

**Economic Justice in the Regulation of Infrastructural Industries:
Electricity, Gas, Water, Telecommunications, Transportation**

**Spring 2025 | M 5:45pm-7:45pm | McD 337
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Table of Contents

Introduction..... 2
Writing Requirement 4
What I hope for you to learn 4
Weekly Questions, Student Pairs, Class Participation..... 6
Grading 6
Communicating with me..... 7
Class Recordings, Syllabus Changes 7
Weekly Topics and Readings..... 7
 Week 1: Course overview: Does economic regulation produce economic justice? Should it?
 (Jan. 13)..... 7
 Week 2: Economic justice: What does it mean? What are we seeking to achieve?
 (Jan. 27)..... 9
 Week 3: Classical economic principles: Do they contribute to justice or do they undermine
 justice? (Feb. 3)..... 10
 Week 4: Regulatory statutes: Whose interests do they promote and protect? (Feb. 10)..... 11
 Week 5: Constitutional provisions: Whose rights do they create? Whose rights do they
 protect? (Feb. 20 *This is a Thursday*)..... 12
 Week 6: Regulatory agencies: How do their designs and practices affect justice? (Feb. 24)13
 Week 7: Electricity (Mar. 10) 14
 Week 8: Natural gas (Mar. 17)..... 14
 Week 9: Drinking water and wastewater (Mar. 24)..... 15
 Week 10: Telecommunications and internet (Mar. 31)..... 16
 Week 11: Ride-Share Transportation (Apr. 7)..... 16
 Week 12: Regulation’s attackers: What are their aims and strategies? (Apr. 14)..... 17
 Week 13: Regulation’s protectors: Strategies to achieve economic justice in regulation
 (Apr. 21)..... 17
Appendix: Semester Paper..... 19

Introduction

Our nation's infrastructure abounds in justice failures:

- In Flint, Michigan, officials subjected thousands of families to lead-poisoned water.
- In Puerto Rico, hurricanes have crippled an electricity infrastructure long neglected by its government-owned, previously unregulated monopoly utility, leaving thousands of families without electricity.
- Wildfires in Maui, arising in part from years of neglect by the utility, plantation owners, and government officials, have left thousands homeless.
- A gas pipeline in San Bruno, California exploded, killing eight people and destroying a neighborhood. The responsible utility, Pacific Gas & Electric, lied about its inspection practices, obstructed justice, and was convicted in federal court of both crimes. The state utility commission imposed a fine of \$1.6 billion, under a statute that, fully applied, would have meant fines exceeding \$100 billion. The same commission has allowed the utility to keep its government-granted franchise to serve as a monopoly.
- Water flooding in coastal Charleston, South Carolina disproportionately affects marginalized communities. The City carries on as a prime tourist destination, leaving the problem unsolved.
- Navajos lack reliable electric supply in most of their territory.
- Internet access in low-income neighborhoods is persistently lower quality than in high-income neighborhoods.
- In the District of Columbia, the government-appointed electricity monopoly, PEPCO, has retained contractors that paid their workers below minimum wage. Informed, the utility and its regulatory commission did nothing.
- New York City's taxi-cab owners are mostly members of minority communities. Many are now hundreds of thousands of dollars in debt, because the value of their medallions (effectively, the license to own and drive a cab) has plummeted. The government and others are still trying to determine who is responsible for the practices that led to inflated, then deflated, prices for the medallions, but there is no doubt about the victims.

Common to each of these situations are two things: economic regulation and economic regulators. One or more public bodies created, encouraged, tolerated, or ignored conditions that allowed private business conduct to produce adverse public outcomes. Private behavior, insufficiently constrained and guided by economic regulation, produced results that disproportionately harmed disadvantaged communities.

This course will examine how economic regulation, and government economic regulators, can advance or impede progress in bringing economic justice to infrastructural industries—industries on which lives, and the nation’s economy, depend. In doing so, this course will advance Institutional Learning Outcome 8, “Ability to think critically about the law’s claim to neutrality and its differential effects on subordinated groups, including those identified by race, gender, indigeneity, and class.” Among the big-picture questions:

- In the context of economic regulation, what is economic justice?
- Does our economic regulation of infrastructural industries produce economic justice? If not, why not? With which actors—industry actors and government actors—does fault lie?
- Does neutral statutory language—bland statutory commands such “just and reasonable rates” “adequate service”, “consistent with the public interest,” “no undue preference or advantage”—have a neutral effect, a pro-justice effect or an anti-justice effect?
- What about constitutional principles—such as the prohibition against government taking of “private property” without “just compensation,” the Due Process Clause, and the Commerce Clause? How do these provisions, and associated court decisions, affect economic-justice outcomes?
- Regulation always involves conflict. People and businesses want its protections without its obstructions. Who are the parties to these conflicts? Do some have unearned advantages, in markets and in government decisionmaking? How do regulatory agency decisionmaking procedures, all influenced by interest groups with conflicting goals and varying willingness and need to compromise those goals, affect economic justice outcomes?
- What do principles of economic justice tell us about what infrastructure products to produce, how to pay for them, where to locate the necessary infrastructure, and who gets to use it and under what terms and conditions?
- Should economic regulation have anything to do with justice? Or should it seek only to improve an industry’s economic performance, leaving matters of justice to other regulatory agencies or to the electoral and legislative processes? (This question is a big one, causing confusion and concern for many.)
- For all these questions, what roles can lawyers play?

Course organization: Week 1 introduces and defines the course large subject area. The course then has three major parts:

- **Part One** presents five building blocks, one week each: theories of justice, fundamental economic principles, typical regulatory statutes, constitutional

provisions, and regulatory institutions. In each of those weeks we ask: Do seemingly neutral legal actions, by legislatures, agencies, and courts, cause adverse outcomes for the disadvantaged?

- **Part Two** applies what we learned in the first six weeks to each of five infrastructural industries: electricity, gas, water, telecommunications, and transportation.
- **Part Three** turns to strategy—one week each on strategies of regulation’s opponents and strategies of regulation’s protectors.

Writing Requirement

This course is an official Writing Requirement course. Semester papers will identify a justice problem in some infrastructural industry affected by economic regulation, then: (a) describe a vision for optimal industry performance, (b) describe the deficiencies in current industry performance, (c) diagnose the problem by identifying the actions and actors that are causing the problem, (d) assess alternative solutions using transparent criteria, and (e) allocate jurisdiction, among various governmental actors, to carry out the solutions.

To repeat the point: Successful problem-solving papers follow a five-part scheme:

- *Vision* for optimal industry performance—all facets
- *Deficient performance*—specific shortfalls relative to the optimal performance
- *Diagnosis*—What are the causes of the shortfalls?
- *Solutions*—What are the solutions for each element of the diagnosis. By what criteria will we judge the solutions?
- *Jurisdiction*—In establishing and enforcing the solutions, what roles should be played by legislature, regulatory agency, and courts? Federal level or state level?

Essential background on the paper-writing process and this course’s writing requirement appear in the **Appendix** to this syllabus.

Caveat: This course is not course about environmental regulation—itsself a separate and rich field. This course focuses on economic regulation—which can have environmental effects, positive and negative. There are, of course, overlaps, so some of our case studies and readings will come from the environmental justice field.

What I hope for you to learn

On completing this course you will be able to—

- articulate alternative definitions of economic justice;
- recognize and critique the multiple and conflicting purposes of economic regulation, then articulate your own law-based definition of the “public interest”—a phrase appearing in nearly every economic regulatory statute;
- recognize how different infrastructural policies produce different effects on economic justice, including whether and how they affect historically and currently disadvantaged groups differentially, including those identified by race, gender, indigeneity, and class;
- assess economic regulatory statutes, economic regulatory decisions, and regulatory agency procedures in terms of their differential effect on different parts of the population, especially historically and currently disadvantaged groups;
- recommend, based on analytical assessments, changes to economic regulatory statutes, decisions, and procedures, to reduce and eventually eliminate differential outcomes that harm historically and currently disadvantaged groups;
- develop a mental file cabinet that stores and organizes the principles that economic regulators use to affect infrastructural industry performance, and how those principles affect economic justice;
- describe the complementary and conflicting roles of competition and regulation, not as ideological poles, not as weapons in a century-long struggle for market control, but as tools one can combine, productively or counterproductively, to improve or diminish a market’s performance for the historically and currently disadvantaged;
- understand how efforts to transform historically monopoly markets into competitive markets, in a way that serves the purpose of economic justice, is exceedingly difficult legally, physically, economically, and politically; and how advocates for various positions mask their real prejudices by misunderstanding, misusing, or coopting broad regulatory language;
- evaluate the effectiveness of a regulatory policy in terms of the multiple dimensions of performance, such as cost, quality, competitiveness, innovation, and equity;
- identify and compare the multiple roles lawyers play in this field; and how those roles make use of experts and expertise from the disciplines of economics, accounting, finance, engineering, management, and politics; and
- contribute to the field by exposing a serious policymaking problem, then identifying and assessing solutions in a substantial scholarly paper.

Weekly Questions, Student Pairs, Class Participation

Weekly questions: By 4p each Sunday before class, each student should submit to Canvas a question that they wish us all to probe in class. The question should be based on that week's reading. It can be question about anything—clarification of a difficult topic, a critique of something in the readings, a possible application of the week's readings to the student's paper topic, anything. On Sunday evenings I will organize the questions by subtopic and send to all via Canvas Announcement. Your questions will help determine how we spend our class time. All should read, and think about, a few of the questions before class.

Pairing with student colleague: I will create pairs of students in ABC order. Each pair member will be the other member's colleague—available to discuss, debate, devil-advocate, and advise. The best use of your pair colleague is to discuss your research papers. This approach—strongly recommended by pedagogical studies—helps all students master their paper topics, while diversifying and deepening each student's exposure to their peers' topics. *Meeting with your student colleague each week for 30 minutes is a course requirement.* In the law practice world, even those who work alone do not work alone.

Class participation: Each week I try to call on each student. Doing so gives everyone crucial practice thinking on their feet and articulating orally—crucial skills for a successful legal career. It also adds value to the class, because everyone has something that they can teach to others. Please don't interpret my close questioning as unfriendly. Challenges make muscles.

Grading

20%: Class participation. This portion of the grade reflects the quality of your weekly questions and your in-class contributions. *Weekly attendance is mandatory.* Family emergency, your illness, religious observations or unavoidable interview conflicts are grounds for missing class, but please try to alert me ahead of time. If you do miss class, be sure to access the recording. I always offer class-missing students a chance to meet with me after they've watched the recording, so that they have a chance to engage with me like their peers did.

80%: Final semester paper: For the paper, aim for professional quality. If you start early, sweat out the first 5 weeks, read prior successful papers (see the Canvas Module labeled Assets for Excellence), and leave yourself time to rethink and revise after your meetings with me, you will have a good shot at excellence. And your April and May will be calmer.

Communicating with Me

You can communicate with me in two ways. First, I will meet with each three-credit student three times to discuss the paper. We will work out those scheduled slots after the first class. Second, you can email me ahead for additional appointments to talk by Zoom. When you email for a Zoom meeting, indicate the purpose of the meeting and *all your available time slots (afternoons and eves) over the next week*. I will select a slot and inform you by email. For these meetings, always use my personal zoom url: <https://zoom.us/j/8444938186>.

Class Recordings, Syllabus Changes

The school will record all classes, with recordings available to you as you wish.

This syllabus is accurate as of the day you receive it. Minor changes are possible; I will announce them well before they become relevant.

Weekly Topics and Readings

Readings with an asterisk (*) are required; all other readings are optional. Readings are either on Canvas in the appropriate week's module, or are available from the web.

Week 1: Course overview: Does economic regulation produce economic justice? Should it? (Jan. 13)

a. What is economic regulation?

Trillions of dollars flow annually from customers to investors, through companies that build infrastructure and provide infrastructure services. Most of these companies engage in actions that are regulated by state agencies, federal agencies, or both. Some are regulated by no agency.

The agencies that make decisions about these trillions of dollars are economic regulatory agencies. They regulate—in fact all regulation regulates—the *actions of actors*. Economic regulation *constrains or prohibits, encourages or mandates*, the actions of actors. The aim of economic regulation should be to cause each actor's actions to align with some vision for the “public interest”—as that phrase is defined by the regulatory statute, or by the regulatory agencies responsible for carrying out the statute's commands.

The assumption underlying all regulation—think of speed limits—is that private conduct, unregulated, will produce results inconsistent with the public interest. The purpose of all regulation, therefore, is performance—performance of the industry whose actors and actions we are regulating. For those concerned with economic justice, the central question is this: For

any particular industry, what is our desired performance? And to produce that performance, do we depend on markets alone, do we depend on economic regulation alone, or do we use a combination? And then: Do we confine economic regulation's purpose to economic performance, ignoring other measures of performance such as justice? Or do we delegate justice concerns to some agency—either the economic regulatory agency or some other regulatory agency?

b. Tour of the course's subjects

To create a policy on economic justice in economic regulation, there are five building blocks, each of which will occupy a week:

- *Economic justice*: What does it mean? What are we seeking to achieve?
- *Classical economic principles*: What are they? Do they contribute to justice or do they undermine justice?
- *Regulatory statutes*: What interests, and whose interests, do they promote and protect?
- *Constitutional provisions*: What interests, and whose interests, do they create and protect?
- *Regulatory institutions*: How do their designs and practices affect justice?

We then will look at examples of justice challenges in five industries:

- Electricity
- Gas
- Drinking water and waste water
- Telecommunications and internet
- Intra-metropolitan transportation

Finally, we will study strategies to achieve economic justice. First we will learn about those who attack regulation in the courts and before agencies, by replacing *Chevron* with *Loper* and mounting challenges using what some label a “major questions” doctrine. Then we will study strategies available to regulation's protectors.

Week 1 Readings

- **NAACP v. Fed Power Comm'n*, 425 U.S. 662 (1976).
- *Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (2021), Chapter 1. (on Canvas under Week 1)

- *Hempling, *Preside or Lead? The Attributes and Actions of Effective Regulators* (2013), Essays 11, 12, and 30 (pp. 47-54). (on Canvas)
- *National Regulatory Research Institute, *Effective Regulation: Guidance for Public Interest Decisionmakers*. Read any one of the short chapters on the major regulated utility industries: electricity, gas, water, or telecommunications. (on Canvas under Assets for Excellence)

Part One

Building blocks:

What is economic justice? What is economic regulation? With what tools can economic regulators pursue economic justice?

Week 2: Economic justice: What does it mean? What are we seeking to achieve? (Jan. 27)

What is economic justice? Is it pure economic efficiency, with all consumers bearing the costs they cause, and all sellers receiving rewards proportionate to their merits? Is it pure economic efficiency, but amended as necessary to redress past and present mistreatment? Is it protection from the random distribution of economic bad luck? Is it elimination of mechanisms that provide a disproportionate share of benefits to the lucky and better off, and disproportionate share of costs to the worse off? Is it valuing all lives the same, instead of valuing different lives differently? Can we define economic justice in a way that avoids taking from X to benefit Y, or does existing injustice make those transfers necessary?

Week 2 Readings

- *Hempling handout: *Excerpts on Justice* (materials from Rawls, Friedman, Kant, Bentham, others). (on Canvas)
- *”The Democrats are in Trouble—This Man Can Save Them” (about philosopher John Rawls). (on Canvas)
- *Pope Francis, Encyclical Letter *On Fraternity and Social Friendship*, https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_ enciclica-fratelli-tutti.html. (Read paragraphs 1-8, 18-21, 29-31, 118-120, 124-127, 137-138, 163-169, 222-224).
- *Pope Francis on the environment, *Laudato si* (2015), <https://www.vatican.va/content/francesco/en/encyclicals/documents/papa->

francesco_20150524_ enciclica-laudato-si.html. (Read paragraphs 1-62, 93-95, 101-162, 163-175, 176-181).

- *Indigenous economic theories
 - <https://www.iied.org/heres-why-indigenous-economics-key-saving-nature>.
 - <https://theconversation.com/recognizing-the-transformational-potential-of-indigenous-led-conservation-economies-187586>.
- Dworkin and Savacool, “Energy justice: Conceptual insights and practical applications” (on Canvas)

Week 3: Classical economic principles: Do they contribute to justice or do they undermine justice? (Feb. 3)

Conventional economic regulation aims, in theory, to achieve *economic efficiency*: biggest bang for the buck, no waste, no excess profits, no price-gouging, no free lunch, everyone bears the cost they cause, everyone benefits commensurate with their productivity. One can question whether these aims achieve justice. One can also question whether those who carry out economic regulation truly pursue these objectives.

First, though, we need to understand some economic basics. That understanding will equip us to diagnose and solve problems with professional skill. A short list of the economic basics includes: rationales for government intervention (public goods, private goods, market failures, subsidies); prices (demand curves, supply curves); types of cost (fixed cost, variable cost, marginal cost, incremental cost); investment analysis (opportunity cost of capital, time value of money, benefit/cost ratio, hurdle rate, internal rate of return, risk and uncertainty); market structure (competitive markets vs. regulated monopoly markets).

Once we understand these concepts, we will ask: Are they neutral? Or do they, inherently or as applied, influence justice outcomes?

Week 3 Readings

- *Hempling handout: Excerpts from Krugman’s *Microeconomics*. (on Canvas)
- *Value of a life
 - U.S. Dept. of Transportation memo (Aug. 8, 2016)
<https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf>;
 - “Putting a value on human life” (*New York Times* 2020). (on Canvas)

- C. Cecot, Efficiency and Equity in Regulation, 46 Vanderbilt Law Review 361 (March 2023). (on Canvas)
- *Lisa Heinzerling, Climate Change, Racial Justice, and Cost-Benefit Analysis, LAW & POL. ECON. PROJECT: SYMP. ON THE FUTURE OF COST-BENEFIT ANALYSIS (Sept. 28, 2021), <https://lpeproject.org/blog/climate-change-racial-justice-and-cost-benefit-analysis/>.

Week 4: Regulatory statutes: Whose interests do they promote and protect? (Feb. 10)

All economic regulation focuses on the actions of industry actors. Economic regulation is authorized and constrained by substantive statutes and procedural statutes. Across infrastructural industries, these statutes have common language.

Substantive statutes authorize and constrain actions by sellers. These statutes typically require that the actions of regulators and regulated entities be “consistent with the public interest.” The seller’s rates, terms, and conditions must be “just and reasonable,” and the seller may not grant to any customer an “undue preference or advantage.”

Procedural statutes authorize and constrain actions by regulatory agencies. Agencies act through rulemaking and adjudication, both subject to judicial review. Agency actions must be based on fair procedures and substantial evidence, and must not be arbitrary and capricious.

Thousands of times over a career, lawyers and agencies repeat these words, often without defining them. Are these terms neutral, or do they affect justice? For a given statute, what is the “public interest”? What makes one company’s rates “just and reasonable” and another company’s rates unjust and unreasonable? If it is unlawful to grant any undue preference or advantage, why is it that so many customers of infrastructural services receive preferences and advantages while others receive poor service? How can procedures be fair and nonarbitrary when participation in a typical regulatory proceeding requires hundreds of thousands of dollars in lawyer and witness costs?

Examples of specific questions we will consider: Does regulatory price-setting reward infrastructure construction more than energy conservation? Is it appropriate for a CEO’s compensation to be in conflict with customers’ needs? Is it appropriate for utilities selling electricity, gas, and water—services people need to live—to raise prices during shortages? What are the pros and cons—legally and otherwise—of providing discounts to the disadvantaged?

Week 4 Readings

- *Hempling, *Regulating Public Utility Performance*, Ch. 6.A, 6.B (pp. 251-272). (on Canvas)

- *”Ratemaking in 30 minutes.” (on Canvas)
- Filipink, Serving the “Public Interest” Traditional vs Expansive Utility Regulation (2009). (on Canvas)
- *Hempling, *Preside or Lead?*, Essays 26, 27, 28. (on Canvas, in Assets for Excellence)

Week 5: Constitutional provisions: Whose rights do they create? Whose rights do they protect? (Feb. 20 *This is a Thursday*)

Regulatory statutes, and the actions of economic regulators, are constrained by constitutional provisions—most prominently the Due Process Clause, the Takings Clause, the Commerce Clause, the Equal Protection Clause, and the First Amendment. Do these provisions, as applied by economic regulators and their reviewing courts, contribute to justice or do they deny justice?

For example: The Equal Protection Clause does not guarantee equal economic treatment. The Takings Clause protects shareholders but not customers. The Supreme Court has interpreted the Commerce Clause to limit Congress’s power to regulate the provision of health care; the Court is also fracturing over the powers of states to influence economic behavior in other states. The Court has applied the First Amendment to limit how economic regulators can address profit-oriented advertising by public utilities that the government protects from competition.

Week 5 Readings (*asterisk items required; others optional)

- **Federalist Papers*, Nos. 10, 12 (all related to economics and politics) (available on web).

Equal Protection Clause

- **San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (access to free public education is not a “fundamental right” under the Constitution).

Takings Clause

- *Kelo v. City of New London*, 545 U.S. 469 (2005).

Commerce Clause

- **Katzenbach v. McClung*, 379 U.S. 294 (1964) (Olly’s BBQ).
- *National Pork Producers Council v. Ross* (U.S. 2023).

- <https://crsreports.congress.gov/product/pdf/LSB/LSB11031#:~:text=On%20May%2011%2C%202023%2C%20the,National%20Pork%20Producers%20Council%20v.>
- *General Motors v Tracy*, 519 U.S. 278 (1997).
- *Nat'l Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012).

First Amendment

- **Central Hudson Gas & Elect. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)

Week 6: Regulatory agencies: How do their designs and practices affect justice? (Feb. 24)

Regulatory agencies, and the businesses they regulate, exercise powers over actors and actions that affect over trillions of dollars of investments—investments that in turn affect hundreds of millions of people. The question for this course is whether these agencies' designs and practices advance or impede justice. We will address these topics:

- Economic regulation's purposes: Industry performance, fair treatment of investors and customers.
- Economic regulation's general topics: Market structure; pricing; corporate structure, mergers and acquisitions; jurisdictional relationship between federal and state.
- Regulated entities, their motivations, and their incentives: The profit motive, the public-service motive, the survival motive, and the dominance motive.
- Regulatory procedures: Do they promote or discourage equity? Rulemaking, adjudication, alternative dispute resolution, and "consensus."
- Regulatory enforcement: Fines, penalties, franchise revocation.
- Regulators' tools: Action-prescriptive standards, outcome standards, market-based approaches, "incentives" (positive and negative).

Week 6 Readings

- *Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (2021), reread ch. 1. (on Canvas under Week 1)
- *Regulatory litigation diagram. (on Canvas)

- *Hempling Presentation to California Public Utilities Commission on “Culture of Entitlement” (on Canvas)
- *Hempling presentation to Mexico energy regulators, on distributive justice in utility regulation (on Canvas)
- *Hempling, *Preside or Lead?* Essays 50-53, 55. (on Canvas under Assets for Excellence)

Part Two

Investigations of Economic Justice in Specific Industries

Week 7: Electricity (Mar. 10)

Electricity-related justice issues include: planning for and addressing wildfires, Puerto Rico’s historically under-supported generation and transmission systems; affluent families’ preferential access to solar energy; the location of electric vehicle charging stations in well-off neighborhoods; undergrounding of distribution lines for aesthetic and reliability reasons; unequal access to energy efficiency assistance—such as replacing gas appliances with electric appliances; and insufficiency of electric service on tribal reservations.

Week 7 Readings

- *Hempling, *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Consolidation and Corporate Complication* (2020), Tutorial on electric industry. (on Canvas)
- *E. Baker, et al, Metrics for Decision-making in Energy Justice. (on Canvas)
- *Gabriel Chan and Alexandra B. Klass, Regulating for Energy Justice, 97 *N.Y.U. L. Rev.* 1426 (Nov. 2022) (footnotes optional). (on Canvas)

Week 8: Natural gas (Mar. 17)

Gas-related justice issues include local monopoly gas company efforts to cause customers to pay for new gas infrastructure that electrification will make unnecessary; fatal explosions from aging pipelines; efforts to support low-income energy needs with underground thermal heating systems.

Week 8 Readings

- *National Regulatory Research Institute, *Effective Regulation: Guidance for Public Interest Decisionmakers*. Read chapter on gas. (on Canvas under Assets for Excellence)
- *California Public Utilities Commission, *Decision On Fines And Remedies To Be Imposed On Pacific Gas And Electric Company For Specific Violations In Connection With The Operation And Practices Of Its Natural Gas Transmission System Pipelines*, Decision 15-04-024 (April 9, 2015), 2015 Cal. PUC LEXIS 230 (use the version on Canvas, highlighted sections only, through p. 26/238)
- *MD OPC Gas Planning Petition. (on Canvas) (though p.42 only)
- *MD PSC Order on gas appliance incentives (paras. 32-51 only). (on Canvas)
- *VIEC report on gas appliance incentives (pp. 26-28 only). (on Canvas)

Week 9: Drinking water and wastewater (Mar. 24)

Water-related justice issues include lead in water pipes (the Flint, Michigan example); unequal attention to wastewater treatment, leading to unsafe conditions in disadvantaged neighborhoods; and water flooding and storm vulnerability in coastal cities, with disproportionate effects on disadvantaged neighborhoods (examples in New Orleans, Louisiana and Charleston, South Carolina).

Week 9 Readings

- *National Regulatory Research Institute, *Effective Regulation: Guidance for Public Interest Decisionmakers*. Read chapter on water. (on Canvas, in Assets for Excellence)
- *Blame for Flint Water Crisis. (on Canvas)
- *<https://www.epa.gov/npdes/combined-sewer-overflows-csos>
- *<https://wilderutopia.com/ecojustice-radio/charleston-race-water-and-the-coming-storm/>
- *<https://sclawreview.org/article/pfas-in-charleston-s-c-a-review-of-pollution-regulatory-issues-and-potential-solutions/>

Week 10: Telecommunications and internet (Mar. 31)

The prominent justice issue in telecommunications is access to the internet for disadvantaged neighborhoods and rural areas; and industry-created obstacles to “net neutrality” (meaning owners of the internet highways not discriminating when granting access to content).

Week 10 Readings

- *National Regulatory Research Institute, *Effective Regulation: Guidance for Public Interest Decisionmakers*. Reread chapter on telecommunications. (on Canvas in Assets for Excellence)
- **Restoring Internet Freedom*, FCC 17-166, WC Docket No. 17-108, Dissent of Commissioner Clyburn. (on Canvas)
- *Laura E. Bailey and Nanjala Nyabola, “Digital Equity as an Enabling Platform for Equality and Inclusion” (June 2021). (on Canvas)
- Adie Tomer, Lara Fishbane, Angela Siefer, and Bill Callahan, *Digital Prosperity: How Broadband Can Deliver Health And Equity To All Communities* (Brookings Feb. 2020). (on Canvas)
- Kevin Werbach, *A Capabilities Approach To Communications Equity*

Week 11: Ride-Share Transportation (Apr. 7)

Justice issues include the treatment of gig drivers by companies like Uber and Lyft; the indebtedness suffered by low-income taxi drivers in New York City because the value of their “medallions” has declined; and discrimination in the planning of intra-metropolitan travel, where stark differences exist in who drives, who rides the trains, and who takes the buses.

Week 11 Readings

- *Brian M. Rosenthal, ‘They Were Conned’: How Reckless Loans Devastated a Generation of Taxi Drivers, *THE NEW YORK TIMES*, May 19, 2019, <https://www.nytimes.com/2019/05/19/nyregion/nyc-taxis-medallions-suicides.html?module=inline>.
- Rosenthal, “As Thousands of Tax Drivers were trapped in loans, top officials counted the money, <https://www.nytimes.com/2019/05/19/nyregion/taxi-medallions.html>.
- *New York City rule on help for medallion owners: https://www.nyc.gov/assets/tlc/downloads/pdf/MRP_3_for_Mayor_to_sign.pdf

- *David K. Suska, Regulatory Takings and Ridesharing: Just Compensation for Taxi Medallion Owners, 19 *N.Y.U. J. Legis. & Pub. Pol’y* 183 (2016)

Part Three

Strategies to Achieve Justice

Week 12: Regulation’s attackers: What are their aims and strategies? (Apr. 14)

Do regulation’s attackers’ private aims conflict with the public interest? Or are some forms of regulation contrary to the public interest? In economic regulation the conflict is usually about money or control—pricing, profit, and market dominance. How the conflict gets resolved affects industry efficiency, innovation, and the quality of citizens’ lives.

The conventional strategy for regulation’s attackers was to weaken the specific regulations that affect them, through a variety of methods generically described as “regulatory capture.” Today, we see a broader strategy—of attacking what critics call “the administrative state.” The attacks, which have gotten the Supreme Court’s attention, include (a) eliminating the *Chevron* doctrine; (b) using what the attackers call the “major questions doctrine” to question regulators’ authority to apply broad statutory language; and (c) reducing the role of agency adjudication, including its use of administrative law judges.

Week 12 Readings

- *Hempling, “Regulatory Capture: Sources and Solutions,” Emory Corporate Governance and Accountability Review Vol. 1, Issue 1 (August 2014), available at <http://law.emory.edu/ecgar/content/volume-1/issue-1/essays/regulatory-capture.html>.
- *Harry Frankfurt, *On Bullshit*
- **Loper v. Raimondo* (U.S. 2024)
- *Chevron v. NRDC*, 467 U.S. 837 (1984)
- **City of Arlington v. FCC*, 133 S.Ct. 1863 (2013)
- Deacon and Litman, “The New Major Questions Doctrine,” 109 *Va. L. Rev.* 1009 (2023)

Week 13: Regulation’s protectors: Strategies to achieve economic justice in regulation (Apr. 21)

This final session assesses the role of economic regulation in efforts to pursue economic justice. Is economic regulation the source of the justice problem? Or does the problem precede economic regulators' involvement? Should the solutions to justice problems lie economic regulators, or do the solutions belong with legislative bodies—where those bodies would declare the public-interest values, then delegate to economic regulators the responsibility to inject those values into the industries they regulate? Do economic regulators read their statutes too narrowly—or do regulatory statutes need updating?

In all these questions, what roles can lawyers and subject-matter experts play—before legislative bodies, regulatory agencies, and courts?

Week 13 Readings

- *S Baker, *Anti-Resilience: Anti-Resilience: A Roadmap for Transformational Justice within the Energy System*, 54 *Harvard Civil Rights-Civil Liberties Law Review* 1 (read only pdf pp. 1-27, 38-48). (on Canvas)
- **NAACP v. Fed Power Comm'n*, 425 U.S. 662 (1976) (in Module for Week
- Hempling, *Preside or Lead?*, Essays 1-10. (on Canvas, in Assets for Excellence)
- George Lakoff, *The All New Don't Think of an Elephant*

- *Insights from George Lakoff, Professor of Linguistics

https://newsarchive.berkeley.edu/news/media/releases/2003/10/27_lakoff.shtml

https://newsarchive.berkeley.edu/news/media/releases/2003/10/27_lakoff_p2.shtml

https://www.youtube.com/watch?v=_OC-aS_QyHU

https://www.youtube.com/watch?v=S_CWBjyIERY

- *Milton Friedman on Business Responsibility. (on Canvas)

Appendix: Semester Paper

This course satisfies Georgetown's Writing Requirement for JD students. Under the Writing Requirement rules, each three-credit student (a) creates a thesis statement, an abstract and outline, and a polished draft; then (b) meets with me after each of those submissions to discuss my comments on them; then (c) produces a 6000-word paper of publishable quality (for this course, 5900-6100, not counting table of contents or footnotes—but don't cram text into footnotes, like I used to do before courts replaced page limits with word limits). The deadlines below reflect these requirements.

LLM students are two-credit students. They do not have to take the three steps; they need only submit a final paper of 4000 words (for this course, 3900-4100, not counting table of contents or footnotes).

About paper topics: In the Assets for Excellence module, take a look at the titles of prior student papers. Notice how broad is the range and how rich is the substance. How do you choose a topic? Consider asking these questions, in sequence:

1. *What problem do you wish to solve? More specifically: For the industry of your interest, what about its performance is suboptimal?*
2. *Which actions, of which actors, need to change so that the industry's performance satisfies your vision for its performance?*
3. *What regulatory decisions—whether by legislation, rulemaking or adjudication, federal or state or both—are necessary to cause those actors to change those actions?*

Why these questions? The purpose of regulation is performance. The effective regulator (a) has a vision for industry performance; (b) identifies the deficiencies in industry performance; (c) identifies the industry actors and actions that conflict with that vision for performance; then (c) designs legislative or regulatory solutions that align those actors and actions with the desired performance. Students have applied this analytical approach to diverse industries, from renewable energy sellers' market entry to Youtube's and Facebook's market power, to the dating app industry, and to the commercial sperm-bank industry.

So my recommendation: For now, choose a few industries and services that interest you. Do some reading on each industry's current challenges, including the actors and actions that are creating or resolving those challenges. Develop your own public interest vision for that industry's performance. Then start thinking about the questions above.

Prior to the thesis statement—*indeed at any time, starting now*—you can contact me to discuss your interests. I'm not expecting you to know this field before you've taken the course. The more help I give you and the earlier I give it, the better your chance at success.

Here are the deadlines associated with the semester papers:

Week 3 ***Thesis statement (due to Canvas Sat. February 1, 4pm):*** The thesis statement is a one- or two-paragraph description of the problem or problems you wish to solve. Include enough detail, based on enough reading and research, so that I can learn the topic and give you guidance.

Filename: lastname.thesis

Week 6 ***Abstract and outline (due to Canvas Oct. Saturday, Feb. 15, 4pm):*** You will prepare these items after doing substantial research and thinking. They should present the regulatory challenge you intend to solve, and your current plan for solving it. The abstract is a full-page, single-spaced description of the problem and plan, written so a layperson (like me, because you will quickly know more about your topic than I will) can understand it. The outline is detailed, resembling what will be the table of contents to your paper. *Each element of this multi-level outline has complete sentences* (which can be questions at this point, or propositions you intend to test, rather than actual conclusions), showing a logical structure of presentation and reasoning. It is customary for the outline to change during the research and writing process, but at this stage it still should have clarity and coherence.

File name: lastname.abstract.

These first five weeks are crucial, because a detailed, logical outline is the basis for productive discussions with me, and for a successful final paper. On Canvas, under Assets for Excellence, are examples of abstracts and outlines that led to successful papers. Aim to replicate that level of detail and clarity. Every year, I see a straight line from outlines that look like those on Canvas and papers that succeed; and an equally straight line from outlines that lack the Canvas quality and papers that don't succeed.

Sharing tentative ideas: During the researching, outlining, and writing process, use your pair member to test ideas. Take risks and learn. The earlier you do so, the more likely your final paper will succeed.

Week 9: ***Full, polished draft (due to Canvas Oct. Saturday, Mar. 22, 4pm):*** This draft should reflect your best work. It should not be a mere draft; it should be what you consider to be your best, final product. That way, I can focus my attention on your reasoning and engage with you as a colleague. Otherwise our interaction risks being distracted by problems of clarity, organization, or writing glitches that you likely would have solved yourself. I learned this the hard way: *Never submit to a boss or a client—or a professor—something that is not your best work, merely*

because it is a “draft.” Ok, at this stage not every footnote need be bluebooked—but everything else about the draft should be polished. Exception: It is fine if there are some elements to the problem that you have not yet solved, the purpose of the draft being to at least get the problem stated with crystal clarity so that we can discuss it.

Filename: lastname.draft

May 5: **Final paper:** Deliver the final paper to *Canvas* by the school’s official deadline: **Monday, May 5** at 5pm. Use proper Bluebook form. Margins should be about one inch (top, bottom, left, right), the paper should be double-spaced (except for footnotes), and the typeface should be 12-point Times New Roman (including footnotes).

Filename: lastname.finalpaper.doc. Please do not wait until 4.55pm to submit the paper. One glitch and the paper’s late, then all kinds of official people above my pay grade get involved.

My evaluative criteria: I assess your papers the way law firm partners assess associates’ work, the way judges assess parties’ submissions—by asking this question: *How well did you teach the reader?* I assess six categories: (a) clarity of your purpose, (b) logic of your organization, (c) analytical depth, (d) objectivity, (e) clarity of the writing, and (f) accuracy of the footnoting. See “Suggestions for Producing a High-Quality Paper” on Canvas in the “Assets for Excellence” module.

Three of my former students have had their semester papers published in prominent industry journals. Another student’s paper won first place in a national competition sponsored by the *Berkeley Technology Law Journal*. One example is in the Assets for Excellence module.