

REGULATORY LAW AND POLICY

Professor Michael A. Livermore
Spring 2016

COURSE DESCRIPTION

As Justice Kagan noted in *Kimble v. Marvel Entertainment*, “[W]ith great power there must also come great responsibility.” 576 U.S. __ (2015) (quoting Lee and S. Ditko, *Amazing Fantasy* No. 15: “SpiderMan,” p. 13 (1962)). Setting regulatory policy—or advising, influencing, challenging, or defending those who do—is an exercise of great power. In this course, you will learn the values, norms, and methodologies that inform responsible regulatory policy and you will put that knowledge to use analyzing, critiquing, and debating contemporary regulatory problems.

Administrative agencies—like the Environmental Protection Agency and Securities and Exchange Commission—are charged with protecting public health, enhancing financial stability, promoting worker safety, preserving the environment, and defending national security. In carrying out their statutory mandates, these agencies often have vast discretion. How do they make decisions between competing priorities and policy options? Do agencies just respond to raw politics? What considerations should they weigh when setting pollution limits, creating security protocols at airports, or regulating financial products? Do statutes provide adequate guidance? What roles can and does science, economics, and democratic accountability play?

Although regulations cover vastly different substantive areas, there are many common principles. Methodologies, such as risk assessment and cost-benefit analysis, are required across the government. Every agency faces challenges of uncertainty and expertise. Decision makers in many domains are influenced by values of precaution, autonomy, and well-being. Success in a variety of practice settings—from government, to advocacy organizations, to corporate practice—is based on the ability to master these cross-cutting elements of regulatory law and policy.

In this course, you will acquire the knowledge and build the skills needed for you to effectively and responsibly participate in shaping regulatory policy. Readings are drawn from real world case studies as well as texts that provide theoretical and conceptual information, which will be augmented by online videos and presentations. Ongoing regulatory policy debates will serve as the basis for discussions in class and online, presentations, and written projects. This work is designed to facilitate your proficiency in identifying relevant questions, accessing information, contrasting alternative perspectives, developing sound judgments, and marshaling evidence and arguments for effective advocacy. At the end of this course, you should walk away not only with a greater commitment to careful, reflective, and evidence-based approaches to regulatory law and policy, but with the tools needed to bring that commitment to your professional practice.

LEARNING OBJECTIVES

By the end of this course, you will:

- Analyze and apply economic and non-economic normative and descriptive frameworks to regulatory decision making and be able to identify the empirical, political, and values questions that are raised by regulatory policy.
- Critique and justify complex regulatory proposals based on multiple perspectives; anticipate areas of conflict and overlap between alternative normative approaches.
- Value the diverse expertise provided by different types of professionals, understand your own limits and unique contributions, and draw together and integrate information and analysis from different disciplinary perspectives.
- Develop a careful, reflective, evidence-based perspective on regulatory policy.
- Be able to approach new regulatory problems, frame questions, access relevant information, and carry out balanced and well-informed analysis and advocacy.

COURSE STRUCTURE

Class sessions will be divided roughly equally into two general types of activities. The first portion of class will serve as an extension of the online discussions and will cover the readings and online video that provide the content for the course. This is your opportunity to address substantive questions that you have on the content and for us all to have some stimulating conversations in which we apply the content to current policy debates. The second portion of class will be devoted primarily to group activities working toward your rule analysis and final project. Four class sessions will be devoted entirely to Book Responses (discussed below).

There are five sections in this course: Introduction (2 classes); Economic Perspectives and Beyond (5 classes); Behavioral Models and Paternalism (6 classes); Risk Construction (8 classes); and Policy Design and Evaluation (5 classes).

The section on **Economic Perspectives and Beyond** will provide a general overview of the neoclassical economic case for regulation as well as alternatives to the neoclassical approach. We will begin by introducing preference satisfaction as a yardstick for measuring the value of social policies. We then describe the basics of the market system and the arguments for why markets, under certain conditions, lead to social welfare-maximizing outcomes. We then explore market failures and the role of government in responding to those failures. We will also examine the potential for fairness and liberty to make up separate categories of value, and we will begin to explore critiques of preference-based conceptions of welfare.

The section on **Behavioral Models and Paternalism** will examine alternative theories about how people make choices and the consequences of those theories for public policy. We will focus on the field of behavioral economics, the movement to translate the insights

of psychology and behavioral economics into public policy, and concerns about paternalism that this movement has generated.

The section on **Risk Construction** will focus on the social construction of risk—how risks are perceived, communicated, and understood through social institutions. We will discuss how risks take on different social meanings, depending on their social and cultural contexts. We will also examine expert and lay methods for estimating risk (both quantitative and qualitative) and discuss the relationship between empirical risk assessment, normative judgment, and politics, as well as how risk assessment relates to the policy process.

The final section, on **Policy Design and Evaluation**, will discuss the primary tool used in the American administrative state to estimate regulatory effects—cost-benefit analysis—as well as controversies over its use. We will explore cutting edge methodological questions, such as valuing employment effects and retrospective review. We will also discuss the policy instruments used to achieve social goals and their merits and problems.

ASSESSMENT

Assessment and feedback will occur throughout the course. Grading is discussed further below. This section describes the assessments that you should anticipate and how they are linked to the learning objectives of the course.

1. Canvass Posts

We will be taking advantage of the “Discussions” feature on Canvas. Each section of the course (except the introduction) will have a dedicated thread on the Canvas discussion page. The online discussions are your opportunity to reflect on readings and class discussion, raise new issues for comment and debate, or share a link to a relevant blog post or news story. Through participating in the online forums, you will begin to integrate the course material and apply the concepts that we discuss in class to novel questions. **Each student is required to make 3 posts on the thread for each section**, either an original comment or a response to another student’s comment. The posts do not need to be formal. The discussion threads will be closed 3 days after the final class session for each section.

2. Book Discussions

There is a list of “Supplemental Readings” for each section of the course (except the introduction) that is posted on Canvas. One class session of each section will be devoted to discussion of these books. You will select one book to read from the list—there will be a signup sheet on Canvas (first come first serve). By 5pm on the day *before* the Book Response discussion day for your book, you will post a 1,000 word short essay to the appropriate discussion thread. The essays should examine the primary arguments of the readings, but also apply their insights to regulatory issue that we have discussed in class. Those online essays will serve as the basis for the discussion. For all discussion days, you are asked to read the essays and be prepared to have a question or comment on each book.

The purpose of this exercise is twofold. First, these books are important works in the field in the field. The essays and discussions provide a way for you get a useful general understanding of their primary arguments, and perhaps pique your interest for further inquiry. Second, you will be called on to analyze, in depth, one of these major works, and deliver and defend your arguments to the class. This activity creates an opportunity for you to use your critical thinking, writing, and oral presentation skills in a context that requires application of complex conceptual perspectives to regulatory policy issues.

3. Rule Analysis

Working with a group of other students, you will select a federal rulemaking from the past several years and develop a ten page “rule analysis.” In that document, you will summarize the rulemaking, identify the most important policy choices that were made by the agency, discuss the alternative options that were available, and compare the policy choices made by the agency against the alternatives, drawing on the economic and non-economic frameworks that we discuss in the course. The rule analysis provides an opportunity to gain experience working with complex rulemaking documents and identifying embedded policy choices and to practice integrating multiple disciplinary perspectives into your analytic mindset. The rule analysis will serve as the basis for your final project.

4. Final Project: Public Comment

Under the Administrative Procedure Act (APA), all agencies are required to accept and consider comments provided by the public. Your final project for the course will be a set of public comments on the regulation that was examined in your group rule analysis. Each student will individually draft public comments and submit to me for a grade. If you choose, you can also submit your comments to the relevant agency for consideration. The comments should identify the strengths and weaknesses of the agency’s approach and identify recommendations for reform or additional analysis. The public comments should be grounded in the concepts that we examine over the course of the semester, in supporting research, and in your own personal perspectives.

MATERIALS

Required texts

Baruch Fischhoff & John Kadvany, *Risk: A Very Short Introduction* (2011)

Daniel Kahneman, *Thinking, Fast and Slow* (2011)

Deborah Stone, *Policy Paradox: The Art of Political Decision Making* (3d. ed. 2012)

Cass Sunstein, *Valuing Life: Humanizing the Regulatory State* (2014)

Charles Wheelan, *Introduction to Public Policy* (2011)

Additional required readings will be posted on Canvas, and will be made available as a course packet.

Supplemental readings

A list of supplemental readings is available on Canvas that includes several major works associated with each of the course sections.

GRADING PROCEDURES

Participation (20pts): This is a composite grade that covers the online discussion, open discussions at the beginning of class, and participation during Book Responses.

Book Responses (10pts): This includes the Book Response essays and presentations.

Rule Analysis (20pts): This grade has two components. 15 points will be awarded on a group basis for the final product; five points will be awarded based on (anonymous) peer assessment of your contribution.

Final Project (competent completion) (35pts): The max of 35 points will be awarded for professional, competent completion of the project. Additional points for excellence discussed below.

The Curve: Note that there are 85pts to this point. If you get 75pts of the 85pts, you are then eligible for 15 additional points that will be awarded on the basis of excellent performance on the Final Project. Grades will be allocated according to the standard law school curve, based on the total number of points, with the caveat that no student with 75 points or higher will receive a grade lower than B. If you would like to check in at any point, I am happy to discuss.

INSTRUCTOR

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About me:

I joined the faculty here at UVA in 2013. Prior to that, I founded a think tank at NYU Law called the Institute for Policy Integrity. The mission of the institute is to “improve the quality of government decision making through research and advocacy in the areas of cost-benefit analysis, regulation, and administrative law.” Over the five years that I was at Policy Integrity, I participated in dozens of regulatory proceedings on issues ranging from climate change to prison safety. I continue to stay active in regulatory policy issues—for example, I litigated a case in the D.C. Circuit in the fall of 2014 on behalf of an environmental organization. In that case, my client challenged the Department of Interior’s 2012 plan to open up new offshore areas for oil exploration.

Of course, just because I participate doesn’t mean I always win: I lost the case on offshore drilling. The court agreed that the agency got the economics wrong, but just not wrong enough to overturn the decision. The Supreme Court also recently rejected my defense of an EPA rule to cut emissions from power plants. This time, I thought the agency did a *good* job of weighing costs and benefits and said so in an *amicus* brief. But Justice Scalia, in the majority, disagreed. Given my recent losing streak, you would be wise to make up your own mind on all of the issues we talk about in class.

My scholarship focuses on administrative law, cost-benefit analysis, and environmental law. My particular interest is on how politics influences the structure of executive oversight and the methodologies used to assess regulatory impacts. I co-authored a book on these topics in 2008, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (with Richard L. Revesz). I have some other interests as well; for example, I recently worked with two computer scientists at Dartmouth to conduct text analysis of every U.S. Supreme Court decision—one of our findings is that, over the past 200 years, the Court has become decidedly more negative in the language that it uses. I’m also on the board of UVA’s Contemplative Science Center and I teach a Seminar on Ethical Values that focuses on mindfulness.

It is important to me that you have what you need to succeed in this course, and I’m always happy to discuss course material, law school, professional development, et cetera, outside of class. I hold formal office hours, but I’m also generally around and you should feel free to email me and we can set up a time to chat that fits your schedule.

COURSE POLICIES

Laptop policy

Laptops are allowed for the purpose of taking notes. If you would like to bring a laptop to class, you must promise not to use the computer for any other purpose (e.g., social media, chat/email, games, news). If you have trouble with online distraction, either take notes by hand or install distraction software. Two software options that allow you to limit online distractions while in class:

For Mac (free): <http://selfcontrolapp.com/>

For PC (\$10): <http://macfreedom.com/>

Attendance

In accordance with American Bar Association standards, regular and punctual class attendance is part of each student's required work in courses. At a minimum, students are required to attend 80 percent of class sessions. Poor attendance will be taken into account through the participation portion of the grade.