

**Law 289: Perspectives on Regulation**  
**Antonin Scalia Law School | George Mason University**  
**Spring 2024**

**Professors:** Jennifer Huddleston ([jhuddle@gmu.edu](mailto:jhuddle@gmu.edu))

**Class Time:** Wednesdays 8:10-10:10 pm

**Office Hours:** By appointment.

**Textbooks:** Susan Dudley and Jerry Brito, Regulation: A Primer (2nd Ed. 2012), available for free at [http://mercatus.org/sites/default/files/RegulatoryPrimer\\_DudleyBrito\\_0.pdf](http://mercatus.org/sites/default/files/RegulatoryPrimer_DudleyBrito_0.pdf)

Adam Thierer, Evasive Entrepreneurs & the Future of Governance: How Innovation Improves Economies and Governments

*\*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 (10%)
- Regulatory Comment Exercise (10%)

Details of exam, assignments, 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.

Two practice exams will be available on TWEN beginning week 6 for those who wish to use it to prepare.

### **Class presentations:**

Each student will lead a presentation to the class of one reading for that week twice over the course of the semester. This should last approximately 15-20 minutes.

Readings with an asterisk (\*) next to them are not eligible for presentation.

A sign-up sheet will be made available via TWEN after the first class.

Only two slots will be available per week without special permission of the professor. You may only take one slot per week. In other words, you may NOT do both presentations the same week.

Students may switch dates for presentations, but a student must do so at least 1 week in advance without special permission of the professor.

### **Regulatory Comment Exercise:**

Each student will look up a proposed or final rule in the *Federal Register* and to find their accompany regulatory impact analyses on Regulations.gov and draft a sample comment analyzing the regulation using the skills they learned in class. In this comment students should identify the following: What does the agency do well in its analysis? What does it not do well its analysis? What key assumptions does the agency make?

This assignment is to be emailed to the professor **by the start of the last class period (8:10 pm ET) on APRIL 17.**

### **AI Policy:**

You are welcome to use AI (in fact you likely already are) including generative AI in this class so long as it is in accordance with all existing university and law school policies around its use.

Please remember technology is a tool not a replacement and in law school critical thinking is needed. You are unlikely to do well if you merely plug a question or assignment into ChatGPT. The use of AI is not an excuse for mistakes and so note that you will be accountable and it will negatively impact your grade if there are mistakes from AI use such as hallucinated citations.

If you choose to use *generative* AI (such as ChatGPT) you are expected to disclose what program you used and in what manner (for example to find additional information on a topic, to improve readability, or to format citations). Such a disclosure must be made at the top of the question or the top of the assignment if used for the entire assignment.

### **Class Readings:**

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

### **Absences and Tardies:**

Attendance and participation are expected in a professional manner. You are allowed a set number of absences by the law school policies and there are no distinctions made excused or unexcused.

Roll will be taken within 5 minutes of the scheduled start of class. Any student arriving more than 15 minutes late should speak to the professor as soon as possible after class if he or she had not previously communicated to the professor that he or she would be tardy. A student who is **30 minutes or more** late (1/4 of class) will be counted as absent. If a student misses the roll by mistake or due to tardiness and does not communicate it to the professor before the next class, he or she will be counted as absent.

Life happens (flat tires and DC area traffic, illness, job and family conflicts, good or bad). Communication is important. If you know you will be absent or tardy, please coordinate with a classmate and notify the professor as soon as possible. Repeated tardies will negatively impact participation grades.

Please note you are allowed a maximum of **3** absences in this class in accordance with law school policies.

### **Week 1 (Jan 17) -- 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>

**Week 2 (Jan. 24) - Class Canceled** (if additional cancelations are necessary a make-up will be scheduled)

### **Week 3 (Jan. 31) - 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 (Feb. 7) – Who Regulates?**

- Jeff Kosseff, Hamiltonian Cybersecurity, *Wake Forest Law Review*, Volume 54, Forthcoming [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3234758](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.\*
- Adam Thierer, Evasive Entrepreneurs, Chapter 5: Innovation as Checks and Balances

#### **Week 5 (Feb 14)- 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 6 (Feb 21)–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](http://www.harvard-jlpp.com/wp-content/uploads/2010/01/ViscusiGayer_4.pdf)

#### **Week 7 (Feb 28)– 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 (Mar. 6) - Spring Holidays- No Class**

#### **Week 9 (Mar. 13) –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 10 (Mar. 20)- Limits of Regulation**

- West Virginia v. EPA 597 U.S. \_\_\_\_ (2021)\*; available at [https://www.supremecourt.gov/opinions/21pdf/20-1530\\_n758.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf)
- 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.thereview.org/2019/07/08/hickman-nondelegation/>

### **Week 11 (Mar. 27)– 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](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](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 12 (Apr. 3) Regulating without Regulation**

- 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](https://ctlj.colorado.edu/wp-content/uploads/2019/03/3-Thierer_3.18.19.pdf)
- Adam Thierer, Evasive Entrepreneurship, Chapter 7
- Huddleston, Thierer, Haggeman, "Soft Law is Eating the World," <https://www.mercatus.org/bridge/commentary/soft-law-eating-world-driverless-car>

### **Week 12 (Apr. 10)- Regulation and the Future**

- 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](http://permissionlessinnovation.org/wp-content/uploads/2016/03/Thierer_Permissionless_web.pdf)
- Adam Thierer, Evasive Entrepreneurship, Chapters 1, 4, and post-script
- Adam Thierer, The Pacing Problem, The Collingridge Dilemma, & Technological Determinism, <https://techliberation.com/2018/08/16/the-pacing-problem-the-collingridge-dilemma-technological-determinism/>
- Liya Palagashvili and Paola A. Suarez, Women as Independent Workers in the Gig Economy, <https://www.mercatus.org/system/files/palagashvili-women-in-gig-economy-mercatus-v1.pdf>

### **Week 13 (Apr. 17)- A Look at State and Local Level Regulation and Regulatory Reforms**

- Adam Millsap, A State and Local Federalist Relationship Must Be Market Preserving, <https://www.mercatus.org/publications/corporate-welfare/state-and-local-federalist-relationship-must-be-market-preserving>
- James Broughel, Idaho Repeals Its Regulatory Code, <https://www.mercatus.org/bridge/commentary/idaho-repeals-its-regulatory-code>
- James Madison, [Federalist No. 10](#), The Federalist Papers\*
- James Czernaski, How Utah Aims to Help Businesses Flourish after the Pandemic, <https://www.usnews.com/news/best-states/articles/2021-03-25/how-utah-aims-to-help-businesses-flourish-after-coronavirus-pandemic>
- Andrea O'Sullivan, Expanding Regulatory Sandboxes to Fast-Track Innovation, [https://www.jamesmadison.org/wp-content/uploads/2021/01/Regulatory\\_Sandbox\\_1.27.21.pdf](https://www.jamesmadison.org/wp-content/uploads/2021/01/Regulatory_Sandbox_1.27.21.pdf)

### **Final Exam Period – Thursday, April 24 - Thursday, May 8**

#### **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://sls.gmu.edu/honor/>