Telecom Regulation and Public Policy – 2007: Undermining Sustainability of Consumer Sovereignty?

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Introduction

- Deregulatory telecommunications policies are shifting the boundaries between the traditional industry-specific (common carriage/public utility) and general business legal regimes in the U.S.
- The boundaries are shifting in ill-defined ways and with considerable conflict in interpretation among the courts.
- It is unclear whether consumers will be offered a range of viable service options and effectively protected from unreasonably discriminatory practices, unconscionable contract terms, misleading billing or industry practices, and various other forms of consumer abuse.

Overview of Conclusions

- Averitt & Lande's theory of consumer sovereignty is a powerful concept for analyzing the shifting boundaries between industry-specific and general business legal regimes for telecommunications and broadband access services.
- Coupled with an understanding of the differential, historical evolution among the industry-specific and general business regimes in the U.S., we find that:
  - There is an evolving legal gap for issues of consumer sovereignty that may no longer be adequately addressed by either the industry-specific or the deregulatorily-adjusted industry-specific regimes.
  - The network neutrality debate is an early manifestation of attempts to address such a legal gap.
  - The sustainability of consumer sovereignty for telecom and broadband services is threatened by deregulatory policies.

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I. The Meaning of Consumer Sovereignty

- Averitt & Lande's approach to **consumer sovereignty** describes the general business regime of antitrust and consumer protection law (65 Antitrust L. J. 713, 722-723 (1997)).
  - Consumer sovereignty is "the state of affairs in which consumers have an unimpaired ability to make decisions in their individual interests and markets operate efficiently in responding to the collective effect of those decisions."
  - *Antitrust law* seeks to ensure that a *meaningful range of options is available* to consumers through market competition.
  - *Consumer protection* laws seek to protect the ability of consumers *to freely choose among such options.*
  - It explains the FTC's dual jurisdiction for antitrust and consumer protection issues.
- But industry-specific legal regimes for common carriers and public utilities evolved to address consumer sovereignty by significantly different means.

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II. The Historical Evolution of Industry-Specific and General Business Regimes

- In the U.S., there has been a general *institutional progression* of regulation
  - from common law to statutory law to administrative agencies.
  - in response to limitations of the existing regime to adequately respond to technological, economic and societal changes.
- Within the progression of institutional change, new *bodies of law* have evolved and changed over time.
- The coevolution of institutional change and bodies of law have created *coexisting industry-specific and general business regulatory regimes.*

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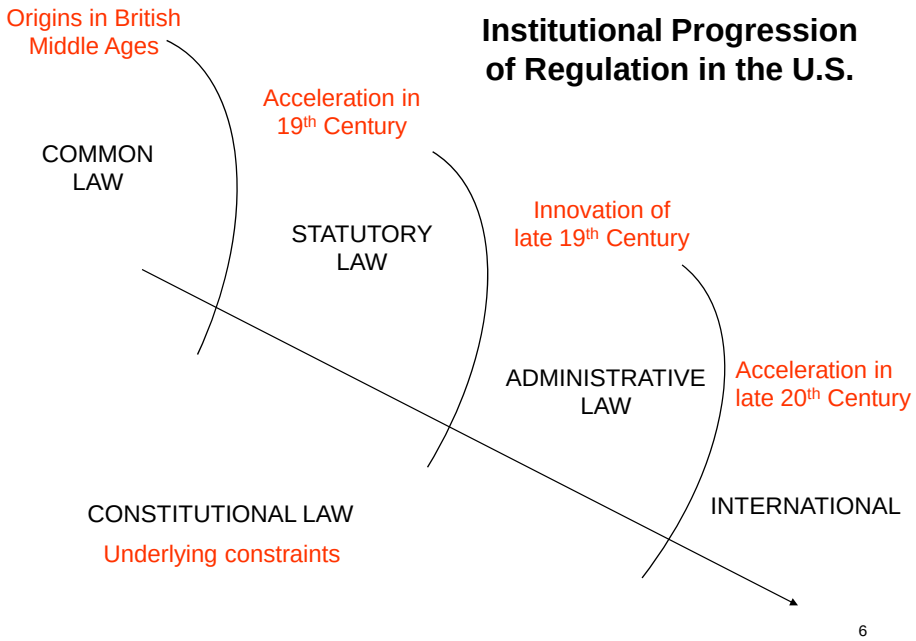

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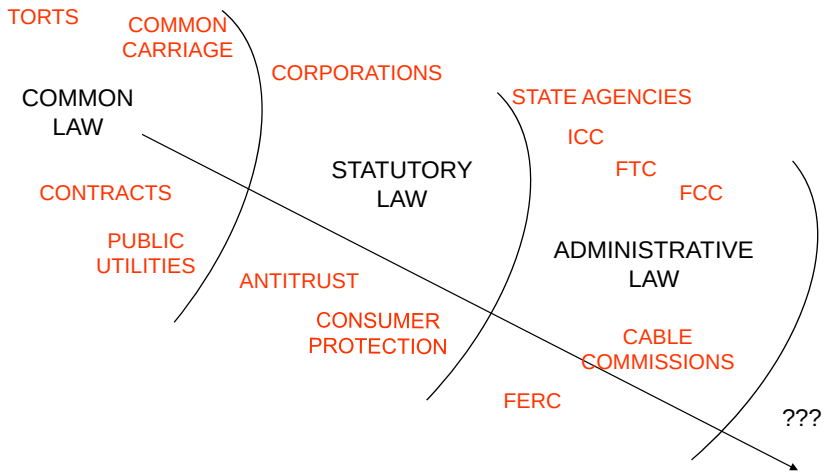
Evolution of Bodies of Law In the U.S.



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II. The Historical Evolution of Industry-Specific and General Business Regimes

- *Yet, the general business regulatory regime largely **post-dates** that of the industry-specific regimes for common carriers and public utilities.*
- **Understanding this temporal sequencing is critical**, because some analyses falsely assume that the general business regime can adequately solve (industry-specific) problems it did not evolve to address.
- The resultant shift in the interrelationship of the regimes under deregulatory policies may generate *legal gaps* for issues of consumer sovereignty that may no longer be adequately addressed by either regime.

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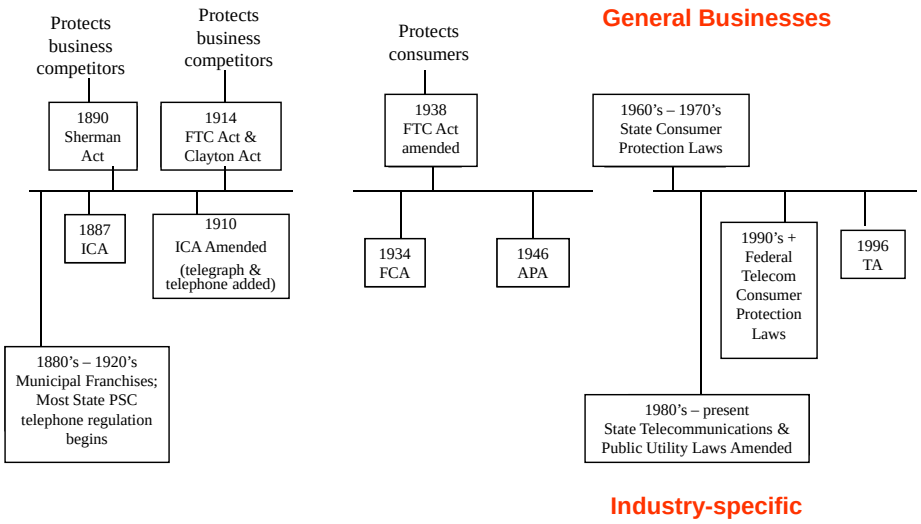

Timeline for Regulatory Regimes:
Industry-Specific v. General Businesses

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III. The Historical Interrelationship of the Industry-specific and General Business Regimes

- Applicability of antitrust law to the industry-specific regime
  - Exemptions and immunities for regulated industries
  - Filed rate doctrine bars recovery of treble damages (*Keogh* doctrine)
- Consumer protection under the Communications Act of 1934
  - FCC complaint jurisdiction (sec. 208)
  - Private rights of action in federal district courts (secs. 206, 207, 414(b))
  - State PSC complaint jurisdiction
- Applicability of consumer protection laws to the industry-specific regime
  - Savings clause in sec. 414 of the Communications Act of 1934 (preserves federal or state remedies existing at common law or by statute).
  - Filed rate doctrine bars many legal remedies, notwithstanding sec. 414.

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IV. Evolving Interrelationship of the Regimes for Telecommunications Services

- (1) A new antitrust-specific savings clause must be interpreted (sec. 601(b) of TA96).
- (2) The scope of the existing sec. 414 savings clause and the applicability of the filed rate doctrine under detariffing must be reinterpreted.
- (3) The FCC's new truth-in-billing rules and its savings clause must be interpreted.
- (4) The scope of the sec. 332(c)(3)(A) savings clause for CMRS must be interpreted.

IV. Redrawing the Boundaries with Antitrust Law for Telecommunications Services

- (1) A new antitrust-specific savings clause must be interpreted (sec. 601(b) of TA96).
  - *Verizon v. Trinko,* 540 U.S. 398 (2004) creates uncertainties:
    - Antitrust-specific savings clause bars a finding of implied immunity,
    - But does not create new claims beyond existing antitrust standards
      => arrests applicability of further evolution in antitrust law.
    - Does not recognize or repudiate the essential facilities doctrine.
    - Viewed by some in Congress as undermining the intended interrelationship of the antitrust law and TA96.
  - *Bell Atlantic v. Twombly,* 127 S. Ct. 1955 (2007) exacerbates Congress' concern:
    - Court raises standard for pleading antitrust claim of unlawful agreement v. parallel conduct, with no reference to sec. 601(b)(1) .
    - Dissenting Justices found majority opinion to be inconsistent with Congressional intent as to interrelationship among the Sherman Act, the TA96, and the Federal Rules of Civil Procedure.

IV. Redrawing the Boundaries with Consumer Protection Law for Telecommunications Services

- (2) Reinterpreting the scope of the sec. 414 savings clause and the applicability of the filed rate doctrine under detariffing
  - There is a direct conflict between the 7th and 9th Circuit Courts of Appeals.
    - Seventh Circuit
      - Secs. 201 and 202 still impliedly preempt state law claims that challenge the validity of rates, terms and conditions in contracts for interstate telecommunications services. (*Boomer v. AT&T* (2002))
      - Expressly disagrees with the 9th Circuit and reaffirms its interpretation. (*Dreamscape Design v. Affinity Network* (2005))
    - Ninth Circuit (*Ting v. AT&T* (2002))
      - Expressly disagrees with the Seventh Circuit, holding that the filed rate doctrine does not survive detariffing.
      - Quotes the FCC order that, under detariffing, consumers will have remedies under state consumer protection laws and contract law.
    - Note: Seventh and Ninth Circuits disagree as to interpretation of yet another savings clause, sec. 601(c)(1), stating that TA96 does not modify secs. 201 and 202.

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IV. Redrawing the Boundaries with Consumer Protection Law for Telecommunications Services

- (3) Interpreting the FCC's truth-in-billing rules and its savings clause
  - Under the truth-in-billing rules, consumers may seek legal remedies through complaint filed with FCC or through a private right of action filed in federal district court for damages.
  - The rules' savings clause preserves state legal remedies not inconsistent with the federal rules – remains to be interpreted.

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IV. Redrawing the Boundaries with Consumer Protection Law for Telecommunications Services

- (4) Interpreting the scope of the sec. 332(c)(3)(A) savings clause for CMRS
  - Under the savings clause, the states may regulate other terms and conditions but not rates.
  - FCC finds that the statutory savings clause preempts state regulation of line items (*NASUCA Order* (2005)).
    - *NASUCA Order is* vacated by the 11th Circuit Court of Appeals,
    - but is followed by U.S. Dist. Ct. for W. D. Wash. in 3 different cases.
  - Note: FCC finds that the filed rate doctrine does not apply to CMRS services (*Wireless Consumers Alliance Order* (2000)) -- unacknowledged by the Seventh Circuit.

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V. Evolving Legal Regime for Broadband Access Services

- FCC is attempting to construct a new regime for broadband access services
  - Using ill-defined Title I authority, and
  - Supplemental reliance on the general business regime
  - As a result of its rulings in *Cable Modem Declaratory Ruling* (2002) and *Wireline Broadband Access Order* (2005).
- Network neutrality is illustrative of the difficulties and complexities of building a new interface between a Title I-based industry-specific regime and the general business regime.
  - See Barbara A. Cherry (2006), "Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System," 33 *N. Ky. L. Rev.* 483-511.

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V. Evolving Legal Regime for Broadband Access Services

- A Title I-based regime yields a greater role for the general business regime.
  - Role of antitrust law will likely differ under Title I-based regulation.
  - FTC jurisdiction is not preempted by the common carrier exemption.
  - The conflict between the 7th and 9th Circuit Courts of Appeals, regarding the scope of legal remedies preserved under the sec. 414 savings clause, is irrelevant.
  - FCC truth-in-billing rules and the limitations on state regulation for CMRS services are inapplicable.

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Concluding Remarks

- There is an evolving legal gap for issues of consumer sovereignty that may no longer be adequately addressed by either the industry-specific or the deregulatorily-adjusted industry-specific regimes.
- The network neutrality debate is an early manifestation of attempts to address such a legal gap.
- The sustainability of consumer sovereignty for telecommunications and broadband services is threatened by deregulatory policies.
- Reference: Barbara A. Cherry, "Consumer Sovereignty: Redrawing the Boundaries Between Industry-Specific and General Business Legal Regimes for Telecommunications and Broadband Access Services," presented at the 35th Telecommunications Policy Research Conference, Arlington, VA (Sept. 2007).

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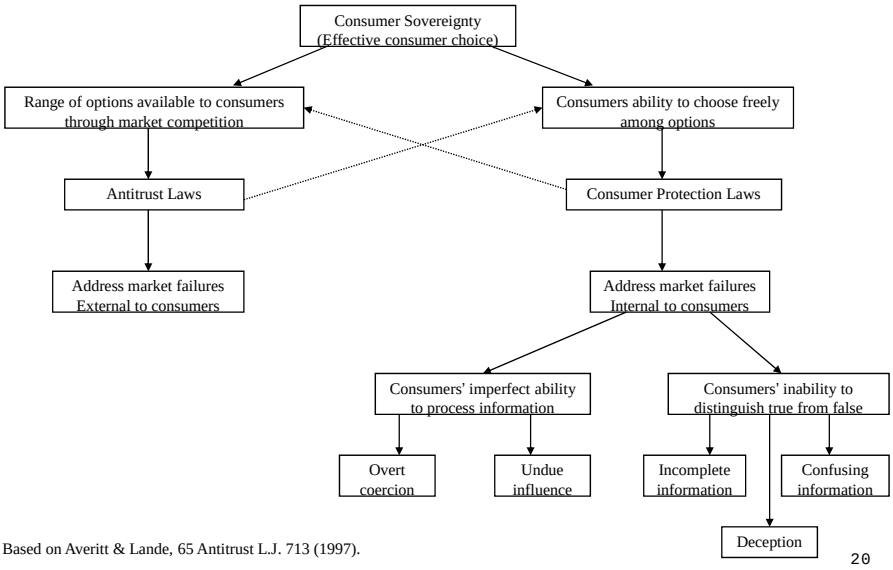
Appendix

Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law



Based on Averitt & Lande, 65 Antitrust L.J. 713 (1997).