Law: From Common Carriage to Expert Regulator

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Forgotten History of Common Carriage

- Basic requirement is rates that are just, reasonable, and nondiscriminatory
- Original justifications offer little guidance
- Since 1960s, scholars and regulators moved away from common carriage
  - Averch & Johnson (1962)
  - FCC's Competitive Carrier (1979)
  - NTIA Regulatory Alternatives Report (1987)
- Historical legacy implies limits/tradeoffs

The Inconclusive Origins of Common Carriage

- At common law: ferries, warehouses, wharves, grain elevators, mills, inns, taverns, bridges, turnpikes
- Rejection of "affected with the public interest"
  - E.g., housing, banking, fire insurance, textile mfg., ice
  - "no closed class or category of businesses"
  - "not susceptible of definition"/"unsatisfactory test"
- Relationship to transportation or communications?
  - Underinclusive: gas, electric power, water
  - Overinclusive: buses, trucks, etc.

The Modern Reconstruction Around Monopoly

- Use natural monopoly to define scope of regulation
- Limit regulation to areas that are still natural monopolies/mandate structural separation
- Must face limits re how small you can make a firm
  - Technological integration (e.g., vertical switching services/ caller ID)
  - Theory of the firm (Coase)

Problems with Nondiscrimination

- Is hard when product quality varies
- Is hard when production technologies vary
- Leads to regulation of nonprice terms
- Is hard when interface is complex
- Absent structural separation, requires rate regulation
  - Can evade by charging nondiscriminatory high prices to both affiliated and unaffiliated companies
  - Simply leads to passthrough of the monopoly price (benefits competitors, not consumers)

Problems with Regulating Rates

- Supreme Court: an "embarrassing question," "a laborious and baffling task," "vicious circle"
- Cost of service ratemaking
  - $R = O + Br$
    - *R* is revenue requirement
    - *O* is operating expense
    - *B* is rate base (capital expenditure)
    - *r* is rate of return
  - Price: revenue requirement/projected revenue

Problems with Regulating Rates

- Inefficiency/lack of investment/forestalling compet.
- Prudent investment: used and useful, stranded costs
- Historical vs. replacement costs/obsolete tech.
- Allocation of common costs/structural separation
- Setting rate of return
- Bias towards capital-intensive solutions
- Need for stability in market share
- Multiple classes of service/need for exceptions

Facilitation of Collusion

- Entry controls
- Standardization of products and pricing
- Pooling of information
- Advance notice of product and price changes
- Prohibition of hidden price cuts (filed rate doctrine)
- Government as enforcer of cartel prices

Implications

- History offers little guidance
- Common carriage works best when the product is uniform, transmission technology is stable, network is already deployed, and the interface is simple
- Nondiscrimination entails rate regulation
- Structural separation has its limits
- Common carriage has no exit model
- Competition may be more tractable/self-limiting
- Aside: real driver has been the courts