

Syllabus: LAW 7221-001

Government Regulation of Business

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This course surveys the legal, economic and policy framework that governs American business. In doing so, it examines the core principles that guide our economy and, against the backdrop of the proposition that non-regulated markets are generally preferred, introduces a number of areas of regulation, including antitrust, securities, environmental, patents, advertising/information and consumer protection. We will critically examine the rationales (market failures of one kind or another, a desire on the part of those regulated to avoid the rigors of the marketplace, etc.), legal ground rules and regulatory models used in various areas of regulation. One objective will be to gain a good understanding of how government intervention has actually played out in selected markets. We will also examine markets that, though once regulated, have since been deregulated.

We will also have a lot of fun. One reason for that is that we will be examining many of the regulatory questions within the context of current “hot” issues—high energy prices, global warming, merger-mania, pending regulatory “reform” proposals, the financing of political campaigns, internet privacy, Wal-Mart’s threats and benefits, run-amuck litigation and the like.

Readings. Readings for this course will be distributed (*Selected Materials*), available through TWEN or accessible directly from the internet links provided in this syllabus. In addition, there are two sources to which we will refer throughout the course. The first is the recently released *Report and Recommendations of the Antitrust Modernization Commission* (April 2, 2007) (hereafter, “*AMC Report*”) (see www.amc.gov/report_recommendation/amc_final_report.pdf). (I served as a Commissioner on the AMC and hope to be able to provide a hard copy of the *AMC Report* to each student.) The second is Viscusi, Harrington and Vernon (“VHV”) (4th ed. 2005). (Copies of this and other books referred to in specific class sessions below will be placed on reserve in the law library.) It will also be useful to keep informed on relevant current business issues by reading *The Wall Street Journal*, *Business Week* and the like. ***You will be expected to have read the assigned material before class.***

One thing further about the readings. As you’ll see below, this is a “speaking” syllabus, with a brief “teaser” paragraph for each class session designed to stimulate student thinking in advance of the class. For some class sessions, the reading list may appear intimidating at first blush. Don’t be intimidated. Many of the readings are short newspaper articles. Some we will simply skim so that we can discuss certain concepts more profitably (with one or two students being assigned to read them and lead the discussion). At the end of each class session, I will provide an overview of the upcoming readings to advise which portions should be skimmed, which should be read more carefully, who will have primary responsibility for certain readings, etc.

Office hours and contact information. Office hours will be each day from 1:30 to 2:30 pm or any time by appointment. My office is Room 412. My email is: dkempf@kempflaw.com. Office phone: 303-492-0119.. Cell phone: 303-842-8466.

Class requirements and grading. The course will meet Monday through Friday from 9:30 am though 11:40 am in Room 307. Students are expected to attend all class sessions. Each student will write a paper (approximately ten to twenty pages) related to one of the matters the course will cover; it will count for 45% of the grade. (Students can select their own topic or choose one

from a list of suggested possible topics that I will provide.) The final exam will count for 40% of the grade. Finally, class participation will count for 15% of the grade.

Section I. Introduction and overview.

Class # 1 (May 14, 2007). The theory of economic regulation: Overview and basics. In its landmark *Northern Pacific* decision nearly half a century ago, the Supreme Court emphasized that the antitrust laws are bottomed “on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.” Sounds good. Yet large chunks of American commerce are not “unrestrained” but rather are regulated. What explains this? Is regulation necessitated by market failures? Are there certain “public goods” that require regulation? And are certain “market goods” such that we as a society are just plain better off if their distribution is determined by regulation rather than the free market? To help us answer these questions, we’ll review some of the basic analytical building blocks used in assessing regulatory issues. Legendary coach Vince Lombardi had his own unique way of emphasizing the importance of continuously re-mastering the basics as a critical first step to success in any endeavor. “Gentlemen,” he began the first practice session each year, “this is a football.” Similarly, Nobel Laureate George Stigler (in his equally colorful manner) said that consumers “invariably obey one law as universal as any in social life; they buy less of a thing when its price rises.” And its corollary: “people will not buy less, and usually will buy more, of a commodity when its price falls.” Thus, we’ll explore the basics of economic analysis—supply and demand, price theory, economies of scale, the law of diminishing returns, externalities, deadweight loss, public values, price discrimination and the like. We’ll focus in particular on markets. How do you go about identifying and defining “relevant” product and geographic markets anyway? And why is it important that we undertake this exercise? Do some markets behave differently from others? If so, why? Are some goods such that consumers are just not equipped to make sound decisions about them in an unregulated market (thus, necessitating regulation)? Readings:

1. Is “non-regulation” the greatest thing since sliced bread? *Northern Pacific*.
2. *AMC Report*, p. 441.
3. Economics 101, *Selected Materials*, p. 3.
4. VHV, pp. 1-10, 61-66 (skim).
5. R. Kuttner, *Everything for Sale: The Virtues and Limits of Markets* (Un. of Chicago Press 1998), pp. x-xvii, 3-48, 225-39 (skim).
6. S. Breyer, *Regulation and Its Reform* (Harvard Press 1984), pp. 1-35.

Section II. The Antitrust Laws.

Class # 2 (May 15, 2007). Antitrust: Sherman Act Section 1. The theory is this: Rigorous competition produces the lowest prices, highest quality and best service. If one supplier is “the only game in town,” prices are apt to be higher, quality lower and service worse than if there are two or more competitors all striving to capture the consumer’s business. Competition also spurs innovation. We want people striving “to build a better mousetrap”—one that catches more mice, is cheaper or costs the same but catches more mice. In the auto business, vigorous competition among dealers is what leads to “Mr. Goodwrench,” “overnight loaners” and “the quickest turnaround time in town.” To secure better the benefits of competition, Congress passed the Sherman Act in 1890, making every contract, combination or conspiracy in restraint of trade illegal. But, hey, *all* contracts are in restraint of trade. That’s why we have contracts. The core objective of contracts—every last one of them—is to restrain trade. What gives? Readings:

1. Antitrust is *really* important: *Northern Pacific and Topco, Selected Materials*, p. 2.
2. Maybe not: Crandall and Winston, “Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence,” 17 *J. of Econ. Perspectives* 2 (2003); <http://www.brookings.edu/views/articles/2003crandallwinston.pdf>.
3. The principal antitrust statutes, *Selected Materials*, p. 1.
4. The early days: Trust-busting 101. VHV, pp. 134-40, 299-300.
5. The *per se* rule v. the rule of reason, *Selected Materials*, p. 5
6. J. Klien, “A Stepwise Approach to Antitrust Review of Horizontal Agreements” *ABA Speech* (November 7, 1996); <http://www.usdoj.gov/atr/public/speeches/0979.htm>.
7. *National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984).
8. *United States v. Brown University*, 5 F.3d 658 (3rd Cir. 1993).
9. MIT press release on the Overlap Group Settlement (December 22, 1993), *Selected Materials*, p. 12.
10. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).
11. M. Burros and M. Warner, “Bottlers Agree To a Ban On Sweet Drinks,” *The New York Times*, p. A1 (May 4, 2006), *Selected Materials*, p. 15.
12. J. Kluger, “How Bill Put the Fizz in the Fight Against Fat,” *Time*, pp. 22-25 (May 15, 2006), *Selected Materials*, p. 17.
13. *AMC Report*, pp. 31-37, 413-14.

Class # 3 (May 16, 2007). Monopolization. How does a company get to be a monopolist anyway? You could do a merger that creates a monopoly (or, as condemned by Section 7, a merger whose effect may be to “tend to create a monopoly”). But how do you recognize that a merger may end up creating a monopoly? Our gut tells us that, if there are only two widget manufacturers and they merge, that might well create a monopoly and cause prices to go up. Our gut also tells us that, if there are 100 widget manufacturers (each with 1 % of the widget market) and two of them merge, that would likely have no market impact and prices would likely remain the same after the merger as before. But what if there are ten widget makers and two of them merge? Or six widget makers and two of them merge? Or three widget makers and two of them merge? Potential monopoly problems? Another way to end up as a “monopolist,” of course, is to compete well—make the highest quality product efficiently and sell it, along with the very best service possible, at the lowest price. But as the great Judge Learned Hand emphasized more than 60 years ago, “the successful competitor, having been urged to compete, must not be turned upon when he wins.” Another way to become a monopolist might be to engage in so-called “predatory conduct”—(say) burning down your competitor’s factory or charging prices so low that your competitor can’t stay in business profitably. But, then again, aren’t low prices the central goal of the antitrust laws? Hello! Readings:

1. *United States v. Aluminum Company of America (Alcoa)*, 148 F.2d 416, 421-432 (2d Cir. 1945) (excerpts only); read only those passages highlighted in yellow at <http://hubcap.clemson.edu/~sauerr/classes/425/cases/alcoa.pdf>.
2. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).
3. *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585 (1985).
4. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986).
5. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, ___ U.S. ___ (February 20, 2007) (slip opinion); <http://www.supremecourt.gov/opinions/06pdf/05-381.pdf>.
6. VHV, pp. 309-312 (skim).
7. Three cases of particular interest: *Brooke Group, Trinko* and *LePage’s, Selected Materials*, p 21.

8. DGK, “From Ghoulies and Ghosties and Long-Legged Beasties and Things That Go Bump in the Night, Good Lord Deliver Us,” *Selected Materials*, p. 23.
9. *AMC Report*, pp. 81-88.

Class # 4 (May 17, 2007). Mergers. If it is sound antitrust policy to prevent mergers that are anticompetitive, then isn't it also sound antitrust policy to encourage mergers that are pro-competitive? One would think so. Still, Section 7 is often referred to as the “anti-merger law.” And mergers are routinely blamed by politicians and others for a wide assortment of economic and other ills—everything, it sometimes seems, save the common cold. Proposed legislation is almost always pending that aims to block all kinds of mergers—big ones, media- or petroleum-related ones, etc., etc., etc. Passions run strong in the merger area. Fear of the aggregation of “power,” concern over possible oligopolistic behavior, a desire to return to “a nation of shopkeepers,” you name it. What explains all this? And how the heck do you tell when a proposed merger really poses a threat to competition anyway? Another thing: on the way to addressing broader issues, merger law has lots of important “technical” issues. How do you decide what the relevant “line of commerce” and “section of the country”—the product and geographic markets—are? How do you handle a proposed merger involving a “failing company” that is going to disappear from the market under any circumstance. What about joint ventures? In analyzing mergers, do “efficiencies” count as a good thing or a bad thing? What are the “Merger Guidelines” and what role do they/should they play in merger analysis? Readings:

1. VHV, pp. 203-09 (merger theory) and pp. 299-300 (the early days) (skim).
2. Merger law enforcement: the bad old days (*Brown Shoe, Philadelphia Nat. Bank, Pabst and Von's*) and the paradigm shift (*General Dynamics*), *Selected Materials*, p. 24.
3. Kempf, “Merger Litigation: From the Birth of *General Dynamics* to the Death of Section 7,” *65 Antitrust L. J.* 653 (1997).
4. *AMC Report*, pp. 53-60, 155-61, 429-34.
5. Simplified charts for use with the Merger Guidelines (*Selected Materials*, p. 26):
 - a. Measuring market concentration/Herfindahl-Hirschman Index
 - b. The 1968 DOJ Merger Guidelines.
 - c. Professor Steven C. Salop (Georgetown and CRA) (1999).
 - d. Kirkland & Ellis (1999).
6. Old wine in new bottles?: *FTC v. Staples, Inc.*, 970 F.Supp. 1066 (DDC 1997) (skim).
7. The Whirlpool-Maytag merger:
 - a. Whirlpool Press Release, “Whirlpool and Maytag at a Glance,” (December 25, 2005), *Selected Materials*, p. 31.
 - b. Market shares in key home appliance industry markets (as set forth in D. Moss, “Antitrust Analysis of Whirlpool’s Proposed Acquisition of Maytag,” Tables 1 and 2, pp. 4, 13 (January 17, 2006)), *Selected Materials*, p. 32.
 - c. DOJ Press Release, “Statement on the Closing of Its Investigation of Whirlpool’s Acquisition of Maytag” (March 29, 2006), *Selected Materials*, p. 33.
 - d. J. Miller, “Whirlpool to cut 4,500 jobs,” *Chicago Tribune*, Section 3, p. 1 (May 11, 2006); J. Miller, “Birthplace of Maytag expects to get older, poorer,” *Chicago Tribune*, Section 3, p. 1 (May 11, 2006), *Selected Materials*, p. 36.
8. *FTC v. Great Lakes Chemical Corp.*, 528 F.Supp. 84, 87, 95-98 (ND Ill 1982).
9. *Texaco, Inc. v. Dagher*, ___U.S.___ (February 28, 2006);
<http://www.supremecourtus.gov/opinions/05pdf/04-805.pdf>.

Class # 5 (May 18, 2007). Patents. The granting of patents (and all that follows from that) is one form of regulation that has always been a big deal in America. The first antitrust law wasn't enacted until 1890. The Constitution, however, from the get-go, provided for the enactment of patent laws. There is, of course, a tension between the antitrust laws and the patent laws: the

former condemn monopolies, while the latter grant them. Each set of laws has its advocates, and they argue about where the line should be drawn to balance best the interests each set of laws serves. Should a patent holder, for example, be prohibited from seeking to “extend” his monopoly to non-patented products? By “bundling”? By “tying”? And do we need “reforms” of the patent laws to prevent people from gaining patents too easily for things that don’t really deserve to be patented? Are some patented items so important that there should be compulsory licensing of the patents for them? All these questions reflect the reality that patents raise a multitude of “public goods” issues. Readings:

1. FTC Report, “To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (read Executive Summary only); <http://www.ftc.gov/os/2003/10/innovationrptsummary.pdf>.
2. *Illinois Tool Works Inc. v. New Ink, Inc.*, ___ U.S. __ (March 1, 2006); <http://www.supremecourtus.gov/opinions/05pdf/04-1329.pdf>.
3. J. Surowiecki, “Patent Bending,” *The New Yorker* (July 14, 2003), *Selected Materials*, p. 39.
4. C. Shapiro, “Navigating the Patent Thicket” (March 2001) (skim); www.haas.berkeley.edu/~shapiro/thicket.pdf.
5. B. Sewell, “Troll Call,” *The Wall Street Journal*, p. A14 (March 6, 2006), *Selected Materials*, p. 41.
6. *Ebay, Inc. v. MercExchange, L.L.C.*, ___ U.S. ___ (May 15, 2006); <http://www.supremecourtus.gov/opinions/05pdf/05-130.pdf>. *MercExchange, L.L.C. v. eBay, Inc.*, ___ F.3d ___ (Fed. Cir. 2006); <http://www.fedcir.gov/opinions/03-1600.pdf>.
7. R. Epstein, “Court soft on property rights,” *Financial Times*, p.18 (May 16, 2006), *Selected Materials*, p. 43.
8. *KRS International Co. v. Teleflex Inc.*, ___ U.S. ___ (April 30, 2007) (slip opinion); www.supremecourtus.gov/opinions/06pdf/04-1350.pdf.
9. R. Parloff, “Microsoft takes on the free world,” *Fortune* (May 14, 2007)
10. *AMC Report*, pp. 122-23, 437-38.

Class # 6 (May 21, 2007). Antitrust revisited. (1) “Exemptions and immunities.” Nearly all politicians regularly sing the praises of the antitrust laws, call for stiffer penalties for their violation and urge that there be no exemptions or immunities from the antitrust laws. Yet those same politicians also regularly pass legislation granting all sorts of exemptions and immunities. Why? And when it comes to getting rid of exemptions and immunities, where a politician stands depends on where he sits. Will a Democrat from an industrial state vote for repeal of the labor exemption? Will a Republican from an agricultural state vote for repeal of food and dairy exemptions? And because it is thus a bipartisan issue/problem, almost no exemption ever gets repealed: “I’ll let you keep your exemption, if you’ll let me keep mine.” Congress is always willing to listen to special pleas from special interests who argue that the antitrust laws should not apply to them. Does this imply that we should also abolish the so-called *per se* rule and let courts do the same? After all, the test is: Is this an “unreasonable” restraint of trade? And what about various specific exemptions—labor, agriculture, insurance, baseball, petitioning the courts or legislatures, exports, state-action . . . and the list goes on. **(2) Misuse of antitrust.** Over the years, some have sought to use the antitrust laws as an instrument for lessening competition rather than for protecting and enhancing it. For judges (and others), it can be difficult at times to tell whether a particular course of conduct or proposed transaction is pro-competitive or anticompetitive. Congress too has enacted “special” antitrust laws that many view as at odds with the Sherman Act and aimed at thwarting competition rather than advancing it. In Europe these days, antitrust enforcers are increasingly attacking large companies for “abuse of dominance.” Are such challenges designed to protect competition or prevent it? Readings:

1. F. Easterbrook, "Antitrust and the Economics of Federalism," 26 *J. of L. and Econ.* 23, 23-29, 45-50 (1983).
2. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982).
3. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
4. The Antitrust Laws: For Whose Benefit?, *Selected Materials*, p. 45.
5. *Chrysler v. General Motors* (1983-1984): Statement by Richard Goodyear, Chrysler General Counsel (January 12, 1984), *Selected Materials*, p. 46.
6. *White/Magic Chef v. Whirlpool* (1985-1986): Brief on Appeal, Dart & Kraft, p. 1 (September 3, 1985), *Selected Materials*, p. 48.
7. *United States v. Microsoft* (1998-2002):
 - a. 253 F.3d 34, 45-48, 50-59. 78 ("Course of Conduct"), 82-85, 95-97(DC Cir. 2001)
 - b. Baxter, "Microsoft is Wrongly Targeted," *Los Angeles Times* (October 19, 1998), *Selected Materials*, p. 49.
 - c. Kempf, "Antitrust upside down: the Microsoft case," *Seattle Times*, p. B5 (October 4, 1999), *Selected Materials*, p. 51.
 - d. G. Becker and K. Murphy, "Rethinking Antitrust," *The Wall Street Journal* (Feb. 26 2001), *Selected Materials*, p. 52.
8. Bundling, tying and the like.
 - a. Taylor, "AT&T challenges its cable rivals with bundle discounts," *Financial Times*, p.19 (March 30, 2006), *Selected Materials*, p.56.
 - b. Article, "A bundle of trouble," *The Economist* (July 5, 2001), *Selected Materials*, p.57.
 - c. T. Buck, "EU warns Microsoft over Vista," *Financial Times*, p. 17 (March 30, 2006), *Selected Materials*, p. 60.
9. VHV, pp. 343-44, 350-52.
10. *AMC Report*, (1) Exemptions and immunities, pp. 333-42, 421-22, 434-35, 442; (2) Misuse of antitrust (The Robinson-Patman Act), pp. 311-26, 396 (first paragraph only), 417, 442-43.

Section III. Regulation In Our Economy.

Class # 7 (May 22, 2007). Environment-related regulation. Pollution control—whether involving automobiles, coal-fired power plants or factories—raises a host of challenging legal and regulatory issues. How do we best go about it? Do we want prescriptive-based regulation or incentive-based regulation? The carrot or the stick? Do we prohibit (or limit) emissions? Or auction off "rights" to pollute? Or what? Readings:

1. VHV, pp. 691-96, 703-05, 745-51, 757-60, 775-76, 785-86.
2. Wikipedia, "The Coase Theorem"; http://en.wikipedia.org/wiki/Coase_Theorem.
3. *Whitman (EPA) v. American Trucking Assn, Inc.*, 531 U.S. 457 (2001).
4. R. Hahn and G Hester, "The Market for Bads: EPA's Experience with Emissions Trading," 1987 *AEI J. on Govt. and Society Reg.* 48
5. P. Joskow, R. Schmalensee and E. Bailey, "The Market for Sulfur Dioxide Emissions," 88 *Am. Econ. Rev.* 669 (1998).
6. Article, "E.P.A. Rules Outweigh Costs, Report Finds," *The New York Times*, Section 1, p. 36 (September 28, 2003), *Selected Materials*, p. 48.
7. *Massachusetts v. Environmental Protection Agency*, ___ U.S. ___ (April 2, 2007) (slip opinion); <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>.

Class # 8 (May 23, 2007). Advertising and information regulation. Effective advertising can impact markets. As David Ogilvy sums up in his wonderful book *Ogilvy on Advertising* (1983, p. 7), “I do not regard advertising as entertainment or an art form, but as a medium of information. When I write an advertisement, I don’t want you to tell me that you find it ‘creative.’ I want you to find it so interesting that you *buy the product*. When Aeschines spoke, they said, ‘How well he speaks.’ But when Demosthenes spoke, they said, ‘Let us march against Philip.’” But advertising is not without regulatory controversy and issues. Is it designed to inform or to persuade? (Or trick? Or create artificial demand?) Advertising regulation has been both limiting and proscriptive. Some advertising is banned; some is limited to certain media only. Some is required to contain disclaimers—or even warnings. (Interestingly, in at least one area, in recent commercials, the warning has become part of the sales pitch.) Some consider regulations banning (or limiting) certain advertising as simply another example of price fixing. Readings:

1. Stigler, “The Economics of Information,” 69 *J. Polit. Econ.* 213 (1961) (skip math).
2. I. Janssens, “Galbraith versus Hayek on advertising,” Ivan’s Weblog (April 4, 2006) (quoting from N. Gregory Mankiw, *Principles of Economics* (4th ed. 2007), *Selected Materials*, p. 63).
3. J. Surowiecki, “The Tastemakers,” *The New Yorker* (January 13, 2003), *Selected Materials*, p. 65.
4. H. Jenkins, “Yes Logo,” *The Wall Street Journal*, p. A18 (May 30, 2007).
5. Akerlof, “The Market For ‘Lemons’: Quality Uncertainty and the Market Mechanism,” 84 *Quarterly J. of Econ.* 488 (1970) (skip math).
6. *FTC v. California Dental Ass’n.*, 526 U.S. 756 (1999) (skip Section II, pp. 765-69 (jurisdiction)).
7. VHV, pp. 576-78.

Class # 9 (May 24, 2007). Regulation for consumer protection. “Consumer protection” efforts have had a mixed reception—as captured nicely in the title of a 2002 conference hosted by the Manhattan Institute, “Unfair Competition and Consumer Fraud Statutes: Recipe for Consumer Fraud Prevention or Fraud on the Consumer.” Still, some have been unqualified successes—the establishment of the FTC’s do-not-call registry, for example, which has been called “the greatest government program since the Elvis stamp.” The competing rights of privacy and free speech raise a host of constitutional and regulatory issues in the currently-hot area of internet privacy. And regulation with respect to the providing of financial support for political activities—so-called “campaign contribution reform” efforts—have always been greeted with legal challenges. Readings:

1. T. Muris, “The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy,” “Remarks before the Progress and Freedom Foundation’s Aspen Summit (August 19, 2003); <http://www.ftc.gov/speeches/muris/030819aspen.htm>.
2. The FTC do-not-call registry.
 - a. *Mainstream Marketing Services, Inc. v. Federal Trade Comm.*, 358 F.3d 1228 (10th Cir.), *cert. denied*, ___ U.S. ___ (2004).
 - b. Online Interactive Forum, “Ask the White House” (interview with FTC Chairman Muris) (June 27, 2003), *Selected Materials*, p. 67.
3. The internet.
 - a. B. Johnson, “Is There a Constitutional Right to Bombard the Public with Penis Enlargement Proposals?,” 21 *Communications Lawyer* 1 (Summer 2002) (skim).
4. Political campaign finance reform.
 - a. C. Lane, “Supreme Court upholds McCain-Feingold campaign law,” *Washington Post* (December 11, 2003); <http://www.washingtonpost.com/wp->

srv/nation/supremecourt/scotus_0304term.html (then click on coverage of *McConnell v FEC* to learn more).

- b. F. Barnes, "McCain-Feingold Will Backfire," *The Wall Street Journal* (April 3, 2001), *Selected Materials*, p. 71.
- c. MSNBC, "Justices overturn law curbing political funds" (June 26, 2006), *Selected Materials*, p. 72.
- d. *Randall v Sorrell*, __U.S. __ (June 26, 2006) (slip opinion); <http://www.supremecourtus.gov/opinions/05pdf/04-1528.pdf>.
- e. T. Edsall, "FEC Rules Exempt Blogs From Internet Political Limits," *Washington Post*, p. A3 (March 28, 2006), *Selected Materials*, p. 74.

Class # 10 (May 25, 2007). Regulation: securities markets/corporate governance. Early on, the Supreme Court held that certain formal markets (securities, commodities, etc.) involve unique characteristics that warrant special treatment under the antitrust laws. The Securities and Exchange Commission has general oversight for the securities of all issuers and particular regulatory supervisory authority over securities exchanges and securities firms. The principal theme of securities regulation has been disclosure. Recent corporate scandals have led to regulatory reforms in the securities arena—such as the passage of the Sabanes-Oxley law—(with, among other things, new and expanded disclosure requirements) and to demands for so-called "corporate governance" reforms. The SEC's oversight of securities firms is supplemented by an extensive "self-regulation" regime—the NYSE, NASD and others. With securities firms now being subjected to actual, active direct regulation by the SEC, does the SRO scheme still make sense? High profile trials for alleged frauds on the public (Enron) or on the corporation (Tyco) have ensured that all these issues remain very much on the front-burner. Readings:

1. *United States v. Chicago Board of Trade*, 246 U.S. 231 (1918).
2. *IPO-Antitrust case*. Supreme Court decision to be released soon. (slip opinion).
3. Hedge Funds.
 - a. Cover Story, "Behind the Hedge: Are They Good or Evil?," *New York*, p. 42 (April 15, 2007), *Selected Materials*, p. 75.
 - b. Pozen, "To Regulate or Not?," *The Wall Street Journal*, p. A14 (June 29, 2005), *Selected Materials*, p. 90.
 - c. Moneyline, "Bernanke warns of hedge fund growth," *USA Today*, p. 1B (May 17, 2006), *Selected Materials*, p. 91.
 - d. G. Ip and K. Scannell, "New Hedge-Fund Rules Discouraged," *The Wall Street Journal*, p. C3 (May 17, 2006), *Selected Materials*, p. 92.
 - e. I. McDonald, "Hedge-Fund Manager Arrested," *The Wall Street Journal*, p. C4 (May 18, 2006), *Selected Materials*, p. 93.
 - f. R. Boyd, "Hedge Fund Flight," *New York Post*, p. 21 (May 20, 2006), *Selected Materials*, p. 94.
 - g. *Goldstein v. Securities and Exchange Commission*, 451 F.3d 873 (D.C. Cir. 2006); <http://pacer.cadc.uscourts.gov/docs/common/opinions/200606/04-1434a.pdf>.
 - h. Editorial, "Hedge Fund Hokum," *The Wall Street Journal* (June 26, 2006), *Selected Materials*, p.95.
4. CNNMoney.com/Reuters, "Goldman latest to offer unregistered trades" (May 24, 2007).
5. Corporate governance.
 - a. A. Murray, "Corporate Governance Concerns are Spreading, and Companies Should Take Head," *The Wall Street Journal* (April 12, 2006), *Selected Materials*, p. 96.

- b. D. Kempf, "Corporate Governance as Religion," __ *J. of Econ. Regulation* __ (2007) (forthcoming), *Selected Materials*, p. 98
- c. Maremont and White, "Stock Activism's Latest Weapon," *The Wall Street Journal*, p. C1 (April 4, 2006), *Selected Materials*, p.114.
- d. H. Jenkins, "Surprise! CEOs Are Still Highly Paid!", *The Wall Street Journal*, p. A15 (May 3, 2006), *Selected Materials*, p. 116.
- e. Wikipedia, "The Sarbanes-Oxley Act"; http://en.wikipedia.org/wiki/Sarbanes-Oxley_Act.
- f. Press Release, "SEC Commissioners Endorse Improved Sarbanes-Oxley Implementation To Ease Smaller Company Burdens, Focusing Effort on 'What Truly Matters'" (April 4, 2007), *Selected Materials*, p.117.
- g. Institutional Shareholder Services, "ISS U.S. Corporate Governance Policy, 2006 Updates" (2005) (skim); <http://www.issproxy.com/pdf/2006USPolicyUpdate.pdf>.
- h. Institutional Shareholder Services, "ISS 2006 U.S. Proxy Voting Guidelines, Summary" (2006); <http://www.issproxy.com/pdf/2006USConcisePolicies.pdf>.
- i. K. Whitehouse and S. Anand, "Proxy-Advisory Firms Encounter Concerns on Owners' Influence," *The Wall Street Journal*, p. A8 (May 22, 2007).

Section IV. Regulatory Institutions.

Class # 11 (May 29 2007). Regulation by litigation (or the threat thereof). Litigation can be high stakes indeed. In the antitrust field, in addition to suits by the DOJ or FTC, private plaintiffs can bring cases as so-called "private attorneys general." Not only that, but, if they win, they can recover treble damages and attorney's fees. Often antitrust and securities private lawsuits are brought as class actions. In some areas of the law, the corporation may also face exposure to punitive damages. Potential class-action, treble damage or punitive damage exposure in such cases can run into the billions of dollars. And in our "federalism" system, it is possible that firms might face the prospect of both federal actions and state actions. In some industries, an adverse court finding (or governmental administrative ruling) can result in the loss of the company's license to do business. And does a firm really want to go to war with a regulator that has continuing oversight over all (or most) aspects of its business? No wonder many such situations are referred to as "bet-the-company" cases. One outgrowth of all this is that litigation settlements can achieve "regulatory reform" that might not have been able to have been accomplished through the regulatory processes itself. Readings:

1. K. Strassel "The Passion Of Eliot Spitzer," *The Wall Street Journal*, p A14 (May 3, 2006), *Selected Materials*, p. 119.
2. AP story, "Spitzer files suit against AIG, former CEO" (May 26, 2005), *Selected Materials*, p. 120.
3. K. Strassel, "The Weekend Interview with Hank Greenberg: 'You Couldn't Build an AIG Today,'" *The Wall Street Journal* (April 15, 2006), *Selected Materials*, p. 122.
4. R. Smith, S. Craig and D. Solomon, "Wall Street Firms To Pay \$1.4 Billion To End Inquiry," *The Wall Street Journal*, p. A1 (April 29, 2003); G. Zuckerman and S. Craig, "Wall Street's Payout: Too Little and Late?", *The Wall Street Journal*, p. C1 (April 29, 2003), *Selected Materials*, p. 126.
5. W. Shughart, "Private Antitrust Enforcement: Compensation, Deterrence, or Extortion," *Regulation*, pp. 53-61 (Fall 1990); <http://www.cato.org/pubs/regulation/regv13n3/reg13n3-shughart.html>.
6. *AMC Report*, pp. 251-56, 400 (first paragraph only), 417-19 (contribution and carve-out).
7. DOJ Press Release, "Milberg Weiss law firm, two senior partners, indicted in secret kick-back scheme involving named plaintiffs in class-action lawsuits" (May 18, 2006); *Selected Materials*, p. 131.

8. Milberg Weiss, “Statement regarding Milberg Weiss indictment” (May 22, 2006), Selected Materials, p. 135.
9. N. Koppel and L Cohen, “Milberg’s Bershad Weighs Making Guilty Plea in Talks With Prosecutors,” *The Wall Street Journal*, p. A10 (May 31, 2007).
10. N. Koppel, “Milberg Weiss Held Talks On Settling Criminal Case,” *The Wall Street Journal*, p. B2 June 1, 2007).

Class # 12 (May 30, 2006). Regulation v. Deregulation. (1) Regulation: we can do it better.

Ronald Reagan often said that “the nine most terrifying words in the English language are ‘I’m from the government and I’m here to help.’” Yet government is the original and enduring growth industry. Indeed, it even remained so during Reagan’s presidency. Thus, in politics, **reducing** the size of government has come to mean **increasing** the size of government, but reducing the rate of increase in the size of government. Over the years (and continuing to today), economists have published a great deal on whether to regulate and, if so how. **(2) Deregulation: trust the markets.** Sometimes a consensus is reached that a market that is regulated isn’t working all that well and that it should be deregulated. Many factors can contribute to reaching of this consensus, including a sense that the regulating body has effectively been “captured” by those being regulated. In Europe, many countries have taken industries that were both owned and operated by the government (the ultimate form of government regulation) and “privatized” them. (In the former communist countries, much of the economy has gone through this process.) In the United States, perhaps the poster child for deregulation has been the airlines industry. Interestingly, while we generally associate deregulation with Republicans, it was three Democrats who were most instrumental in bringing about airline deregulation—Sen. Ted Kennedy, Professor Alfred Kahn and a then-young Senate staffer named Stephen Breyer. How has it worked out? There are far fewer airlines today; does that mean there’s been a “lessening” of competition? And those that have survived seem to go in and out of bankruptcy proceedings on a regular basis. And what do we learn from the new entrants—Southwest, Jet Blue, etc.? One interesting experience with deregulation is the situation where an industry operates at several levels and only one level is deregulated. This has happened in the energy field. We end up with markets that are part regulated and part not regulated. What follows? Readings:

1. VHV, pp. 375-92 (skim).
2. S. Breyer, *Regulation and Its Reform* (Harvard Press 1984), pp. 36-37, 60-62, 71-74, 96-108, 120-22, 131-34.
3. *AMC Report*, pp. 357-63.
4. Coase, “The Federal Communications Commission,” 2 *J.L. & Econ.* 1, 1-6, 14-17, 40 (1959).
5. Buchanan, “Public Choice: Politics Without Romance,” *Policy*, vol. 19, No. 3 (Spring 2003); <http://www.cis.org.au/policy/spr03/polspr03-2.htm>.
6. P.J. O’Rourke, “How to Stuff a Wild Enron,” *The Atlantic Monthly* (April 2002), *Selected Materials*, p. 137..
7. T. Muris, “Improving the Economic Foundations of Competition Policy” (January 15, 2003); www.ftc.gov/speeches/muris/improveconfoundatio.htm.
8. M. Friedman, *Capitalism & Freedom*, Chapter 2, (“The Role of Government in a Free Society”), pp. 22-36 (Un. of Chicago Press 1962).
9. G. Stigler, “The Intellectual and the Marketplace,” from *The Intellectual and the Marketplace and Other Essays* (Harvard Press 1984), pp. 143-58.
10. Airlines.
 - a. P. Weiser, “The relationship of antitrust and regulation in a deregulatory era,” 50 *Antitrust Bull.* 549 (2005); http://papers.ssrn.com/sol3/papers.cfm?abstract_id=814945.

- b. A. Kahn, "Airline Deregulation," *The Concise Encyclopedia of Economics* (2002), *Selected Materials*, p. 140.
 - c. PBS TV program: *Commanding Heights*, "Up For Debate: Deregulation" (Panelists; Stephen Breyer, Alfred Kahn and Judith Hamill), *Selected Materials*, p. 148.
 - d. S. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace," 74 *Calif. L. Rev.* 1005, 1005-11, 1018, 1027, 1044-47 (1987).
11. R. Kuttner, *Everything for Sale: The Virtues and Limits of Markets* (Un. of Chicago Press 1998), pp. 255-70 (skim).
12. Energy
- a. P. Joskow, "California's Electricity Crisis," 17 *Oxford Rev. of Econ.* 365, 365-70, 376-87 (2001).
 - b. T. Fogarty and E. Iwata, "Energy deregulation: is it friend or enemy," *USA Today* (May 15, 2002), *Selected Materials*, p. 157.
 - c. Congressional Budget Office Paper, "Causes and Lessons of the California Electricity Crisis," pp. 1-7, 27-29 (September 2001):
<http://www.cbo.gov/showdoc.cfm?index=3062&sequence=0>.
 - d. S. Stolberg and C. Hulse, "\$100 Rebate: Rise and Fall Of Capitol Idea," *The New York Times*, p. A1 (May 5, 2006). *Selected Materials*, p. 160.
 - e. B. Dorgan, "Windfall Profits," *Selected Materials*, p. 164.
 - f. J. Glassman, "'Windfall Profits' Tax on Oil Companies," *Capitalism Magazine* (September 26, 2005), *Selected Materials*, p. 167.
 - g. M. Feldstein, "Tradeable Gasoline Rights," *The Wall Street Journal* (June 5, 2006), *Selected Materials*, p. 170.
 - h. T. Friedman, "Only Halfway There," *The New York Times* (May 13, 2007).
 - i. R. Samuelson, "High fuel prices are essential," *Rocky Mountain News*, p. 46 (May 31, 2007).

Section V. Regulation and the Future.

Class # 13 (May 31, 2007). Globalization and Its Critics: Of NAFTA, global warming and the like. Ross Perot came back from the sidelines during the debate over Congressional ratification of the NAFTA treaty to coin a memorable phrase about "the giant sucking sound" that would be heard if NAFTA was ratified. As he saw it, jobs in America would be lost in the wake of the passage of NAFTA as work was "sucked" out of the United States and transplanted to foreign countries. How do international trade disputes get addressed and resolved? WTO? NAFTA panels? And what, if anything do we do about "global warming"? Here? Throughout the rest of the world? And how do we go about doing whatever it is we decide should be done? And where? What do we learn (or make use of) from the Kyoto Protocols? Readings:

1. T. Friedman, *The World is Flat* (Farrar, Straus and Giroux 2005); see the summary list of what Friedman identifies as "the ten forces that flattened the world," *Selected Materials*, p. 171. (skim pp. 3-47, 225-236 so that we can discuss Friedman's "ten forces")
2. S. Roach, "Backlash Against Globalization," *Morgan Stanley Research Report* (April 25, 2001), *Selected Materials*, p. 172.
3. International trade disputes.
 - a. Wikipedia, "North American Free Trade Agreement";
<http://www.en.wikipedia.org/wiki/NAFTA>.
 - b. C Brand, "EU Imposes More Trade Sanctions on U.S.," (April 30, 2006), *Selected Materials*, p. 175.
 - c. "United States-Canada softwood lumber dispute," *Wikipedia*;
http://en.wikipedia.org/wiki/U.S.-Canada_softwood_lumber_dispute.

- d. Statement, "President Pleased with U.S.-Canada Agreement Resolving Softwood Lumber Trade Dispute" (April 27, 2006), *Selected Materials*, p. 177.
4. J. Surowiecki, "Morales's Mistake," *The New Yorker* (January 23, 2006), *Selected Materials*, p. 178
5. *AMC Report*, pp. 213-16.
6. VHV, pp. 769-71.
7. Global warming.
 - a. *An Inconvenient Truth*: <http://www.youtube.com/watch?v=TUiP6dqPynE> (Trailer for movie.). (If there's sufficient student interest (and I hope there is), we will schedule an evening to watch the full movie and have dinner afterwards.)
 - b. G. Chichilinsky and G Heal, "Global Environmental Risks," 7 *The J. of Econ. Perspectives* 65, 65-70, 74-77, 84 (1993).
 - c. A. Powell, "Step-by-step to a cleaner energy future," *Harvard University Gazette*, p. 5 (April 13, 2006), *Selected Materials*, p. 180.
 - d. R. Lutter, "Chill Out on Warming," AEI-Brookings Policy Matters Article 01-12 April 10, 2001), *Selected Materials*, p. 184.
 - e. Article, "Gore Slams Global Warming Critics" (June 20, 2006), *Selected Materials*, p. 186.
 - f. R. Lindzen, "There Is No 'Consensus' on Global Warming," *The Wall Street Journal*, p. A14 (June 26, 2006), *Selected Materials*, p. 189.
 - g. H. Jenkins, "Decoding Climate Politics," *The Wall Street Journal*, p. A12 (January 24, 2007), *Selected Materials*, p. 190.
 - h. Article, "Global Warming Smear," *Wall Street Journal Online* (February 9, 2007), *Selected Materials*, p. 193.
 - i. H. Jenkins, "Ethanol Liberation Movement," *The Wall Street Journal*, p. A14 (March 14, 2007), *Selected Materials*, p. 195.
 - j. D. Schoenbrod, "What Next on Global Warming?," *The Wall Street Journal*, p. A12 (April 5, 2007), *Selected Materials*, p. 197.
 - k. P. Barta, "Crop Prices Soar, Pushing Up Cost Of Food Globally," *The Wall Street Journal*, p. A1 (April 9, 2007), *Selected Materials*, p. 198.
 - l. J. Broder and M. Connelly, "Public Says Warming Is a Problem, but Remains Split on Response," *The New York Times*, p. A23 (April 27, 2007), *Selected Materials*, p. 201a.
 - m. J. McKinnon, "White House Unveils New Climate Strategy," *The Wall Street Journal Online* (May 31, 2007).

Class # 14 (June 1, 2007). Wal-Mart. Is Wal-Mart the greatest things since sliced bread? Or the worst thing since the plague? Economic regulation often involves a struggle between the head and the heart. Everyone prefers the warmth and friendliness of the Ma-and-Pa corner grocery store to the coldness and piped-in Muzak at the supermarket. Or at least they say they do. But they vote with their feet. So the Ma-and-Pas are vanishing and the supermarkets are growing like weeds. Lately, some have sought to address this issue via regulation. Wal-Mart decided it would like to enter the banking business. Because banking is extensively regulated, Wal-Mart would have had to go through a lengthy and contentious approval process. As you might expect, many came forward to urge the regulators not to let Wal-Mart into banking. It got pretty ugly; finally, Wal-Mart just gave up. Others have sought to restrain Wal-Mart's growth through legislation. Some communities, for example, have passed laws effectively banning Wal-Mart from opening a store there—by (say) prohibiting store-size from exceeding 75,000 square feet. And Maryland recently passed a law requiring Wal-Mart to allocate a certain percentage of its profits to health care benefits for its employees. Great humanitarian legislation or thinly disguised effort to keep Wal-Mart from doing business in the state? Readings:

1. C. Fishman, *The Wal-Mart Effect* (Penguin Press 2006) (Excerpts: read pp. 1-22, 79-84, 102-09, 167-73, 219-24, 249).
2. Article, "The very bottom line," *The Economist* (Dec. 20, 2005), *Selected Materials*, p. 202.
3. Legislative Efforts to keep Wal-Mart out of certain areas.
 - a. J. Wagner, "Md. Legislature Overrides Veto on Wal-Mart Bill," *The Washington Post*, p. A01 (January 13, 2006), *Selected Materials*, p. 207.
 - b. A. Paley, "Calvert to Weight Three More Options to Block, Curb Wal-Mart," *The Washington Post*, p. SM01 (April 24, 2005), *Selected Materials*, p. 210.
 - c. M. Saul, "Quinn vows she'll keep Wal-Mart out of city," *New York Daily News*, p.13 (April 19, 2006), *Selected Materials*, p. 212.
4. Wal-Mart's efforts to go into banking.
 - a. M. Barbaro, "Wal-Mart Promises To Limit Banking," *The New York Times*, p. C1 (April 11, 2006), *Selected Materials*, p. 213.
 - b. M. Gordon, "Wal-Mart's banking bid opposed," *USA Today*, p. 2B (April 11, 2006), *Selected Materials*, p. 215.
 - c. J. Thottam, "Wal-Mart's Banking Shot," *Time*, p. 49 (April 24, 2006), *Selected Materials*, p. 216.
 - d. Article, "Wal-Mart Ends Plans To Enter Banking Business," *Wall Street Journal Online* (March 16, 2007), *Selected Materials*, p. 217.
 - e. K. Hudson and R. Wells, "Wal-Mart Cancels Its Bank Plan," *The Wall Street Journal*, p. A3 (March 17, 2007), *Selected Materials*, p. 218.
 - f. Documents, "Wal-Mart, FDIC Statements," *Wall Street Journal Online* (March 16, 2007), *Selected Materials*, p. 220.
5. The attack on Wal-Mart's labor practices.
 - a. R. Fournier, "Wal-Mart Issue Now Washington-Style Brawl," *AP/Yahoo! Finance* (April 23, 2006), *Selected Materials*, p. 221.
 - b. M. Kabel, "Unions Protest Wal-Mart Health Care" *AP story* (April 26, 2006), *Selected Materials*, p. 224.
 - c. Article, "Wal-Mart challenged on wages stance," *USA Today*, p. B1 (June 16, 2006), *Selected Materials*, p. 226.