

Regulatory Law and Policy

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Cases and Materials

FOURTH EDITION

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*Dedicated to
Justice Stephen Breyer
whose scholarship on administrative law
and government regulation inspired this book.*

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Preface to the Fourth Edition

Regulations are ubiquitous in our lives. Local regulations tell us where we can live and often where we can send our children to school. State regulations tell us how we can vote and tell us the rules of the road. And federal regulation governs the labels on the foods we buy, the licenses to build nuclear power plants, or construct interstate natural gas pipelines. As citizens, we confront regulations daily. As lawyers, then, we cannot practice law without coming into contact with regulation at some level of government.

Regulatory Law and Policy will explain regulation and will provide you with the legal and analytic tools needed to participate in the regulatory state. We have designed the book in two parts. Chapters 1 through 4 present a broad overview of the regulatory state including a brief history of regulation. Chapters 5 through 10, then, examine specific regulatory problems in detail. Additionally, we present Practice Problems throughout the book for the purpose of developing regulatory skills not the least of which is learning how to read statutes and regulations. In addition to developing your interpretation skills, we also present problems that involve policy and political analyses as well as legal analysis.

The book is based on three fundamental ideas about regulation, which constitute the takeaways for the course. First, we present a specific model of government regulation. In short, in order for a regulatory proposal to become a reality, it must satisfy three conditions. A proposal must not only be constitutional, it must fall within the statutory ambit of the particular administrative agency that wishes to implement that proposal. In other words, in order for a regulatory proposal to become a reality it must satisfy a legal requirement. Additionally, the regulatory proposal must be based upon sound policy arguments. Most often, those policy arguments are based upon economic and other empirical data intended to show that the proposal will advance an articulated public purpose. And, finally, regulatory proposals must be politically salient and acceptable. Again, in other words, for a proposal to gain acceptance, it must appeal to the political interests of not only regulators but of interested legislators as well. Therefore, before a regulation can be implemented it must satisfy legal, policy, and political criteria.

The second fundamental idea is that although regulation has been a part of government since before the founding of the country, it generally follows a cycle. The regulatory cycle starts with the idea that markets are an important part of capitalist democracy and that markets are a preferred form of social ordering because they provide valuable benefits to society. It is the case, however, that markets do not

always function as desired and when there is a market failure, then government can step in to fix that defect.

All human institutions, of course, are imperfect and, therefore the regulatory fix may itself fail to function as desired. In the face of regulatory failure, then, the regulation itself may be reformed or the regulation may be dispensed with altogether in which case we experience a return to the market as a form of social and economic ordering. Throughout the book you will see that the cycle is not always strictly observed, nevertheless it does operate to demonstrate the interaction between government and markets.

The third fundamental idea of the book is that regardless of the expanse and scope of regulation all regulations are justified by only a small handful of reasons. In the face of monopoly power, for example, regulation can be used protect consumers from excessive prices and to promote competition in a particular industry. In the face of a failure to provide sufficient information to consumers, regulation can be used to require producers to disclose information so that consumers can make informed choices and, again, so that markets can be more fairly competitive.

In addition to a limited number of reasons or justifications for government regulation, you might be surprised to learn that the government uses only a limited number of tools to regulate and we have already mentioned some of those tools. Licenses, price regulation to curb monopoly power, and disclosure requirements are all part of the government regulatory toolbox intended to correct market defects.

It is important to recognize that sometimes the market defects are purely economic. In other words, if competition is lacking in an industry, then for purposes of efficiency, government regulation can step in to address that market failure. There are, however, market defects that are not purely economic and they affect our social lives. Simply consider racial segregation or gender inequalities. Historically, markets have not eliminated either of those problems and, therefore, it is incumbent upon government to step in for the purpose of creating a more just and fairer society.

This casebook provides an opportunity to develop a set of lawyering skills that are distinguishable from the common law skills that you learn in courses such as contracts, torts, and property. For the most part, in the common law courses you were taught the adversarial method. Adversary skills are necessary for lawyers, but they are not the only skills and in some dimensions of the regulatory arena those skills may be counterproductive. Briefly, a lawyer who represents a client who seeks a particular regulatory outcome must be familiar not only with trial tactics, she must be familiar policy arguments, political arguments, and must be familiar with the limits of a particular regulatory agency. In short, the lawyer who confronts a regulator is involved in as much negotiation as she is with advocacy.

As regulatory lawyers, you must therefore have a set of skills that go beyond the adversarial techniques generally taught in law school and your professional skill set must contain political awareness and sensitivity as well as the ability to undertake and understand policy analyses. Most importantly, you must be able to persuasively

articulate the policy positions that you seek to advance in a variety of settings from a client's or adversary's office to the halls of Congress and of regulatory agencies. You must also be comfortable with a variety of audiences including clients, judges, legislators, staff members, administrative officers, and the like as well as the press.

Regulatory Law and Policy, then, should be seen as complementary to such courses as Administrative Law, and other more specific courses on regulation such as Environmental Law, Securities Law, Media Law, or Energy Law as examples. Additionally, the regulatory analysis that we discuss in this book is a way of understanding government regulation by identifying and analyzing patterns of regulatory activity that cut across industries and markets, just as case analysis cuts across various areas of private law. Regulatory analysis also helps explain the limits and benefits of regulation as well as the limits and benefits of the historic and enduring relationship between government and markets.

The traditional regulatory state has been governed by a set of rules and policies that are over a century old. With the traditional model, regulatory agencies were intended to be expert, technical, focused on economics, politically neutral and objective, address discrete problems *ex post*, and were seen as a countervailing power to corporate concentration. For most of the 20th century, those agencies were also largely non-partisan. Beginning in the 1980s, however, partisanship entered the regulatory state.

Today's regulatory challenges, however, continue to need expert, technical, and economic skills. Yet today regulation faces an anti-scientific/anti-government bias as well as political polarization. Further, the regulatory state is no longer seen as a countervailing force to corporate concentration. Instead it is often seen as a threat to the corporate world. More problematic, however, is that the problems that we face today involve new variables and they often need *ex ante* solutions. Indeed, it is the case that we will need regulation, but the question then becomes: What sort of regulation?

The future of government regulation, then, appears to be pulled in two directions. First, the anti-government/anti-regulatory state criticisms continue. Second, the social and economic problems that we face appear more, not less, complex. Professor Richard Lazarus's "super wicked" problem of climate change is a prime example. These problems are multidimensional, multidisciplinary, transboundary, and multi-jurisdictional among other complexities. It seems, then, appropriate to ask what the future of regulation will look like.

The United States exists as a mixed market economy. Government regulation and competitive markets cannot only exist side-by-side, they can strengthen and reinforce each other, and they can do so in a way that promotes the general welfare as the Constitution requires.

The regulatory future will continue to deal with old problems such as environmental pollution, deceptive trade practices, and harmful products as it confronts

new challenges of climate change, cyber security, the production of new drugs as well as new technologies, the place of privacy in an ever-expanding technological society, and the like.

Even in an era in which much government regulation is contested, it is not only fair, but necessary, to ask whether or not the existing regulatory structure is flexible and adaptive enough to deal with the societal changes that are inevitable with the development of new and sometimes disruptive technologies. Imagine, as one example, if electricity storage becomes dramatically affordable will we still need traditional electric utilities? Similarly, if fusion technologies become cost-effective, then what is the consequence on the development of all other energy sources? In such a case, will we need our environmental laws? And, to the extent that the world becomes more connected, what cybersecurity and privacy threats are posed? In short, the magnitude of these questions requires us to ask whether or not the current regulatory state is in a position to anticipate, plan for, and be prepared to regulate such eventualities.

We hope that the tools that you have been exposed to throughout this casebook help prepare you for the regulatory future.

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