United States Regulatory System

Professor Ernie Englander
U.S. Constitutional Framework
http://www.archives.gov/exhibits/charters/constitution.html

- The Legislative Branch – Congress
- The Executive Branch – the President
- The Judicial Branch – federal courts
The Legislative Branch
– the Congress
The Legislative Branch

• House of Representatives
  http://www.house.gov/
  – 435 legislative districts
  – Allocated by population (larger states have more representatives)

• Senate
  http://www.senate.gov/
  – Two senators per state (100 total)
The Legislative Branch

• Congress enacts all legislation
• Congress controls the budget
• Congress creates and empowers regulatory agencies (sometimes called “administrative agencies”) to develop and enforce rules to carry out the purposes of the legislation
• Congressional Committees oversee the actions of the regulatory agencies and controls their budgets
The Executive Branch – the President
The Executive Branch – the President

http://www.whitehouse.gov/

• President appoints the leadership of the regulatory agencies
• President give policy direction or advice to the agencies
• Executive Branch agency, the Office of Management and Budget, reviews regulations before they take effect
The Judicial Branch – federal courts
Judicial Branch – federal courts

http://uscourts.gov
Regulatory Agencies

• “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

The United States Constitution, Article 1, Section 8
Regulatory Agencies

• Two types – (1) Executive Branch agencies and (2) Independent agencies
• Two types of employees – (1) politically-appointed leadership and (2) career civil servants
• Executive Branch agencies – work directly for the President, leadership can be fired by the President
• Independent agencies – leadership cannot be fired by the President
Regulatory Agencies

http://www.lib.lsu.edu/gov/index.html

- Created by Congress
- President appoints leadership
- US Senates confirms leadership
- President gives policy direction
- Congress gives policy direction
- Congress controls agency budget
- Federal courts can review agency decisions for substantive actions and procedural actions
U.S. Regulatory System
Creating and Reviewing Federal Rules

- Laws Affecting Federal Register Publications
- Administrative Procedure Act
- Federal Advisory Committee Act
- Federal Register Act
- Negotiated Rulemaking Act
- Paperwork Reduction Act
- Regulatory Flexibility Act
- Small Business Regulatory Enforcement Fairness Act
- Congressional Review Act
- Public Participation in Rulemaking [http://www.regulations.gov/search/about.jsp#](http://www.regulations.gov/search/about.jsp#)
Rulemaking Process

“The Reg Map” ICF International

Regulating the Regulators

• Congressional Oversight Committees
• Congressional Governmental Accountability Office (GAO) http://www.gao.gov/about/index.html
• White House Office of Management and Budget Information & Regulatory Affairs http://www.whitehouse.gov/omb/regulatory_affairs/default/
U.S. Regulation History

• Most regulation in United States is at the state and local levels, not at the federal level

• Federal regulation by independent agencies “begins” in the 1930s
U.S. Regulation History

- 1887 First independent regulatory agency—Interstate Commerce Commission [ICC]
- 1890 First federal antitrust law – the Sherman Antitrust Act
- 1930s Economic regulation
- 1970s Social regulation
- Late 1970s Deregulation begins
The Interstate Commerce Act of 1887

Sec. 1 Be it enacted..., That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment.... All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. Sec. 11. That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate.... Not more than three of the Commissioners shall be appointed from the same political party. Sec. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created....
Forty-Ninth Congress of the United States of America;

At the Second Session,

Begun and held at the City of Washington on Monday, the first day of December, one thousand eight hundred and eighty-six.

AN ACT
To regulate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the provisions of this act shall apply to every common carrier or carrier engaged in the transportation of passengers or property, moving by railroad, or partly by railroad and partly by water, from one State or Territory of the United States to any other State or Territory of the United States, or from the District of Columbia, to any part of the United States, or from any place in the United States to any foreign country, or from any place in the United States through a foreign country to any other place in the United States, and vice versa, by the transportation in the manner of facilities the public may use in the United States to a foreign country, and carried from place to place by a vessel of transportation, or shipped from a foreign country to any place in the United States, and carried to such place from a port or place within the United States, or an independent foreign country, provided, however, that the provisions of this act shall not apply to the transportation of passengers or property or of the carrying, discharging, storing, or landing of property, when, part or all of the transportation, or shipments, or landing was performed in a foreign country, or to any State, city, town, or other place within any State, and not shipped to or from a foreign country, from or to any State, or Territory, as aforesaid.

The term "carrier," as used in this act, shall include all barge and ferrymen, and all persons engaged in navigation with any vessel, and all the books, records, and accounts of any corporation, organized, whether a railroad or otherwise, under a charter, agreement, or lease, and the bona fide profits and earnings, which may be made for any service rendered or to be rendered, in the transportation of passengers or property, as aforesaid, with connection to any State, Territory, or foreign country.
Sherman Antitrust Act of 1890

- An act to protect trade and commerce against unlawful restraints and monopolies.
- Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Every contract, combination in the form of trust or other- wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
U.S. Antitrust Laws

Regulate Structure
  • Mergers
  • Market Power

Regulate Behavior
  • Individual Actions
  • Actions Among Competitors
  • Actions Between Suppliers, Producers, Transporters, and Retailers
Congress of the United States of America;

At the First Session,

Begun and held at the City of Washington on Monday, the second day of December, one thousand eight hundred and eighty.

AN ACT

To protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among any portion of the people of the United States, in the District of Columbia, or in restraint of trade or commerce between any State and Territory, or between any State and the District of Columbia, or between any two or more States, or any State and any foreign nation, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby
unquestioned with jurisdiction to prevent and restrain violations of this act and it shall be the duty of the several district attorneys of the United States in their respective districts under the direction of the Attorney General to institute proceedings in equity to prevent and restrain such violations. And proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined, or otherwise prohibited. When the parties so complain shall have been duly notified of such petition the court shall proceed as soon as may be to the hearing and determination of the case and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just to the prevention

Sec. 2. Whoever it shall appear to the court before, which any prosecution under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and summoning to that end may be served in any district by the marshal thereof.

Sec. 3. Any property owned under any contract or by any combination, or purchased to any conspiracy (and having this in fact thereby been) in violation of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States and may be seized and condemned by the proceedings as here provided for, in the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 4. Any person who shall be required in the business or property of any other person or corporation by reason of any thing forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the circuit in which the defendant resides or is found, without respect to the amount in controversy, and shall recover, therefor, the damages by him sustained, and

the costs of suit, including a reasonable attorney's fee.

Sec. 5. That the word "person," or "person," whenever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the States, the laws of any State, or the laws of any foreign country.

Thomas H. Reed
Speaker of the House of Representatives.

Lincolnshire

John A. Morton
President of the Senate.

[Signature]

Jared V. prized
Vice-President of the United States and
President of the Senate.
Clayton Act of 1917 (amending the 1890 Sherman Act and amended by the Cellar-Kefauver Act of 1950)

- No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly….

- …any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained….
Federal Trade Commission
Act of 1914

- A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party….

- (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful….

- (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations…, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.
Federal Antitrust Agencies


• U.S. Department of Justice Antitrust Division  http://justice.gov/atr/index.html
1930s Economic Regulation

Franklin D. Roosevelt 1933-1945
1930s Economic Regulation

- Congress creates or redesigns federal agency to regulate an industry
- Agency determines which companies are in the industry being regulated (entry)
- Agency determines what the companies will do (service and product)
- Agency determines price companies will charge for service and product
1930s Economic Regulation

• Four sectors (plus agriculture) were chosen for regulation
  – Finance (banking and securities)
  – Transportation (airlines, railroads, trucking)
  – Energy (gas, electric, pipelines)
  – Communication (radio, telephone)

The United States only regulated the service sector; it did not regulate the manufacturing sector except for telephone equipment
1970s Social Regulation
1970s Social Regulation

Created regulatory agencies in the following areas: product safety, environmental protection, energy conservation, worker health and safety, employment discrimination
Late 1970s Deregulation Begins
Late 1970s Deregulation Begins

• Attacks on regulation from business (Business Roundtable), conservative politicians (Presidents Ford and Reagan), liberal politicians (President Carter and Senator Kennedy)

• Regulation shifts from command-and-control to market-like-incentives

• Begins with unregulating airline industry
1980s Attack on Regulation
1980s Attack on Regulation

- Continuing economic deregulation – banking, finance, transportation, energy, communications
- Going after labor unions
- Attempts to reduce environmental regulation
- Ending antitrust enforcement
1990s-2000s
Markets, not Regulation
1990s-2000s
Markets, not Regulation

George W. Bush 2001-2009
2008-2009 Markets Fail, Regulation Returns
Theories of Regulation

- Public Interest Theory – normative (the morally correct reason to act)
- Market-Failure Theory – rational (belief in markets and that markets can be corrected if there are bad outcomes)
- Political Economic Theory – descriptive (interest groups “compete” for governmental policies)
- Bureaucratic Theory – descriptive (governmental actors choosing to act in their own personal or institutional interests)
- Sub-system or Coalition Theory – private interests working with public officials and others
- Agency Theory – relationship between Congress and the regulatory agencies
Theories of Regulation

Public Interest Theory:
How is “Public Interest” to be Defined?
Theories of Regulation

Market-Failure Theory:

• Monopoly Power
• Public Goods
• Externalities
• Information Asymmetries
• Transaction Costs
• “Excessive Competition”
Theories of Regulation

Political Economic Theory:

• Response to the Political Demands of the Economic Interests Groups Who Would Benefit from Regulation – “Regulation FOR the Regulated”

• Life-Cycle and Capture Theory of Regulation
Theories of Regulation

Bureaucratic Theory:

• Regulatory agencies, their officials, and their career employees shape the organizational mission and activities – either driven by self-interest or policy goals

• Regulatory agencies, their officials and their employees are constrained by the institutional structure
Theories of Regulation

Sub-system or Coalition Theory:

• “Iron Triangles”
• Agenda-focused: Policy Windows, Policy Entrepreneurs, and “Garbage Cans” [John Kingdon]
Theories of Regulation

Agency Theory:

- Congress (the Principal) versus the Regulatory Agency (the Agent)
- Specificity of Legislation
- Monitoring structure and costs – regulating the regulators