

Law 289: Perspectives on Regulation
Antonin Scalia Law School | George Mason University
Spring 2022

Professors: James Broughel (jbroughel@mercatus.gmu.edu)
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Class Time: Thursdays 6:05 pm – 8:05 pm

Office Hours: By appointment.

Textbook: Susan Dudley and Jerry Brito, Regulation: A Primer (2nd Ed. 2012),
http://mercatus.org/sites/default/files/RegulatoryPrimer_DudleyBrito_0.pdf

Most assignments can be found online or in the library.

Overview:

This course will enable students to gain a deeper understanding of 1) how the federal regulatory process and regulatory agencies work; 2) how to engage in the regulatory process; 3) how different interest groups affect the process; and 4) and how to analyze the effects of regulations from an economic point of view.

Learning Outcomes:

- Develop a practical, ground-level perspective on the federal regulatory process and the struggles that shape it;
- Develop presentation and advocacy skills;
- Learn to look at regulatory issues through the lens of economic analysis and important court cases.

Grade is determined by:

- Performance on final exam (70%)
- Class participation (10%)
- Class presentations (20%)

Details of exams and class participation will be discussed in class.

Exams:

Final exam will be take-home format. The final exam will take place over the final exam period at the end of the semester.

Class Readings:

Note that readings should be completed in advance of the lecture in the week in which they are assigned. Readings are available online or through the GMU library website.

Week 1 – January 20 – Broughel and Huddleston - Why regulate?

- Susan Dudley and Jerry Brito. 2012. Regulation: A Primer: 1 – 10.
- Robert Litan, “Regulation,” The Concise Encyclopedia of Economics, <http://www.econlib.org/library/Enc/Regulation.html>
- Bryan Caplan, “Externalities,” The Concise Encyclopedia of Economics, <http://www.econlib.org/library/Enc/Externalities.html>
- James Broughel. 2021. “The Tradeoffs Between Energy Efficiency, Consumer Preferences and Economic Growth.” In *Regulation and Economic Opportunity: Blueprints for Reform*. Adam Hoffer and Todd Nesbit (eds). Logan, Utah: Center for Growth and Opportunity at Utah State University. <https://www.thecgo.org/wp-content/uploads/2021/09/Regulation-16-pdf-1.pdf>

Week 2 – January 27 – Huddleston – Who Regulates?

- Jeff Kosseff, Hamiltonian Cybersecurity, Wake Forest Law Review, Volume 54, Forthcoming https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3234758
- Clyde Wayne Crews, Ten Thousand Commandments 2021: An Annual Snapshot of the Federal Regulatory State, <https://cei.org/studies/ten-thousand-commandments-2021/>
- Susan Dudley and Jerry Brito. 2012. Regulation: A Primer: 57-64.

Week 3 – February 3 – Broughel - 20th Century History of Regulation

- Susan Dudley and Jerry Brito. 2012. Regulation: A Primer: 23 – 55.
- Mathew D. McCubbins, Roger G. Noll, Barry R. Weingast. 1999. “The Political Origins of the Administrative Procedure Act,” *The Journal of Law, Economics, and Organization* (15)1: 180-217.
- Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114, no. 8 (2001): 2245–2385.

Week 4 - February 10 – Huddleston- What are Regulators Maximizing?

- William A. Niskanen, Jr., “Bureaucracy: A Final Perspective,” 189-207, in REFLECTIONS OF A POLITICAL ECONOMIST: SELECTED ARTICLES ON GOVERNMENT POLICIES AND POLITICAL PROCESSES (Chapter 19) (2008)
- James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do it 30-110 (1989)
- Barry R. Weingast & Mark J. Moran, “Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission,” 91 *J. Pol. Econ.* 765 (1983)

- Timothy J. Muris, “Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control,” 94 J. Pol. Econ. 884 (1986)

Week 5 – February 17 - Broughel - Theories of Regulation

- Susan Dudley and Jerry Brito. 2012. Regulation: A Primer: 11 – 22.
- Paul A. Samuelson. 1954. “The Pure Theory of Public Expenditure,” *The Review of Economic and Statistics* (36)4: 387–389.
- George J. Stigler, “The Theory of Economic Regulation,” *The Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3–21.
- Bruce Yandle, “Bootleggers and Baptists - The Education of a Regulatory Economist,” *Regulation* 7 (1983): 12-16.
<http://pirate.shu.edu/~rotthoku/Liberty/On%20Bootleggers%20&%20Baptists.pdf>
- Ted Gayer and W. Kip Viscusi. “Behavioral Public Choice: The Behavioral Paradox of Government Policy.” *Harvard Journal of Law & Public Policy* 38(3): 973-1007
http://www.harvard-jlpp.com/wp-content/uploads/2010/01/ViscusiGayer_4.pdf

Week 6 – February 24 - Huddleston- Agency Structure

- Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 TEX. L. REV. 15 (201)
- PHH Corporation v. CFPB, 839 F.3d 1 (2016) FOCUS ON SECTIONS DISCUSSION CFPB STRUCTURE
- Neil Chilson, Does Big Tech Need Its Own Regulator?,
<https://gaidigitalreport.com/2020/08/25/does-big-tech-need-its-own-regulator>

Week 7 – March 3 - Broughel - OIRA Review and Regulatory Impact Analysis

- Jim Tozzi, “OIRA’S Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding,” *Administrative Law Review* 63 (2011): 37–69.
- Don Arbuckle. 2011. “The role of analysis on the 17 most political acres on the face of the earth.” *Risk Analysis* 31(6):884-92.
- Executive Order 12,866 (1993).

Week 8 - March 10 - Huddleston- Limits of Regulation

- City of Arlington, TX v. FCC 133 S.Ct. 1836 (2011)
- Danial Lyons, "Tethering the Administrative State: The Case Against Chevron Deference for FCC Jurisdictional Claims" 36 J. Corp. L. 823 (2011)
- Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511 (1989)
- Christopher J. Walker, What Kisor Means for the Future of *Auer* Deference?,
<https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/>
- Kristin E. Hickman, Gundy, Non-Delegation, and the Never-Ending Hope,
<https://www.theregreview.org/2019/07/08/hickman-nondelegation/>

Week 9 - March 17 - NO CLASS - SPRING BREAK

Week 10 – March 24 - Broughel - Quantifying Regulation

- Omar Al-Ubaydli and Patrick A. McLaughlin, “RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997–2012,” *Regulation & Governance*, 2015.
- “2018, 2019 and 2020 Draft Report to Congress on the Benefits and Costs of Federal Regulations” (Washington, D.C.: Office of Management and Budget, 2019).
https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5899-REV_DOC-Draft2018_2019_2020Cost_BenefitReport11_20_2019.pdf
- Mark Febrizio, Susan Dudley and Melinda Warren. FY2021. Regulators’ Budget: Regulators’ Budget: Overall Spending and Staffing Remain Stable.
https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/downloads/RegulatorsBudget/GW%20Reg%20Studies%20-%20FY2021%20Regulators%20Budget%20-%20MFebrizio%20and%20MWarren_Weidenbaum%20Center.pdf
- James Broughel and Richard Williams. “Toward an Improved OMB Annual Report on Federal Regulations”. *Regulation Magazine*. Winter 2019-2020.
<https://www.cato.org/sites/cato.org/files/2019-12/v42n4-5.pdf>

Week 11 – March 31 - Huddleston - Regulating without Regulation

- John D. Graham and James Broughel, “Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act,” *Harvard Journal of Law and Public Policy: Federalist Edition* (2014): 30-54. http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Graham_Broughel_final.pdf
- Ryan Haggeman, Jennifer Huddleston Skees, and Adam Thierer, Soft Law for Hard Problems, *Colorado Law and Technology Journal* (2019): 40-53, 119-128,
https://ctlj.colorado.edu/wp-content/uploads/2019/03/3-Thierer_3.18.19.pdf

Week 12 – April 7 - Broughel – Valuing Life and Death

- James Broughel and W. Kip Viscusi. 2021. “The Mortality Cost of Expenditures,” *Contemporary Economic Policy* 39(1): 156–167.
- James Broughel and Dustin Chambers, “Federal Regulation and Mortality in the 50 States,” *Risk Analysis* (published ahead of print), <https://doi.org/10.1111/risa.13774>.
- James Broughel and Andrew Baxter. “A Mortality Risk Analysis of OSHA’s COVID-19 Emergency Regulations.” *Working Paper*, 2022.

Week 13 - April 14 - Huddleston - The Future of Regulation

- Thierer, Koopman, Hobson, and Kuiper, “How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the ‘Lemons Problem,’” *70 University of Miami Law Review* 830 (2016)
- Adam Thierer, *Permissionless Innovation*, Preface and Chapter V,
http://permissionlessinnovation.org/wp-content/uploads/2016/03/Thierer_Permissionless_web.pdf

- Dan Bosch and Thomas O'Rourke, Utah Regulatory Sandbox Proposal Is the First of Its Kind, <https://www.americanactionforum.org/insight/utah-regulatory-sandbox-proposal-is-first-of-its-kind/>

Week 14 - April 21 - Broughel – Problems with Cost-Benefit Analysis

- Tjalling C. Koopmans, "Measurement without theory." *The Review of Economics and Statistics* 29.3 (1947): 161-172.
- James Broughel, "The Unlikely Story of American Regulatory Socialism," *Quarterly Journal of Austrian Economics* 24, no. 1 (2021): 147–65.
<https://qjae.scholasticahq.com/article/22181-the-unlikely-story-of-american-regulatory-socialism>
- James Broughel. "Cost-Benefit Analysis as a Failure to Learn from the Past." *Journal of Private Enterprise*, Spring 2020.
http://journal.apee.org/index.php/2020_Journal_of_Private_Enterprise_Vol_35_No_1_Spring_parte5

Final Exam Period – Thursday, April 28 - Thursday, May 12

George Mason's Honor Code:

To promote a stronger sense of mutual responsibility, respect, trust, and fairness among all members of the George Mason University Community and with the desire for greater academic and personal achievement, we, the student members of the university community, have set for this Honor Code: Student Members of the George Mason University community pledge not to cheat, plagiarize, steal, or lie in matters related to academic work.

<https://oai.gmu.edu/mason-honor-code/>