



## The Rise of the Regulatory State

- I. Introduction
  - a. Lochner marked the high point of protecting economic liberty
  - b. Rise of progressive politics and belief in science set the starting point to get government more involved (heavily) in regulation
  - c. Period of the Expert
    - i. Goal became to create a vehicle by which experts could use the power of government to better society
    - ii. New Deal laid the groundwork
  - d. It's hard to imagine modern capitalist democracy without regulation / administration
  - e. We expect the government to tell us when a car is unsafe and force a recall!
- II. The Upside
  - a. Permits government to regulate areas that are extremely complicated and may not be regulated well by the market.
  - b. Externalizing costs (like pollution / waste) is highly attractive to business owners.
  - c. The government can make sure these costs are kept internal.
  - d. Separation of manufacturer and consumer made it increasingly hard to go after those at fault; regulation reduced the need.
- III. The Downside
  - a. Enormous expansion of government's power.
  - b. Zero sum game: You lose some power if government gets it.
  - c. May not ultimately be "fair" – could benefit consumers at the expense of industry
  - d. May also benefit industry at the expense of consumers
  - e. Agency heads may be more loyal to the agency than to the party's agenda – "capture" by the agency.
- IV. Factors
  - a. Supreme Court rejection of substantive due process
  - b. Article I, Section 8, Commerce Clause
    - i. The question becomes: What constitutes commerce?
    - ii. The Supreme Court has taken a very broad view
    - iii. Telephone calls, power transmission, anything that may affect out-of-state commerce is covered by the commerce clause
  - c. Civil Rights Act, 1964
    - i. Illegal to discriminate based on race in private business.
    - ii. From where did Congress get the power to do that?
    - iii. Congress did it under the commerce clause.
    - iv. Discrimination affects interstate commerce.
    - v. Did research; found information about blacks traveling to the South.
  - d. How much must it affect commerce?
    - i. Almost unlimited authority for Congress to regulate
    - ii. Supreme Court backed down a *little* in the mid '90s.
- V. How does it Work?
  - a. These agencies live in the Executive branch, charged with *enforcing* laws.
  - b. Congress creates the agency and defines criminal penalties, but leaves the actual regulations up to the agencies
  - c. Administrative Procedures Act
    - i. Sets procedures for how agencies make regulations.
    - ii. Agencies have their own hearings, et cetera – their own court system!
    - iii. Federal courts tend to uphold agency rules since they don't have the expertise to contradict them.
  - d. Agencies that were meant to be apolitical end up being as political as any other part of the government.