After the Rights Revolution

Reconceiving the Regulatory State

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After the Rights Revolution

Preface

By the "rights revolution" I mean the creation, by Congress and the President, of a set of legal rights departing in significant ways from those recognized at the time of the framing of the American Constitution. The catalogue is a long one, but the most prominent examples include rights to clean air and water; safe consumer products and workplaces; a social safety net including adequate food, medical care, and shelter; and freedom from public and private discrimination on the basis of race, sex, disability, and age. The rights revolution was presaged by the New Deal and by President Roosevelt's explicit proposal of a Second Bill of Rights in 1944; it culminated, at least thus far, in the extraordinary explosion of statutory rights in the 1960s and 1970s.

The recognition of such rights has produced a wide array of federal regulatory programs, and it has dramatically affected the substance and structure of modern government. In some respects the rights revolution has been an important success. Something like the modern fabric of statutory programs is indispensable in contemporary industrialized democracies (or so I will be arguing). But in important ways the rights revolution has failed to achieve its own purposes—in the process jeopardizing important constitutional values, responding to the power of self-interested private groups, ignoring the possible nullification of well-intended programs by the marketplace, producing unnecessary inefficiencies, and downplaying the great difficulties of treating the management of social risks as conventional "rights." My principal goal in this book is to suggest reforms and principles that

would promote the purposes of statutory programs and of constitutional government, while avoiding these problems.

I am grateful to many generous colleagues and friends for their help with this book. Akhil Amar, Michael Aronson, Douglas Baird, Jack Beerman, Frank Buckley, Frank Easterbrook, Richard Epstein, William Eskridge, Richard Fallon, Philip Frickey, Stephen Gilles, Don Herzog, Stephen Holmes, Donald Horowitz, Benjamin Kaplan, Larry Kramer, John Langbein, Howard Latin, Larry Lessig, Margaret Levi, Jon Macey, Geoffrey Miller, Martha Minow, Susan Rose-Ackerman, Lisa Ruddick, Frederick Schauer, Ian Shapiro, Martin Shapiro, David Strauss, Lloyd Weinreb, Robin West, James Boyd White, and John Wiley offered valuable comments on all or parts of the manuscript. Richard Stewart has been a continuing source of facts and ideas, and a generous reader and critic as well. Two extraordinary deans and friends, Gerhard Casper and Geoffrey Stone, who helped nurture the wonderful academic environment of the University of Chicago Law School, provided advice and encouragement throughout.

I am also grateful to my students in the law school and political science department at Chicago; they have been patient listeners and critics, helping to improve many of the arguments in the book. James Gimpel, Gahmk S. Markarian, Marc Porosoff, D. Gordon Smith, and Catherine O'Neill provided research assistance and useful comments. Marlene Vellinga typed and retyped countless drafts with extraordinary speed, energy, and good cheer.

An earlier and somewhat more technical version of portions of chapters 4 and 5 (as well as a few other passages) was published as "Interpreting Statutes in the Regulatory State," 103 *Harv. L. Rev.* 415 (1989); I am grateful to Daniel Bromberg for many helpful suggestions on the earlier version. I am also thankful to participants in stimulating workshops at the University of California at Los Angeles, Harvard University, and the universities of Michigan, Princeton, Tulane, and Virginia.

I owe a particular debt to three friends and colleagues whose support, generosity, criticism, and occasional skepticism have been indispensable to the project. Jon Elster provided a great deal of help with chapters 1 and 2 and with earlier efforts to grapple with some of the problems discussed there; his suggestions and his own writings on related subjects informed and shaped many of the arguments here.

He also gave generous advice on the manuscript as a whole. Bruce Ackerman read the manuscript several times and offered a wide range of helpful suggestions about the New Deal, statutory construction, private ordering, neutrality, and other subjects; and it was he who first suggested that a set of somewhat unruly ideas might be made into this book.

It will come as absolutely no surprise to Richard Posner's colleagues, at Chicago and elsewhere, for me to report that he read and commented helpfully on embarrassingly many drafts. His writings and conversation also helped inspire many of the book's principal concerns and claims, even—especially—those that fundamentally disagree with his views. I am extremely grateful for his help.

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

As our nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness . . . We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education . . .

I ask Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress to do so.

—Franklin Delano Roosevelt, January 1944

Technique without morals is a menace; but morals without technique is a mess.

—Karl Llewellyn

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Introduction

This book explores the rise of social and economic regulation and its consequences for American law and government. Modern regulation has profoundly affected constitutional democracy, by renovating the original commitments to checks and balances, federalism, and individual rights. The nature and scope of this transformation, which culminated in the rights revolution of the 1960s and 1970s, have not generally been appreciated. Notwithstanding the tensions between the original regime and modern bureaucratic government, I believe that it is possible to reform and interpret regulatory measures in a way that is fundamentally faithful to constitutional commitments and promotes, in a dramatically changed environment, the central goals of the constitutional system—freedom and welfare.

The book has three more particular goals. The first is to defend government regulation against influential attacks, recently found, for example, in the Reagan and Thatcher administrations and often based on free-market economics and pre-New Deal principles of private right. Although my coverage is quite broad, I focus in particular on regulation concerning the environment, occupational safety and health, broadcasting, and discrimination. I argue that regulatory initiatives in these areas are far superior to an approach that relies solely on private markets and private ordering. The modern system of governmental controls—allowing freedom of contract and private property in general, but rejecting them in targeted areas—has far more coherence and integrity than is generally supposed. Moreover, that system responds to ideas about democracy, freedom, and welfare that deserve widespread support.

My second goal is to give an account of the history of government regulation in America and its actual performance over the last generation. It is a gross misstatement, even if a fashionable one, to suggest that social and economic regulation has generally proved unsuccessful. Many areas, ranging from protection of the environment to safety on the highways to the prevention of racial discrimination, enjoyed large gains. But regulatory regimes have frequently failed, and it is possible to explain the failures. An identification of the patterns of failure leads directly to reforms that will make success more likely in the future.

My third goal is to propose a theory of interpretation that courts (and administrative agencies) might use to promote constitutional goals and at the same time to improve the operation of regulatory programs. I propose a series of interpretive principles, grounded in an understanding of the constitutional backdrop and of regulatory functions and failures, that interpreters might invoke in order to improve the performance of modern government. My ultimate goal is to provide a sympathetic assessment of the diverse functions of government regulation and to describe how regulation sometimes succeeds and sometimes fails. I will seek to develop, from these points, a set of reforms and principles with which to synthesize the modern regulatory state with the basic commitments of the American constitutional system.

Regulation and Interpretation

In the last sixty years, the government has enacted a large number of regulatory initiatives. These initiatives span a wide range of areas: occupational safety and health, consumer products, nuclear power and energy in general, the environment, fraud and deception, endangered species, toxic substances, communications and broadcasting, and discrimination on the basis of race, sex, age, and disability.

Initiatives of this sort have often come under sharp attack, largely from critics of collectivism of any sort who seek fundamental change in the form of a return to the "free market." In responding to such attacks I emphasize three principal points. *First,* regulation often counteracts the problems involved in satisfying private desires when large numbers of individuals are interacting with one another. These problems—sometimes described as difficulties of coordination and

collective action—can often be best solved through governmental action. Regulation might, for example, prevent the sort of air or water pollution that is in the case of each polluter relatively trivial, but in the aggregate disastrous; or it might ensure the coordination of automobile traffic, airline transportation, or broadcasting. In such cases regulation facilitates private choice by allowing preferences to be satisfied in a context in which free markets produce chaos or irrationality. Regulation does not override private choice at all; constraints turn out to be enabling. Problems of collective action and coordination are surprisingly common. In view of those problems, regulation that is frequently derided as "paternalistic" is necessary in many settings.

Second, regulation sometimes protects collective goals and aspirations, embodied in laws that reject the choices of private consumers in favor of public values or considered judgments. The protection of high-quality broadcasting, environmental quality, or antidiscrimination principles illustrates the possibility that citizens might enact, in law, aspirational measures that conflict with their own behavior in private markets. The protection of such aspirations is a vindication of democracy. It should not be regarded as an objectionable interference with freedom.

Third, regulation sometimes responds to the fact that private preferences and beliefs are not fixed, but instead adapt to limitations in available opportunities and information, and to existing circumstances. Regulation of risks in workplaces, food and drugs, and consumer products overcomes the absence of information on the part of employees and consumers. Regulation of discrimination responds to the problem of preferences and beliefs that have adapted to an unjust status quo.

All of these points help to account for governmental initiatives. They can fit quite comfortably with a system that provides a presumptive right to freedom of contract and private ordering—while at the same time providing reasons to reject private ordering in identifiable areas. Indeed, these points suggest that in some contexts the problem is one of too little rather than too much regulation. President Franklin Delano Roosevelt's New Deal, President Lyndon Johnson's Great Society, the rise of national environmental controls and antidiscrimination statutes, and many less dramatic movements occurring at other points in the twentieth century reflected a belief that regulatory enactments might simultaneously promote economic productivity and help the disadvantaged. Optimism about regulatory controls and

about solution of social problems through creation of legal rights has been shaken in recent years—partly for good reasons that point in the direction of necessary reforms, but partly, I shall argue, as a result of a too casual understanding of the functions and performance of regulatory regimes.

There are, in short, multiple defects in private markets, defects that will be poorly understood if economic principles, or pre-New Deal beliefs in "private autonomy," provide the sole criteria for evaluation. Other criteria, drawn from law, social psychology, and political theory provide the basis for a more sympathetic understanding of the functions of modern social and economic legislation. But to say this is emphatically not to say that the initiatives of the 1930s, 1960s, and 1970s have always been sensibly directed, or to deny that such legislation has had serious defects. I hope also to show that the relevant criteria point not only to a theoretical defense of modern regulation, but also toward significant changes. In particular, it is necessary to bring to bear, on the rights revolution, an understanding of the constitutional backdrop, of market forces, and of the frequent failures of regulatory initiatives.

This sort of understanding should play a large role in legal interpretation as well. In so proposing, I will reject some widely held ideas about the nature of interpretation in the law. In construing statutes, courts (and regulatory agencies) are frequently thought to be charged with the duty of faithfully carrying out the will of the legislature. While this view has an important element of truth, the task of interpretation, I suggest, inevitably requires courts (and others) to develop and rely on background principles that cannot be tied to any legislative enactment. Because reliance on such principles is inevitable, their use by judges is no cause for embarrassment, but on the contrary a potentially valuable part of the fabric of modern public law.

This claim has more general implications for the question of interpretation in the law (and perhaps elsewhere). In the modern era the interpretation of statutes ranks among the most important tasks entrusted to courts and regulatory agencies. The process of statutory interpretation frequently requires courts not only to apply a judgment by others but also to draw on background principles from the legal culture more generally. Courts sometimes make these principles explicit, but the governing norms are often unarticulated and latent, and frequently they are extremely controversial. For example, some of the relevant principles are held over from nineteenth-century conceptions

of the relationship between the citizen and the state, conceptions that are inconsistent with the values underlying the modern regulatory state. Judicial (and administrative) approaches to regulation have also been misdirected as a result of a naive understanding of the probabilistic character of regulatory harms and the complex systemic effects of regulatory intervention.

When people disagree over the meaning of a statute, what is it that they are disagreeing about? I suggest that disputes often turn not on statutory terms "themselves," but instead on the appropriate interpretive principles in cases in which, without some such principles, the process of interpretation cannot go forward. Once the relevant principles are made explicit, they sometimes appear highly contestable. In these circumstances, I argue, it is necessary to identify them, to subject them to scrutiny, and ultimately to develop principles of interpretation that grow out of, and do not collide with, the basic purposes of the constitutional framework, of existing institutional arrangements, and of social and economic regulation. Above all, it is important to develop principles that are consistent with the goals and improve the performance of the modern regulatory state, and that are not drawn from pre-New Deal perceptions, which sometimes seem to have overstayed their welcome.

The Anachronistic Legal Culture

To those with a sense of history, it will seem puzzling to suggest that courts might be hospitably inclined toward regulation and attempt to interpret statutes so as to ensure their success. In the early part of the twentieth century, courts often treated regulatory statutes as foreign substances. Starting from principles of laissez-faire, judges saw statutory protections of workers, consumers, and others as unprincipled interest-group transfers supported by theories that were at best obscure and more often disingenuous. By contrast, judge-made doctrines of property, contract, and tort seemed to create a system with enormous integrity and coherence. Nineteenth-century principles of private markets and private right provided the baseline against which regulatory measures were assessed and interpreted.

In this period, the basic role of the courts was one of damage control. The most important organizing principle for interpretation was that regulatory statutes should be construed narrowly—so as to harmonize with, and minimally to disrupt, the principles of common law

ordering. Traditional private law provided the backdrop for interpreting public law. This approach found its major locus in the principle calling for courts narrowly to construe "statutes in derogation of the common law."[1] Under the guise of statutory interpretation, courts limited the reach of statutes protecting workers, consumers, and other intended beneficiaries of regulation. Silences were filled in, and ambiguities resolved, by reference to common law principles. Often such interpretations grossly distorted the meaning of the relevant statute.

Legal interpretation of regulatory principles can no longer be understood in these terms. The period of aggressive judicial resistance to statutory disruption of the common law ended in the 1930s. But in many respects public law has not outgrown the assumptions that account for the initial period of judicial antagonism. Above all, public law lacks a sympathetic understanding of the functions of social and economic regulation, a failing that accounts for the continued presence of private law principles in contemporary law. The initial period of judicial resistance is unmistakably recalled by recent suggestions that courts should indulge a presumption in favor of private ordering, and that they should interpret regulatory statutes so as to intrude minimally on the private market.[2] In this view, traditional private law and laissez-faire should continue to provide the backdrop for public law. Statutes protecting (for example) the environment and victims of discrimination should thus be construed as narrowly as possible—views supported by some recent judicial decisions.[3]

The original view that regulatory statutes should be seen against a baseline of common law property and contract rights and hence as naked wealth transfers also finds a modern home in the increasingly prominent idea, growing out of the economic tradition, that statutes should be understood as unprincipled "deals" among self-interested private actors.[4] On this view, the role of the courts is to carry out the deal, which is mere fiat, unsupported by intelligible policies or principles.

Others have emphasized the findings of public choice theory, which suggest that legislative outcomes have a large degree of irrationality built into them. Collective action problems, vote cycling, strategic and manipulative behavior, and other difficulties make it hard to speak sensibly of preferences aggregated through a multimember institution, or of a unitary, let alone public-regarding, legislative "pur-

pose."[5] In this view as well, courts should treat statutes as unprincipled interventions lacking coherent normative underpinnings.

Less obviously, the initial encounter between courts and the regulatory state is recalled by both poles of the contemporary debate over the possibility of constrained or objective interpretation of legal texts. At one extreme, some courts and observers contend that the "plain meaning" of statutory language[6] is the exclusive or principal guide to meaning. At the other extreme is the view that legal terms are quite generally indeterminate,[7] or have the meaning that those with authority impose on them.[8] But the two camps form an important alliance. Both treat the category of regulatory statutes as an undifferentiated and unprincipled whole, without distinct and accessible purposes. Both camps treat as inevitably unsuccessful the attempt to mediate the sharp ideological disagreements that sometimes underlie interpretive disputes. Both camps neglect the need for, and fail to supply, an understanding of the distinctive and separable functions of regulatory statutes and of the various ways in which such statutes tend to fail. It is the lack of understanding of the role of interpretive norms—and an emphasis on the inevitably value-laden or political character of those norms—that drive some commentators to the pretense that words have plain meanings before interpretation and outside of their context; others to the demonstrably false claim that statutes are generally indeterminate in meaning; and still others to the uninformative view that meaning is a function of authority.

Some of the most prominent commentators on statutory construction repudiate claims of plain meaning and indeterminacy and suggest that courts should fill interpretive gaps by "making sense" of statutes or by interpreting them so as to be "the best that they can be."[9] But even if unexceptionable, advice of this sort is simply too open-ended to be useful in difficult cases; and it fails to bring to bear on interpretive problems a conception of regulation and its pathologies that might give content to the idea that statutes should be interpreted so as to "make sense."

Finally, judicial interpretation of regulatory statutes has been influenced by misunderstandings of the nature and performance of regulatory agencies. Courts have, for example, demanded a showing of a sharp and clear relationship between regulatory measures and particular, identifiable, real-world harms—even though regulatory statutes frequently attempt to counteract environmental or other risks that are