

REGULATORY LAW  
AND POLICY:  
CASES AND MATERIALS

THIRD EDITION

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Dedicated to  
Justice Stephen Breyer  
whose scholarship on administrative law  
and government regulation inspired this book.

## PREFACE TO THE THIRD EDITION

*Regulatory Law and Policy* explores regulatory decision making, but unlike the traditional course in administrative law, it focuses on the substance of government regulation. The focus has two parts. You will study the justifications for regulation and the methods or “tools” that are used to implement the regulation. When you are finished, your understanding of the basic concepts that underlie regulatory law and policy should enable you to pursue specific areas of regulation more effectively.

Regulatory law and practice involves special lawyering skills, and those skills are addressed in this book. Like lawyers that practice in other disciplines, regulatory lawyers must be able to read and understand statutes and cases. These establish the authority of an agency to regulate and specify the limits of its authority. But those who are involved in a regulatory practice must also have an understanding of the policy and political aspects of administrative regulation. Moreover, this need does not differ when a lawyer’s focus is a state or local agency instead of a federal one.

Although policy, politics, and law are three elements of administrative regulation, only the third element—the legal limits of regulation—is covered in most other law school courses. Our aim is to permit you to consider the missing elements—how policy and politics affect regulatory decisions—and how these elements are related to the legal authority of agencies. For this reason, although we do not neglect the study of the legal limits of regulation, we emphasize policy analysis and politics. Because of this emphasis, this course is a complement to other courses about regulation, such as environmental law, securities law, and labor law that you might take or have taken.

Our goal is to teach you “regulatory analysis,” which functions similarly to case analysis, uncovers the principles and arguments behind the justifications for government intervention in markets, and reveals the strengths and weaknesses of the regulatory tools employed to correct market defects. Regulatory analysis is a way of understanding government regulation by identifying and analyzing patterns of regulatory activity that cut across industries and markets, just as case analysis cuts across various areas of private law. Regulatory analysis also helps explain the limits and benefits of regulatory tools. Finally, in the situation of deregulation and regulatory reform, regulatory analysis can explicate the limits of regulation itself.

The 3<sup>rd</sup> edition explores these themes relying on the prior edition but with updated material to reflect important developments, including the fate of the Telecommunications Act of 1996, the collapse of the airline industry, new farm subsidy legislation, the fate of the 1996 welfare reform legislation, and the 2001 No Child Left Behind Act, reforming federal educational support. We also track the significant new Supreme Court cases, especially involving takings law and commercial free speech.

Part I of the casebook explores these ideas by providing different perspectives on government regulation. Chapter 1 presents a short history of

government regulation and a case study to illustrate the entire regulatory process. Chapter 2 introduces the topics of market analysis and policy analysis by introducing you to the reasons and justifications for government regulation. Chapter 3 explores the politics of regulation, particularly as it relates to public participation before regulatory agencies. In summary, Part I examines the contextual background of the regulatory state.

Parts II and III are organized according to the various justifications for government regulation. In each chapter, we examine a specific justification for government regulation and one or more regulatory programs that were enacted in response to that justification. For each regulatory program, the materials address two policy issues: Is the justification for regulation defensible, and is the government utilizing the appropriate regulatory method or tool? The materials also raise legal and political issues, although the extent of this coverage varies depending on the regulatory program being studied.

We have considered the writing of this casebook as a conversation about the nature of government and its potential to improve or hinder the development of society. We hope that our efforts will not only educate you about the practice of regulatory law, but that it will also challenge you to contemplate the role of government in making this a better society.

Dean Joseph Tomain would like to thank his research assistants, Dan Dodd, Joshua Nolan, and Emily Shults for their invaluable help in the preparation of this edition.

*Sidney A. Shapiro*  
*Joseph P. Tomain*

Lawrence, Kansas  
Cincinnati, Ohio  
March 1, 2003

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