

Regulated Industries

Law 315; George Mason University School of Law; Spring 2022
Prof. Jeffrey Eisenach – 202-448-9029 – jeff@eisenachs.com
Prof. Robert Kulick – 913-209-4502 – Robert.Kulick@nera.com
Tuesdays, 6:05 – 8:05 p.m.

Description

This course introduces students to the law and economics of government regulation. Topics include key concepts and analytical frameworks (e.g., natural monopoly, externalities, network effects) as well as legal and procedural issues (e.g., the limits of regulatory agency discretion, presidential review of regulatory agency actions, the “independence” of independent regulatory agencies). In addition to addressing regulation of traditionally regulated industries such as utilities and transportation, the course exposes students to the breadth of government regulation of economic activity in a modern global economy, especially as it relates to the information technology sector.

Grades

Grades are based primarily on two research projects, the first of which is a paper which constitutes 35 percent of the grade and the second of which is an oral presentation/short paper, which constitutes 45 percent of the final grade. The remaining 20 percent of the grade is based on class attendance and participation. Students are expected to be prepared to summarize and discuss required readings.

Text and Other Materials

The primary text for the course is W. Kip Viscusi, Joseph E. Harrington Jr. and David E.M. Sappington, *Economics of Regulation and Antitrust* 5th Ed. (MIT Press, 2018). As a secondary text, we will also rely on Susan E. Dudley and Jerry Brito, *Regulation: A Primer* 2d ed. (Mercatus Center, 2012) (available at http://mercatus.org/sites/default/files/RegulatoryPrimer_DudleyBrito_0.pdf). Other materials will be provided online at the TWEN website for the course or are available through JSTOR. Materials marked with an asterisk (“*”) are “recommended.” The remainder should be considered “required.”

Course Outline and Readings

Class 1 (January 18): Class Introduction and Overview (Eisenach and Kulick)

- Viscusi, Herrington, Sappington (Chap 1, pp. 442-448)
- Dudley and Brito (Chap. 1)

Class 2 (January 25): History of Government Regulation (Eisenach)

- Frederick W. Taylor, *The Principles of Scientific Management* (New York: Harper & Brothers Publishers, 1911), (Chapter 1, pp. 5-29) (available online at <http://books.google.com/books?id=5ek4cYPdndYC&pg=PA30&dq=%22principles+of+scientific+management%22+1911#PPA9,M1>)

- Ronald C. Moe, *Reorganizing the Executive Branch in the Twentieth Century: Landmark Commissions* (Washington, DC: Congressional Research Service, March 19, 1992) pp. 1-12
- Arthur M. Schlesinger, Jr., *The Coming of the New Deal* (Boston: Houghton Mifflin Company, 1958), (Chapter 11, pp. 179-194)*
- Charles Francis Adams, “A Chapter of Erie,” in Charles Francis Adams and Henry Adams, *Chapters of Erie and Other Essays* (Boston: Osgood and Company, 1871)*
- Thomas K. McCraw, “Regulation in America: A Review Article,” *The Business History Review*, Vol. 49, No. 2 (Summer 1975), pp. 159-183*
- Joan Hoff Wilson, *Herbert Hoover: Forgotten Progressive* (Boston: Little, Brown & Company, 1975) (Chapter 4, pp. 79-121)*

Class 3 (February 1): The Political Economy of Regulation (Kulick)

- Viscusi, Herrington, Sappington (pp. 53-56; 453-474)
- Dudley and Brito, Chap. 2
- Richard A. Posner, “Theories of Economic Regulation,” *Bell Journal of Economics & Management Science* 5 (Autumn 1974) 335-358
- George Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics & Management Science* 2 (Spring 1971) 3-21
- Gordon Tullock, “The Welfare Costs of Tariffs, Monopolies and Theft,” *Western Economic Journal* (1967) 224-232
- Sam Peltzman, “Toward a General Theory of Regulation,” *Journal of Law and Economics* 19 (August 1976) 211-240*

Class 4 (February 8): Economic Regulation and Traditional Market Power I (Eisenach)

- Viscusi, Herrington, Sappington (Chaps. 12-13)
- Dudley and Brito, Chap. 6.
- Richard A. Posner, “Monopoly and Its Regulation,” *Stanford Law Review* 21;3 (February 1969) 548-643.
- *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).
- Harold Demsetz, “Why Regulate Utilities,” *Journal of Law and Economics* 11; 1 (April 1968) 55-65.*

Class 5 (February 15): Social Regulation, Externalities and Public Goods (Kulick)

- Viscusi, Herrington, Sappington (pp. 15-53; 772-792)
- Ronald Coase, “The Problem of Social Cost,” *Journal of Law and Economics* 3 (October 1960).

Class 6 (February 22): The Federal Regulatory Review Process (Eisenach)

- Dudley and Brito, Chap. 7.
- OMB Circular A-4.
- Executive Order 13371 (January 30, 2017) (available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/>)

Class 7 (March 1): Topic I -- Market Power with Network Effects and “Tipping” (Kulick)

- Viscusi, Herrington, Sappington (Chap. 9)
- Michael L. Katz and Carl Shapiro, “Systems Competition and Network Effects,” *The Journal of Economic Perspectives* 8;2 (Spring 1994) 93-115.
- Jeffrey A. Eisenach, “Broadband Competition in the Internet Ecosystem,” *American Enterprise Institute* (October 2012) (available at http://www.aei.org/files/2012/10/17/-broadband-competition-in-the-internet-ecosystem_164734199280.pdf).*

Class 8 (March 8): Topic II – Regulation of Financial Services (Ang)

- Readings TBA

Spring Break (March 15): No Class

Class 9 (March 22) Topic III – Privacy and the Regulation of Consumer Information (Guest Lecturer TBA)

- Rohit Chopra, *In Re: Facebook, Inc., Dissenting Statement* (July 24, 2019) (https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf)
- J. Howard Beales, III and Timothy J. Muris, “Choice or Consequences: Protecting Privacy in Commercial Information,” *University of Chicago Law Review* 75 (2008) 109-135
- Howard Beales, Richard Craswell and Steven C. Salop, “The Efficient Regulation of Consumer Information,” *Journal of Law and Economics* 24 (December 1981) 491-539*
- J. Howard Beales and Jeffrey A. Eisenach, “Putting Consumers First: A Functionality-Based Approach to Online Privacy,” Navigant Economics LLC (January 2013)*
- Geoffrey Manne et al, Comments on Developing the Administration’s Approach to Consumer Privacy, International Center for Law and Economics (November 9, 2018) (available at https://www.ntia.doc.gov/files/ntia/publications/icle_comments_-_ntia_-_developing_administrations_approach_to_privacy.pdf).
- *U.S. v. Facebook, Inc.*, Complaint for Civil Penalties, Injunction, and Other Relief (July 24, 2019) (available at https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf)
- *U.S. v. Facebook, Inc.*, Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief (July 24, 2019) (available at https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_order_filed_7-24-19.pdf).Regulation of Commercial Information

Class 10 (March 29): Topic IV– Occupational Licensing Regulation (Kulick)

- Milton Friedman, *Capitalism and Freedom*, University of Chicago Press Anniversary Edition (2002) Chapter 9.
- Aaron Edlin and Rebecca Haw, “Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny,” *University of Pennsylvania Law Review* 162 (2014) 1093-1164.
- *North Carolina State Board of Dental Examiners v. Federal Trade Commission, Certiorari to the United States Court of Appeals for the Fourth Circuit*, No. 13-534 S. Ct. (2015).
- Margaret C. Levenstein and Valerie Y. Suslow, “What Determines Cartel Success?” *Journal of Economic Literature* 44 (2006) 43-95.*

- Carolyn Cox and Susan Foster, *The Costs and Benefits of Occupational Regulation*, Federal Trade Commission (1990) (available at https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf).*
- Morris M. Kleiner, “Occupational Licensing,” *Journal of Economic Perspectives* 14;4 (2000) 189-202 (available at <http://lgi.umn.edu/people/mkleiner/pdf/licensing.pdf>).*

Class 11 (April 5): Topic V – Copyright Royalty Rate Regulation (Eisenach)

- American Society of Composers, Authors and Publishers, “Response to Department of Justice’s June 5, 2019 Request for Public Comments Concerning the ASCAP and BMI Consent Decrees” (August 9, 2019) (available at <https://media.justice.gov/vod/atr/ascapbmi2019/pc-043.pdf>)
- Jeffrey A. Eisenach, “The Sound Recording Performance Right at a Crossroads: Will Market Rates Prevail,” *CommLaw Conspectus* 22;1 (2014) (available at <http://scholarship.law.edu/commlaw/vol22/iss1/3/>)
- Kevin M. Murphy, “Economic Considerations for Modification and Termination of the ASCAP Consent Decree (August 9, 2019) (available at <https://media.justice.gov/vod/atr/ascapbmi2019/pc-044a.pdf>)
- United States Copyright Office, *Copyright and the Music Marketplace* (February 2015) (available at <https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>) (pp. 1-52, 90-104)

Class 12 (April 12): In-Class Review and Make-Up

Class 13 (April 19): In-Class Presentations

Law 315: Assignments

Assignment 1: The Political Economy of Regulation (15 pages, or about 3,750 words)

Apply the analytical frameworks discussed in Richard Posner's "Theories of Economic Regulation" to a specific Federal regulation or area of Federal regulation. Specifically, discuss the role of interest group politics in the creation and operation of the regulation at issue, making specific reference to the theories of government regulation discussed in the readings and in class. The paper should include: a clear explanation the various theories of interest group politics; a brief discussion of the origins and institutional history of the regulation at issue; a general description of the rule's economic effects; and, an analysis of how interest group politics affected the regulatory outcome. Due March 22.

Assignment 2: Advancing a Position on a Major Regulatory Issue (5-10 page white paper plus oral presentation): Taking as your topic a major regulatory issue currently being addressed by a Federal regulatory agency, prepare a 5-10-page white paper advancing a specific position on a salient aspect of the issue (e.g., whether the Federal Trade Commission should regulate collection of consumer information by broadband service providers). Make sure your arguments are grounded in the facts and the law, and that the paper takes an objective, evidence-based approach to supporting your position: Successful papers will feature reasoned arguments backed by documented evidence, not polemical rhetoric. Be prepared to make a 15-minute presentation of your arguments in class and respond to questions from the professor and your classmates. Due April 19.

General Guidelines for Written Papers

First, papers should be well-constructed, well-written and well-referenced. A well-constructed paper has a clear, concise introduction which introduces the topic and describes what follows, headings or clearly defined sections that present specific elements of the analysis, and a well-reasoned conclusion which brings the arguments together and restates the paper's findings. A well-written paper has no misspellings, uses proper grammar correct, adheres to correct usage of words and terminologies, and presents arguments and ideas in a logical, easily understood order, each leading naturally into the next. A well-referenced paper contains relevant, authoritative citations in support of key evidentiary points and, of course, it accurately attributes facts, ideas and quotations to their original sources.

Second, papers should evidence familiarity with the readings and topics addressed in the class, and demonstrate the ability to apply key principles, concepts and frameworks to the analysis of regulatory issues. Paper topics should be chosen with this goal in mind – i.e., to provide an opportunity to demonstrate the student's knowledge of and fluency with the course's curriculum.

Learning Outcomes

- Students will have a basic understanding of the scope of government regulation in the United States and the primary institutions responsible for developing and enforcing regulations.
- Students will understand the primary rationales for enacting regulation, including market power, externalities and public goods.

- Students will be exposed to literature on the law and economics of government regulation, including various theories on how and why regulations are adopted.
- Students will be able to evaluate economic and public policy issues relevant to the analysis of particular regulations and express their views concisely, relying on generally accepted principles of regulatory analysis.