Designing U.S. Regulatory Institutions for the 21st Century: A View from Abroad

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George Washington Univ. & King’s College London
Silicon Flatirons
Boulder, 12 February 2018
Forty-Seven Years Ago

  - Analysis of decision making during Cuban Missile Crisis
  - Focus: Infrastructure and operations of public agency bureaucracy
Allison on Implementation

• “If analysts and operators are to increase their ability to achieve desired policy outcomes, ... we shall have to find ways of thinking harder about the problem of ‘implementation,’ that is, the path between the preferred solution and actual performance of the government.”
Allison and the Silicon Flatirons Conference: The Common Awareness

- Institutional Arrangements
  - Shape Substantive Policy Outcomes
  - Require continuous assessment and adjustment
Is US Institutional Reform *Essential*?

• Perhaps Not
  – US can pass the course with a C+/B-

• Is the System Ideal?
  – We’d design it differently from scratch
  – Yet it adapts by formal/informal means

• *Compare* Postal and Delivery Services
Would Upgrades in US Institutionals Improve Performance?

• Probably
  – Coherence and coordination deficiencies

• Realistic Aim
  – Closer to production possibilities frontier

• Why Care: Two Examples
  – Global norms for competition policy
  – Global norms for data protection
How to Get There?

• Examine Own Experience
  – Law and History
  – Example: FCC’s economic analysis unit
    • Understanding design tradeoffs

• Study Others’ Experience
  – At home
  – Abroad
Global Regulatory Reform

- Illustration: Competition Law
- Past 30 years
  - 100+ new systems
  - Makeover of older regimes: e.g., UK
- Experiments and Comparative Study
- Is the US Missing a Good Game?
Agenda

• Experience Abroad: Notable Features
• Possible US Adaptations
• Emphasis: US Federal Trade Commission
• Reflections from Sunday’s Proceedings
• Caveat: Personal Views Only
• Contact: wkovacic@law.gwu.edu
Joint Work

• David Hyman
• Marianela Lopez-Galdos
• Marc Winerman
Federal Trade Commission Focus: Rationale

• Flawed and Fascinating Platform
• Uniquely Exhaustive Study
• Relevant Mandate
  – Competition
  – Consumer protection
  – Privacy
Notable Foreign Developments

• Governance
  – Priorities and case selection
  – Interagency coordination: ECN and UKCN

• Disclosure
  – Aims, plans, decisions to act/not to act

• Tools
  – UK Markets regime: BAA Illustration

• Respect for Past Achievement
US Compared

• Governance
  – Sunshine Act: planning and priorities
• Decentralization of Authority
  – Weak coherence/reluctant cooperation
• Disclosure: Intentions and Decisions
  – Example: FTC and Google
• Tools: DOJ/FTC and single-firm conduct
• Branding: Angkor Wat Model
Two Sets of Proposals

- More Difficult
  - Statutory Change

- Less Difficult
  - Soft Law (Customs/Norms)

- Note: None of It Is Easy
  - Long-term capital investments
  - Inconsistent with activity-based norm
Statutory Change Required

- Adopt Variant of UK Markets Regime
- Eliminate FTC Jurisdictional Carve-Outs
- Adjust Sunshine Act
Markets Regime

• Swap Out
  – FTC Act Section 5 “unfair methods of competition authority” for
  – FTC Section 6(b) mandate that allows FTC to do studies and impose remedies that promise to improve economic performance
Assumptions

• Section 2 of the Sherman Act and Section 5 of the FTC Act Have Become a Sterile Policy Instruments
• Equilibration
• Regulatory Leveraging
Supreme Court Unilateral Conduct Jurisprudence Since *Otter Tail* (1973)

- *Matsushita*
- *Spectrum Sports*
- *Discon*
- *Brooke Group*
- *Trinko*
- *Weyerhaeuser*
- *linkLine*
- *Aspen*
- *Kodak*
Notable Features

• All Private Treble Damage Cases
• Largely Pro-Defendant
  – Compare Aspen with Trinko
• Doctrines Apply to US Government
How Did This Happen?
How Did This Happen?
Modern Chicago and Modern Harvard

- Two Books: 1978
- Goals: Economic Efficiency First
- Antipathy to US Private Rights
- Adjustments in
  - Procedural screens
  - Evidentiary tests and liability rules
- Modern Exposition
  - Scalia/Breyer Coalition in *Trinko*
FTC Section 5 UMC

- Last Litigated FTC Victory: 1968
- Reasons
  - Lack of limiting principles
  - Sherman Act Overhang
FTC Carve-Outs

• Eliminate the Exemptions
  – Common carriers
  – Banking
  – Not-for-profits
  – Insurance

• Preserve Concurrency
Sunshine Act

• Curtail Coverage
  – Planning
  – Priorities
  – Consultations on cases

• Improve Disclosure
  – Planning
  – Priorities
  – Decisions
Non-Statutory Reforms

• Deeper Bilateral Cooperation
  – Example: DOJ/FTC

• More Expansive Networks
  – Competition
  – Consumer Protection
  – Data Protection
Further Soft Law Step

- Greater Historical Awareness
- Causes of Success and Failure
- Appreciation for Incremental Quality of Policy Development
“SOFT LAW” & THE FUTURE OF TECHNOLOGICAL GOVERNANCE

Ryan Hagemann, Jennifer Skees & Adam Thierer

MERCATUS CENTER
George Mason University

Last updated February 2018
Presentation based on forthcoming paper...
I. Major emerging tech issues
II. Trends shaping the future of tech policy
III. Why hard law is on the decline
IV. Growth of soft law for emerging tech
V. Advantages & disadvantages
VI. Deference issues
VII. Other reform options
How Will Emerging Tech Be Governed?
Transportation
Supersonic
Space
Hyperloop

Virtual / Aug. Reality

Robotics
Smart cars
Private drones
A.I.

Advanced Health
Mobile medical apps
Biohacking / Embeddables
Genetic issues
Personalized medicine
Food modification
3D-printed devices

Internet of Things
Wearable Tech
Smart Homes
Smart Cities
Industrial Internet

3-D Printing & Add. Manuf.

Crypto
Bitcoin
Dark markets

Sharing Economy

Wearable Tech
Smart Homes
Smart Cities
Industrial Internet

Supersonic
Space
Hyperloop
5 Trends Shaping the Future of Tech Policy

1. The ever-accelerating “pacing problem”

2. Rise of evasive entrepreneurship / “technological civil disobedience”

3. Increasing ease of “global innovation arbitrage”

4. Widening “level playing field” problems

5. “Demosclerosis” & decline of hard law
Trend 1: The Pacing Problem & the “Collingridge Dilemma”
“Software Is Eating the World”
- Marc Andreessen

My own theory is that we are in the middle of a dramatic and broad technological and economic shift in which software companies are poised to take over large swathes of the economy

— Marc Andreessen —
Drivers of Modern Tech Disruption Spreading

- the digitization of all data
- massive increases in processing power
- exploding storage capacity
- ubiquitous networking capabilities
- steady miniaturization of everything
- increasing sensorization of the world
- falling cost of almost everything
"The Law of Disruption" That Governs Modern Life
Technology changes **exponentially**; Political systems change **incrementally**.

Source: Larry Downes
It’s hard to put the proverbial genie back in the bottle once a given technology has reached a certain inflection point.

“The social consequences of a technology cannot be predicted early in the life of the technology. By the time undesirable consequences are discovered, however, the technology is often so much part of the whole economics and social fabric that its control is extremely difficult.” - David Collingridge, *The Social Control of Technology* (1980)

Collingridge referred to this as the “dilemma of control.”

“When change is easy, the need for it cannot be foreseen; when the need for change is apparent, change has become expensive, difficult and time-consuming.”

Philosophers of technology are OBSESSED with this problem. It has become part of ongoing debate about “technological determinism.”
Trend 2: Evasive Entrepreneurship (Technological Civil Disobedience)
Technological Civil Disobedience or Evasive Entrepreneurialism

• The refusal of innovators (individuals, groups, or even corporations) or consumers to obey technology-specific laws or regulations because they find them offensive, confusing, time-consuming, expensive, or perhaps just annoying and irrelevant.

• Examples:
  – Uber, AirBnB, Rover (sharing economy)
  – 3D printing of medical devices
  – Smartphone applications
  – Drones
Trend 3:
Global Innovation Arbitrage
Innovation Arbitrage

• Getting easier for innovators to relocate to jurisdictions that provide legal and regulatory environment more hospitable to entrepreneurial activity.
• What happened with capital flows now happening with innovative activities.
• Happening at both global and domestic scale.
  – innovators playing state and local governments off each other in search of some sort of competitive advantage
Global Innovation Arbitrage in Action

- Digital commerce generally over last two decades
- Drones in Australia & Canada
- Fintech in U.K.
- 23andme in U.K.
- Driverless cars in Singapore & elsewhere as well as in competition between U.S. states and cities
Trend 4: The “Level Playing Problem” Gets Worse
Technologies That are “Born Free” Will Have an Easier Time than Those “Born in Regulatory Captivity”

<table>
<thead>
<tr>
<th>“Born Free”</th>
<th>“Born Captive”</th>
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<tbody>
<tr>
<td><em>(no law / no agencies)</em></td>
<td><em>(lots of law / existing agencies)</em></td>
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<tr>
<td>• Most online services</td>
<td>• Driverless cars (DOT)</td>
</tr>
<tr>
<td>• Smartphone apps</td>
<td>• Medical tech / genetics (FDA)</td>
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<tr>
<td>• Social networks</td>
<td>• Food tech (FDA, Ag.)</td>
</tr>
<tr>
<td>• 3D Printing</td>
<td>• Commercial drones (FAA)</td>
</tr>
<tr>
<td>• Virtual Reality / AR</td>
<td>• Supersonic &amp; Space (FAA)</td>
</tr>
<tr>
<td>• General robotics</td>
<td>• Financial services</td>
</tr>
<tr>
<td>• Artificial intelligence</td>
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But, a Few “Born in Captivity” Broke Free

• The Internet (defied FCC + state & global regs)
• Sharing economy (defied state & local regs)
• Wearable health devices & Smartphone apps (defied FDA regs)
• 3D-printed prosthetics (defied FDA regs)

How’d that happen?
• enlightened policy choices?
• an end-run around regulation?
• technological civil disobedience?
• global innovation arbitrage?
Trend 5: “Demosclerosis”
“Demosclerosis” Necessitates New Solutions

• legislative and executive efforts to craft policy also undermined by chronic “demosclerosis”

• *= growing government dysfunctionalism brought on by the inability of public institutions to adapt to changes*
  – Causes: regulatory accumulation, bureaucratic bloat, special interest rent-seeking, etc.

• we shouldn’t expect federal lawmakers to play as much of a role in technological governance as they did in past decades.
The Net Combined Effect of All 5 Trends

• Combination of pacing problem + evasive entrepreneurialism + global innovation arbitrage + unlevel playing fields + demosclerosis = gradual decline of “hard law”

• Corresponding rise of “spontaneous private deregulation”
  – the *de facto* rather than the *de jure* elimination of traditional laws and regulations
  – no laws have been altered; no formal deregulation has occurred and yet liberalization has occurred
But governments are evolving, too...
The Future of Technological Governance: Soft law & “Entrepreneurial Administration”
Soft Law: Hard to Define, But Dominant

• “Instruments or arrangements that create substantive expectations that are not directly enforceable, unlike ‘hard law’ requirements such as treaties and statutes.” (Marchant and Allenby)

• Informal, collaborative, and constantly evolving governance mechanisms

• Soft law already the dominate governance model for today for technology such as: driverless cars, mobile medical applications, the Internet of Things, biometrics, nanotech, biotech, 3D printing, bitcoin, online advertising, and more
Soft Law Mechanisms for Emerging Tech

- Guidance documents
- “Sandboxes” (informal consultations) & soft nudges
- Multistakeholder processes
- Agency workshops & reports
- Best practices & codes of conduct
- Industry self-regulation, co-regulation & other collaborative efforts

Soft law has become the dominant modus operandi for modern technological governance, at least in the United States
Examples of Pre-Digital Era Soft Law

• Food Inspection Decision 44 (Bureau of Chemistry, 1906)
  – “… many persons suppose that the answers to inquiries addressed to this Department, either in letters or in published decisions, have the force and effect of the rules and regulations for the enforcement of the food and drugs act of June 30, 1906 . . . It seems highly desirable that an erroneous opinion of this kind should be corrected. The opinions or decisions of this Department do not add anything to the rules and regulations nor take anything away from them. They therefore are not to be considered in the light of rules and regulations. … They are therefore issued more in an advisory than in a mandatory spirit.” (emphasis added)

• Bureau of Chemistry → Food and Drug Administration
  – FDA is the most prolific agency promulgator of soft law releasing over 100 guidances every year
  – Reliance is so significant “that a Government Accountability Office report from 2015 noted that, ‘certain provisions of the OMB Bulletin [on “Good Guidance Practices”] were informed by written FDA practices for the initiation, development, issuance, and use of their guidance documents.”
Examples of Modern Soft Law

- **NHTSA**
  - Policy guidance on autonomous vehicles
  - Proactive principles for vehicular cybersecurity
- **NTIA**
  - Best practices for commercial facial recognition technology
  - Privacy best practices and multistakeholder process for commercial unmanned aircraft systems
  - Voluntary frameworks and multistakeholder process on IoT security upgradability
- **OSTP**
  - White papers and reports on AI and big data
- **FDA**
  - Guidance for industry on clinical trial best practices, “medical” smart phone apps, and 3D-printed medical devices
- **FTC**
  - Staff reports and guidance documents on the IoT
- **FAA**
  - Advisory circulars on small unmanned aircraft systems
It All Started With …

The Framework for Global Electronic Commerce

1997 Clinton administration policy guidance on the Internet

5 Basic Principles:

1. “The private sector should lead.”
2. “Governments should avoid undue restrictions on electronic commerce.”
3. “Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce.”
4. “Governments should recognize the unique qualities of the Internet.”
5. “Electronic Commerce over the Internet should be facilitated on a global basis.”
Advantages and Disadvantages of Soft Law Mechanisms

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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<tbody>
<tr>
<td>• Trust developed between agencies, industry, and consumers for both the</td>
<td>• Techno-populism (“Net Neutrality” debate)</td>
</tr>
<tr>
<td>products produced and the agency’s ability to address issues</td>
<td>• Lack of Congressional oversight and difficulty using typical checks in balances</td>
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<tr>
<td>• Certainty regarding possible agency actions</td>
<td>• Participant transparency</td>
</tr>
<tr>
<td>• Faster, more flexible, and more adaptable to new industries and</td>
<td>• Potential issues regarding how to challenge such actions</td>
</tr>
<tr>
<td>technologies</td>
<td>• Uncertainty about enforceability and continuation of the actions</td>
</tr>
<tr>
<td>• Clarity and precision due to the ability to more narrowly tailor</td>
<td></td>
</tr>
<tr>
<td>• Greater transparency for actions at a more accessible level</td>
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Making Sure Soft Law Doesn’t Become “Soft Despotism”

- Moratorium on new regulations (1 in 2 out type rule)
- Requirements of annual regulatory transparency reports
- Additional resources for and accountability to OIRA
- Inclusion of guidance under OIRA review
- Increased legislative oversight
- Legislative accountability through budget actions for agencies that abuse power
- Presidential or internal administrative actions
- Reform of deference standards
Our (Somewhat Reluctant) Conclusions

• The era of “hard law” governance appears to be fading and the age of “soft law” is firmly underway.
• Nothing likely to reverse that trend for emerging tech governance. If anything, it will accelerate, regardless of legitimacy concerns.
• But soft law / entrepreneurial administration have some real advantages over old regimes.
  – More adaptive than old governance regimes
  – Responsive to policy concerns without being overly precautionary
  – Builds trust among stakeholders
  – Creates more innovation opportunities

>> to paraphrase Churchill, it may be the case that soft law represents the worst form of technological governance except for all those others that have been tried before.
The Role of the Courts and the Question of Agency Deference for Soft Law
Changing Views of *Chevron* deference?

“There’s an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth. . . .”

- Honorable Neil Gorsuch, *Gutierrez-Brizuela v. Lynch*

“[T]he danger posed by the growing power of the administrative state cannot be dismissed.”

- Chief Justice John Roberts, *FCC v. City of Arlington*
## Overview of Judicial Deference

<table>
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<tr>
<th>Judicial Standard</th>
<th>Level of Deference to Administrative Agency</th>
<th>When It Applies</th>
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<tr>
<td><strong>Chevron</strong></td>
<td>Deference to agency interpretation unless unreasonable</td>
<td>Ambiguity in a statutory grant to an agency concerning the issue; agency has acted through formal or informal rulemaking</td>
</tr>
<tr>
<td><strong>Skidmore</strong></td>
<td>Deference accorded assuming thoroughness, validity, consistency, and persuasiveness of action</td>
<td>Agency interpretations and statements that “lack the force of law”</td>
</tr>
<tr>
<td><strong>Auer</strong></td>
<td>Controlling unless clearly erroneous</td>
<td>Agency interpretations of its own regulations</td>
</tr>
</tbody>
</table>
OTHER POLICY REFORMS
Before We Get to Soft Law, Consider Other Reforms

• The Innovator’s Presumption: *Any person or party (including a regulatory authority) who opposes a new technology or service shall have the burden to demonstrate that such proposal is inconsistent with the public interest.*

• The Sunsetting Imperative: *Any existing or newly imposed technology regulation should include a provision sunsetting the law or regulation within two years.*

• The Parity Provision: *Any operator offering a similarly situated product or service should be regulated no more stringently than its least regulated competitor.*
For more information, see ...

(forthcoming) Colorado Technology Law Journal

by Ryan Hagemann, Jennifer Skees & Adam Thierer

Silicon Flatirons: Designing Twenty First Century Regulatory Institutions
McKinsey’s No Ordinary Disruption
The Four Forces Breaking All the Trends

Technological change driven by increased value of data

Shift of economic output to Asia-Pacific

Greater global connectivity

Aging of the population
Areas Impacted by Digital Transformation

- Platforms, social media and algorithms
- Business model changes
- Rising role of IoT
- Data analytics
Trust Index

A World of Distrust

Average trust in institutions, general population, 2017 vs. 2018

Global Trust Index remains at distruster level

20 of 28 countries are distrusters, up 1 from 2017

Source: 2018 Edelman Trust Barometer.
The Trust Index is an average of a country’s trust in the institutions of government, business, media and NGOs. General population, 28-country global total.
The Polarization of Trust

Aggregate percentage point change in trust in the four institutions, and change from 2017 to 2018

6 countries with extreme Trust Gains

China: 27
UAE: 24
S. Korea: 23
Sweden: 20
Malaysia: 19
Poland: 17

16 countries with Typical Changes in Trust

Turkey: 13
Spain: 12
Russia: 10
Ireland: 9
Indonesia: 9
Mexico: 8
Japan: 7
Argentina: 7
Hong Kong: 5
The Netherlands: 3
Germany: 3
France: -1
U.K.: -2
Canada: -3
Singapore: -10
Australia: -10

6 countries with extreme Trust Losses

Colombia: -13
India: -13
S. Africa: -17
Brazil: -17
Italy: -21
U.S.: -37

Source: 2018 Edelman Trust Barometer. Trust Volatility Measure. The net year-over-year (2017-2018) percentage point change across the four institutions (TRU_INS). General population, 28-country global total. For more details on how the Trust Volatility Measure was calculated, please refer to the Technical Appendix.
Trust in NGOs Declines in 14 of 28 Countries

Percent trust in NGOs, and change from 2017 to 2018

Distrusted in 10 countries

Source: 2018 Edelman Trust Barometer. TRU_INS. [NGOs IN GENERAL] Below is a list of institutions. For each one, please indicate how much you trust that institution to do what is right using a nine-point scale where one means that you "do not trust them at all" and nine means that you "trust them a great deal." (Top 4 Box, Trust) General Population, 28-country global total.
Trust in Business Increases in 14 of 28 Countries

Percent trust in business, and change from 2017 to 2018

Source: 2018 Edelman Trust Barometer. TRU_INS. [BUSINESS IN GENERAL] Below is a list of institutions. For each one, please indicate how much you trust that institution to do what is right using a nine-point scale where one means that you "do not trust them at all" and nine means that you "trust them a great deal." (Top 4 Box, Trust) General Population, 28-country global total.
Trust in Government Increases in 16 of 26 Countries

Percent trust in government, and change from 2017 to 2018

Source: 2018 Edelman Trust Barometer. TRU_INS. [GOVERNMENT IN GENERAL] Below is a list of institutions. For each one, please indicate how much you trust that institution to do what is right using a nine-point scale where one means that you “do not trust them at all” and nine means that you “trust them a great deal.” (Top 4 Box, Trust) General Population, 28-country global total.
Media Now Least Trusted Institution

Percent trust in media, and change from 2017 to 2018

Distrusted in 22 of 28 of countries

Source: 2018 Edelman Trust Barometer. TRU_INS. [MEDIA IN GENERAL] Below is a list of institutions. For each one, please indicate how much you trust that institution to do what is right using a nine-point scale where one means that you "do not trust them at all" and nine means that you "trust them a great deal." (Top 4 Box, Trust) General population, 28-country global total.
Each Institution Must Play its Role

Top trust-building mandates for each institution

**Business**
- Safeguard privacy
- Drive economic prosperity
- Provide jobs and training

**NGOs**
- Support the poor
- Call out abuses of power
- Create a sense of community

**Media**
- Guard information quality
- Educate, inform and entertain
- Safeguard privacy

**Government**
- Drive economic prosperity
- Investigate corruption
- Support the poor

Source: 2018 Edelman Trust Barometer. Trust-Building Mandates Analysis. The most effective trust building mandates for each institution. INS_EXP_GOV, INS_EXP_MED, INS_EXP_BUS, and INS_EXP_NGO. Below is a list of potential expectations or responsibilities that a social institution might have. Thinking about [insert institution] in general, how would you characterize each using the following three-point scale. General population, 28-country global total. For more details on the Trust Mandates Analysis, please refer to the Technical Appendix.
World Worried About Fake News as a Weapon

Percent who worry about false information or fake news being used as a weapon

Nearly 7 in 10 worry about false information or fake news being used as a weapon

Source: 2018 Edelman Trust Barometer. ATT_MED_AGR. Below is a list of statements. For each one, please rate how much you agree or disagree with that statement using a nine-point scale where one means “strongly disagree” and nine means “strongly agree”. (Top 4 Box, Agree), question asked of half of the sample. General population, 28-country global total.