

Political Studies Program, Summer 2012
DEMOCRACY, CAPITALISM, AND REGULATION
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Washington, D.C.

Washington is in a regulatory growth spurt. Hundreds of rule-making proceedings are underway or impending under the Wall Street Reform and Consumer Protection Act (Dodd-Frank) and the Patient Protection and Affordable Care Act (ObamaCare), both enacted in 2010. The Environmental Protection Agency (EPA) is pursuing many hugely expensive pollution-control initiatives. The Federal Communications Commission (FCC) wants to regulate the Internet. Agencies are tightening highway fuel-economy standards and banning the incandescent light bulb. Federal price controls, out of favor since the wage-price controls of the 1970s, are making a comeback in health insurance and debit cards.

Congressional Republicans are up in arms over these developments. The arrival of the Tea Party class of 2010 produced prompt moderations in the trajectories of taxing, spending, and borrowing, all of which require periodic legislation. Yet the current partisan divide is illusory. The modern regulatory state is a thoroughly bipartisan enterprise. During the half-century before President Obama's election, the greatest growth in regulation came under Presidents Richard Nixon and George W. Bush. And the Bush administration set the stage for many of the Obama initiatives that Republicans are now attacking.

In this seminar, students will explore the challenges of regulatory growth. What are the sources and consequences of regulatory power? Can our regulatory state be reformed, and what strategies might be effective in constraining regulatory power?

Monday, July 2, 2012, 9:00 am to Noon

"An Immense and Tutelary Power"

Reading:

- Alexis de Tocqueville, *Democracy in America*, Vol. II, Sec. 4, Ch. 6 ("What Sort of Despotism Democratic Nations Have to Fear")
- From *The Economist*, February 18, 2012: "Over-regulated America," "Tangled up in green tape," and "The Rule of More"
- Sam Peltzman, "Regulation and the Natural Progress of Opulence," AEI-Brookings Joint Center for Regulatory Studies, 2004
- Christopher DeMuth, "The New Regulatory State," forthcoming 2012

Discussion Questions:

1. Why, in Tocqueville's view, are Americans vulnerable to the sort of despotism that he describes? From the other readings, and from your own experience, do you think that Tocqueville's predictions have proven accurate?

2. What are the sources of regulatory growth? In what sense is regulatory growth a problem?
3. Are the reform measures currently under consideration likely to affect regulatory growth or improve the substance of regulatory policies?

Tuesday, July 3, 2012, 9:00 am to Noon

Growth and Control

Reading:

- R. Shep Melnick, "Courts and Agencies," from *Making Policy, Making Law* (Miller and Barns, eds.), 2004; ch. 5, pp. 89–97
- Ronald Reagan, Executive Order 12291—Federal Regulation (Feb. 17, 1981)
- Barack Obama, Executive Order 13563—Improving Regulation and Regulatory Review (Jan. 18, 2011)
- Stephen Breyer, *Breaking the Vicious Cycle: Towards Effective Risk Regulation* (1992), ch. 3
- Christopher DeMuth, "OIRA at Thirty," 63 *Administrative Law Review* 15 (2011)

Discussion Questions:

1. What are the purposes of White House review of agency regulatory proceedings?
2. Is cost-benefit analysis an appropriate means of improving regulatory decisions?
3. What are the strengths and weakness of White House review?
4. How might it be improved?

Wednesday, July 4, 2012, 9:00 am to Noon

Expertise versus Representation

Reading:

- Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, 2010, Introduction and ch. 1
- David Schoenbrod, "How REINS Would Improve Environmental Protection, 21 *Duke Environmental Law & Policy Forum* 347 (2011)
- Sally Katzen, "Statement before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary on the REINS Act," January 24, 2011
- David Goldston, "How REINS Could Impede Promulgation of Environmental Safeguards," *Inside EPA*, April 28, 2011

Discussion Questions:

1. Why, in Posner and Vermeule's view, has policy-making power migrated from the Congress to the Executive Branch? Does this change in government structure present serious

problems of democratic accountability and/or policy substance? Is the separation of powers really a dead letter?

2. Is the REINS proposal a plausible corrective to the problems of unilateral Executive government? Is greater legislative participation in regulatory policy-making practicable and desirable? Does REINS seem well suited to the characteristic deficiencies of regulation that we have examined?

Thursday, July 5, 2012, 9:00 am to Noon

Cost-Benefit Analysis and the Courts

Reading:

- Securities Exchange Act of 1934, Section 14(a)—*Proxies*, and Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Section 971—*Proxy Access*
- From *The Wall Street Journal*: Jessica Holzer, “Court Deals Blow to SEC, Activists,” July 23, 2011; and Review & Outlook, “SEC Smackdown,” July 25, 2011
- Securities and Exchange Commission, “Facilitating Shareholder Director Nominations,” 75 Federal Register 56,688 (2010)
- *Business Roundtable v. Securities and Exchange Commission*, U.S. Court of Appeals for the District of Columbia Circuit, No. 10-1305 (July 22, 2011)

Discussion Questions:

1. Was the SEC’s proxy rule a fair application of Congress’s statutory mandate on the subject? Who made the important policy decisions—Congress or the Commission?
2. Was the SEC’s decision convincing? Did it give you a good idea of the purposes of its rule and the evidence and reasoning that led to its policy choices? Did the cost-benefit analysis, and the various procedural hoops the Commission was obliged to jump through, seem to help or hinder its decision?
3. Was the Court of Appeals decision convincing? Did the court apply the law at hand or substitute its policy judgment for that of the SEC?
4. As a check on the discretion of regulatory agencies, which seems preferable—an economic (cost-benefit) check wielded by the courts or a political (REINS) check wielded by Congress?

Friday, July 6, 2012, 9:00 am to Noon

Crisis and Response: The Financial Collapse of 2008

Reading:

- Financial Crisis Inquiry Commission, *Final Report* (Preface and Conclusions) and *Dissenting Statement of Peter J. Wallison* (Introduction and Summary)
- Christopher DeMuth, *Conservatism and Regulation* (2012), ch. 4 (“The Financial Crisis of 2008”) and Appendix (“Did Deregulation Cause the Financial Collapse of 2008?”)
- Richard A. Posner, “The Causes of the Financial Crisis,” in Jeffrey Friedman, ed., *What Caused the Financial Crisis* (2011)

Discussion Questions:

1. Was the Inquiry Commission report a useful exercise in identifying the causes of the collapse and proposing measures to reduce the likelihood of another one? Who did a better job of identifying causes and cures—the Commission majority or the dissenter?
2. Did the financial collapse amount to a “crisis of capitalism” or a “crisis of government”? Did private financial markets prove to be inherently unstable? Did the government’s involvement, before and after the collapse, improve or worsen the operation of private markets? Did private financial firms abuse their economic power?
3. What further lessons do the financial collapse and government response provide on the questions addressed in our previous sessions—concerning the nature of regulation, the growth of Executive power at the expense of the Congress, and the utility of the various regulatory reform measures currently being considered?