



HIDDEN IN PLAIN SIGHT: WHY REGULATIONS NEED A FRESH LOOK

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This year is the 10th anniversary of *The Regulatory Review*. Anniversaries are an occasion to celebrate and reflect on how far *The Review* has come, and where it might be going.

There is obviously much to celebrate; in ten short years, you have built an “institution” that is widely read, cited, and viewed as authoritative by people of all stripes and all political persuasions. That is high praise indeed in our fraught world of today. But as you reflect on your accomplishments, have you given much thought to your name, *The Regulatory Review*? I raise the question of your name because regulations are so out of favor, criticized, denigrated, even despised by “right”-thinking people.

In days past, regulations were once accepted, even welcomed, to set things right:

- Food safety regulations followed Upton Sinclair’s *The Jungle*;¹
- Clean water regulations came after the Cuyahoga River in Cleveland caught fire from all the debris floating past the city pier;² and
- Automobile safety regulations followed Ralph Nader’s *Unsafe at Any Speed*.³

But if regulations were once applauded—or even tolerated—that is no longer the case.

The conventional wisdom today, at least by all appearances from speeches, news stories, blogs, books, and other media is that regulations are

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¹ 21 U.S.C. §§601-695.

² *Cuyahoga River Fire*, OHIO HISTORY CENTRAL, https://ohiohistorycentral.org/w/Cuyahoga_River_Fire.

³ Christopher Jensen, *50 Years Ago, ‘Unsafe at Any Speed’ Shook the Auto World*, N.Y. TIMES, Nov. 26, 2015, <https://www.nytimes.com/2015/11/27/automobiles/50-years-ago-unsafe-at-any-speed-shook-the-auto-world.html>.

costly, burdensome, and inconvenient—if not dangerously disruptive—to markets and life generally.⁴ We are told they inhibit innovation, impair our competitiveness, destroy jobs, and infringe on our liberties.⁵ Is that not what you hear on the campaign trail, at least from some candidates, every election cycle? Is that not what you hear in the halls of the U.S. Congress? Is that not what you hear from the White House?

How did we get here? Why are regulations so unpopular with the people?

Part of the explanation may be the normal ebb and flow of popular opinion. After the 60s and 70s—with the creation of the U.S. National Highway Traffic Safety Administration, the U.S. Environmental Protection Agency, and other regulatory agencies—we elected President Ronald Reagan, who vigorously campaigned against the government, and whose antipathy to regulations was well known and epitomized in his Executive Order 12,291.⁶ That order established the Office of Management and Budget's centralized review of all proposed and final draft regulations and set decisional criteria for approval of those drafts—namely, requiring a regulation's benefits to exceed its costs and to maximize net societal benefits.

Then came President Bill Clinton. As now-Justice Elena Kagan wrote in her seminal piece for tenure at Harvard Law School, the Clinton Administration returned to a regulatory (rather than a deregulatory) approach, even though the benefits still always justified the costs, especially in the areas of environment, health, and safety.⁷

The pendulum swung back with President George W. Bush, particularly with environmental, health, and safety regulations. The Bush Administration had a deregulatory agenda, although the total number of new regulations issued during that Administration was nonetheless high because of all the regulations in the aftermath of 9/11, such as those strengthening the doors of cockpits, banning substances on airplanes—including liquids, gels, and anything that could be used as a weapon—and expanding the collection of information from citizens, notwithstanding privacy concerns.⁸

Then came President Barack Obama and the resurgence of new regulations in the face of intransigence (or gridlock) by Congress, especially

⁴ W. MARK CRAIN & NICOLE V. CRAIN, *THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING AND SMALL BUSINESS* (2014), <https://www.nam.org/wp-content/uploads/2019/05/Federal-Regulation-Full-Study.pdf>.

⁵ *This Is How Much Overregulation Would Cost Your Family Each Year*, THE WHITE HOUSE (July 16, 2020), <https://trumpwhitehouse.archives.gov/articles/this-is-how-much-overregulation-costs-your-family-each-year>.

⁶ President Ronald Reagan, Inaugural Address 1981 (Jan. 20, 1981); 3 C.F.R. §§ 1-10 (1981).

⁷ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2000).

⁸ *2008 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, OFFICE MGMT. & BUDGET (2008), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/information_and_regulatory_affairs/2008_cb_final.pdf#page=10; 14 C.F.R. §§ 25.791-25.807 (2009); 49 C.F.R. § 175.3 (2006); PATRIOT Act of 2001, H.R. 3162, 107th Cong. (2001).

with respect to:

- Environmental protection, such as the Clean Power Plan and Waters of the United States Rule;⁹
- Workers' rights, such as the increase in the number of employees eligible for overtime pay;
- Investor protection, such as the fiduciary rule;¹⁰ and
- Implementation of the Affordable Care Act and the Dodd-Frank Act.

And now we have President Donald J. Trump, who at one point vowed to eliminate 75 percent of the regulations on the books, and whose initial chief strategist—Steve Bannon—advocated the “deconstruction of the administrative state.”¹¹

Incidentally, the Trump Administration is not only hard at work trying to modify or rescind Obama-era regulations, but it is also adopting a “more lenient” enforcement policy of those regulations still on the books. For example, the Trump Administration has declined to impose fines at nursing homes on a per-incident, rather than a per-day basis, a move that has had grave implications with the outbreak of the coronavirus crisis.¹²

There is also potentially a newly resurgent player on the field: the U.S. Supreme Court, which—with two new appointees and one more waiting in the wings—is considering resurrecting the non-delegation doctrine (only administrative law lawyers who are deep in the weeds know this one) or limiting deference to agencies supposedly to reflect better the founding fathers' perception of good government.¹³ The consequences of such judicial activity, if it were to follow the course urged by the more conservative Justices, would likely be fewer regulations and a higher hurdle for judicial affirmance of those regulations that are ultimately challenged in the courts.

Are these developments part of the historic ebb and flow we have seen in the public's attitude about regulations? Is this period we are in just part of a normal process?

I think not.

With great regret, I do not think there is anything normal about where we are. The antagonism to regulations today is palpable, and the rhetoric is

⁹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015); Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37054 (June 29, 2015).

¹⁰ 81 Fed. Reg. 20946 (Apr. 8, 2016).

¹¹ Chris Arnold, *President Trump To Cut Regulations By '75 Percent'—How Real Is That?*, NPR (Jan. 24, 2017), <https://www.npr.org/2017/01/24/511341779/president-trump-to-cut-regulations-by-75-percent-how-real-is-that>; Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State'*, WASH. POST, Feb. 23, 2017, https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html.

¹² Jordan Rau, *Trump Administration Eases Nursing Home Fines in Victory for Industry*, N.Y. TIMES, Dec. 24, 2017, <https://www.nytimes.com/2017/12/24/business/trump-administration-nursing-home-penalties.html>.

¹³ *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).

all out of proportion to reality. Throughout the Reagan and both Bush Administrations, there may have been a strong disinclination to regulate, but there was also a recognition that *some* regulations were salutary. Think of President Reagan's decision to require the removal of lead from gasoline, President George H.W. Bush's leadership in securing passage of the 1990 amendments to the Clean Air Act, and President George W. Bush's advocacy for, and issuance of regulations implementing, the No Child Left Behind Act.¹⁴

Today, with the Trump Administration, there is no "good" regulation—except perhaps to limit women's reproductive rights and further restrict immigration.¹⁵ Regulations on businesses, financial institutions, or health care providers are presumed illegitimate and inappropriate, and the Administration thinks they should be reviewed and rescinded.¹⁶

If I am correct that there is something other than the normal ebb and flow at play, we ought to try to understand where the reason—or passion—is coming from so that we can at least consider whether there is something that could be done to rectify or ameliorate the situation.

In that vein, one possible explanation, or at least a contributing factor, comes from political science and economics—namely, what is commonly known as the "collective action" problem.¹⁷ The theory posits that, when benefits are widely dispersed and costs are directed to a specific few, the beneficiaries are less able to mobilize support for their interests because of the "free rider" problem that occurs as groups get larger.¹⁸ In contrast, those who bear the burden are singular in their focus. Social scientists have observed this phenomenon in numerous areas where there are pure public goods, such as protection of air and water quality.¹⁹ The voices of those who appreciate the benefit are muted, while the opponents of the regulations (the polluters) howl. As a result, we can barely hear the drowned-out voices of any beneficiaries who try to speak out. Meanwhile, the critics' cries for modification or repeal hog the airways and set the agenda. Not surprisingly, regulations get a bad name.

Another possible explanation comes from the field of psychology and is known as "selective abstraction," which was originally developed by famed psychiatrist Aaron Beck.²⁰ The theory refers to the process of focusing on one detail while ignoring more relevant ones, and thinking of a whole experience as defined by that one element.²¹ To compound matters, people

¹⁴ Amendments to the Clean Air Act, P.L. 101-549, 101st Cong. (Nov. 15, 1990); *Fact Sheet: No Child Left Behind Has Raised Expectations and Improved Results*, THE WHITE HOUSE, <https://georgewbushwhitehouse.archives.gov/infocus/bushrecord/factsheets/No-Child-Left-Behind.html>; No Child Left Behind Act of 2001, P.L. 107-110, 107th Cong. (Jan. 8, 2002).

¹⁵ 45 C.F.R. § 147 (2016); *see also* 84 Fed. Reg. 41292 (Aug. 14, 2019).

¹⁶ 82 Fed. Reg. 9339 (Feb. 3, 2017).

¹⁷ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

¹⁸ *Id.*

¹⁹ Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

²⁰ Aaron T. Beck, *Thinking and Depression: Idiosyncratic Content and Cognitive Distortions*, 9 JAMA PSYCHIATRY 311 (1963).

²¹ *Id.*

tend to focus only on the negative aspects of an experience. In other words, people tend to pocket or take for granted what is good for them, or from which they derive benefit, but that which is costly, or irritating, or hurtful to them remains a sore spot and never seems to scab over and heal.

So, we really do not think much about safe and efficacious drugs, sanitary hospitals, seatbelts or airbags, or well-performing government programs or well-functioning markets—unless and until something goes wrong. But we do harp on the absurd complexity of tax forms, or the long and complicated building and occupancy permit applications, or maybe how unconscionably difficult it is to sign up for health benefits or student loans. And when politicians call for cutting red tape or eliminating burdensome regulations, people join the chorus, forgetting the good that regulations can offer.

There is also a possible third contributor to this phenomenon, which has always bothered me. Start with the politicians. Republicans, at least since President Reagan, have consistently attacked regulations—whether on the stump or in office. It is red meat for their audiences. Blame the government, blame Washington bureaucrats, blame regulations, blame red tape for all that ails you. A real crowd pleaser. A great applause line. Usually politicians are not very specific as to which regulations they want to eliminate. They just attack all regulations with a broad brush.

What is even more noteworthy is that very few answer this attack. When was the last time there was a full-throated defense of the administrative state or of regulations generally? Democrats talk about health care as a human right, and a living wage as an entitlement, but they do not spell out that these benefits come first as legislation and then as implementing *regulations*. They too often fail to point to any of the successes of the administrative state—ingredient information or warning labels on food and medicine packaging, clean air to breathe, financial disclosures, and fair competition in the market, among others.

And, significantly, not only do politicians rarely speak in defense of regulations, but most people in this country do not even know where regulations come from (you know that Congress authorizes agencies to act; agencies are not free to follow their own whims).²² Nor do most people know how regulations are developed—with extensive scientific, engineering, and economic analyses, and with elaborate processes for participatory engagement by those affected.²³ And, most importantly, the public does not know what good regulations do for us.²⁴

One of my deep frustrations is that the unbounded enthusiasm and support for STEM (science, technology, engineering, and math), although welcome, came at a cost. Gone from many schools is serious attention to

²² TODD GARVEY & DANIEL J. SHEFFNER, CONG. RES. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2021), <https://fas.org/sgp/crs/misc/R45442.pdf>.

²³ 5 U.S.C. § 553 (1966).

²⁴ *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL'Y CTR (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/>.

physical education, music, art, and *civics*. At least a whole generation of students may have been taught about the military and how we defended our shores and brought an end to wars in Europe and the Far East in the mid-twenty-first century. But they have not learned much, if anything, about the civil service, the people who go to work every day in federal, state, and local governments to make their lives better.

Although I wear a “D” jersey, I do not see this as a partisan issue. Indeed, let me invoke Chief Justice John Roberts here. In his most recent annual report, he asked the judiciary to “promote public confidence in the judiciary, both through their rulings and *through civic outreach*.”²⁵ So too, Justice Sandra Day O’Connor used her prestige and authority after she stepped down from the Supreme Court to try to revive civics in our schools. Justice O’Connor even founded a technology company to develop an app that taught civics as a game, not unlike how the old School House Rock song about how a bill becomes a law had educated earlier generations of children.

In any event, administrative law scholars and practitioners owe the same to the American public. The American public does not like or trust regulations. Who better, though, than lawyers and legal scholars to let them know what they are missing? Who better to talk about how to make the regulatory process better, without throwing out the baby with the bath water? Who better to provide the public with a roadmap, using your favorite tech platforms, working in person with individuals or groups—at schools or community centers—or conversing with friends, relatives, and even strangers, to help them understand and appreciate this invaluable tool in democracy’s toolkit?

Think positively, and use the marvelous education you are receiving here at Penn, and your in-depth knowledge of the reality of regulations, to spread the word. Yes, proselytize if you will, but carry forward.

²⁵ 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf>.