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Analyzing Government Regulation

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ANALYZING GOVERNMENT REGULATION

JOSEPH P. TOMAIN*
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INTRODUCTION

Government regulation is as ubiquitous as it is seemingly chaotic. From grazing fees to toxic waste clean-up and from financial institutions to welfare and education, virtually no part of society or of our lives is untouched

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by government. What we eat, how we vote, and what we listen to on the radio or watch on television are each affected by government regulation. In addition to its ubiquity, government regulation has another characteristic: It is notably unpopular.¹ Every presidential administration at least since FDR's has commissioned a presidential task force to get hold of or reform the "headless fourth branch."² Political, especially presidential, candidates regularly campaign against government regardless of the candidate's party affiliation. And, small businesses and other parts of the private sector rail against regulatory costs that threaten their existence. Reacting to these influences, the *Contract with America*³ was based on the assumption that voters positively respond to candidates who promise to get government off their backs.

Pervasive government regulation, together with its general unpopularity, poses important questions for our polity: Can sense be made out of the seeming chaos of government programs? What are the costs and benefits of government regulation? Is the regulatory state effective in mitigating the economic and social problems that it addresses? Although administrative law scholars recognize these issues, most respond with process reforms, such as greater executive oversight or new methods of statutory interpretation, rather than by articulating substantive answers concerning what should be the substantive goals and norms of the regulatory state. Moreover, law school curricula usually ignore these systemic issues despite their social significance.⁴

An incipient legal literature does exist that addresses the substantive attributes, norms, and goals of regulatory government. This literature, here called "government regulation scholarship," contains important insights, but it does not yet yield paradigmatic principles. This article begins to organize this literature and brings its disparate components into a more coherent relationship. Our analysis, which proceeds in five parts, describes the current state of the literature, the conclusions that can be drawn from it, and the more numerous issues that require further consideration by scholars and their students.

Part I discusses the end of administrative law scholarship, particularly

1. See generally E.J. DIONNE, *WHY AMERICANS HATE POLITICS* (1991); WILLIAM B. GREIDER, *WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY* (1992).

2. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (finding rise of administrative agencies most significant trend of last century).

3. *CONTRACT WITH AMERICA* (Ed Gillespie & Bob Schellhas eds., 1995); see also Common Sense Legal Reform Act, H.R. 10, 104th Cong. (1995); Common Sense Product Liability Reform, H.R. 956, 104th Cong. (1995); Real Welfare Reform Act, H.R. 4566, 104th Cong. (1995); Regulatory Reform and Relief Act, H.R. 926, 104th Cong. (1995).

4. RICHARD A. POSNER, *OVERCOMING LAW* 4-15, 84-91 (1995).

noting its limitations. Traditional scholarship is largely occupied with the workings of the Administrative Procedure Act (APA),⁵ related procedural requirements, and judicial review. Consequently, it makes only a limited contribution to the discussion of regulatory policy and techniques that constitutes the current debate over government regulation. Government regulation scholarship, by comparison, addresses these systemic issues.

Part II establishes the institutional interaction and process-bound nature of the regulatory state. It presents a model of the regulatory process that links the variables of policy, politics, and institutions. Through this model, we suggest how law, policy, and politics influence regulatory decisions in the legislature and administrative agency. This exercise rejects exclusive reliance on public choice explanations of regulation as inconsistent with the government regulation literature. Indeed, the strength of the model is that it permits and invites a multi-disciplinary understanding of government regulation.

Part III proposes a methodology to study government regulation which parallels case analysis. Just as the study of common law cases yields an understanding of the principles and structures of much private law, as well as legal institutions, regulatory analysis yields an understanding of the types of regulations and institutions used by government to intervene in private markets. This methodology is a set of building blocks that serves as an introduction to government regulation for law students and as the basis for advanced study by legal scholars.

The first step in the methodology is to consider the justification for a particular program of regulation. Part IV describes this step by explaining the general substantive values and norms of the regulatory state and, in particular, the tension between economic and noneconomic goals. The subsequent steps in the methodology consider whether government has chosen the most appropriate regulatory method to obtain its goals. Part V explains the linkage between regulatory goals and tools, how regulators may have a choice of tools with different impacts, and how the choice of tools is affected by political considerations.

Finally, Part V closes the article by noting some practical and scholarly implications of this analysis. The methodology should assist law students and lawyers in understanding better the nature of the regulatory process. It should also encourage legal scholars to join the debate over the policy, institutional, and political dimensions of the regulatory state.

5. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994).

I. THE END OF ADMINISTRATIVE LAW SCHOLARSHIP

Administrative law scholarship has reached the end of the questions it may pose and answer.⁶ This is not to say that the study of the administrative legal process has reached the end of its useful life. To the contrary, traditional scholarship is increasingly vibrant and important, given the scale and scope of modern government, particularly so with the hundred-page plus revision of the APA sought by the 104th Congress.⁷ Here, the "end" of administrative law scholarship means that the fundamental variables and contours of the discipline have been defined and that the questions scholars now raise cannot be answered with reference to those variables or within those contours.

Administrative law does not provide a sufficient vocabulary to resolve issues concerning the substantive scope and nature of regulatory government because it focuses primarily (and correctly) on law and procedure. Yet, a growing literature indicates that even a basic understanding of government regulation depends on an appreciation of substantive policies and politics and their interrelationship with law. Regulatory lawyers and students of government regulation must have a broader understanding of the administrative state beyond the formal rules of administrative law.

Modern administrative law scholarship has evolved through three historical periods, each of which emphasized a particular aspect of the field. In the Progressive and the New Deal Eras, scientific experts and professional bureaucrats fashioned rational, objective public policies.⁸ This policy science continues and is enjoying some renaissance.⁹ The post-APA period, roughly from 1946 through 1965, was a time of administrative law formalism. Ken-

6. "Endism" enjoyed a brief popularity as writers and commentators decried the end of history, the end of philosophy, and the end of many other disciplines. See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992); JAMES A. STEVER, *THE END OF PUBLIC ADMINISTRATION: PROBLEMS OF THE PROFESSION IN THE POST-PROGRESSIVE ERA* (1988); DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (1988); JOB DITTBERNER, *THE END OF IDEOLOGY AND AMERICAN SOCIAL THOUGHT* (1976); *AFTER PHILOSOPHY: END OR TRANSFORMATION?* (Kenneth Baynes et al. eds., 1987); WILLIAM V. SPANOS, *THE END OF EDUCATION: TOWARDS POSTHUMANISM* (1993).

7. Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. (1995).

8. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* liv-lxii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

9. E.g., SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* (1992); THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1991).

neth Culp Davis,¹⁰ Louis Jaffe,¹¹ and company¹² concentrated on two matters. First, naturally, these scholars engaged in a close examination of the APA. Second, they focused on the relationship between courts and agencies through their analysis of the scope of judicial review. Both areas were familiar terrain for legal scholars because each required the application of law through familiar methods of legal analysis.

To this point in its history, administrative law scholarship involved two key variables—policy and law. With the social regulations that emerged from the programs of the New Frontier and the Great Society in the mid-1960s to mid-1970s, the focus of administrative law scholarship shifted to encompass regulatory politics, particularly the politics of representation and participation.¹³

Thus, since the turn of the century, administrative law scholarship has identified the variables of policy, politics, and law as central to regulatory government.¹⁴ The tricky problem for administrative law scholars was what to do with these variables once they were identified.¹⁵ Certainly, the presence of policy and politics makes legal analysis richer if not more complex.¹⁶ Yet, the seductiveness of policy and politics distracts administrative law from its mission. For some scholars, policy and politics are so embedded in administrative law that the system is largely incoherent, as judges mask their political or policy preferences behind legal formalities.¹⁷ If not disingenu-

10. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* (West 1951); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* (3d ed. 1972).

11. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

12. E.g., HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 5-11, 14-16 (1962).

13. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1711-13 (1975) (diagnosing imbalance in public representation during agency decisionmaking process in that special interest groups are overrepresented and command agency's attention while agency remains "unresponsive to unorganized interests").

14. CHRISTOPHER F. EDLEY JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 13-15 (1990); GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 189 (1991).

15. See generally Peter L. Strauss, *Teaching Administrative Law: The Wonder of the Unknown*, 33 J. LEGAL EDUC. 1 (1983).

16. See generally Robert L. Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U. L. REV. 120 (1977); Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975).

17. EDLEY, *supra* note 14, at 190; Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1340-44, 1354-55 (1984); Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 431 (1987) (summarizing functionalist's critique of judicial use of nondelegation doctrine to limit agency's power).

ous, the interaction of policy, politics, and law is at least disconcerting. One can either bemoan the incoherence this interaction produces or seek some sort of reconciliation or understanding.

Administrative law scholars have responded to this challenge by raising essential questions about the nature of government. What are the goals and objectives of the "regulatory state"?¹⁸ What constitutes "sound governance"?¹⁹ What is our "new public agenda"?²⁰ What constitutes the "public good" of bureaucratic government?²¹ These questions are important, addressing as they do the essential values of public life and public order. They are also questions that cannot be answered by the field of administrative law. In fact, each of the scholars cited appears to have been frustrated trying to answer these questions with the materials of administrative law. Instead of articulating substantive answers about what constitutes the norms of the regulatory state, sound governance, a new public agenda, or the public good, each scholar pulled his or her punches by resorting to explicitly legal solutions, such as greater judicial control of agency action,²² closer statutory interpretation,²³ tighter congressional oversight,²⁴ or specialized reviewing courts.²⁵

As long as administrative law scholars attempt to discuss these larger issues of government regulation within the traditional legal formality of administrative law doctrines and norms, they will not and cannot address the substantive and normative issues that underlie the regulatory state. This roadblock between process and substance has led legal and other analysts to the creation of a government regulation scholarship that goes beyond law's necessary formality to address the content and values of the administrative state

This move for legal scholars is a natural one. Economists and political scientists contribute to government regulation scholarship, but legal scholars are the most familiar with the primary materials and with the constitutive rules of government. Moreover, legal scholars have become adept with applied policy analysis in their particular fields, such as environmental law or occupational safety and health law, and asking broader questions about

18. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 1-10, 227-33 (1990).

19. EDLEY, *supra* note 14, ch. 7.

20. ROSE-ACKERMAN, *supra* note 9, at xi.

21. ROBINSON, *supra* note 14, at 34-38, 185-89.

22. EDLEY, *supra* note 14, at 236-38, 260; ROBINSON, *supra* note 14, at 5, ch. 3.

23. ROSE-ACKERMAN, *supra* note 9, ch. 4; SUNSTEIN, *supra* note 18, at 73, 133-37.

24. ROSE-ACKERMAN, *supra* note 9, at 38, 44, chs. 3-5.

25. EDLEY, *supra* note 14, at 247-52.

the good state is naturally appropriate.²⁶ Finally, legal scholars are not as constrained by their professional training from considering all of the substantive implications of law, policy, and politics as are economists or political scientists.²⁷

Contributors to the new scholarship face a substantial task in responding to the questions posed earlier concerning what constitutes "good government." In part, scholars are hampered by the lack of a paradigm within which such questions can be considered. Their task is also complicated by the schizophrenic political ideology inherent in contemporary administrative scholarship. The new scholarship is liberal (or neo-liberal²⁸) in its skepticism about economic efficiency as the sole criterion for good government,²⁹ in its continued faith in government solutions to socioeconomic problems,³⁰ and in its concern about public participation in the regulatory state.³¹ Simul-

26. See *infra* notes 108-14 and accompanying text (citing examples of policy analysis by legal scholars).

27. See Martin Shapiro, *Of Interest and Values: The New Politics and the New Political Science*, in *THE NEW POLITICS OF PUBLIC POLICY* 3 (Marc K. Landy & Martin A. Levin eds., 1995) (noting issues raised by political science may require substantive answers, but political scientists are trained to provide only process solutions).

28. See RANDALL ROTHENBERG, *THE NEO-LIBERALS: CREATING THE NEW AMERICAN POLITICS* (1984) (identifying liberals influenced by conservative arguments to adjust traditional liberal concepts of, and approaches to, government).

29. EDLEY, *supra* note 14, at ix-xi; ROSE-ACKERMAN, *supra* note 9, at 16-19; SUNSTEIN, *supra* note 18, at 39, 42-45, 228-29; ROBINSON, *supra* note 14, at 3; Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 977 (1993) (discussing administration compensation scheme as alternative to current tort liability for mass toxics claims); Peter H. Schuck, *Regulation, Non-Market Values, and the Administrative State: A Comment on Professor Stewart*, 92 YALE L.J. 1602, 1608 (1983) (analyzing Professor Stewart's trinity of justifications for administrative action, securing rights, promoting efficiency, and protecting non-commodity values); Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983).

30. EDLEY, *supra* note 14, at ix; Rabin, *supra* note 29, at 981-82; ROBINSON, *supra* note 14, at 4; ROSE-ACKERMAN, *supra* note 9, at 188-89; Schuck, *supra* note 29, at 1607-08; SUNSTEIN, *supra* note 18, at 12, 70-71, 74-75, 229-30; see also STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 80-81 (1993) (advocating structural changes in agencies so agency regulations will better reflect society's needs and consequently enhance public's trust in agencies' ability to deal effectively with socioeconomic problems).

31. BREYER, *supra* note 30, at 73; EDLEY, *supra* note 14, at 213; Rabin, *supra* note 29, at 968; ROBINSON, *supra* note 14, at 58-61; ROSE-ACKERMAN, *supra* note 9, ch. 13; Stewart, *supra* note 29, at 1586-87; Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1465, 1473-75 (1992); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 298-300; PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN*

taneously, it is conservative (or neo-conservative³²) in its reliance on policy analysis,³³ in its use of market-based solutions,³⁴ and in its reluctant acceptance of administrative agencies.³⁵

We recognize that agreement about what constitutes good government will be difficult to come by as the previous schizophrenia demonstrates. But it is important to have this discussion. James Morone explains that public unease about government is related to the reliance on process norms to legitimize regulatory programs.³⁶ Cognizant of the country's strong liberal heritage, reformers have sought to reassure the public about government by stressing its accountability through administrative and political processes. As a result, "Americans have failed to institutionalize a communal spirit—an active notion of the people—within their government."³⁷ This process orientation has two impacts. It stresses the risks posed by government without establishing any philosophy of the benefits to be gained from government. Without a philosophy of government, the risks posed by government cannot be weighed and measured. The new government regulation scholarship addresses this deficiency.

REMEDIES FOR OFFICIAL WRONGS (1983).

32. See PETER STEINFELS, *THE NEO-CONSERVATIVES* (1979) (identifying conservatives influenced by liberal arguments to adjust traditional conservative concepts of, and approaches to, government).

33. ROSE-ACKERMAN, *supra* note 9, ch. 13.

34. Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 631-42. Congress should adopt "flexible, market-oriented incentive-based regulated strategies" that focus on the ends to be achieved while allowing the market to determine the means that would most effectively eliminate the harmful activity. *Id.* at 632-33.

35. EDLEY, *supra* note 14, at 263; ROBINSON, *supra* note 14, at 37-38, ch. 3; Rabin, *supra* note 29, at 954-55, 982; ROSE-ACKERMAN, *supra* note 9, at 95-96; Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993)); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987). "Public antipathy to overregulation by Washington bureaucracies could provide popular support for judicial requirements that Congress legislate more specifically in order to limit agency discretion." *Id.* at 324. However, Professor Stewart seriously doubts that courts will revive the delegation doctrine to invalidate congressional statutes. He contends that the country has increasingly relied on "centralized command and control regulation" to achieve social goals and economic justice, which has created further burdens on Congress. He suggests "outright deregulation" in some areas and creating "new reconstitutive strategies of regulation" in others. *Id.* at 328-29.

36. JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* ch. 8 (1990).

37. *Id.* at 29.

II. THE REGULATORY PROCESS

The distinction between traditional administrative law scholarship and government regulation scholarship is not semantic. The objects of study are different. Administrative law is procedural and formalistic.³⁸ While policy controversies abound at the margins of procedure, administrative law primarily answers questions about whether the APA was followed, which branch of government should be the proper decisionmaker as a matter of jurisdiction, the scope of judicial review, and the ambit of statutory and regulatory interpretation. To be sure, the marginal controversies dramatically determine who will be the winners and losers of the regulatory game. Yet, these are essentially legal questions albeit with political and policy consequences. Nevertheless, traditional scholarship cannot tell us what good policy should be or what the ideal political landscape should look like. Nor can it tell us which policy proposals are likely to succeed or fail. Rather, the role of government regulation scholarship is to develop the policy and political dimensions of the regulatory state.

Where administrative law is procedural, government regulation is substantive because it explores political and policymaking processes and, in turn, uncovers the policy arguments, political influences, and legal constraints that determine public policies. Indeed, the heart of government regulation is to assess the relationship of policy, politics, and law to each other, and to articulate the substantive and normative attributes of the regulatory state. In this section, we suggest a process model of government regulation that grew out of our efforts to teach law students about the nature of the regulatory process.³⁹

A. An Interactive Model

The basic understanding of government regulation is that regulations emanate from administrative agencies. This basic understanding is partial, however. A better understanding of government regulation incorporates the interaction between agencies and the legislature as well as judicial review of the actions of both branches. Simply stated, agencies cannot act without legislative authorization, and that authorization comes in two basic forms. Most frequently, legislatures pass broad statutes and leave the details of legislation to be filled in by agencies. This maneuver allows legislators to gain credit for legislation, avoid blame for regulatory failures, and provide

38. See generally PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES (1989).

39. SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY (1993).

services to their constituencies.⁴⁰ The other form of legislation is narrower in scope, either establishing entitlements to be administered by agencies⁴¹ or correcting regulatory failures.⁴² Thus, regulation is the product of the interaction between the legislative allocation of authority and implementation by administrative agencies.

Our model posits that regulation in the legislative arena is the product of the interaction of politics, policy, and law (see Figure 1 below).⁴³ The circle marked "politics" represents legislative proposals that have political support.⁴⁴ The circle marked "policy" represents those regulatory alternatives for which rational policy arguments can be made.⁴⁵ The line marked "constitutional law" constrains the adoption of some alternatives (those below the line) that have political support but lack constitutional authority.

40. Peter H. Aronson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

41. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12101 (1994).

42. See, e.g., Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1994); Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 552 (1994).

43. Our model can be contrasted with the "interactive institutional" model of Eskridge and Frickey. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 33-42 (1994). They argue that constitutional institutions tend to interact so as to bring law into equilibrium. *Id.* at 35. Their model is similar to and congenial with this analysis to a point, but their analysis is narrower than the one presented here because it pays less explicit attention to the exogenous variables of policy and politics.

44. Of course, the intensity of political support will vary according to the impact of a proposal on stakeholders and other interested parties. See *infra* notes 72-74 and accompanying text (discussing intensity of support). The claim here is only that political support is a necessary element for legislation to be adopted.

45. A rational policy argument is one that would be recognized as legitimate by the community of policy analysts that analyze and debate an issue or group of issues. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 138-45 (1st ed. 1984) (discussing policy alternatives debated and tested within policy communities).

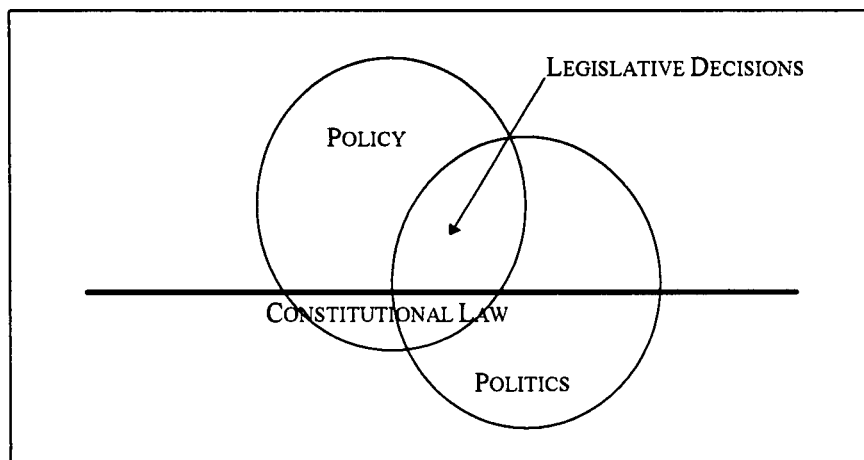


Figure 1. Legislative Decisions

For example, parents may support the use of school vouchers to pay tuition at private religious schools, but legislation establishing such funding may be a violation of the Establishment Clause.⁴⁶ According to the model, proposed laws must fit into the overlap between the policy and politics circles as necessary conditions to survive the legislative process.

Figure 2 depicts the relationship of policy, politics, and law in the agency arena. As in the legislature, an agency's regulatory decisions are influenced by the interaction of law, politics, and policy. An agency, however, has less discretion to react to these influences than does a legislature because its enabling act prevents it from adopting some regulatory alternatives that have policy and political support. For example, the use of food color additives that pose a *de minimis* risk of cancer might be good policy and might enjoy political support, but the Delaney clause forbids the Food and Drug Ad-

46. U.S. CONST. amend. I; see James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 280-81 (1991) (reviewing JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990)). Most legislative proposals, however, are likely to be constitutional because of the deference that the Supreme Court usually gives Congress. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993) (applying rational basis test to equal protection claim); *Hodel v. Indiana*, 452 U.S. 314 (1981) (applying rational basis test to determine whether regulated activity affects interstate commerce). Moreover, the power of Congress to act is virtually unlimited by the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; see, e.g., *FERC v. Mississippi*, 456 U.S. 742 (1982). Likewise, state legislation has almost unlimited authority as a matter of the state's police powers. See, e.g., *Finucane v. Pennsylvania Milk Mktg. Bd.*, 582 A.2d 1152 (Pa. Commw. Ct. 1990). The Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), however, places some outer limit on the commerce power.

ministration from approving such additives.⁴⁷ Thus, a regulatory decision will be one that satisfies constitutional and statutory law and that, at least initially, has political and policy support. These decisions are located in Figure 2 in the intersection of the policy and political circles that is located above the two legal baselines established by statutory and constitutional law constraints.

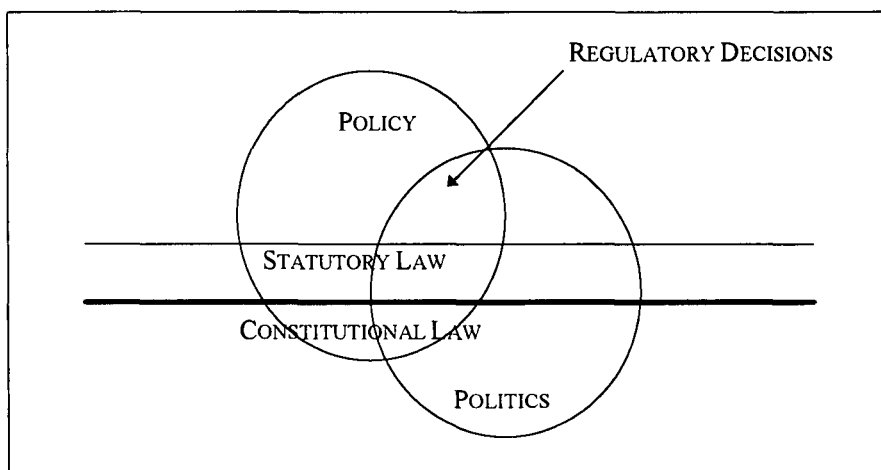


Figure 2. Regulatory Decisions

Finally, in Figure 3, we enlarge on the concept that constitutional and statutory law limit the capacity of agencies to choose specific regulatory policies.⁴⁸ An organization's capacity to act is affected by its institutional framework, which includes legal constraints, but more generally consists of the institutional arrangements, capacities, and incentives present in any administrative environment.⁴⁹ Agency decisions will be affected by such non-

47. Federal Food, Drug, and Cosmetic Act, § 409(c)(3), 21 U.S.C. § 348 (1994); see *Public Citizen v. Young*, 831 F.2d 1108, 1109 (D.C. Cir. 1987) (explaining that Delaney clause prohibits FDA from listing as safe any cancer causing food color additive).

48. A similar model used at the John F. Kennedy School of Government at Harvard University posits that regulatory decisions are the product of organizational capacity, vision/purpose, and external environment. MATERIALS FOR PROGRAM FOR SENIOR MANAGERS IN GOVERNMENT (1993) (copy on file with author). These influences relate to policy (vision/purpose), politics (external environment), and institutional framework (organizational capacity).

49. GARY MUCCIARONI, REVERSALS OF FORTUNE: PUBLIC POLICY AND PRIVATE INTERESTS 9 (1995); see generally JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989).

legal factors as institutional routines, bureaucratic culture, professional training, and agency resources.⁵⁰

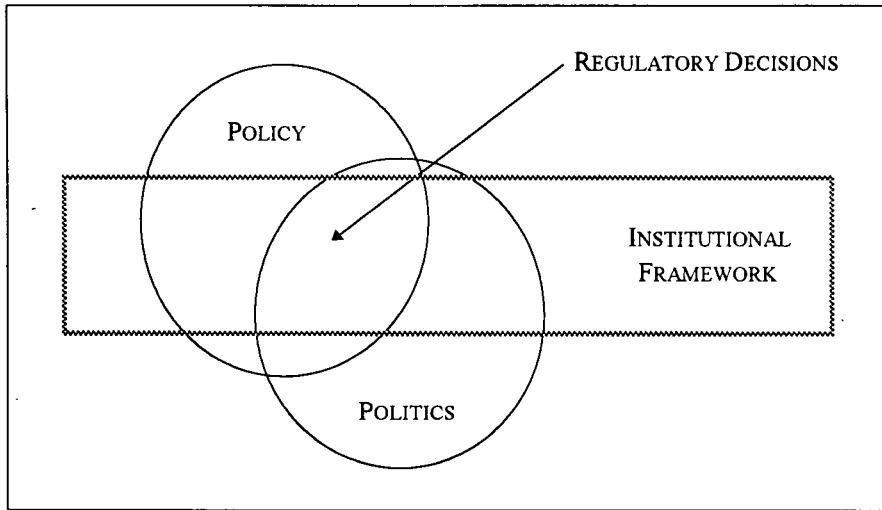


Figure 3. Regulatory Process

For example, day-to-day decisionmaking in the Social Security Administration is controlled by sophisticated techniques of organization and management.⁵¹ Thus, as depicted in Figure 3, some policy choices that are acceptable as a matter of politics and policy (located in the overlapping circles) are ruled out by some aspect of the institutional framework (the portion of the overlapping circles outside of the rectangular framework).

B. Beyond Public Choice

The proposed model specifies a role for policy arguments, political influence, and institutional factors in regulatory decisionmaking. Two insights about the regulatory process may be drawn from the model. First, the model has some general predictive power. The success of a regulatory proposal requires the favorable congruence of policy, political, and institutional factors. Because the generality of this insight limits the model's predictive power, the model is more useful for a second insight: The model rejects a purely public choice orientation that regulatory decisions result solely from

50. See *infra* notes 85-87 and accompanying text (explaining how institutional influences impact agency decisionmaking).

51. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 166-68 (1983).

self-interest. For this reason, the impact of policy arguments and institutional influence on government regulation has important implications for the study and practice of regulatory law. These implications suggest a methodology to analyze government regulation which will be described below.

The model shows the interaction of the variables and reveals certain patterns. All proposals must satisfy the legal requirements. Further, the policy and politics variables interact in certain ways. When a regulatory program makes strong policy sense, there is a powerful inference that it is the product of a deliberative process rather than public choice politics.⁵² Alternatively, when the policy rationale is substantially weak, the lack of a rationale supports the conclusion that a program is the result of self-interested behavior. Many programs, however, fall somewhere in between these extremes. Concerning these programs, proponents and opponents make policy arguments whose validity is not easily determined. Thus, outcomes are determined by the efficacy of the policy evidence, the political feasibility of the supporting arguments, and the impact of institutional influences.

The model predicts which proposals on the agenda of a legislature or agency will survive and which are likely to fail. It specifies that proposals that lack policy, political, or institutional support cannot survive the regulatory process. Although this prediction is general and requires refinement, it is a useful starting point. For one thing, the model leaves room for the various positive or descriptive theories of government regulation, such as public interest,⁵³ public choice,⁵⁴ and organizational and institutional theories.⁵⁵ Indeed, the value of the model is to link the variables and to suggest that no one dimension of the regulatory state⁵⁶ nor any one academic discipline⁵⁷ is

52. See generally Sidney A. Shapiro, *Keeping the Baby and Throwing Out the Bathwater: Justice Breyer's Critique of Regulation*, 8 ADMIN. L.J. AM. U. 721 (1995).

53. See generally STEVEN KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* (1987).

54. See, e.g., Samuel Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

55. MARCH & OLSEN, *supra* note 49.

56. MUCCIARONI, *supra* note 49, at 1-10, ch. 6; George Priest, *The Origins of Utility Regulation and the Theories of Regulation Debate*, 36 J.L. & ECON. 289 (1993); RICHARD H.K. VIETOR, *CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA* ch. 1 (1994).

57. Consider, for example, the insights provided in histories of regulation. MORTON KELLER, *REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-1933* (1994); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937* (1991); *REGULATION: ECONOMIC THEORY AND HISTORY* (Jack C. High ed., 1991); MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA,*

sufficient to capture its dynamism. In particular, the model belies a purely public choice orientation that regulatory decisions result from self-interested behavior. Although self-interest is an important influence and can be dominant, policy analysis plays an important role in the regulatory process.

Public choice scholarship describes regulatory politics as composed of market-like transactions between those who demand regulation (the buyers) and those who supply it (the sellers).⁵⁸ In public choice theory, business and producer groups are expected to prevail because these interests have a significantly greater economic incentive to be politically active than do citizens who are affected by legislative action.⁵⁹ Moreover, according to theory, these organized interests and their political sponsors develop relationships that are highly resistant to change by outsiders.⁶⁰

The influence of organized interests on regulatory politics is indisputable, but the public choice approach does not explain significant elements of the regulatory state. Industry and producer groups have been unable to stop the passage of many environmental, health and safety, and consumer protection laws and are still unable to secure the repeal of those laws.⁶¹ They have also

1900-1933 (1990).

58. The buyers are organized interests that support or oppose regulation according to the self-interest of their members. The sellers are public officials who make regulatory decisions according to their own self-interest. Legislators respond to buyers who offer support for reelection, while agency officials respond to buyers who can assist them to obtain additional power and prestige and larger budgets. When organized interests compete, the outcome depends on what group or groups offer the greatest rewards to legislators or administrators. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21-23 (1991) [hereinafter *LAW & PUBLIC CHOICE*]; JOE B. STEVENS, *THE ECONOMICS OF COLLECTIVE CHOICE* chs. 7-10 (1993).

59. When a government action affects a small number of persons or entities in a significant manner, they have an adequate incentive to join in collective action. By comparison, when legislation affects a large number of persons, the impact on any single individual is usually so small that it is less than the cost of joining in a collective action. Moreover, individuals who succeed as "free-riders" on the political efforts of others will be better off. Smaller groups are generally more successful in overcoming this constraint. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357 (James Q. Wilson ed., 1980); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 43-52 (1971).

60. THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY* 90 (1969).

61. See Sidney A. Shapiro, *Occupational Safety and Health: Policy Options and Political Reality*, 31 *HOUS. L. REV.* 13, 22-37 (1994) (analyzing whether workers can overcome weak political power to enact stronger health and safety legislation); Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 *YALE J. ON REG.* 369, 407-20 (1993) (analyzing why environmentalists prevailed in enactment of environmental legislation); see generally Martin Shapiro, *supra* note 27, at 5. Shapiro states that:

been unable to stop deregulation efforts that disfavored the airline, trucking, banking, and telecommunications industries⁶² or to prevent unfavorable tax legislation.⁶³ Thus, although public choice scholarship predicts that business and producer groups should prevail because they have more political influence and economic muscle than their opponents, often the outcomes are otherwise.

The public choice explanation falls short in explaining the origins of regulation because it does not account for the influence of "ideas"⁶⁴ or of policy considerations in regulatory decisionmaking that are not about self-interest.⁶⁵ This insight is the focus of what has been described as the "new

the rather elegant theory that built to the conclusion that Congress could pass legislation that diffused costs among the taxpayers in general while concentrating benefits on specific interest groups and could not pass legislation that concentrated costs on identifiable groups but created diffuse or "public" benefits has been confounded by much of the major legislative product of the Congress during the past thirty years.

Id.

62. See VIETOR, *supra* note 56, at 1 ("Before deregulation, observers of the political process generally believed that the mutual interests of bureaucrats, legislators, and regulated businesses were so strong that significant reform was unlikely, if not impossible.").

63. JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (2d ed. 1988).

64. See SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 10 (1981) (arguing that political explanations of government fail to account for significant impact of ideas); see also JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994) (analyzing role of deliberation in policymaking); ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1995) (analyzing role of ideas of Keynesianism and consumer spending on national economic policy from 1937 to 1945); RICHARD N. GOODWIN, *PROMISES TO KEEP: A CALL FOR A NEW AMERICAN REVOLUTION* (1992) (offering background ideas for modern government); MORONE, *supra* note 36, chs. 3, 4 (explaining how dynamic view of democracy shapes administrative state); WILSON, *supra* note 49, at 67-68 (discussing influence of political ideology in administrative decisionmaking); Herbert Hovenkamp, *Regulation History as Politics or Markets*, 12 *YALE J. ON REG.* 549 (1995) (book review) (contending that historians should acknowledge role of ideas and values in legislative choices).

65. See GIANDOMENICO MAJONE, *EVIDENCE, ARGUMENT AND PERSUASION IN THE POLICY PROCESS* 1 (1989) ("Political parties, the electorate, the legislature, the executive, the courts, the media, interest groups, and independent experts all engage in a continuous process of debate and reciprocal persuasion."); LAW & PUBLIC CHOICE, *supra* note 58, at 24-33 (concluding that economic model overlooks importance of ideology); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 *J.L. ECON. & ORG.* 167, 193-94 (Special Issue 1990) (establishing that public officials respond to self-interested and other-regarding motives); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 *N.Y.U. L. REV.* 1, 23-25 (1991) (asserting public choice model is based on faulty assumptions concerning legislative behavior); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism,*

politics of public policy,"⁶⁶ which represents a "shift of concern from interests to values, from procedure to substance, from the correlation of preferences to the attainment of good, or at least the better, or perhaps (to put the matter more succinctly) a movement from will to reason."⁶⁷ Thus, the linkages between policy arguments and regulatory outcomes are not easily observed, because often the motivating factor—an idea—is difficult to track, and its influence is difficult to measure.⁶⁸ Yet, the process by which politics and policy come together can be described. Moreover, this description verifies the central role of policy arguments in regulatory decisionmaking.

Once Congress decides to act,⁶⁹ interest groups and political actors compete to influence which solutions are adopted by advocating policies that serve their interests.⁷⁰ Although an interest group must have at least some political power to be successful,⁷¹ even powerful groups do not depend on political influence alone. Rather, they spend considerable time and money developing policy rationales for their proposals,⁷² and their lobbyists stress the importance of making good policy arguments.⁷³ Which alternative policy the legislature will adopt depends on the relative merits of competing proposals, on the political influence of the competing parties, and on institutional arrangements in Congress.⁷⁴ Thus, political intensity can fuel the passage of policies with marginal policy justifications, and good ideas can pre-

and Democratic Politics, 90 COLUM. L. REV. 2121, 2127 (1990) (asserting that social choice theory does not fully describe "general legitimacy and meaningfulness of democratic decisionmaking"); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 76-94 (1990) (finding that public choice explanations must be supplemented to account for other legislative motivations, including lawmakers' ideological satisfaction).

66. See THE NEW POLITICS OF PUBLIC POLICY, *supra* note 27, at ix-xii (describing role of policy ideas in regulatory decisionmaking and impact of such ideas on regulatory politics).

67. Martin Shapiro, *supra* note 27, at 12.

68. Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980s*, in THE NEW POLITICS OF PUBLIC POLICY, *supra* note 27, at 51.

69. See KINGDON, *supra* note 45, at 3-4 (describing "agenda setting" as process by which legislature recognizes problem as requiring legislative solution).

70. *Id.* at 52; FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 29 (1993).

71. See MICHAEL PERTSCHUK, *GIANT KILLERS* 45 (1986) ("Reports to Congress suggesting controversial action, unaccompanied by political momentum, ordinarily move the Congress with all the force of a bulldozer with an empty gas tank.").

72. DAVID M. RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS* 165-66 (1993).

73. BRUCE C. WOLPE, *LOBBYING CONGRESS: HOW THE SYSTEM WORKS* 24 (2d ed. 1996); JOHN P. HEINZ ET AL., *THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICY MAKING* ch. 2 (1993).

74. KINGDON, *supra* note 45, at 170-72, 209-10; MUCCIARONI, *supra* note 49, at 9.

vail even in the face of intense political opposition. Moreover, the impact of policy and politics can be blunted or accelerated by institutional arrangements in Congress.⁷⁵

Several reasons account for the impact of policy on regulatory decision-making.⁷⁶ Building coalitions among groups with different conceptions of self-interest and of the public interest requires finding general ideas in common. Moreover, political success is more likely if people defend their initiatives as consistent with existing policies, institutions, and implementation capacities and, more generally, with social norms concerning the appropriate role of the state in society⁷⁷ or with society's normative and emotional commitments.⁷⁸ In particular, ideas are necessary to defend initiatives as consistent with general public purposes in light of public distrust of special interest pleading.⁷⁹ Ideas, according to Peter Schuck, also "give eloquent voice to a previously inarticulate sense among members of the public that social values and ways of thinking are changing and that policies therefore need to be brought into harmony with these new practices. By engendering a kind of cognitive dissonance, ideas can underscore tensions in our political life, stimulating the search for new modes of behavior or governance."⁸⁰

When a regulatory decision has been delegated to an administrative agency, ideas are important for additional reasons. Agency decisionmakers are usually lawyers, economists, or members of other professions who are socialized to approach problem-solving in a rational manner.⁸¹ Administrators are also more likely to act rationally because there is judicial review, in which neutral decisionmakers determine whether the agency applied its expertise to technical problems in a bona fide way and responded to significant

75. MUCCIARONI, *supra* note 49, at 9.

76. This analysis follows Schuck, *supra* note 68, at 77-85 (relating ideas to interests in relation to policymaking).

77. See MORONE, *supra* note 36, at 4 (reformers deflect public concerns about aggregation of power in government by promising that changes will yield communal democracy).

78. See, e.g., ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* (1991); FRANCES MOORE LAPPE, *REDISCOVERING AMERICA'S VALUES* (1989); see generally HERBERT McCLOSKEY & JOHN ZALLER, *THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD CAPITALISM AND DEMOCRACY* (1984).

79. James Q. Wilson, *New Politics, New Elites, Old Publics*, in *THE NEW POLITICS OF PUBLIC POLICY*, *supra* note 27, at 252 ("Policy making has been rationalized in the sense that partial interests are now suspect and general interests are thought paramount.")

80. Schuck, *supra* note 68, at 80; see HUNTINGTON, *supra* note 64, chs. 3-4 (observing that instability follows either excess consensus or dissonance).

81. See RICHARD J. PIERCE ET AL., *ADMINISTRATIVE LAW & PROCESS* § 1.9 (2d ed. 1992) (discussing role of organizational norms in agency decisionmaking).

objections from affected persons.⁸² In addition, recent presidents have imposed their own analytical requirements that agencies must justify significant rules by comparing their benefits and costs and by identifying other regulatory impacts.⁸³ Congress is considering codifying and extending such requirements.⁸⁴

As noted, the professional training of administrative personnel will affect their reaction to policy arguments. Professional training is one of several institutional factors that can influence agency decisionmaking. Decisions will also be affected by such additional bureaucratic influences as institutional routines,⁸⁵ bureaucratic culture,⁸⁶ and agency resources.⁸⁷ Because these influences may or may not be synchronized with regulatory initiatives, they can have the effect of assisting, modifying, or blocking such changes.⁸⁸ For example, the hostility to regulation among the White House personnel charged with regulatory oversight in the Reagan administration stymied the efforts of regulatory agencies.⁸⁹ Similarly, the extent to which the public can effectively influence agency decisionmaking can influence the outcome of regulatory decisions.⁹⁰ Finally, because institutions differ concerning their capacity to implement regulation, some regulatory regimes may be more effective than others.⁹¹

Despite the apparent impact of policy deliberations and institutional factors on regulatory outcomes, public choice scholars remain skeptical.⁹² Yet,

82. Thus, the possibility of judicial review can be a significant hedge against arbitrariness, even if it does not occur in every case. STEPHEN G. BREYER & RICHARD STEWART, *ADMINISTRATIVE LAW & REGULATORY POLICY* 307 (1979).

83. THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 17-25 (1991); see Exec. Order No. 12,291, 3 C.F.R. 128 (1981); Exec. Order No. 12,498, 3 C.F.R. 323 (1985); Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

84. See Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. (1995) (proposing legislation that would codify and extend analytical requirements for agency rulemaking).

85. MARCH & OLSEN, *supra* note 49, ch. 2.

86. WILSON, *supra* note 49, ch. 6 (analyzing impact of bureaucratic culture on agency decisionmaking).

87. CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW & MAKE POLICY* 90 (1994).

88. MUCCIARONI, *supra* note 49, at 8, 18.

89. Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 11-12 (1994).

90. SHAPIRO & TOMAIN, *supra* note 39, ch. 4.

91. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

92. E.g., Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 181 (1988) (investigating substance of cri-

as Donald Green and Ian Shapiro have recently demonstrated, "successful empirical applications of rational choice models have been few and far between."⁹³ They and other analysts do not deny the potential explanatory power of public choice theories, but they oppose the concept that a general, all encompassing theory of politics can be built on the infrastructure of self-interested behavior.⁹⁴ At bottom, then, the public choice conception of public behavior is at odds with what one can observe.

III. REGULATORY ANALYSIS

In light of the model, it is no accident that a significant part of what administrative lawyers and lobbyists do is to present and debate policy arguments.⁹⁵ For agency lawyers, the focus is whether the agency can defend the exercise of its discretion as being consistent with its statutory mandate. For private lawyers, the goal is to steer the agency (or a legislature) to a policy choice that maximizes the objectives of the client. The arguments raised in agencies and Congress range from the particular, such as whether airbags reduce automobile injuries and deaths,⁹⁶ to meta-arguments about the role of government in society, such as whether the government should fund social and educational services for illegal aliens⁹⁷ or eliminate or reduce affirmative action.⁹⁸ What these policy arguments have in common, however, is that they concern the substantive nature and scope of regulatory government.

A. *The Origins of Regulatory Analysis*

Regulatory debates draw on the emerging government regulation scholarship. Experience in teaching government regulation suggests a methodology

tique of public choice based on role of policy influences).

93. DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* ix (1994).

94. *Id.* at 184; *see supra* notes 64-65 (citing other analysts seeking pluralistic account of public decisionmaking).

95. *See* Sidney A. Shapiro, *Reflections on Teaching Administrative Law: Time for a Sequel*, 43 *ADMIN. L. REV.* 501, 501-02 (1991) (describing speech by prominent Washington regulatory lawyer who argued that such lawyers spend most of their time advocating policy positions).

96. *See* SHAPIRO & TOMAIN, *supra* note 39, at 3-20 (describing policy debate at National Highway Traffic Safety Administration concerning airbags).

97. CAL. HEALTH & SAFETY CODE § 130 (West Supp. 1996). The § 130 heading, "Exclusion of Illegal Aliens from Publicly Funded Health Care," was taken from the caption of Proposition 187, § 6, a California Initiative Measure approved Nov. 8, 1994.

98. George Skelton, *Affirmative Action Issue: Another 187?*, L.A. TIMES, Feb. 2, 1995, at A3; Steven A. Holmes, *White House Signals an Easing on Affirmative Action*, N.Y. TIMES, Feb. 25, 1995, at 9.

of regulatory analysis modeled on the common law analysis used to read cases. Likewise, it is intended to establish background knowledge that opens up the study of government regulation literature.

Many if not most of the policy arguments that turn up in legislative and administrative deliberations originate in policy communities composed of specialists, such as congressional staffers, people in planning and evaluation offices, interest group analysts, and academics.⁹⁹ In John Kingdon's wonderful metaphor, the generation of arguments in this community resembles a process of natural selection.¹⁰⁰ As in natural selection, there is a pattern to the ideas that survive and prosper. Some of the criteria for survival are internal to the policy community, such as technical feasibility and consistency with the professional values of that community. Other criteria are dictated by the political environment, such as tolerable cost, public acquiescence, and a reasonable chance for receptivity among elected decisionmakers.¹⁰¹ In particular, previous policy successes and failures influence the development of policy strategies during any one period.¹⁰² Ideas that meet all of these criteria are likely to be serious, viable policy proposals, while ideas that fall short might be reworked or combined with other ideas and then proposed again.¹⁰³

The origin of many issues on the current political agenda, including issues such as health,¹⁰⁴ welfare,¹⁰⁵ and telecommunications,¹⁰⁶ can be traced back to the academic policy literature. Policy ideas produced in think tanks and policy institutes, however, may not be subject to the same level of scrutiny in

99. See Peter A. Hall, *Policy Paradigms, Social Learning, and the State: Economic Policymaking in Britain*, 25 COMP. POL. 275, 289 (1993) (explaining that government policymakers are linked to society by flows of ideas between government policymaking and policy debates).

100. KINGDON, *supra* note 45, at 122-23.

101. *Id.* at 138; MAJONE, *supra* note 65, ch. 3.

102. Steven R. Smith, *The Role of Institutions and Ideas in Health Care Policy*, 20 J. HEALTH, POL., POL'Y & L. 385, 387 (1995).

103. KINGDON, *supra* note 45, at 138.

104. See, e.g., Alain Enthoven, *Managed Competition of Alternative Delivery Systems*, 13 J. HEALTH POL., POL'Y & L. 305 (1988); SETTING DOMESTIC PRIORITIES: WHAT CAN GOVERNMENT DO? ch. 2 (Henry J. Aaron & Charles L. Schultze eds., 1992); MICHAEL D. REAGAN, *CURING THE CRISIS: OPTIONS FOR AMERICA'S HEALTH CARE* (1992); PAUL STARR, *THE LOGIC OF HEALTH CARE REFORM* (1992).

105. See, e.g., MARY JO BANE & DAVID T. ELLWOOD, *WELFARE REALITIES: FROM RHETORIC TO REFORM* (1994); CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* (1992); MICKEY KAUS, *THE END OF EQUALITY* (1992).

106. See, e.g., PETER W. HUBER ET AL., *THE GEODESIC NETWORK II: 1993 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY* (1992); MICHAEL K. KELLOGG ET AL., *FEDERAL TELECOMMUNICATIONS LAW* (1992).

political debates as the venting that occurs in academic circles. As a result, policy proposals may be politically successful even though they lack a distinguished academic pedigree or distort the findings of academic analysts.¹⁰⁷

A model of the policy process that identifies the roles of policy, politics, and law opens up the study of the substance and norms of government regulation. Once it is accepted that all three factors play an important role in policy deliberations, the study of regulation moves from an orientation on self-interested economic behavior, represented by public choice theory, into the more complex world of political behavior. Furthermore, the study of regulation moves beyond the formal rules and procedures of administrative law into the complex world of policy and politics. Current examples of such government regulation scholarship include recent studies of automobile safety,¹⁰⁸ environmental standards,¹⁰⁹ nuclear power,¹¹⁰ risk regulation,¹¹¹ product safety hazards,¹¹² social security and welfare,¹¹³ and workplace health and safety.¹¹⁴

B. A Methodology

Just as the common law method mines cases to uncover basic legal principles, regulatory analysis mines the statutes and regulations (together with judicial glosses) to uncover the basic principles of the modern state. While case analysis reveals the principles and structures of much private law, regulatory analysis reveals the principles and structures of public law. In addition, regulatory analysis yields an understanding of the types of policy justifications and techniques used by government to intervene in private markets. From these justifications and techniques, the analyst can begin to describe the substantive values and norms of the regulatory state.

107. See, e.g., PAUL R. KRUGMAN, *PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS* 10-19 (1994) (describing rise and fall of supply-side economic theory).

108. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

109. BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION DOLLAR BAIL-OUT FOR HIGH-SULPHUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT* (1981).

110. JOSEPH P. TOMAIN, *NUCLEAR POWER TRANSFORMATION* (1987).

111. BREYER, *supra* note 30; CARL F. CRANOR, *REGULATING TOXIC SUBSTANCES: A PHILOSOPHY OF SCIENCE AND THE LAW* (1993).

112. ROSS E. CHEIT, *SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS* (1990).

113. THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* (1990); BANE & ELLWOOD, *supra* note 105.

114. THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* (1993).

Ever since the New Deal, the regulatory state has expanded to the point where it has largely displaced the common law. Today, the ordinary tools of the regulatory lawyer are statutes and regulations rather than cases. Case analysis, which proceeds by identifying relevant facts, pertinent issues of law, the holding of the court, and the court's rationale for its holding, is a legal skill necessary for the practice of law.¹¹⁵ The great strength of the common law method is that it provides lawyers with a way to read cases in any discipline and to derive from those cases the essential arguments, fundamental principles, and justifications that drive the common law. Case analysis works less well in explaining regulatory decisions involving statutory and regulatory rules.¹¹⁶ For that, one must turn to regulatory analysis.

Regulatory analysis 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.

Figure 4 indicates how regulatory analysis proceeds along a logical path similar to case analysis.¹¹⁷

115. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 109-21 (1993); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* ch. 9 (1994).

116. There are several differences between common law cases and statutory or regulatory cases. First, common law cases are more ad hoc (involving individuals and rarely whole markets) than regulatory and statutory cases. Second, statutory and regulatory cases are often more detailed, procedural, and situation-specific than common law cases. Third, common law cases reflect a longer tradition and, consequently, are more sensitive to their precedential consequences than are statutory or regulatory cases. Fourth, the "interpretation" of common law cases differs from that of statutory or regulatory cases because of the existence of a text in the latter cases. Fifth, the authority of judges is greater in common law adjudication. Sixth, principles and standards are more likely to apply to common law cases, while detailed regulations and canons of interpretation apply to statutory and regulatory cases. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* ch. 8 (1990) (distinguishing common law and statutory law).

117. This analysis is suggested by the pioneering work of Justice Breyer. See STEPHEN G. BREYER, *REGULATION AND ITS REFORM* (1982).

CASE ANALYSIS	REGULATORY ANALYSIS
Fact Analysis: Which factors are <i>relevant</i> ?	Market Analysis: Does a market produce results <i>inconsistent</i> with economic or other social values?
Legal Issue: Which legal issues <i>apply</i> to the factual predicate?	Policy Issue: Which regulatory methods (institutions and tools) will produce more <i>consistent</i> market or social results?
Holding: Which <i>rule of law</i> disposes of the dispute?	Resolution: Which <i>regulatory method</i> is being used?
Ratio: <i>Assess</i> whether the holding addresses the identified problem and furthers justice.	Ratio: <i>Assess</i> the efficacy and political feasibility of other regulatory methods.

Figure 4: Case and Regulatory Analysis

The first issue addresses the reason for government regulation. Simply stated, does government have an economic or noneconomic justification to intervene in a private market?¹¹⁸

An economic justification exists when a market fails to perform in an efficient manner and government intervention is intended to address this "market failure." The economics literature recognizes a limited number of such failures. The question is whether a market appears to be subject to one or more of these defects. A noneconomic justification exists when a market produces results that are unfair, inequitable, or inconsistent with other social values. Government intervention in this case is intended to conform the operation of the market to the social value. Thus, a market may be efficient yet produce results that are socially unacceptable.

The second issue considers the options available to the government to obtain the economic or noneconomic result sought, while the third issue considers which approach was actually chosen. The government has at its disposal a relatively limited arsenal of regulatory approaches, and more than one of these approaches may be relevant to the regulatory problem it is attempting to solve. Likewise, the government can choose the institutional arrangements under which regulation will take place. For example, the federal government can directly regulate or it can employ states as the agents of

118. Justice Breyer primarily analyzed economic justifications, but he recognized that noneconomic justifications might exist. These noneconomic justifications include unequal bargaining power, rationalization, moral hazard, paternalism, and scarcity. *Id.* at 32-34.

regulation.

The final issue is whether the government has chosen the most effective method of regulation. If not, then, as Justice Breyer said, a “mismatch” has occurred because government has failed “to correctly match the [regulatory method or] tool [used] to the problem at hand.”¹¹⁹ As noted, the problem that the government is trying to resolve might be economic or noneconomic. A mismatch may occur for two reasons. First, the government may misdiagnose the problem it is attempting to solve and may apply the wrong regulatory approach as a result.¹²⁰ Second, even if the problem is correctly identified, regulatory tools will vary in terms of their effectiveness and cost. In other words, another regulatory response may generate lower costs or more benefits. Even if a mismatch exists, however, the political system may not be prepared to adopt a more efficacious approach.

The key to understanding how regulatory analysis brings coherence to government regulation is the realization that there are a limited number of justifications for government regulation and that there are a limited number of methods or regulatory tools by which regulation can be implemented.¹²¹ The next two sections describe and expand this key point.

The pedagogical value of regulatory analysis should now be clear. Students should become familiar with the patterns of regulatory justification and response. It is less necessary to know intimate details of multiple industries, which will come with experience and on a need-to-know basis, than it is to understand the uses and limits of particular regulatory tools. In other words, it is more important for students to know how licensing works for nuclear power plants, magnetic resonance imaging, new drugs, and beauticians than to know about the specific details of regulation of the electricity, health care, pharmaceutical, and cosmetology industries. Armed with this background knowledge, lawyers can appreciate and utilize policy arguments that are appropriate to their fields of practice or service.

Regulatory analysis also gives scholars a common denominator from which advanced arguments can be built. The ideas of “match” and “mismatch” focus scholarly analysis on the justifications for a regulatory program and the suitability of the regulatory tools used to carry it out. These insights enable scholars to consider both the substantive and procedural issues that arise from a regulatory program and to contribute to the resolution of both.

119. *Id.* at 191.

120. A similar mismatch may occur if there is a change in the political climate and political leaders no longer support the previous goal.

121. ANTHONY OGU, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* ch. 1 (1994).

IV. REGULATORY JUSTIFICATIONS

The first step in regulatory analysis is to consider whether there is an economic or noneconomic justification for market failure. The approach proposed here accepts the fact that economic theory has become the dominant language of regulatory analysis today¹²² but posits that the analysis of market failure is incomplete without consideration of noneconomic values.¹²³ Considerations such as fairness and equity are also the basis of regulation.¹²⁴

The economic analyst starts with a preference for markets as a form of social ordering.¹²⁵ Yet, markets often lack the necessary attributes or conditions to be efficient.¹²⁶ The presence of such a "market failure" serves as a justification for the government to enter into and fix a market in order to achieve better allocative efficiency.

Under an economic justification, regulation is unnecessary in the absence of efficiency defects. The noneconomic analyst starts with the premise that society uses its political system to establish a set of values that defines how society wishes to be organized. If markets operate in a manner inconsistent with social values, the government's role is to conform a market's operation to those values. In this view of regulation, law can legitimately constrain, rather than merely perfect, market outcomes.¹²⁷ From the noneconomic perspective, the problem with relying exclusively on markets to organize social relationships is that the operation of markets reflects only "commodity" values, or norms that reflect market exchanges.¹²⁸

122. MCGARITY, *supra* note 83, at 13; BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW ch. 5 (1984); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 123 (1989).

123. SHAPIRO & TOMAIN, *supra* note 39, at 58.

124. See e.g., AMITAI ETZIONI, PUBLIC POLICY IN A NEW KEY (1993) (discussing "moral conduct in an unregulated economy"); THE MORAL DIMENSIONS OF PUBLIC POLICY CHOICE: BEYOND THE MARKET PARADIGM (John Martin Gillroy & Maurice Wade eds., 1992) (discussing efficiency in policy analysis and ethical demands of public policy); MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT 2-3 (1988) (identifying economic efficiency and "equity" as fundamental policy values).

125. Competitive markets achieve allocative efficiency as goods move to their highest valued uses. In this manner, wealth is created, consumer and producer surpluses are maximized, technological innovation is encouraged, and liberty and equality are enhanced because individual choice is maximized. MILTON FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS (1953).

126. See *infra* Part V (discussing regulatory responses to market inefficiencies).

127. SUNSTEIN, *supra* note 18, at 57-58; RICHARD ANDREWS, *Cost-Benefit Analysis as Regulatory Reform*, in COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATION: POLITICS, ETHICS, AND METHODS 107, 112 (D. Swartzman et al. eds., 1982).

128. Elizabeth Anderson, *Values, Risks, and Market Norms*, 17 PHIL. & PUB. AFF. 54, 59 (1988); see generally MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT ch.

The dance between economic and noneconomic regulatory justifications, that is between efficiency and equity, is a political *pas de deux*.¹²⁹ No social science model can predict precisely when one norm will trump the other. More importantly for our purposes, no social science model that ignores one or the other can succeed. Debates about health care, spotted owls, teenage pregnancy, welfare, or cable television rates each use economic and noneconomic policy arguments to greater or lesser degrees.

V. MATCH AND MISMATCH

Once the purpose of regulation is defined, our methodology considers the efficacy of the regulatory method the government uses. This section explains the application of this methodology in the context of “economic” and “social” regulation. The former generally refers to regulatory programs enacted in the first half of this century to protect the financial interests of consumers. The social regulation generally refers to the regulatory programs enacted in the 1960s and 1970s to protect the environment, reduce health and safety risks, eliminate discrimination, and ameliorate poverty.

A. Economic Regulation

As explained before, regulatory analysis brings coherence to regulation because it indicates that there are a limited number of regulatory justifications and methods. Economic regulation addresses three market failures—natural monopoly, excessive competition, and economic rents—with two regulatory tools—price controls or entry and exit controls.

1. Natural Monopoly

The regulation of public utilities is based upon the concept of natural monopoly, which leads to reduced output and higher consumer prices.¹³⁰ Gov-

2 (1993); MARGARET JANE RADIN, REINTERPRETING PROPERTY 32-34 (1993).

129. Christopher Schroeder, *In the Regulation of Manmade Carcinogens, If Feasibility Analysis Is the Answer, What Is the Question?*, 88 MICH. L. REV. 1483, 1491 (1990); MICHAEL REAGAN, REGULATION: THE POLITICS OF POLICY 208 (1987) (analyzing economic principles in regulatory system's intellectual structures); see generally ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975).

130. SHAPIRO & TOMAIN, *supra* note 39, at 181-206. In industries in which there are large front-end capital costs and economies of scale resulting in lower costs over a long range of production, one firm will eventually monopolize the market because it can price its goods lower than those of any new rivals. Because of these economic attributes, it is cheaper to have a single telephone company run the telephone lines and one electrical utility run a single set of electrical lines than to have multiple transmission systems. Consequently, utilities, such as water, electricity, natural gas, telephone, and now cable televi-

ernment has traditionally responded with a regulatory compact in which the utility is given a monopoly to serve a particular territory and the government uses rate making to set the utility's rates and impose a service obligation.¹³¹ Recently, however, disruptions in gas and electrical utility markets have caused regulators to reassess this approach.¹³² After closer examination of utility markets indicated the potential for at least some competition, the government created "governmental markets" for utility sales.¹³³ The term

sion, develop a common structure in which a good is produced, transported, and distributed to customers by an integrated firm. 1 ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS*, ch. 4 (1988); DANIEL F. SPULBER, *REGULATION AND MARKETS* 3-4 (1989) (analyzing concept of natural monopolies in its introduction). Noneconomically, the argument is that a utility's product is affected with a public interest and should be universally available. SHAPIRO & TOMAIN, *supra* note 39, at 301.

131. The government maintains the monopoly because having one firm produces the lowest production costs. It protects consumers by attempting to set prices at a level that would prevail in a competitive utility market. LEONARD S. HYMAN, *AMERICA'S ELECTRIC UTILITIES: PAST, PRESENT, AND FUTURE 195-96* (3d ed. 1988) (discussing natural monopolies in reference to public utilities); *see also* *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987).

132. Federal and state rate making in the natural gas industry distorted markets so much that artificial shortages were created, especially in the interstate market, and cheaper gas was unavailable to consumers. *See* Stephen G. Breyer & Paul MacAvoy, *The Natural Gas Shortage and Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941 (1973); A. TUSSING & C. BARLOW, *THE NATURAL GAS INDUSTRY: EVOLUTION, STRUCTURE & ECONOMICS* (1984); Richard J. Pierce, *Reconstituting the Natural Gas Industry from Wellhead to Burner Tip*, 9 ENERGY L.J. 1 (1988); Richard J. Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345 (1983). In addition, a series of events in the electrical utility markets, including the collapse of the nuclear power industry, led to rising electricity costs, excess capacity in the industry, and increased pressure for dramatic rate hikes. HYMAN, *supra* note 131, at 127-44; PAUL JOSKOW & RICHARD SCHMALENSEE, *MARKETS FOR POWER: AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION* (1983). Further, both industries were buffeted by the "energy crisis" of the 1970s.

133. In the electricity industry, for example, Congress passed legislation giving preferred status to certain power producers and literally created a new market of non-utility generators. *See, e.g.*, STEVEN FERRY, *LAW OF INDEPENDENT POWER: DEVELOPMENT/COGENERATION UTILITY REGULATION* (1991). In the natural gas and electrical industries, the Federal Energy Regulatory Commission (FERC) has pried open transportation access, thereby creating a new market for transportation services. James McManus, *Natural Gas*, in 2 ENERGY L. & TRANSACTIONS § 50.04(1)(d) (David J. Muchow & William A. Mogel eds., 1995); Reinier H.J.H. Lock & Marlene L. Stein, *Electricity Transmission*, in 3 ENERGY L. & TRANSACTIONS ch. 81 (David J. Muchow & William A. Mogel eds., 1995); Floyd L. Norton, IV & Bruce L. Richardson, *Electricity: Open Access, Wheeling and Comparability*, in 3 ENERGY L. & TRANSACTIONS ch. 82 (David J. Muchow & William A. Mogel eds., 1996); Jonathan D. Schneider, Richard M. Lorenzo & James C. Beh, *Natural Gas Transportation*, in 3 ENERGY L. & TRANSACTIONS ch. 83 (David J. Muchow & William A. Mogel eds., 1994).

“government markets” indicates a situation in which, through a statutory or regulatory scheme, the government attempts to improve a market by changing its structure.¹³⁴

2. Excessive Competition

Regulation of excessive competition is based on the theory that in some markets, powerful competition can force sellers to cut prices to the point where many of them will go out of business or lower the quality of their products or services. The theory contemplates that the public will be harmed if firms fail to take safety precautions to save money or if they charge prices higher than they could in a more competitive market.¹³⁵ After the policy literature revealed that the transportation regulation based on this theory unnecessarily raised consumer prices, the federal and state governments deregulated.¹³⁶ Despite similar doubts about agricultural price supports, the government continues to intervene in agricultural markets because

134. Another example of a government market comes from the Clinton administration's failed plan for health care with the proposal for the creation of medical alliances. See Health Security Act, H.R. 3600, 103d Cong. § 5401 (1993). The medical alliances created new market actors for the production and consumption of health care services. See Paul Starr, *Healthy Compromise: Universal Coverage and Managed Competition Under a Cap*, 12 AM. PROSPECT 44 (1993); David U. Himmelstein et al., *Mangled Competition*, 13 AM. PROSPECT 116-21 (1993).

135. SHAPIRO & TOMAIN, *supra* note 39, at 319; KAHN, *supra* note 130, vol. 2, at 172-78; BREYER, *supra* note 117, at 29-30.

136. Government regulation of transportation services addressed excess competition by using rate making to set prices and by controlling the entry and exit of firms. After policy analysts demonstrated that regulation harmed consumers by keeping prices artificially high, transportation was deregulated. See RICHARD H.K. VIETOR, *The Hubris of Regulated Competition: Airlines, 1925-1988*, in REGULATION: ECONOMIC THEORY AND HISTORY 19-58 (Jack High ed., 1991) (airlines); BREYER, *supra* note 117, ch. 12 (trucking); ALBRO MARTIN, RAILROADS TRIUMPHANT: THE GROWTH, REJECTION, & REBIRTH OF A VITAL AMERICAN FORCE 390 (1992) (railroads). The most visible changes occurred in the airline industry where deregulation has been judged to be a qualified success. Consumers have substantially benefited from increased competition, but pockets of competitive problems remain. STEVEN A. MORRISON & CLIFFORD WINSTON, THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION (1986); Peter C. Carstensen, *Evaluating "Deregulation" of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Promises*, 46 WASH. & LEE L. REV. 109, 121 (1989); Alfred Kahn, *Airlines Deregulation—A Mixed Bag, but a Clear Success Nevertheless*, 16 TRANSP. L.J. 229 (1988). But see PAUL S. DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION (1990); HOUSE COMM. ON PUBLIC WORKS AND TRANSP., NATIONAL COMM'N TO ENSURE A STRONG COMPETITIVE AIRLINE INDUSTRY, H.R. REP. NO. 103-22, at 3, 5, 9, 11 (1993) (increasing commission membership, revising qualifications, and providing for Department of Transportation funding outside funding cap for commissions).

of the entrenched political power of agricultural interests.¹³⁷ The press of the budget deficit, however, may cause Congress to reduce, if not end, agricultural price supports.¹³⁸

3. *Economic Rents*

The final area of economic regulation concerns "economic" rents, or the excess profits earned by those who sell a good or service that is in short supply. High prices (and high profits) in markets with scarce goods and services are the product of *normal* market conditions. The justification for reducing such "rents" is to promote "fairness."¹³⁹ The most common type of this regulation today is the control of the prices charged for rental housing in urban areas.¹⁴⁰ Such controls can stabilize neighborhoods and protect poor persons,¹⁴¹ but controls can also introduce economic distortions, such as housing shortfalls and substandard housing stock, particularly if they are widely used to limit rental prices for middle-class residents.¹⁴²

137. The excessive competition argument for government intervention in agriculture is that foodstuffs are necessities that are best provided by a multiplicity of producers. But in light of the huge supply of agricultural commodities, the reality is that government continues to intervene in agricultural markets to protect the profitability of sellers. E.C. PASOUR, JR., *AGRICULTURE AND THE STATE: MARKET PROCESSES AND BUREAUCRACY* (1990). If establishing a floor for the income of farmers justifies price supports, the government should use some form of means-testing to screen out wealthy recipients. As now constituted, wealthy farm owners receive the majority of the benefits from agricultural programs. Elmer W. Learn et al., *American Farm Subsidies: A Bumper Crop*, 84 PUB. INTEREST 66 (1986).

138. Congress passed a new farm bill that is supposed to phase out price supports for most agricultural commodities after seven years. Federal Agriculture Improvement and Reform Act of 1986, Pub. L. No. 104-127, § 171, 110 Stat. 888, 937. Although payments to farmers end after seven years, the legislation may not be the end of subsidies. The price supports under the old legislation were merely suspended and will take effect again in 2002 unless Congress passes legislation to end them. Guy Gugliotta, *Congress Passes Bill Dropping Agricultural Subsidies: Depression-Era Crop Program Replaced by System of Declining Payments over 7 Years*, WASH. POST, Mar. 29, 1996, at A15.

139. SHAPIRO & TOMAIN, *supra* note 39, at 357-71; BREYER, *supra* note 30, at 22.

140. SHAPIRO & TOMAIN, *supra* note 39, at 371-80. There are prominent historical examples of regulation for this purpose, such as wage and price controls during the two world wars and the excess profits tax imposed by President Carter on rents earned by domestic oil producers because of the Arab oil embargo. *Id.* at 357-69.

141. MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 87 (1993); J. Mandel, *Does Rent Control Hurt Tenants?: A Reply to Epstein*, 54 BROOKLYN L. REV. 1267, 1274 (1989).

142. Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741, 753-55 (1988).

B. Social Regulation

In social regulation, as in economic regulation, the government addresses a small number of market failures with a limited set of regulatory tools. Social regulation addresses four market failures: externalities, inadequate information, scarcity, and public goods. The government responds with regulatory or allocative controls.

1. Externalities

The policy literature contains both economic and noneconomic justifications for regulation of pollution, unsafe products, and other externalities, and political deliberations reflect this conflict.¹⁴³ Whatever goals the political system chooses, regulators must also determine which regulatory methods are the most effective at achieving them. At one level, there is an issue concerning the extent to which externalities should be addressed by tort law or regulation.¹⁴⁴ At another level, there is an issue of what regulatory tools

143. Economic theory teaches that if the price of a good does not include the cost of the social injuries that its production generates, the good will be overproduced and overconsumed, and inefficiency results. The pollution a firm emits into the air, for example, creates costs that are external to the firm because it would not pay such costs in an unregulated market. The market may produce an adjustment if the polluter and the victims of the pollution can bargain over the extent to which the firm will pollute the air, but such transactions require market conditions that are unlikely to exist, such as full information about the consequences of the pollution, no significant transaction costs, and the absence of strategic bargaining. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 37-56 (1992); FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW & POLICY 16-44 (1984). In response, the government can seek to reduce pollution to the point where the costs of such regulation exceed its benefits. SHAPIRO & TOMAIN, *supra* note 39, at 403-14. Other analysts view protection of humans and the environment as a social obligation apart from any economic considerations. Under the "social obligation" approach, society may wish to mitigate an environmental or other risk to a greater extent than a cost-benefit test would indicate. *See, e.g.*, K.S. SHRADER-FRECHETTE, RISK & RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS (1991); SAGOFF, *supra* note 124, chs. 4-5 (illustrating weakness of cost-benefit test).

144. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY ch. 6 (1994). Congress's recognition that the tort system did not sufficiently protect the environment, workers, and consumers motivated its enactment of social regulation in the late 1960s and early 1970s. Today, critics argue that juries are too likely to assess excessive liability on the basis of emotion or in reliance on scientific theories that have little or no support among responsible scientists, PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991); PETER W. HUBER, THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (1991), while defenders dispute that these are serious problems. Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993).

should be used. Agency regulation of externalities has relied principally on standard setting or regulations that specify what preventive actions regulated entities must take. Reformers are interested in adopting new forms of standard setting and in replacing this approach with government market solutions.¹⁴⁵ Opponents generally do not dispute the theory behind such proposals but challenge whether they will work as well as existing approaches.¹⁴⁶ Reflecting this disagreement, Congress and agencies have implemented such reforms on a case-by-case basis.¹⁴⁷

2. Inadequate Information

Regulation addressing the problem of inadequate information is uncontroversial,¹⁴⁸ but the method of regulation is not. Regulators can require sellers to disclose information to consumers, such as happens with food labeling,¹⁴⁹ or they can require a seller to have a license that establishes minimum standards before a product or service can be sold, such as happens with pharmaceutical drug regulation by the Food and Drug Administration.¹⁵⁰ The first option enhances the capacity of consumers to make their own product choices. The second option limits the products or services that a consumer might purchase. For this reason, reformers seek to replace licensing schemes with information disclosure.¹⁵¹

145. For example, they would replace command-and-control approaches with more flexible approaches, such as performance standards, and replace (or augment) standard setting with pollution taxes and pollution trading. See SUNSTEIN, *supra* note 18, at 81-82.

146. See, e.g., Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729.

147. See, e.g., Clean Air Act, 42 U.S.C. § 7671f (1994) (requiring emissions trading).

148. A market will operate efficiently only if consumers have adequate information about the qualities of the products they wish to purchase. Economic analysts agree that sellers have economic incentives not to disclose information. Disclosure is costly, it may aid competitors, and it may reduce demand. Consumers respond to negative information about a seller's product by insisting on lower prices, by buying less, or by not buying the product at all. SHAPIRO & TOMAIN, *supra* note 39, ch. 10; TREBILCOCK, *supra* note 128, chs. 5-6.

149. Nutrition Labeling and Education Act of 1990, 21 U.S.C. §§ 301, 343 (1994).

150. Food, Drug, and Cosmetic Act, 21 U.S.C. § 360 (1994).

151. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 10 (1995). Recent attempts by the Food and Drug Administration (FDA) to speed the delivery of drugs, particularly drugs that may combat AIDS, illustrate the reform debate. Early approval may increase the risks of taking a drug because there is less information about it, but the FDA's critics argue that the decision whether to take the drug in such circumstances should be left to the consumer (with a physician's advice) instead of FDA officials. George J. Annas, *Faith (Healing), Hope, and Charity at the FDA: The Politics of AIDS Drug Trials*, 34 VILL. L. REV. 771 (1989).

3. Scarcity

Economic theory suggests no bounds on what should be traded on markets, but society may choose to block certain exchanges for moral, ethical, or other social reasons,¹⁵² such as permitting a person's wealth to determine who obtains a good. Regulation can be used to ban possession of some goods, such as certain drugs or the pelts of animals that are in danger of extinction, or to prohibit market transactions for other activities, such as the adoption of children¹⁵³ or purchase of human organs.¹⁵⁴ If market transactions are prohibited to determine who is entitled to a scarce good, the government must provide some alternative method of allocation, such as a queue, lottery, auction, or allocation according to a public interest standard.¹⁵⁵ The choice of a regulatory tool also poses difficult policy questions and generates political controversy.¹⁵⁶

4. Public Goods

There are both economic and noneconomic justifications for the regulation of public goods. Private markets will not produce or will underproduce public goods if persons who do not pay for such goods can still benefit from them.¹⁵⁷ Further, society may simply find it morally unacceptable to permit

152. See PETER G. BROWN, RESTORING THE PUBLIC TRUST: A FRESH VISION FOR PROGRESSIVE GOVERNMENT IN AMERICA 56 (1994) (discussing blocked exchanges); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 100 (1983) (same).

153. See J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341 (1984); Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

154. See Emanuel Thorne, *Tissue Transplants: The Dilemma of the Body's Growing Value*, 98 PUB. INTEREST 37 (1990) (illustrating how regulation may be used to ban possession of goods).

155. SHAPIRO & TOMAIN, *supra* note 39, at 529-38. An auction is different than market allocation because the government can restrict who bids in the auction. This permits regulators to establish conditions of ownership to service social goals.

156. For example, reformers contend that the Federal Communications Commission should auction radio and television licenses to qualified applicants because ownership is a valuable asset, like oil or timber on government lands, for which the public should receive revenue. See *In re Cowles Fla. Broad., Inc.*, 60 F.C.C. 2d 372, 443-47 (1976); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959). However, broadcasters have been able to use their political power to block such proposals. Similarly, other powerful interests, such as mining companies and cattle ranchers, have successfully used their political influence to obtain government licenses at below-market rates. See, e.g., John C. Lacy, *The Historic Origins of the U.S. Mining Laws and Proposals for Change*, 10 NAT. RESOURCES & ENV'T 13 (1995).

157. Public goods such as education or welfare illustrate this problem. All citizens

some citizens to starve, go uneducated, or be denied life-saving medical treatment.¹⁵⁸ The noneconomic and economic justifications overlap, but an economic approach would consider whether the costs of such programs exceed the benefits, while a noneconomic approach would reject this utilitarian benchmark.

The public generally accepts the idea of government payment for public goods, but agreement breaks down concerning the size of the subsidy, who should pay for it, and what the public should require of those who receive the subsidy. These disputes relate to a lack of agreement about the goals of these programs¹⁵⁹ and to the fact that, when government budgets are tight or declining, the amount spent on one public good affects the amount spent on other public goods.¹⁶⁰ Because resolution of these disputes affects state and local governments and key political constituencies, such as older persons, school teachers, and veterans, these interests can be expected to resist detrimental changes, as recent efforts to reduce the federal budget vividly demonstrate.

The literature on public goods also considers whether the proper regulatory tools are being used. In the present system, federal and state agencies screen potential applicants for welfare, health, educational, job training, and related programs under programs and eligibility standards largely established by the federal government. Reformers claim that block grants and government markets would reduce regulatory failure and save money, but these claims are disputed by other analysts. Opponents respond that, because block grants would cede to the states more (or complete) responsibility to determine what programs to implement and who is eligible, important national interests are likely to be ignored.¹⁶¹ A government market approach

benefit from having an educated citizenry and from welfare programs that reduce crime and social disruption, yet these benefits cannot be denied to persons who do not pay for them. For this reason, it is irrational for an individual to provide resources voluntarily for welfare or public education if others may do so. That individual response multiplied over the population is likely to yield a suboptimal amount of education or welfare assistance. Government can solve the "free-rider" problem by relying on the tax system to pay for such public goods. SHAPIRO & TOMAIN, *supra* note 39, at 605-06, 671-72.

158. JOHN RAWLS, *A THEORY OF JUSTICE* 111-13 (1971).

159. ROBINSON, *supra* note 14, at 21-22, 33. Marmor, Mashaw, and Harvey explain, for example, that there are "at least four fundamental conceptions of purpose that coexist, often uneasily, in the design of American social welfare programs." THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* 23 (1990).

160. ROBINSON, *supra* note 14, at 32 ("The classic public goods model fails to tell us very much about how those trade-offs ought to be made; neither does it describe how they are made in fact.")

161. Proponents of block grants contend that, because state decisionmakers are closer

would replace government provision of goods or services, such as education, with vouchers that recipients could use to choose their own suppliers.¹⁶²

C. Trends and Patterns

This summary of government regulation only touches the surface of developments in the literature and how such policy recommendations are acted on in the political system. Even this limited description, however, suggests that certain common trends and patterns underlie the relationship of policy and politics in the regulatory system. Applying the methodology identified earlier, regulatory analysts consider whether a market failure (economic or noneconomic) exists and which policy tool is the most appropriate to address it. Political actors use this analysis to make the case for legislative or agency decisions, but these decisions also reflect the impact of political influence, particularly in legislatures. These elements of government regulation can be seen in both economic and social regulation.

As this section briefly explained, regulatory analysts have challenged the goals of most forms of economic regulation. Rate setting for public utilities rests on a justifiable policy premise, but the use of government markets is gaining momentum in light of structural changes in utility markets. Agricultural programs and rent controls potentially can serve redistributive goals, but redistribution is difficult to justify as good public policy unless programs are narrowly tailored to benefit only the most needy recipients. Reform is stymied, however, when programs have powerful political sponsors. Such sponsors were unable to save transportation regulation, however, once reformers were able to publicize widely the policy arguments against such regulation.

Regulatory analysts have challenged both the goals of social regulation and the regulatory tools that are used in this area. The debate over goals centers on the extent to which economic considerations should control envi-

to local social problems, states can better determine the efficacy of various alternative programs. Reformers also argue that block grants will permit a reduction in federal spending because states can operate more efficiently without federal restrictions. Opponents respond that there are important federal interests in how social problems are addressed, which may not be taken into account by the states, and they dispute whether any efficiencies that can be derived from block grants will offset the large reductions in federal support that have been proposed.

162. Proponents of vouchers contend that competition for the business of consumers will improve the quality of public services, such as secondary education. *E.g.*, JOHN CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990). Critics respond that choice plans are unlikely to work and that they impose a high cost in terms of (re)introducing school segregation by class and race. *E.g.*, James Lieberman, *Book Review: Voice, Not Choice*, 101 *YALE L.J.* 259 (1991).

ronmental, health and safety, and other consumer protection regulation. The result in the political system, however, will also be influenced by the power of regulated entities, which prefer a more economic orientation, and by the extent to which legislators believe that the public prefers the social goals that these programs now embody. Reformers would also like to replace current approaches to social regulation with more market-oriented approaches. These arguments reflect developments in the policy literature concerning whether new approaches are more appropriate than existing tools. Again, however, outcomes are influenced by political and institutional considerations, such as the impact of changes in welfare programs on states and regulatory beneficiaries.

CONCLUSION

This discussion of government regulation has scholarly and practical consequences. From a scholarly standpoint, the discussion demarcates the boundary between the traditional, formalistic administrative law scholarship and the more normative and substantive study of the regulatory state. Traditional administrative law addresses the issues of how legal procedures are and should be used to establish fair, efficient, and accountable administrative decisionmaking. Government regulation scholarship, in distinction, incorporates rules of law and explores their interaction with policy, politics, and other institutional influences. In short, the new government regulation literature is the study of what we can and should expect of and receive from the machinery of government.

Thus, government regulation scholarship invites discussion of what are the proper goals and tools of the modern state. Identified patterns of regulatory justification and response are important to understand because they form the underpinning of policy disputes concerning regulation. Our model also explains how the political system addresses the issues and arguments raised in the regulatory literature. Although the relationship of policy arguments and political influence is not entirely clear, patterns can be identified that shed light on how regulatory decisions are reached.

As a practical matter, our model invites lawyers and law students to bring policy literature into their arguments on behalf of clients or employers. Contemporary legal disputes are complex, involve statutes and regulations, implicate a variety of interests of differing intensities, are multi-party and often multi-jurisdictional, and require management of future relations as much as resolution of past disputes. In short, good lawyering requires some form of policy analysis skills. To this end, the methodology for regulatory analysis presented here parallels the methodology for case analysis. Using this methodology, the lawyer-policy analyst can assess whether regulation

(or its absence) achieves allocative efficiency, distributive fairness, both, or neither. Having learned this skill, the lawyer-policy analyst can interact with legislatures and agencies, advise clients on strategy, advocate positions, and mediate among conflicting interests and institutions.¹⁶³

Our model and regulatory methodology also suggest the rich research agenda of technical as well as theoretical questions faced by government regulation scholars. Scholars can compile a catalog of regulatory techniques, variations, applications, and limitations and ask which form of regulation is optimal.¹⁶⁴ From this catalog, scholars can explore such issues as what are the synergies and unintended consequences of mixing and matching regulatory goals and tools; the application of multiple tools to complex markets; and the market signals that should initiate regulation and deregulation.

Future research also includes institutional issues: What is the institutional competence of each source of regulation? What patterns of conflict exist among institutions? Are there paradigm situations in which regulation moves from the common law bench to the legislature? Once in the legislature, should regulation take on a legislative form and be administered through entitlements, or should the legislature merely set general goals and defer to agencies for implementation?

There are also important issues concerning the political environment of regulation. How does the regulatory state affect processes of democratic self-governance? Do markets in government regulation exhibit the same abuses in which unorganized groups (small or large) lose contests to small, well-focused groups? Further, do these failures occur in cycles? Are there specific identifiable patterns of political failure? Do interest groups, in their quest for the accumulation of wealth and power, simply move from the market to the legislature to the agency, until the rules for that accumulation change, and then move back again to the market? Is power in the political marketplace accumulated much like financial power in the economic marketplace? If so, are these systemic failures cyclical and ubiquitous?

Finally, the research agenda will examine the normative dimensions of the regulatory state. Can we more fully define economic and noneconomic goals? When or in which circumstances does one dominate the other? How

163. See DAVID L. WEIMER & AIDAN R. VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* ch. 5 (2d ed. 1992); E.S. QUADE, *ANALYSIS FOR PUBLIC DECISIONS* (2d ed. 1989) (illustrating importance of proposed methodology); see also JOE B. STEVENS, *THE ECONOMICS OF COLLECTIVE CHOICE* ch. 2 (1993); JEAN-JACQUES LAFFONT & JEAN TIROLE, *A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION* 1-47 (1993).

164. See Robert A. Katzmann, *Have We Lost the Ability to Govern? The Challenge of Making Public Policy*, 72 OR. L. REV. 231, 242 (1993) (discussing scholars' ability to analyze which form of regulation is optimal).

strong is the preference for market ordering? When and how should government focus on distributional considerations?

The answers to these questions and related issues will come from scholars who work in the fields of law, economics, political science, and history. The answers also involve empirical, interdisciplinary, and theoretical work in an attempt to construct a better, more descriptive, and more predictive model of regulatory behavior. Legal scholars are uniquely situated to contribute to this effort. They are the most familiar with the substance of government regulation, usually have personal experience with the process, and are not limited by their professional training from considering what different disciplines have to say about the regulatory process.

The challenge to the regulatory analyst is to understand the process of regulation and how to improve it. While administrative law scholarship has come to an end, government regulation scholars have their work cut out for them.