

## **Regulated Industries**

Law 315; George Mason University School of Law; Spring  
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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, including 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* 5<sup>th</sup> 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 <https://www.mercatus.org/research/books/regulation-primer#:~:text=Regulation%3A%20A%20Primer%20by%20Susan,and%20how%20they%20do%20it>). 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 16): Class Introduction and Overview (Eisenach and Kulick)(In Person)*

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

#### *Class 2 (January 23): History of Government Regulation (Eisenach) (Virtual)*

- 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 (January 30): The Political Economy of Regulation (Kulick)(Virtual)

- 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 6): Economic Regulation and Traditional Market Power I (Eisenach) (Virtual)

- Viscusi, Herrington, Sappington (Chaps. 12-13) Dudley and Brito, Chap. 6.
- Richard A. Posner, “Natural 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 13): Social Regulation, Externalities and Public Goods (Kulick) (Virtual)

- 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 20): The Federal Regulatory Review Process (Eisenach) (Virtual)

- Dudley and Brito, Chaps. 4, 7.
- Cass R. Sunstein, “The Cost-Benefit State,” Coase-Sandor Working Paper Series in Law and Economics, 1996 (available at [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1497&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1497&context=law_and_economics)).
- OMB Circular No. A-4: Explanation and Response to Public Input (November 9, 2023) (available at <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf>)

- Sidley & Austin, “A Revolution in Cost Benefit Analysis” (available at <https://www.sidley.com/en/insights/newsupdates/2023/11/new-circular-a4-a-revolution-in-cost-benefit-analysis>)

Class 7 (February 27): Part 1 Class Review (Eisenach and Kulick) (In Person)

Spring Break (March 5): No Class

Class 8 (March 12): Topic I – Regulation of Financial Services (Dr. Ling Ling Ang) (Virtual)

- Viscusi, Herrington, Sappington (Chap. 18)
- Suhuyini Abudulai, Xiaoling Ang, Eric Goldberg and Thomas Kearney, “Cross-border Crosswalk: An Overview of Canadian and U.S. Banking and Consumer Financial Service Regulators,” *Journal of Financial Compliance* 4;1 (2020) 110-125.
- Francisco Gomes, Michael Haliassos and Tarun Ramadorai, “Household Finance,” *Journal of Economic Literature* 59;3 (2020) 919-1000.\*
- Ling Ling Ang, Will Taylor and Max Perez Leon, “Fintech Developments and Antitrust Considerations in Payments” (with Will Taylor and Max Perez-Leon). 2021. *Antitrust Magazine*: Volume 35(1), Spring 2021, 69-74.

Class 9 (March 19) Topic II – (How) Should the Government Regulate Artificial Intelligence? (Dr. Andrew Stivers) (Virtual)

- Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Executive Office of the President, October 30, 2023 (available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>)
- Federal Trade Commission, “Rite Aid Banned from Using AI Facial Recognition After FTC Says Retailer Deployed Technology without Reasonable Safeguards,” December 19, 2023 (available at <https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without>)
- Cat Zakrzewski, “FTC investigates OpenAI over data leak and ChatGPT’s inaccuracy,” July 13, 2023 (<https://www.washingtonpost.com/technology/2023/07/13/ftc-openai-chatgpt-sam-altman-lina-khan/>)
- Daron Acemoglu and Todd Lensman, “Regulating Transformative Technologies,” National Bureau of Economic Research, 2023 (available at [https://www.nber.org/system/files/working\\_papers/w31461/w31461.pdf](https://www.nber.org/system/files/working_papers/w31461/w31461.pdf))
- J. Guerreiro, S. Rebelo and P. Teles, “Regulating Artificial Intelligence,” National Bureau of Economic Research, 2023 (available at [https://www.nber.org/system/files/working\\_papers/w31921/w31921.pdf](https://www.nber.org/system/files/working_papers/w31921/w31921.pdf))
- J.S. Gans, “Can Socially-Minded Governance Control the AGI Beast?” National Bureau of Economic Research, 2023 (available at [https://www.nber.org/system/files/working\\_papers/w31924/w31924.pdf](https://www.nber.org/system/files/working_papers/w31924/w31924.pdf))
- Charles I. Jones, “The A.I. Dilemma: Growth Versus Existential Risk,” Stanford GSB and NBER, October 27, 2023 (available at <https://web.stanford.edu/~chadj/existentialrisk.pdf>)
- James Pethokoukis, “How an Economist Looks at AI and Existential Risk,” AEIdeas December 5, 2023 (available at <https://www.aei.org/economics/how-an-economist-looks-at-ai-and-existential-risk/>).

Class 10 (March 26): Topic III – Labor Regulation: Occupational Licensing and Independent Contracting (Kulick) (Virtual)

- 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).
- Jeffrey Eisenach, Robert Kulick, and Elizabeth Newlon, “The Role of Independent Contractors in the Finance and Insurance Sectors,” *NERA Economic Consulting* (2022) (available at <https://www.nera.com/publications/archive/case-project-experience/the-role-of-independent-contractors-in-the-finance-and-insurance.html>).
- Eric Posner, “The Economic Basis of the Independent Contractor/Employee Distinction,” *Coase-Sandor Working Paper Series in Law and Economics*, No. 909 (2020) (available at [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1039&context=law\\_and\\_economics\\_wp](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1039&context=law_and_economics_wp)).
- 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](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>).\*
- Employee or Independent Contractor Classification Under the Fair Labor Standards Act, Final Rule, U.S. Department of Labor, January 10, 2024 (available at <https://www.govinfo.gov/content/pkg/FR-2024-01-10/pdf/2024-00067.pdf>)\*.

Class 11 (April 2): Topic IV – Copyright Royalty Rate Regulation (Eisenach) (Virtual)

- 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>)\*
- Copyright Royalty Board, *Determination of Rates and Terms for Digital Performance of Sound Recordings and the Making of Ephemeral Copies to Facilitate Those Performances (Web V), Final Rule and Order*, Federal Register 86;205 (October 27, 2021) at 59492 (available at <https://app.crb.gov/document/download/25890>).
- 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 9): One-on-One Individual Meetings to Discuss Final Papers/Presentations (Virtual) (Eisenach-Kulick)

Class 13 (April 16): In-Class Presentations (Eisenach-Kulick) (In Person)

### **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 12.

Assignment 2: Advancing a Position on a Major Regulatory Issue (15-page white paper plus oral presentation): Taking as your topic a major regulatory issue currently being addressed by a Federal regulatory agency, prepare a 15-page white paper advancing a specific position on a salient aspect of the issue (e.g., whether cybersecurity issues constitute a valid rationale for the FCC to impose Title II regulation on broadband internet access 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 professors 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 identifying clearly defined sections that present specific elements of the analysis, and a well-reasoned conclusion that brings the arguments together and restates the paper's findings. A well-written paper has no misspellings, uses proper grammar, 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.

Note on the Use of ChatGPT/AI: Use of ChatGPT and similar AI Assistants in preparing papers is permitted so long as they are properly cited. See e.g., <https://www.chicagomanualofstyle.org/qanda/data/faq/topics/Documentation/faq0422.html>.

### 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.