Introduction

An Uneasy Commitment to Regulatory Government

In the United States today, mainstream attitudes toward the modern regulatory state are well captured by the joke Woody Allen tells about overhearing a lunch room conversation between two complaining inhabitants of a retirement home:

“The food here is so terrible.”
“Yeah, and always such small portions.”

On the one hand, the regulatory state—“big government,” “the bureaucracy,” “Washington”—is a target of endless criticism. Social commentators, politicians, and academicians routinely rail against the regulatory system. Calls to “downsize” government, reduce “regulatory red tape,” and promote “free enterprise” are perennial, as certain as death and taxes.

In part, this phenomenon owes to the rhetoric of politics, and also to the politics of rhetoric. Aspiring politicians promote themselves by running against big government, while established politicians emphasize their experience in navigating an overextended bureaucracy on behalf of their constituents. Not since the 1960s have either Republicans or Democrats run on a platform that defends big government, much less advocates for increased reliance on regulatory government as a solution to social problems. Thus the last Democrats to occupy the White House, for example, trumpeted their extensive efforts to “reinvent” government by relying more on market-based incentives and less on command and control. Government regulation is something to be tamed, managed, not promoted.

Similarly, academicians are rewarded professionally for debunking political institutions. By long-standing tradition, members of the academy have undertaken to show what is wrong with social and political institutions, to identify their weaknesses and paradoxes, not to celebrate what is right with them, and for good reason. So Ph.D. dissertations on Congress, the executive branch, or particular regulatory agencies far more often expose the imperfections of those institutions than they highlight
their successes, while legal-academic analysis of Supreme Court jurisprudence explains what the Court got wrong, or else right but for the wrong reasons. “All is well” makes for boring academic work. No doubt these dynamics are reinforcing: Critical academic commentary provides scholarly support and theoretical justification for such deregulatory initiatives as the Council on Competitiveness in the 1980s and the Contract with America and Reinventing Government efforts in the 1990s, just as such politicians’ deregulatory initiatives provide scholars critical of regulatory government with a sympathetic and influential audience.

At the same time, however, calls for regulatory reform are in part simply constitutive of the larger march of social progress. Finding ways to deliver more goods and services with smaller expenditures of human and economic resources, including the resources of government itself, is part of the human endeavor. Who could object to reducing truly unnecessary bureaucratic red tape, or finding new ways to exploit market-like incentives where those incentives produce results superior to traditional government regulation? In this light, reform is properly always in fashion.

But again these are partial explanations. For one thing, the question remains why politicians’ calls for regulatory reform always sell, and why, for example, reforming big government is in the United States (but much less so in Germany, Japan, or Sweden) such an important marker of social progress. Part of the answer, too, is that criticism of regulatory government also reflects a long-standing skepticism towards centralized government that, although accentuated in recent decades, has colonial roots. Since the Founding, the legal-political culture of the United States has been characterized by an enduring wariness towards centralized regulatory power, and concomitant commitments instead to free enterprise, autonomy, and localism. Moreover, important periods of political reform—for instance the Progressive movement, and the environmental revolution—saw changes precipitated by grassroots movements, initiatives from the “ground up” rather than the “top down.” Even then, centralized regulatory government was as often viewed as part of the problem—too cozy with business trusts, too friendly to polluters—as it was part of the solution.

And this skepticism toward regulatory government is self-fulfilling. Chronicles of regulatory failures are eventually seen as the norm, to be expected. In turn, the refrain that regulatory government is doomed to fail becomes internalized after repetition. Citizens and commentators come to expect less, and therefore demand less, from regulatory government. Meanwhile, confidence in regulatory institutions comes to be viewed as idealistic. Similarly, proposals to reform rather than abandon regulatory government also come to be seen as Panglossian, hopelessly uninformed.
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Paradoxically, however, this skepticism toward regulatory government may be outweighed by Americans’ apparent commitment to and strong reliance upon centralized regulatory institutions, like Woody Allen’s convalescent home diner who wants more food though it is terrible. After all, regulation is ubiquitous. The work-product of the regulatory state—regulations issued by seemingly innumerable federal regulatory agencies—governs every aspect of modern life. Literally: Working, transacting, traveling, communicating, indeed eating, drinking, and breathing, are all activities governed by federal agencies.

Of course, this ironic reliance on centralized regulatory institutions too has early roots, extending back to the establishment of a national government in place of a federation after the American Revolution. And since the Civil War’s establishment of the primacy of centralized government, Americans have repeatedly turned to federal regulatory government in times of crisis to address the country’s most stubborn problems—from the banking crises and business corruption of the early twentieth century, though the Great Depression, stock market crisis, and labor unrest of the 1930s and 1940s, through the environmental crisis and civil rights revolutions of the 1960s and 1970s, to the threat of terrorism and the creation of the huge new Department of Homeland Security at the beginning of the twenty-first century, to name a few. Thus the evolution of the regulatory state has not been gradual, but rather reflects accelerated growth in response to periods of crisis and national trauma. In this light, regulation seems not only ubiquitous but inevitable.

Thus exists a serious and curious disconnect between the familiar politico-rhetorical treatments as well as academic presentations of regulatory government, on the one hand, and regulatory reality—which reflects heavy reliance upon and even faith in regulatory government—on the other. The modern United States of America is thoroughly committed to regulatory government in actual practice, and yet rhetorically and ideologically that commitment seems awkward, if not hypocritical.

The pages that follow seek to ease part of this tension. Specifically, this book argues that the most influential tradition of scholarly analyses critical of the regulatory state has been oversold. More specifically, it argues that a body of related critical analyses of the regulatory state, “public choice theory,” rests on a seriously incomplete and undertheorized understanding of regulatory government, and furthermore that its empirical predictions are not supported by careful consideration of the evidence about how regulatory agencies operate or what they do. This book then offers an alternative, though in some ways complementary, vision of regulatory government that emphasizes the legal-procedural mechanisms by
which administrative bodies actually regulate. It shows how those mechanisms can be—and on important recent occasions have been—employed to produce regulatory outcomes that promote public interests, that is to say, outcomes that vindicate an uneasy faith in regulatory government.

The central thesis advanced here is that the cynical view of regulation shows far too little attention to the actual processes through which administrative agencies regulate, and that such inattention is largely responsible for the dominant, jaundiced view of regulation. Once the administrative regulatory state is unpacked—once it is considered in the light of its procedural complexities—grim conclusions about the inability of regulatory institutions to advance the general welfare give way to more optimistic assessments. Citizens’ and politicians’ regular reliance on regulatory government now appears less ironic, for if regulatory institutions prove capable of addressing important social problems, then it is little wonder that Americans have created administrative agencies in response to those problems. The effort here, then, is both critical and constructive. It seeks to show what is wrong with the public choice account of regulation, and in particular to highlight what is missing from that account, but at the same time to take certain insights from the public choice theory and to show how those insights can support a much more benign view of the regulatory state.

To anticipate the main theme, the ingredients of a complete understanding of regulation that are missing from the public choice account are largely legal-institutional. That is to say, they concern the legal vehicles—such as the Administrative Procedure Act—through which regulatory agencies translate legislative requirements and commands into particularized regulatory decisions. Most critics of regulatory government skip over, or downplay, administrative law. At the same time, most academic lawyers who focus on administrative law skip over, or downplay, claims about the functions and disappointments of regulation. This book seeks to merge the methodological and conceptual sophistication of the economists and political scientists who focus on regulation, on the one hand, with the attention to the complexities of legal-procedural rules and legal institutions shown by academic lawyers, on the other.

The argument is organized into four parts. Part 1, “The Cynical View of Regulatory Government, and Its Alternatives,” parses the dominant and jaundiced view of regulatory government. Chapter 1 poses the question whether regulation may at times advance public interests, and considers methodological approaches to answering that question. Chapters 2 and 3 scrutinize the public choice theory of regulation by focusing on
its specific claims and on the strengths of its theoretical and empirical underpinnings, concluding that the account rests on shaky ground. Chapter 4 identifies weaknesses in the most ambitious challenges to the public choice theory, and then introduces an alternative account developed and tested throughout the rest of the book.

Part 2, “The Administrative Regulatory State,” switches course. It first considers the institutional and legal complexities of administrative government. Chapter 5 provides a tour of the legal-procedural mechanisms by which regulatory agencies produce authoritative regulatory decisions. Chapter 6 presents basic descriptive data showing the extent to which modern government really is administrative government. Informed by chapters 5 and 6, chapters 7 and 8 develop further the administrative-process approach to regulation introduced in chapter 4.

Part 3, “Public Interested Regulation,” moves from forest to trees. Chapters 9 through 12 present several examples of major regulatory initiatives that advanced social welfare, detailing the decisionmaking procedures the relevant agencies employed and the institutional context in which they regulated. With those case studies in mind, part 4, “Public Choice and Administrative Process,” completes the analysis. It evaluates further the competing pictures of regulatory government presented in parts 1 and 2 in the light of the evidence presented in part 3. Chapters 13 and 14 show how the examples of part 3 undermine the public choice account of regulation, while they provide empirical support for the alternative account of regulation presented here. Finally, chapter 15 considers several important objections to the conclusions of part 4.

To be clear from the start, the thesis of this book is not that regulatory government works well all or even most of the time. It aims neither to foster complacency towards regulatory reform nor to apologize for the regulatory status quo. The more modest ambition of this effort, rather, is to show that cynical but commonplace accounts of the regulatory state have enjoyed an influence that far exceeds their conceptual rigor and empirical support: Regulatory failure is not inevitable. Under certain conditions—conditions that are plausible given the real-world legal-institutional environment in which federal administrative agencies operate—regulatory outcomes can and sometimes do advance broad social interests and increase social welfare. While caution towards regulatory government is to some extent surely healthy, at the same time reliance upon regulatory institutions as the least-worst solution to pressing social problems in an ever-complex world is not misplaced.