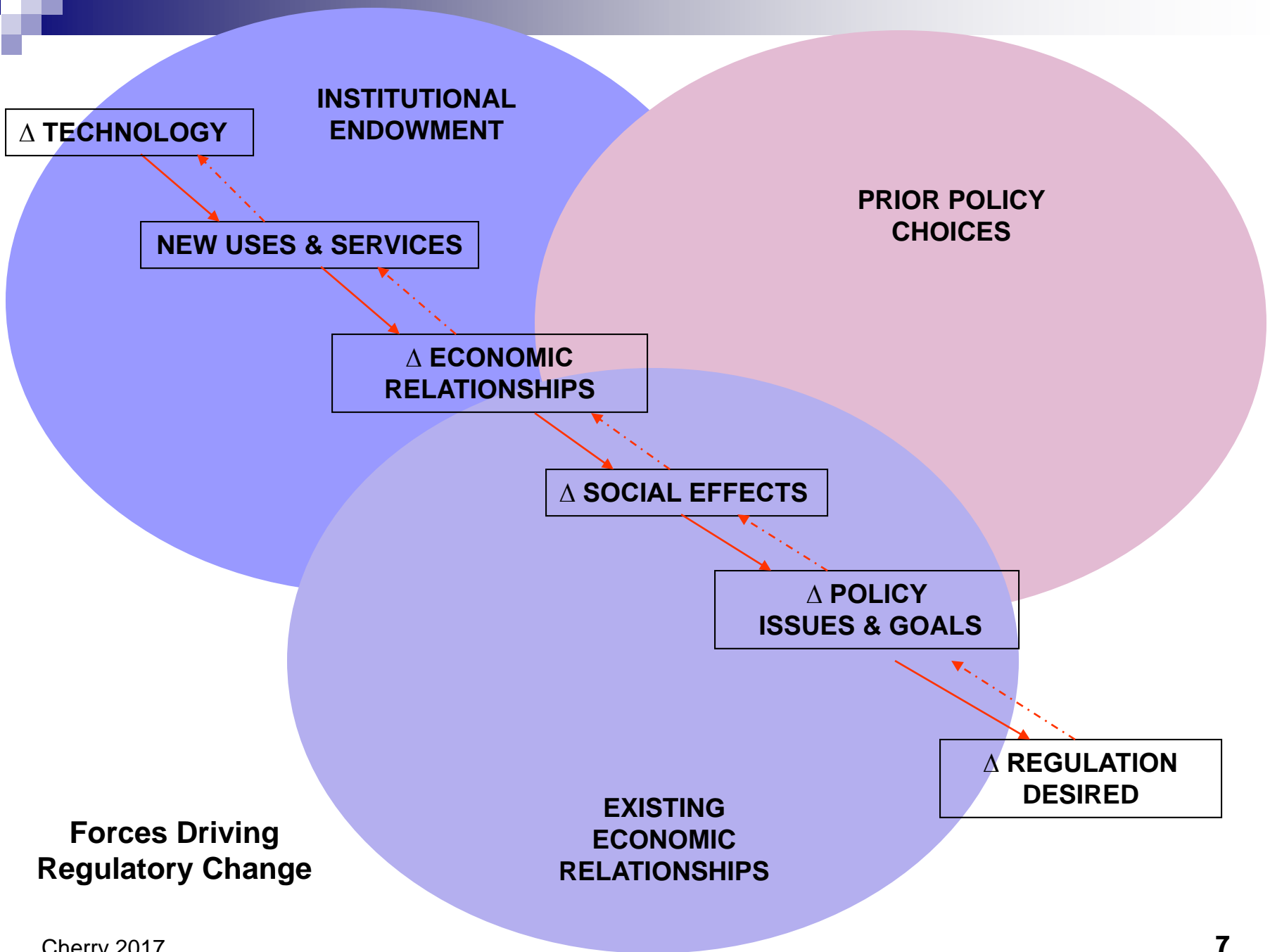
Historical Evolution of Regulation in the U.S.

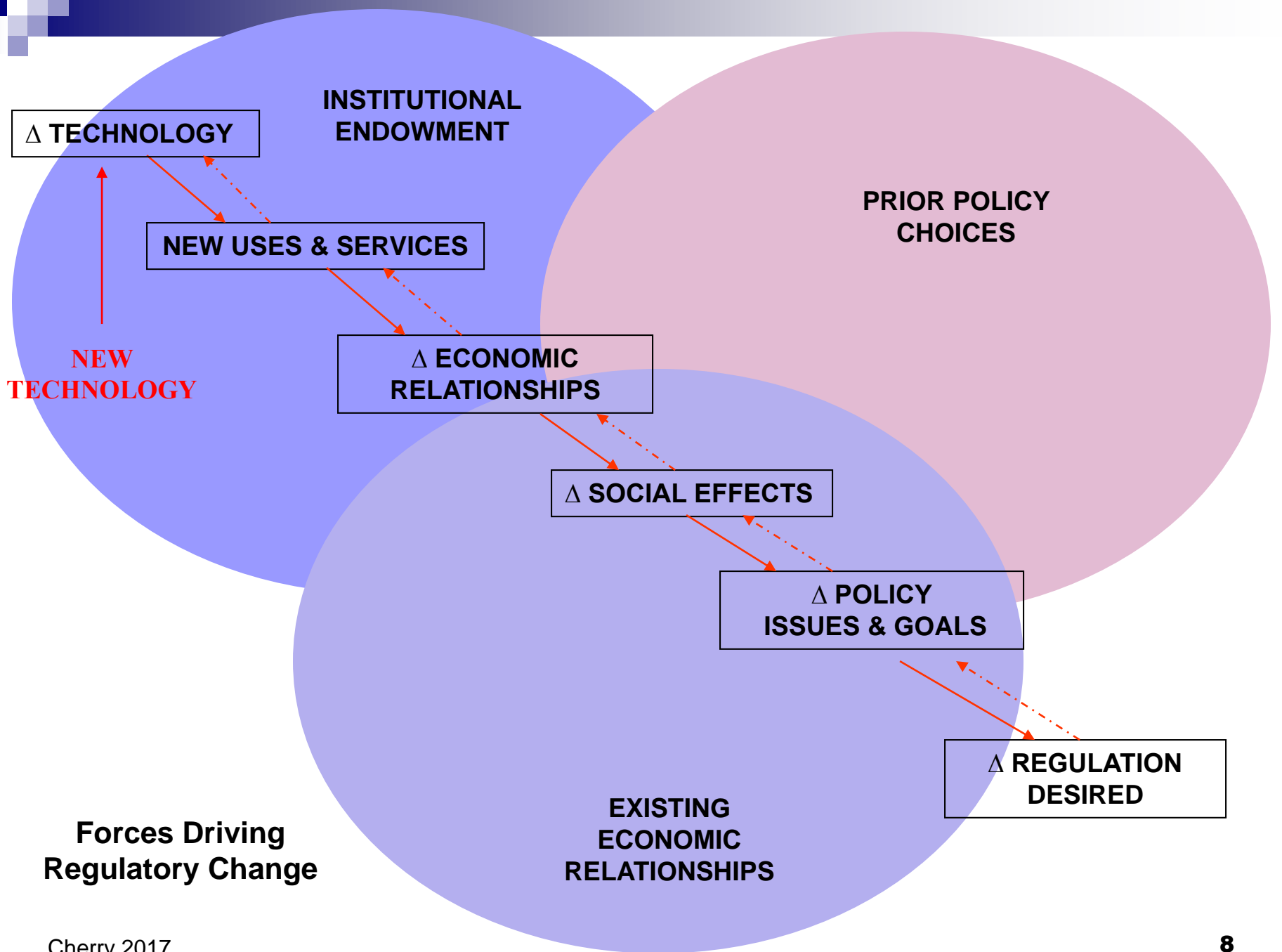
- An overarching system of constitutional federalism (coevolution within and among federal and state/local systems)
- Institutional progression of regulation: common law → statutory law → administrative law
- Evolution of certain bodies of law
- Evolution of coexisting, industry-specific and general 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.
- Reference: Cherry, B. A. (2007). “The Telecommunications Economy and Regulation as Coevolving Complex Adaptive Systems: Implications for Federalism,” 59 *Fed. Comm. L. J.* 369-402.





Origins in British
Middle Ages

Institutional Progression of Regulation in the U.S.

COMMON
LAW

Acceleration in
19th Century

STATUTORY
LAW

Innovation of
late 19th Century

ADMINISTRATIVE
LAW

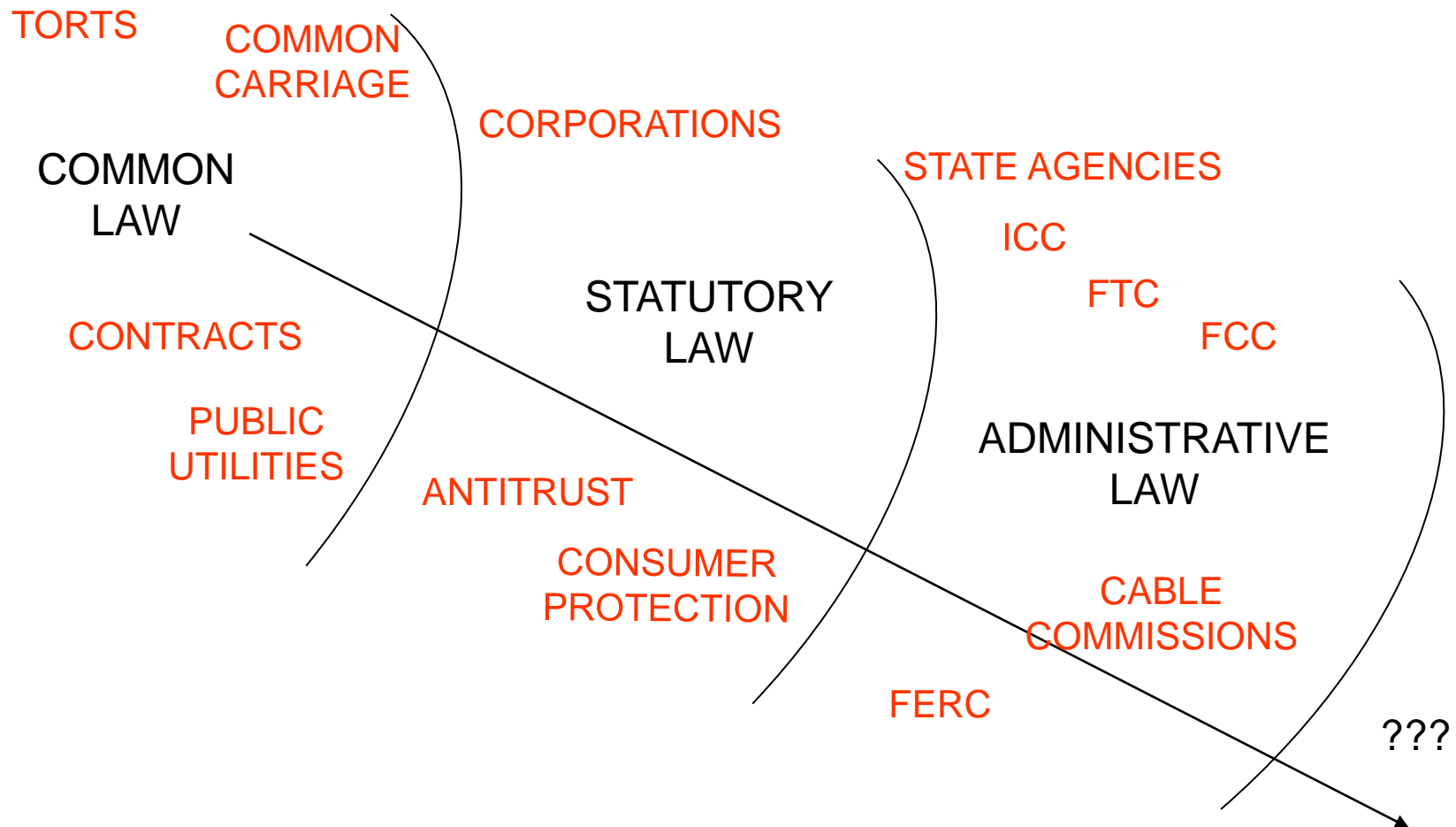
Acceleration in
late 20th Century

CONSTITUTIONAL LAW

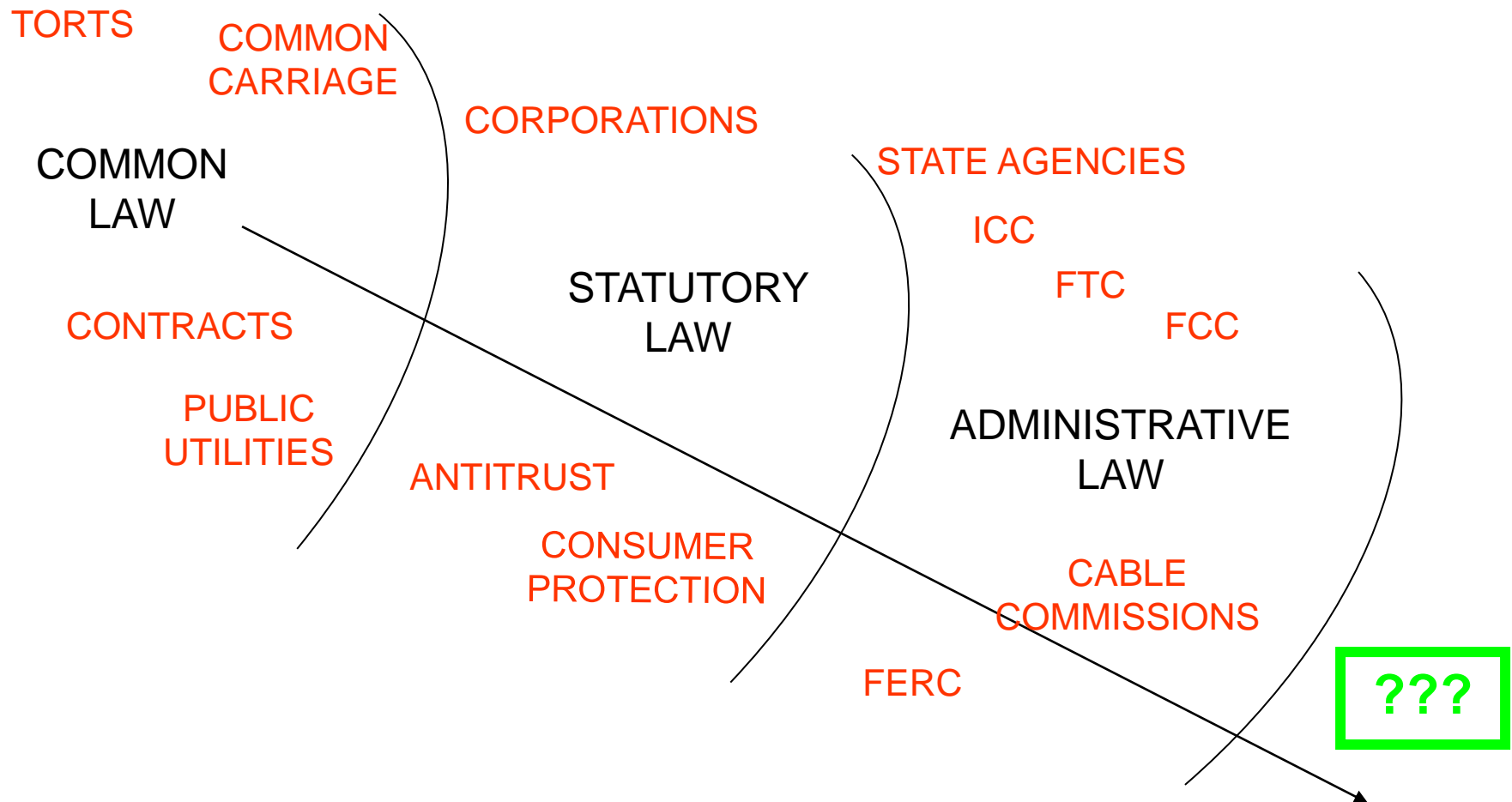
Underlying constraints

INTERNATIONAL

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?

Basic Issues of Further Regulatory Evolution	Possible Options
What should be the presumptive institutional source of law?	<ul style="list-style-type: none">■ Common law■ Statutory Law■ Administrative Law■ New governance innovation?
What should be the presumptive legal principles governing the provider-customer relationship?	<ul style="list-style-type: none">■ Common law -- Tort or Contract?■ Statutory (e.g. consumer protection)
What should be the presumptive legal principles governing the provider-provider relationship?	<ul style="list-style-type: none">■ Contract■ Statutory rules (e.g. interconnection)■ Antitrust
Should any industry-specific regulation remain, and what are its limitations?	<ul style="list-style-type: none">■ Common law■ Statutory law■ Constitutional law
Should administrative agency regulation remain, and of what type and powers?	<ul style="list-style-type: none">■ 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?	<ul style="list-style-type: none">■ 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

Branch of Government	Temporal Presupposition	Temporal Misfit of Social Acceleration of Time	Result
Legislative	■ Slow, deliberate & future-oriented	■ Difficult to predict future trends or to remain stable	■ Motorized legislation
Executive	■ Expeditious, present-oriented	■ Pressure to augment power to increase responsiveness	■ Rise of administrative state
Judiciary	■ Retrospective, past-oriented	■ Pressure to be forward-looking	■ Conflation with legislative function

William E. Scheuerman (2004), *Liberal Democracy and the Social Acceleration of Time*

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