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Regulatory Education and Its Reform

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An Educational Agenda for the Age of Statutes

A. The Regulatory Canon

Ours is unquestionably an Age of Statutes. Yet the comprehensive study of statutes, the legal lifeblood of the regulatory state, is a relatively recent phenomenon. Law school courses in legislation have begun to bridge this gap. The substantive law underlying the most economically sophisticated statutes, however, continues to elude American law schools. What Robert Weisberg said fifteen years ago of statutory interpretation befits economic regulation today: "nothing else as important in the law receives so little attention." Oddly enough, the law of regulated industries seems simultaneously too practical and too theoretical to attract much pedagogical attention. Some professors apparently prefer to teach economic analysis of law at the highest possible level of abstraction, while others focus on specific bodies of law such as banking, food and drug regulation, or communications. The vast middle ground has attracted relatively little classroom coverage. This state of affairs bodes ill for the legal profession and the public at large. A generation of lawyers unschooled in regulatory matters is doomed to offer little resistance against the iron triangle of self-serving industries, uninformed legislators, and captured bureaucrats.

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1 See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1-7 (1982).
This large pedagogical gap justifies what is otherwise a disfavored form of legal scholarship: a review of a law school casebook.\(^4\) To be sure, the law of regulated industries has become so immense, and the number of intellectually distinct perspectives on it so great, that no casebook can comprehensively cover the subject. What Jerome Frank said of agriculture and its regulation in the 1940s applies with exponentially greater force today to the multifaceted law of regulated industries: the field has become "so vast that fully to comprehend [it] would require an almost universal knowledge ranging from [the natural sciences] to the niceties of the legislative, judicial and administrative processes of government."\(^5\) In a field so vital yet underemphasized, every classroom text has a fighting chance to proclaim a vision of economic regulation, akin to the paradigm achieved by the Hart and Wechsler casebook\(^6\) in federal jurisdiction.\(^7\) As "[a]dministrative law scholarship... reach[es] the end of the questions it may pose and answer,"\(^8\) the imminent collapse of a purely process-based regulatory paradigm signals a uniquely opportune moment for establishing a new, unequivocally substantive approach.

Successful teaching of the law of regulated industries depends on some kind of canon. Only by adopting or crafting a canon can anyone hope to organize a subject that cuts across different sectors of the economy and seemingly unrelated bodies of law. To be sure, even a field such as constitutional law, which is unified to a great extent by a single document, a shared historical tradition, and a centralized interpretive institution, can be riven by bitter disputes over the existence of a canon or even the possibility of one.\(^9\) What is blood sport for constitutional law, however, is pedagogical lifeblood for regulated industries. Unless the legal academy can reach some modest, provisional consensus about the content of a course in regulated industries, individual professors will slowly wither in a futile effort to guide

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4 See Janet Ainsworth, Law in (Case)books, Law (School) in Action: The Case for Casebook Reviews, 20 SEATTLE U. L. REV. 271, 272 (1997) ("Once published, casebooks are largely ignored by legal scholars within the pages of law reviews. . . . One could be forgiven for concluding that casebooks are the Rodney Dangerfield of legal scholarship—they just get no respect.").

5 Queensboro Farms Prods., Inc. v. Wickard, 137 F.2d 969, 975 (2d Cir. 1943) (Frank, J.).


7 See Richard H. Fallon, Jr., Reflections on the Hart and Wechsler Paradigm, 47 VAND. L. REV. 953, 955-57, 960 (1994). This is not to suggest that the "paradigm" established by a prominent casebook will win universal acclaim. The Hart and Wechsler paradigm has come under withering attack, see Michael Wells, Who's Afraid of Henry Hart?, 14 CONST. COMMENTARY 175, 176 (1997); Michael Wells, Busting the Hart & Wechsler Paradigm, 11 CONST. COMMENTARY 357 (1994-95), as did the vision of contract law suggested by JOHN P. DAWSON ET AL., CASES AND COMMENT ON CONTRACTS (4th ed. 1982), see Mary Joe Frug, Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook, 34 AM. U. L. REV. 1065 (1985).


their students through competing statutes and multiple regulatory agencies.

The real contest lies in determining the content of the regulatory canon. The twelve decades separating *Munn v. Illinois* \(^{10}\) and the invention of the telephone \(^{11}\) from the Telecommunications Act of 1996 \(^{12}\) span an impressive amount of historical and jurisprudential terrain. The core regulatory canon consists of the leading controversies arising from the business of the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Power Commission (later the Federal Energy Regulatory Commission), the Federal Communications Commission, and their state-law counterparts, plus the intellectual road map that has charted the work of these agencies across the decades. Industries such as "intercity buses, cable television, and water supply systems" \(^{3}\) fit comfortably within this paradigm. \(^{13}\) At an extreme, we might even contemplate the software business as the next great regulated industry. \(^{14}\)

On the other hand, concerns such as environmental integrity, workplace safety, equal employment opportunity, and consumer and investor protection have broadened but not displaced the conventional regulatory agenda. "Social regulation" should be distinguished from "economic regulation in the conventional sense." \(^{15}\) Unlike the Federal Power Act of 1920 \(^{16}\) or the Natural Gas Act of 1938 \(^{17}\), social regulation affects the entire economy (or at least large segments thereof). It neither confers special advantages nor imposes unique burdens on any one industry, at least not by design. From this point of view, the Equal Employment Opportunity Commission is no more a regulatory agency than the Internal Revenue Service.

Perhaps I can better define the canon by reference to the two great statutory charters of federal economic regulation. The Interstate Commerce Act of 1887 \(^{18}\) and the Sherman Act of 1890 \(^{19}\) offered competing solutions to the "sharp, often highly emotional, sometimes violent economic and political

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\(^{10}\) 94 U.S. 113 (1877).


\(^{14}\) *See id.* at 1327 n.12.

\(^{15}\) *Id.* at 1327.


combat" that shook America during the early phases of industrialization. Like the "Granger" laws that the Supreme Court had upheld a decade earlier on the day it decided Munn, federal rail regulation rested on the assumption that the railroad trust could be tamed only through comprehensive governmental intrusion into the common law and the libertarian economic system it sustained. What the Supreme Court said half a century later of broadcast licensing captured the regulatory attitude: "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination..."

Federal regulation of surface transportation eventually became the paradigm for command-and-control regulation of specific industries. The Interstate Commerce Act even served as the blueprint for federal telecommunications law. Well before the Radio Act of 1927 and the Communications Act of 1934, the Mann-Elkins Act of 1910 subjected telephone companies to regulation by the Interstate Commerce Commission as "common carriers" and obligated them "to provide service on request at just and reasonable rates, without unjust discrimination or undue preference." By 1938, Congress extended the filed-rate model that it had perfected in rail regulation to no fewer than eight other common carrier and public utility industries, ranging from shipping and aviation to electricity and natural gas.

Other amendments to the Interstate Commerce Act provided a model for measures designed to protect monopolies from corrosive competition. By extending the Act to trucking, a structurally competitive industry whose main fault lay in its ability to destabilize rail rates, the Motor Carrier Act of 1935 unleashed a new wave of efforts to control prices even in the absence of perceptible tendencies toward industrial concentration. Price and income controls in agriculture, taxicab licensing, and residential rent control

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23 See Kearney & Merrill, supra note 13, at 1325 ("The original [regulatory] paradigm was established over 100 years ago with the enactment in 1887 of the Interstate Commerce Act.").
27 See Kearney & Merrill, supra note 13, at 1333-34.
expressed the prevailing regulatory dogma that excessive competition might be as destructive as monopoly. The Interstate Commerce Act and the Commission it established have both expired, but most courses on regulated industries have continued to focus on statutes modeled on or readily analogized to federal regulation of surface transportation.

By contrast, federal antitrust law exhibits a far stronger faith in the possibility, even the desirability, of more nearly perfect competition. Describing the antitrust laws as "the Magna Carta of free enterprise" captures this sentiment perfectly. Private enforcement and an evolutive common law approach to statutory interpretation would become hallmarks of federal antitrust law. In the century after the passage of the Sherman Act, American lawyers and law schools came to sever antitrust from its more comprehensive counterparts. There thus arose separate courses in antitrust and regulated industries, courses on two related but distinct legal strategies for correcting the perceived defects of capitalistic competition.

The prevailing canon suggests certain minimal standards for a casebook in regulated industries. Students should understand the basic rationales for regulation. In distinguishing among competing rationales, they should learn that rationales routinely overlap and contradict each other. Although some schemes stress overtly redistributive goals or give legal effect to some notion of incommensurability, regulation of entry, exit, and rates remains the primary source of objectives and tools in this field. Students should therefore learn some rudimentary economic analysis, ranging from basic price theory to peak-load pricing, from contestability theory to post-Chicago economics.

Regulated industries, however, is at bottom a law school course. From this perspective, students should attain certain practical measures of competence. Everyone should be able to read a public utility balance sheet, or at least a utility bill. Every student should leave with the confidence that he or she can set a rate, grant a license, or issue a certificate of public convenience and necessity. To restate the point more precisely, every student should acquire sufficient aplomb to advise a putatively expert regulator who performs these tasks. Even a general survey course on regulated industries


should leave each student with a doctrinal, historical, and economic "feel" for at least one significant body of regulatory law. That intangible sense of comfort comes through an eclectic mixture of cases, garnered from this field's jurisprudential canon and from contemporary controversies. Finally, at its very best, the subject should give the student a sense of the seamless connections linking regulation with numerous allied fields, such as administrative law, constitutional law, taxation, public finance, antitrust, environmental law, corporate finance, and even the law of international trade.

B. A New Covenant?

*Regulation and Deregulation*, 33 a radically revised casebook on the law of regulated industries, has staked one of the earliest claims to redefining the regulatory canon in an age in which "reform" and "deregulation" are all the rage. Jeffrey Harrison, Thomas Morgan, and Paul Verkuil offer a "completely reworked" version of their earlier casebook. 34 "The consequences of regulation and deregulation" of passenger airlines, telephone carriage, cable television, pharmaceuticals, and the like "are all around us." 35 On this descriptive point and their prescriptive conclusion, the authors are preaching to the converted: "a legal education cannot be adequate, let alone complete, without some exposure to [regulatory] issues." 36

I had high expectations for this book. Five years ago, as a rookie law professor, I concocted my first course in regulated industries out of Harrison, Morgan, and Verkuil's earlier casebook, an equally antiquated offering by Louis Schwartz and company, 37 and a hastily assembled supplement of my own. In the interim, competing casebooks by Sidney Shapiro and Joseph Tomain 38 and by Richard Pierce 39 have entered this admittedly limited market. But "the existence of significant information and switching costs" hampered serious consideration of these alternatives. 40 As earlier entrants in this rarified market, Harrison, Morgan, and Verkuil had "locked in" at least one consumer. 41

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34 Id. at vi. These authors collaborated more than a decade ago on THOMAS D. MORGAN ET AL., ECONOMIC REGULATION OF BUSINESS (2d ed. 1985). That casebook derived in turn from THOMAS D. MORGAN, ECONOMIC REGULATION OF BUSINESS (1976).
35 HARRISON ET AL., supra note 33, at v.
36 Id. at vi.
41 See Mark A. Lemley & David McGowan, Legal Implications of Network Economic
I regret to report that teaching the new edition of this casebook has provided the impetus to switch brands. The revamped Regulation and Deregulation ironically shares the fate that has befallen so many regulatory schemes: It fails to match appropriate solutions to the problems that beset the teaching of regulation and its reform.  

Part I of this review describes the casebook’s six-step plan of action. Part II assesses the strengths and weaknesses of Regulation and Deregulation’s approach. The casebook, on balance, imparts little or none of the “feel” of the remarkable history of economic regulation in the United States. Nor does this casebook convey the legal texture of any major contemporary regulatory scheme. Students relying exclusively on this casebook will leave class without meaningful information about so much as a single regulatory statute. The book is a disappointment, even on its own terms. To grapple with imperfect competition and its regulation, Part III concludes, is to undertake one of the loneliest tasks in American law. Regulation and Deregulation, unfortunately, provides little relief to those who willfully shoulder this Sisyphean burden.

II. The Six-Legged Octopus

Regulation and Deregulation unfolds in six chapters, evidently arranged in order of increasing legal and economic complexity. In the best tradition of economically informed legal scholarship, Harrison, Morgan, and Verkuil open with a “historical regulatory fable” derived from the Charles River Bridge case. They also include an excerpt from Munn v. Illinois, the Supreme Court landmark that is rightfully regarded as the jurisprudential foundation of modern regulation. After a breezy survey of the ensuing twelve decades, the opening chapter marches through three perspectives on

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46 94 U.S. 113 (1876).
regulation. The authors assign the labels "Public Interest," "Public Administration," and "Public Choice" to the most significant aspects of neoclassical microeconomics, comparative institutional analysis, and positive political theory found in the law of regulated industries. Finally, the casebook provides two "contemporary illustrations" of regulatory policy, the "dilemma" presented by the allegedly discriminatory discharge of an HIV-positive surgical assistant and the "policy choice" presented by taxicab regulation.

Chapter 2 of Regulation and Deregulation surveys five "emerging constitutional limits on regulation": substantive due process, the Commerce Clause as a grant of congressional power, the dormant Commerce Clause, the First Amendment's commercial speech doctrine, and the Equal Protection Clause. What the authors call substantive due process includes the Takings Clause. Except Nebbia v. New York, the cases chosen to illustrate these constitutional principles come from the 1993, 1994, and 1995 Terms of the Supreme Court: Dolan v. City of Tigard, United States v. Lopez, West Lynn Creamery, Inc. v. Healy, 44 Liquormart, Inc. v. Rhode Island, and Adarand Constructors, Inc. v. Pena. The absence of a clear reason for including these cases but not others suggests that the authors were willing to sacrifice doctrinal coherence in order to appear au courant.

Chapter 3 addresses four of the leading traditional "rationales for regulation and deregulation": natural monopoly, excessive competition, transaction costs, and inherent scarcity. After introducing the subject through a 1914 case from Idaho, the natural monopoly segment focuses on two modern instances of regulatory reform: natural gas deregulation and the Bell breakup. Brief notes on the Internet, railroad deregulation, and contestability theory complete the discussion. To illustrate the excessive competition rationale, the authors fill regulation's notoriously "empty box" with the longstanding problems of surface transportation and the increasingly

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48 See HARRISON ET AL., supra note 33, at 13-37.
49 See id. at 37-41 (excerpting and discussing Bradley v. University of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922 (5th Cir. 1993)).
50 See id. at 41-44.
51 See id. at 45-122.
52 291 U.S. 502 (1934).
58 See HARRISON ET AL., supra note 33, at 124-26 (excerpting Idaho Power & Light Co. v. Blomquist, 141 P. 1083 (Idaho 1914)). Blomquist also figured prominently in the earlier version of this casebook. See MORGAN ET AL., supra note 34, at 75-78.
59 See HARRISON ET AL., supra note 33, at 133-62.
60 See id. at 162-65.
61 See BREYER, supra note 42, at 29-32.
unstable mix of convergence and deregulation in financial services. The discussion of transaction costs similarly blends the familiar with the novel. Amid excerpts from *The Tragedy of the Commons* and Calabresi and Melamed’s celebrated “view of the cathedral,” the reader will find cases on ecolabeling and the fair use doctrine in copyright. The survey of the scarcity rationale is by far this chapter’s longest and most diverse. The authors address everything from the must-carry rule in cable regulation, to fish and game management, personal credit, age discrimination, surrogate motherhood, and comprehensive health care reform.

The casebook characterizes Chapter 4 as a survey of three new techniques—cost-benefit analysis, property rights, and self-regulation—that have supplemented the traditional battery of regulatory cures for microeconomic market failure. A cursory comparison with the 1985 version, however, shows that the authors have merely revised and relocated what had been a chapter on the Coasean cluster of “regulatory responses to transaction costs and scarcity.” Any editorial change in direction lies in a substantial effort to distinguish regulatory tools designed to minimize transaction costs from those aimed at some perceived deficiency in market structure or industrial organization. The sprawling segment on cost-benefit analysis covers more than fifty pages and covers a diverse array of controversies. Here the reader finds not only leading Supreme Court decisions on environmental law but also less celebrated case studies in accommodating worker disabilities, lawn dart sales, and hazardous waste cleanups. The settings used to illustrate private-law alternatives to regulation similarly blend familiar chestnuts with candidates for a new regulatory canon. Sandwiched between marketable air pollution credits and *Silver v. New York Stock Exchange*, a classic case on self-regulation, the reader will find an extended excerpt from *United States v. Winstar Corp.* as an illustration of the

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62 See HARRISON ET AL., supra note 33, at 166-91.
65 See HARRISON ET AL., supra note 33, at 195-218.
66 See id. at 221-59.
67 See MORGAN ET AL., supra note 34, at 433-526.
68 See HARRISON ET AL., supra note 33, at 262-315.
70 See HARRISON ET AL., supra note 33, at 282-311.
government’s power to extend and then to retract incentives to invest.73

Rate regulation remains the heart of any course in regulated industries. Chapter 5, titled “rate regulation in a deregulation environment,” comes closest to retaining the structure and texture of the analogous chapter in the 1985 casebook. The cost-side issues of traditional public utility law reappear in a downsized and somewhat updated fashion. For instance, to illustrate the problem of policing a regulated firm’s intracorporate transfers, the authors now focus on a local exchange company’s royalty arrangement with an unregulated affiliate, rather than an electric utility’s coal purchases from a wholly owned subsidiary.74 Surely it is better for a newly revised regulated industries casebook to echo the Bell operating companies’ information services and enhanced services disputes than to sound of the Carter era’s energy crisis, of “[o]ld, [forgotten,] far-off things, and battles long ago.”75

Some issues have evidently proved hard to update, while others have shown a surprising resiliency in contemporary law. Thus, whereas the 1997 text retains the case used in 1985 to illustrate the hoary debate over the accounting treatment of costs incurred in ongoing construction projects,76 the new casebook does incorporate recent Supreme Court decisions on imprudent utility management and confiscatory ratemaking.77 In their treatment of the latter topic, Harrison, Morgan, and Verkuil retain their peculiar strategy of treating the grand jurisprudential cycle from Smyth v. Ames78 to FPC v. Hope Natural Gas Co.79 merely as a convenient case study for “fitting . . . together” the elements of traditional cost-of-service ratemaking.80

The balance of Chapter 5 combines one of the casebook’s most regrettable revisions with one of its most inspired additions. Rate design, which warranted a separate, comprehensive chapter in 1985, has been slashed by more than half.81 Despite choosing to retain some relatively insipid readings to illustrate the principles of average cost pricing,82 peak-load pricing,83 and lifeline rates,84 the authors have abandoned the Supreme

73 See HARRISON ET AL., supra note 33, at 315-50.
77 See HARRISON ET AL., supra note 33, at 368-74, 406-10.
78 169 U.S. 466 (1898).
79 320 U.S. 591 (1944).
80 See HARRISON ET AL., supra note 33, at 401.
81 Compare id. at 410-50 with MORGAN ET AL., supra note 34, at 343-432.
83 See Metropolitan Washington Bd. of Trade v. Public Serv. Comm’n, 432 A.2d 343 (D.C.
Regulatory Education and Its Reform

Court’s leading case on postal rate design. By contrast, the final third of Chapter 5 reads like a tour of this decade’s most contentious ratemaking disputes. The casebook provides valuable glimpses into the Supreme Court’s resolutions of regulatory crises arising from the Natural Gas Policies Act and the trucking deregulation debacle. Its survey of contemporary ratemaking controversies, with a special focus on stranded costs, sets the stage for the Supreme Court’s first case on the local competition provisions of the Telecommunications Act of 1996.

Finally, Chapter 6 presents a heavily abridged version of what had been a lavish treatment of the legal twilight zone between the federal antitrust laws and command-and-control regulation of specific industries. Much of the revision comes at the expense of cases on the antitrust liability of federally regulated firms and the application of antitrust principles by federal regulatory agencies, though the authors have retained such classics as *Keogh v. Chicago & Northwestern Railway Co.* and *Georgia v. Pennsylvania Railroad Co.* The casebook closes with a look at the two “antitrust process” doctrines that have grown out of constitutional concerns over federalism and free speech: the state action and municipal action doctrines spawned by *Parker v. Brown* and the *Noerr-Pennington* line of cases.

III. A General Theory of Second Guess

I base this review of *Regulation and Deregulation* on my classroom experiences during fall semester 1997. To the extent that law professors do

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86 See id. at 478-92. The casebook also provides a brief note on the debate over the appropriate pricing of incumbent local exchange companies’ networks in telecommunications deregulation. See id. at 492-93.
87 Cf. MORGAN ET AL., supra note 34, at 527-661.
88 260 U.S. 156 (1922) (excerpted at pp. 501-04).
89 324 U.S. 439 (1945) (excerpted at pp. 505-08).

155
not regard a "casebook as a serious contribution to legal scholarship" because anyone can pick and edit a few cases,\textsuperscript{93} the academy discounts a casebook review all the more. The reviewer can easily convert a frustrating classroom experience into critical commentary. I will not deny this reality. A law professor's opinion of a casebook unfolds in \emph{incremental} fashion, based on twice or thrice weekly exposure over a semester. Pedagogical wisdom, like its regulatory counterpart, comes only over time.\textsuperscript{94} Having described Lipsey and Lancaster's general theory of second best\textsuperscript{95} as "the addictive cocaine of pragmatic legal scholarship,"\textsuperscript{96} I am keenly aware that the resulting piecemeal critique offers little more than the illusion of improvement.\textsuperscript{97}

I nevertheless hope that reporting my experiences with this casebook will have some positive impact on the teaching of regulated industries. A casebook, after all, is intended for classroom use, and I will write from the perspective of a professor who adopted this casebook and came eventually to regret that decision.

My complaints fall into two broad categories. First, \textit{Regulation and Deregulation} sags under the collective weight of an unusually large number of questionable editorial judgments. I freely concede that complaints of this sort may be dismissed as quibbles over matters of taste. One can surely imagine a regulatory canon that stresses employment discrimination over cable or telephone regulation. But Harrison, Morgan, and Verkuil purchase their regulatory vision at the steep price of omitting huge chunks of the traditional regulatory canon. These omissions, when compounded, lead to a second set of complaints. This casebook not only fails to teach at least one substantial body of contemporary regulatory law, but also leaves its readers with little of the intellectual apparatus needed to confront the regulatory problems most likely to arise in the future.

\textsuperscript{93} Ainsworth, \textit{supra} note 4, at 272.
\textsuperscript{94} Cf. \textcite{Kenneth Culp Davis, A New Approach to Delegation, 36 U. CHI. L. REV. 713, 733 (1969)} (urging administrative agencies to accumulate information over time about the industries they regulate and to follow a "common law" body of rules or precedents in formulating policy); \textcite{Daniel A. Farber, Environmental Protection as a Learning Experience, 27 LOYOLA L.A. L. REV. 791 (1994)} (applying comparable insights in the environmental context); \textcite{Charles E. Lindblom, The Science of "Muddling Through," 19 PUB. ADMIN. REV. 79 (1959)} (giving this regulatory approach the apt name of "muddling through").
\textsuperscript{95} See \textcite{R.G. Lipsey & Kelvin Lancaster, The General Theory of Second Best, 24 REV. ECON. STUD. 11 (1956)}.
\textsuperscript{96} \textcite{Jim Chen & Edward S. Adams, Feudalism Unmodified: Discourses on Farms and Firms, 45 DRAKE L. REV. 361, 367 (1997)}.
\textsuperscript{97} See \textcite{Mario J. Rizzo, The Mirage of Efficiency, 8 HOFSTRA L. REV. 641, 652-53 (1980)}. 
A. "Pick and Choose"\textsuperscript{98}

Harrison, Morgan, and Verkuil's vision of regulation is neither comprehensive nor coherent. Although no one expects a general course in regulated industries to explore every detail and nuance of even a single industry, a survey course can leave students with an impression of the extensive legal toolbox available to regulators and a tangible sense of the logical and rhetorical limits on regulatory advocacy.\textsuperscript{99} The tripartite "public interest"/"public administration"/"public choice" model established in the casebook's introductory chapter holds great promise. In the interest of identifying and supporting some overarching framework by which students can secure a "big picture" perspective, I am prepared to set aside my modest objections to the authors' nomenclature.\textsuperscript{100} It is undoubtedly useful to distinguish the theory of natural monopoly from the Coase theorem, and to distinguish each of these concepts from positive political theory.\textsuperscript{101} Despite taking care to develop their theoretical framework, Harrison, Morgan, and Verkuil make scant use of it.

On the other hand, I have great difficulty understanding, much less explaining, some of the casebook's other editorial choices. To be sure, every casebook customer will quibble over relatively modest details. To take but one example, I question Morgan, Harrison, and Verkuil's decision to lavish

\textsuperscript{98} This section's overarching metaphor comes from the Federal Communications Commission's ill-starred "pick and choose" rule. A "pick and choose" regime allows newcomers, whether local telephone carriers or regulated industries teachers, to select terms offered by an incumbent, without being bound by all the terms and conditions that the incumbent might have offered to others. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997) (invalidating the "pick and choose" rule articulated in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15,499 (1996)), aff'd in relevant part sub nom. AT&T Inc. v. Iowa Utils. Bd., No. 97-826 (U.S. Jan. 25, 1999).

\textsuperscript{99} Cf. RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 100 (1990) ("The most important thing that law school imparts to its students is a feel for the outer bounds of permissible legal argumentation . . . . [T]hinking like a lawyer . . . . is neither method nor doctrine, but a repertoire of acceptable arguments and a feel for the degree and character of doctrinal stability . . . .").

\textsuperscript{100} By "setting aside," of course, I mean consigning those objections to a footnote. "Public interest" as a catchall label for diverse microeconomic considerations risks understating the magnificent scope of the Supreme Court's definition of industries "clothed with a public interest." Munn v. Illinois, 94 U.S. 113, 126 (1876). The label "public choice" tends to conflate theories on interest group behavior with "social choice" theories such as Arrow's impossibility theorem. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-62 (1991) (distinguishing between theories on "interests groups and the political process" and the cluster of "democratic process" theories arising from or responding to Arrow's theorem); MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY, at xvii-xxv (1997) (distinguishing between "public choice" and "social choice"). Finally, the relatively terse term "public administration" only vaguely captures a notion that would better be described as "comparative institutional competence." See generally NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

eighteen pages on an affirmative action case, *Adarand Constructors, Inc. v. Pena.*\(^{102}\) To explore the role of equal protection in regulatory settings, I might have preferred to examine the Supreme Court’s application of the rational basis test in the context of cable regulation.\(^{103}\) Then again, perhaps my view is distorted by my belief that “the idiocy of the [affirmative action] debate” has become too profound for words.\(^{104}\)

The authors’ preference for affirmative action in public contracting over the regulation of satellite master antenna television as an alternative to cable nevertheless reinforces my feeling that the authors missed numerous opportunities. Although *44 Liquormart*\(^{105}\) nicely restates current commercial speech doctrine, one wonders why this casebook makes no use of the leading cases implicating the speech interests of rate-regulated firms.\(^{106}\) Why not link *Dolan v. City of Tigard,*\(^{107}\) so prominent in the chapter on the regulatory constitution, with the later discussion of confiscatory ratemaking, or perhaps even with takings issues embedded in the details of local telephone deregulation?\(^{108}\) The *Winstar* case\(^{109}\) might shed some light on this debate, but it is mired in a section on private-law alternatives to regulation. And speaking of the regulatory constitution, where is *Regulation and Deregulation*’s discussion of the extensive caselaw on preemption?\(^{110}\) Other editorial choices look ill-starred in retrospect, but the authors can hardly be blamed for failing to foresee that the Supreme Court’s recent Tenth Amendment decision, *Printz v. United States,*\(^{111}\) would so quickly rival or even eclipse the revival of serious Commerce Clause scrutiny of federal legislation\(^{112}\) as a leading constitutional barrier in regulatory policymaking.\(^{113}\)

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\(^{107}\) 512 U.S. 374 (1994) (excerpted at pp. 54-65).

\(^{108}\) See, e.g., Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994) (striking down the FCC's pre-1996 collocation rules on the reasoning that the FCC lacked the power to condemn a local exchange company's property in order to reassign it to a competitor); cf. 47 U.S.C. § 251(c)(6) (Supp. II 1996) (ordering incumbent local exchange carriers to permit physical or virtual collocation of facilities with their competitors).


\(^{111}\) 117 S. Ct. 2365 (1997).


Such are the perils of *force majeure* in legal academia.\(^{114}\)

Through this elaborate prologue, I am forswearing further comment on mere questions of taste and timing. Far more outlandish editorial judgments abound. In this regard, I think immediately of the authors’ decision to treat *Rogers v. Koons*,\(^{115}\) a case distinguishing “fair use” from actionable copyright infringement, as the opening illustration of common pools. Come again? In a copyright casebook, *Koons* would appear in a more suitable setting, and Robert Gorman and Jane Ginsburg’s outstanding text is even kind enough to supply illustrations of the disputed artworks.\(^{116}\) *Regulation and Deregulation*’s version of *Koons* lacks not only the illustrations, but also any serious illustrative value.

Although “problems of welfare economics” really do “ultimately dissolve into a study of aesthetics and morals,”\(^{117}\) I cannot explain, much less justify, this casebook’s peculiar predilection for workplace disputes. Discrimination on the basis of HIV status,\(^{118}\) age,\(^{119}\) and disability\(^{120}\) each warrants a full case excerpt, the same as cable television.\(^{121}\) This editorial quirk may well explain the otherwise bizarre prominence afforded to *Adarand*.\(^{122}\) In a subject where rate discrimination rather than race discrimination remains the primary normative concern,\(^{123}\) this indulgence for employment law is reminiscent of a book on law and economics that gives an index entry to “anthropology” but not to “antitrust.”\(^{124}\)

Harrison, Morgan, and Verkuil, of course, do cover antitrust. Indeed, they devote more than a tenth of their book to the subject.\(^{125}\) The interplay between economic regulation and the federal antitrust laws, alas, is one of the biggest orphans of the law school curriculum. Crumbling under inevitable time pressure, many an antitrust teacher has skipped past the antitrust status

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\(^{115}\) 960 F.2d 301 (2d Cir. 1992).


\(^{118}\) See Bradley v. University of Texas M.D. Anderson Cancer Ctr., 3 F.3d 922 (5th Cir. 1993) (excerpted at pp. 37-41).


\(^{120}\) See Vande Zande v. Wisconsin Dep’t of Admin., 44 F.3d 538 (7th Cir. 1995) (excerpted at pp. 282-91).


\(^{125}\) See Harrison et al., * supra* note 33, at 494-561.
of federally regulated firms and the constitutionally inspired doctrines of state action and Noerr-Pennington immunity. A fruitful (and time-effective) discussion of these doctrines in a course on regulated industries all but requires that students bring some prior knowledge of antitrust. Short of imposing antitrust as a prerequisite, the typical professor of regulated industries will likely be forced to write off the final chapter of Regulation and Deregulation as a complete pedagogical loss.

In a Spartan volume with fewer than 600 pages, these editorial frolics and detours will add up. That the authors fail even to cite the leading cases on risk assessment and standard-setting under conditions of uncertainty, the “Benzene” and “Cotton Dust” decisions of the later Burger Court, is simply stunning. The omission is all the more surprising in light of the 1985 casebook’s inclusion of the “Cotton Dust” case. Lesser omissions abound. Garrett Hardin’s lament on the tragedy of the commons stands alone and unrebutted, as if Hardin’s deeply flawed work “represented the whole truth about common pool resources.” Nor do the authors fare better in selecting concrete illustrations of the common pool principle. Their sole examination of natural resources consists of an aberrational case involving Alaska’s preference for subsistence uses of fish and game. The inclusion of this case comes at the expense of leading Supreme Court decisions on grazing, groundwater, and the gathering of gas.

Not surprisingly, most of these editorial disagreements involve Chapters 3 and 4, the authors’ self-conscious effort to reconcile traditional regulatory rationales and techniques with their contemporary counterparts. Rapid...
evolution in economic thought and literature certainly supports something along the lines of these chapters. It is hard to contest a decision to study cost-benefit analysis and private-law alternatives to conventional regulation. At the other extreme, given the law's unfortunate tendency to convert "scarcity" from a universal economic fact into a dispositive legal principle, a survey of regulatory uses of "scarcity" is doomed to ramble. Nevertheless, the combined effect of these editorial decisions, especially the authors' omissions and questionable substitutions, is to distort, even trivialize, the law of regulated industries.

Why, for example, does Regulation and Deregulation compress Chevron U.S.A., Inc. v. Natural Resources Defense Council and its progeny into two scant pages? It will hardly do to acknowledge Chevron as "the most cited case on judicial review in the U.S. Court of Appeals" if one then consigns a detailed discussion of the case and its doctrinal outgrowths to "the judicial review sections of the Administrative Law course." Of Chevron's many applications in this field, I will mention merely two possibilities. The delicate balance between textualism and deference to administrative interpretations of law drives both Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon (which this casebook covers) and MCI Telecommunications Corp. v. AT&T Co. (which this casebook omits). Either case could support an entire seminar on the regulatory imagination of Justice Antonin Scalia, who dissented bitterly in Sweet Home and wrote for the Court in MCI. Why does Justice Scalia believe so strongly in a strict definition of "take" in the context of the Endangered Species Act, when he is a leading exponent of a broad definition of the same verb in the Takings Clause of the Constitution? "The sole consistency that I can find is that . . . the [landowner] always wins."

And as for MCI, "[i]t is odd that Justice Scalia, assumed to be strongly laissez faire, used dictionaries to defeat a major effort at rate deregulation?" We may never know how Harrison, Morgan, and Verkuil would respond.


137 See HARRISON ET AL., supra note 33, at 270-71.

138 Id. at 270 & n.15.


A pedagogical opportunity is a terrible thing to waste. In nearly six years of teaching at a Midwestern law school with a colorable claim to ranking among the nation's top twenty, I have learned that most law students select their upper-level courses according to every criterion except rationality. Whether a class conflicts with a student's work schedule or perhaps even her preferred patterns of socialization will profoundly affect enrollment. At most schools, whether a subject appears on the bar examination of a particular state compounds the extreme arbitrariness and capriciousness of law school curricular design. Actually luring a student into an elective course on regulated industries is too rare and precious an achievement to fritter away a chance to teach one of the most significant Supreme Court decisions of our time.

To take another example, the authors acknowledge negotiated regulation as a leading example of "emerging issues of . . . 'reinvent[ing] government'"—and promptly drop the issue. In the rapidly evolving regulatory arena, negotiated rulemaking has a relatively long pedigree. The intellectual foundation for this "novelty in the administrative process" was laid during President Reagan's first term, and the practice was codified nearly a decade ago. The illusory triumph of regulatory negotiation in the formulation of visibility rules for Grand Canyon National Park now seems as ancient as the notion of a President Dukakis. One could argue, perhaps, that this one-time innovation has become routine and that the scholarly literature has exhausted any meaningful discussion of its effectiveness. The emergence of a segment on negotiated rulemaking in a newly revised administrative law casebook suggests otherwise. Law reviews still devote symposia to the topic. The better part of current wisdom, it seems, regards

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143 HARRISON ET AL., supra note 33, at 260 & n.1.
144 USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996) (Posner, J.).
148 See CASS ET AL., supra note 142, at 576-91. But see id. at 591 ("The judicial reaction to the negotiated rulemaking innovation appears to be akin to a yawn.").
negotiated rulemaking as a leading example of "collaborative governance." The casebook's subsequent discussion of the Negotiated Rates Act of 1993 offers an opportunity to rejoin the debate, but the authors draw no connection between the general and rate-specific variants of regulatory negotiation. Regardless of one's perspective, it is frustrating that Regulation and Deregulation gives no sense of how its authors exercised this eminently contestable editorial judgment.

B. Irate over Rates

To these complaints, the casebook authors may well respond that they intentionally set aside matters more appropriately covered in a traditional administrative law course. Fair enough. As the casebook's preface states, this "book is . . . most likely to be used as the third course" in a "trilogy" consisting of "administrative law, antitrust, [and] economic regulation." In the alternative, the authors argue that their book "can provide basic materials for a more intense and focused inquiry into the regulation of a particular industry." Even on its own terms, however, this casebook fails to satisfy either need.

Every regulated industries course, even one consciously designed as a survey, should leave its students with a strong grasp of at least one major area of regulatory law. Casebooks in allied fields such as legislation and administrative law manage this feat; one should expect no less of a casebook on regulation as such. When I started teaching this subject in 1994, the federal law of natural gas regulation still generated enough heat to play the lead role. By fall 1997, I substituted telecommunications and mass communications regulation, two historically distinct legal schemes that are collapsing into each other. As I did in 1994, however, I relied heavily on

150 See generally Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 33-55 (1997).
152 See HARRISON ET AL., supra note 33, at vi.
153 Id.
self-produced supplementary materials to add some up-to-date doctrinal flavor to my regulated industries course. This should not have coincided with a decision to adopt a newly revised casebook.

Therein lies one of my sternest complaints. *Regulation and Deregulation* provides no introduction to any leading body of contemporary regulatory law. Surely there is no shortage of material. Between 1985 and 1997, large chunks of federal regulatory law underwent significant, even cataclysmic, revision. Natural gas wellhead decontrol,156 the Energy Policy Act of 1992,157 the second federal effort to reshape cable television regulation,158 termination of the ICC and the rise of the Surface Transportation Board,159 comprehensive reform of telephony and mass communications via the Telecommunications Act of 1996,160 and the brewing storm over deregulation of the retail electricity industry161 have all cut deep gashes in the American regulatory landscape. With the exception of natural gas deregulation, *Regulation and Deregulation* consigns each of these developments to a brief note. The casebook does not mention the 1996 farm bill,162 perhaps the most momentous development in federal agricultural policy since the first hundred days of President Roosevelt’s first term.163 Students seeking an introduction to any single body of regulatory law will not find it. Most areas go uncovered, and the cases that do appear are too few and too scantily connected to provide any sense of continuity.

Again, it is useful to distinguish between matters of taste and more pedagogically significant editorial judgments. Anyone familiar with my propensity to think and write about regulatory subjects from a historical perspective164 will readily discount my complaints about the omission of such

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Supreme Court classics as *FCC v. RCA Communications, Inc.*,\(^{165}\) and the *Permian Basin Area Rate Cases*\(^{166}\) and the short shrift given to others, especially *Bluefield Waterworks*\(^{167}\) and *Hope Natural Gas*.\(^ {168}\) But my objections to *Regulation and Deregulation*’s coverage of rate regulation transcend my relatively modest complaints about the casebook’s foray into the new terrain of Chapters 3 and 4. When it comes to matters of ratemaking and rate design, I will yield no ground. Even after the deregulatory revolution that has continued apace since the collapse of the Nixon era’s wage and price controls and the termination of the Civil Aeronautics Board, the law of regulated industries lives and dies by the regulation of entry, exit, and rates.

“Deregulation” as shibboleth barely veils the true condition of regulatory law in the United States. Harrison, Morgan, and Verkuil admit as much.\(^ {169}\) Old-fashioned command-and-control strategies and tactics still pervade the law of regulated industries. Anyone seeking support for this proposition need not go further than the putatively deregulatory Telecommunications Act of 1996.\(^ {170}\) The Federal Communication Commission’s “competition trilogy,” touted as “the most pro-competitive action of government since the break-up of the Standard Oil Trust,”\(^ {171}\) rested on three fiercely contested rules addressing the pricing of and unbundled access to local telephone network elements, “access charges” assessed against long-distance carriers by local exchange companies, and universal service.\(^ {172}\) I can scarcely imagine a more intensive application of public utility principles.

Conventional public utility law thrives still. It will flourish beyond several more deregulatory cycles. Broadcast licensing, after all, retained its essential core of incumbent protection for more than half a century after the

\(^{165}\) 346 U.S. 86 (1953).

\(^{166}\) 390 U.S. 747 (1968).


\(^{168}\) See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). As I mention above, the casebook reduces *Hope* to simply another convenient case for fitting together the three elements of the traditional revenue requirement formula (pp. 401-06). The authors neglect to mention the singular prominence of that case in reversing the Supreme Court’s attitude toward economic regulation. They do recommend reading Justice Jackson’s “lengthy and well-reasoned dissent in *Hope* . . . . for his detailed analysis of the difficulty of rate making in the natural gas industry” (p. 406 n.37), but they neither quote nor excerpt the Jackson dissent.

\(^{169}\) See HARRISON ET AL., supra note 33, at 18, 124.


Superscripts:
175 169 U.S. 466 (1898).
180 Morgan et al., supra note 34, at 73.
an index entry. The authors give no express consideration to the regulation of exit. At most, a single case on railroad abandonment can be construed as raising the issue.\(^\text{181}\)

*Regulation and Deregulation*’s failure to pay explicit attention to exit shortchanges what Stephen Breyer and Alfred Kahn have labeled the clearest regulatory lesson of the last quarter-century: Structurally competitive industries and restrictions on entry, exit, and price do not mix.\(^\text{182}\)

Unsupplemented, this text leaves students ill-equipped to spot the exit strategies at the heart of every cross-subsidization scheme. So-called deregulation has expanded rather than contracted the range of circumstances to which this lesson applies. A decade ago, systematic bypassing of local distribution companies foreshadowed and perhaps even accelerated the demise of federal gas regulation.\(^\text{183}\)

Today, the Supreme Court’s expanding vision of the dormant Commerce Clause is beginning to acknowledge what Richard Posner recognized a generation ago: \(^\text{184}\) Barriers to entry, whether embedded in a comprehensive regulatory scheme or crudely aimed at out-of-state interests, are the first step in crafting an effective (albeit normatively dubious) off-budget “financing measure.”\(^\text{185}\)

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182 See BREYER, supra note 42, at 197 (“The clearest examples of a [regulatory] mismatch arise when classical price and entry regulation is applied to a structurally competitive industry.”); Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 329-30 (1990) (describing this principle as one of the “clearest lessons” of deregulation).


Despite the compelling case for more attention to the relationship between entry, exit, and rate design, Harrison, Morgan, and Verkuil have taken their casebook in the opposite direction. The Supreme Court's leading case on postal rates has disappeared, and the casebook pays no heed to the Kent County case, a 1994 airport finance controversy that represents one of the high court's most intriguing cases on rate design. Even something as seemingly remote as airport finance bears a closer relation to the casebook's core mission than many of the cases the authors do include. A professor using this casebook might well supplement Regulation and Deregulation's comprehensive segment on stranded costs with excerpts from a recent D.C. Circuit dispute over airport finance. That discussion, however, depends in turn on a missing link: the Supreme Court's 1994 decision in Kent County. Suffice it to say that the potential contribution of every omission from this casebook, like that of every species extirpated from its former habitat, is impossible to compute with any precision.

At the same time, the authors have retained their 1985 material on lifeline rates, even though the hottest contemporary debate swirls around novel means of financing universal service. Again, omissions of this magnitude would ordinarily escape critical notice, but the authors' effort to redefine the regulatory canon highlights their failure to cover points of law and policy that lie closer to the traditional core.

Moreover, the casebook inexplicably overlooks some of the most prominent intellectual trends of the last dozen years. There is nary a word on post-Chicago economics, nor a mention of network effects. Although


188 See City of Los Angeles Dep't of Airports v. United States Dep't of Transp., 103 F.3d 1027, 1032 (D.C. Cir. 1997).


these concepts are native to antitrust law, they are far from irrelevant to more intensive systems of economic regulation. Soon enough, in any event, the coming storm over Microsoft will force these concepts into the regulatory consciousness. Regulation and Deregulation, alas, will not have anticipated this possible revolution in regulatory philosophy.

Even more surprisingly is the casebook’s lack of attention to theories of imperfect competition. In 1984, the inaugural issue of the Yale Journal on Regulation heralded “perfect contestability [as] a standard of structure and performance that is more pertinent than pure competition given the character of modern technology,” a new regulatory norm even “more ideal” than perfect competition. The idea of competition under conditions of natural monopoly had been foreordained a generation earlier. In 1968 and 1969, while Harold Demsetz was affixing his name to a form of competition among regulated monopolists, the FCC became embroiled in two spectacular controversies over intermodal competition. In round one, the Supreme Court authorized the Commission to regulate community antenna television; in round two, the FCC approved a crucial long-distance petition from the firm that would become MCI. The 1985 version of this casebook covered both of these cases and added a Clayton Act case that vividly illustrated Demsetz competition. Harrison, Morgan, and Verkuil reduced their coverage to a brief historical note on the Bell breakup and five paragraphs on contestability. Once again, this casebook has retreated from a leading

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193 See generally Lemley & McGowan, supra note 41.
199 See MORGAN ET AL., supra note 34, at 84-96 (excerpting MCI); id. at 141-48 (excerpting Southwestern Cable); see also id. at 187 (relenting Southwestern Cable to Home Box Office, Inc. v. FCC, 547 F.2d 9 (D.C. Cir. 1977)).
201 See HARRISON ET AL., supra note 33, at 147-49, 164-65.
Nor have the authors offset these omissions through closer attention to doctrine. Two of the past decade’s most prominent doctrinal developments in regulated industries, price level regulation and the rapid evolution of line-of-business restrictions, are entirely absent. Nearly a decade ago, Jordan Hillman and Ronald Braeutigam’s study of price level regulation sparked a debate over that alternative to the traditional technique of monitoring a regulated firm’s profits. That debate substantially altered the path of telecommunications reform when the D.C. Circuit upheld the FCC’s price cap regulation of dominant carriers. The eventual application of this price cap to AT&T led in turn to a 1994 Supreme Court decision that stripped the FCC of its discretionary power to relax the filed tariff doctrine. The entire episode arguably had the unintended effect of facilitating collusive pricing within what was then America’s three-firm long-distance oligopoly. Regulatory forbearance has since become a fixture in federal communications law, and the FCC resolved the specific controversy over long-distance detariffing by reclassifying AT&T as a nondominant carrier. The entire saga, one of the most instructive in regulatory reform in response to changes in competitive conditions, warrants a single parenthetical comment in Regulation and Deregulation.

The casebook fares no better in addressing related questions of nonprice regulatory techniques. The singular, overarching objection to line-of-business restrictions under the Bell divestiture decree—that structural

207 See PAUL W. MACAVOY, THE FAILURE OF ANTITRUST AND REGULATION TO ESTABLISH COMPETITION IN LONG-DISTANCE TELEPHONE SERVICES 69-77 (1996); Chen, supra note 26, at 858.
210 See HARRISON ET AL., supra note 33, at 478.
211 For lucid judicial discussions of the relationship between price level regulation and other structural safeguards against cross-subsidization, see California v. FCC, 39 F.3d 919, 926 (9th Cir. 1994); California v. FCC, 905 F.2d 1217, 1232-38 (9th Cir. 1990).
Regulatory Education and Its Reform

separation does more harm in destroying economies of scope than good in patrolling cross-subsidization by rate-regulated firms \(^2\) — gets almost no airtime. Harrison, Morgan, and Verkuil evidently care about the Bell breakup; they devote most of their sixteen pages on post-1984 telecommunications law \(^3\) to the D.C. Circuit case arising from the first triennial review of the Modified Final Judgment. \(^4\) Yet they ignore later doctrinal developments and, more generally, the problems of patrolling the corporate structure of a regulated firm. Among many readily available case studies, the story of the Bell operating companies' efforts to offer enhanced telephone services would have sufficed. \(^5\) The open network architecture concept underlying these “California” cases illustrates the essential structural reforms of FERC Order No. 636 \(^6\) and of the open video service provisions of the Telecommunications Act of 1996. \(^7\) Once again, a lesson in communications law casts doubt on whether the inventor of the telephone “truly succeeded in his grander project of educating the deaf.” \(^8\)

IV. Regulatory Fate

I shall not go so far as to accuse Harrison, Morgan, and Verkuil of “attempting to offer the definitive glance” at the law of regulated industries. \(^9\) Whatever blemishes Regulation and Deregulation may have, intellectual hubris does not rank among them. The casebook is a flawed but well intentioned effort to restate some basic principles of regulation for a putatively deregulatory age. But there remains ample room for a more persuasive pedagogical paradigm for regulated industries. That Holy Grail remains unclaimed.

Most of this review has flowed along two salient lines of criticism. First, almost all of my complaints target sins of omission, not of sins of commission. Second, my catalogue of omitted cases, doctrines, and ideas reads like a belated entry in the Journal of Legal Education's recent symposium on “The Last Ten Years: What Your Students Know That You

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\(^{214}\) See HARRISON ET AL., supra note 33, at 147-62.


\(^{216}\) See California v. FCC, 75 F.3d 1350 (9th Cir. 1996); California v. FCC, 39 F.3d 919 (9th Cir. 1994); California v. FCC, 4 F.3d 1505 (9th Cir. 1993); California v. FCC, 905 F.2d 1217 (9th Cir. 1990).


\(^{219}\) Chen, supra note 164, at 1510.

True enough. I do admit that I expected a 1997 update of a 1985 casebook to survey the leading legal and intellectual developments of the preceding dozen years. What I did not expect was this casebook’s apparent—and ultimately unconvincing—redefinition of “regulated industries” as a coherent legal category.

The revision of Regulation and Deregulation does provide one unequivocal benefit. The three leading casebook offerings in this field are now so distinct that they have segmented the market. Surely there are professors of regulated industries who understand and appreciate this casebook’s view of the field. Much of what I have written here turns strictly on questions of taste, and I cannot imagine that three authors with decades of collective teaching and writing experience stand wholly alone within the legal academy. Pierce’s 1994 casebook remains the best expression of the “old-time” regulatory religion, seen darkly through the glass of federal natural gas law. For my own part, I expect to turn to Shapiro and Tomain’s 1998 revision of their 1993 casebook. Especially as revised, the Shapiro and Tomain casebook provides a more doctrinal treatment of regulated industries than does the Harrison, Morgan, and Verkuil casebook, with a substantially broader range of industries than the Pierce casebook. Suffice it to say that there is now complete product differentiation, and that well informed law professors will sort out the offerings.

Perhaps the paradigm-making ambition is the real source of trouble. My disappointment with Harrison, Morgan, and Verkuil may arise from this casebook’s evident preference for “novelty, surprise, and unconventionality” over more conventional canons of regulatory law and policy. “[B]rilliant insights that overturn conventional thinking and common sense,” so highly valued in other fields, ought to be considered “suspect in economics and law.” More often than not, “brilliant first-order theories about the legal system and the economy are generally false.” So too are first-order visions of regulation. In a field as cyclical and volatile as regulated industries, in an age when “economic analysis of law [has] become[] a critical theory so corrosive that it consumes itself,” “pedestrian ‘normal science’” may be a “worthier endeavor” than a “brilliant, ‘paradigm shifting’” adventure.
Not only worthier, but arguably prettier, too. Doctrine is beauty, beauty is doctrine; that is all you know, and all you need to know.\textsuperscript{229} Paradoxically, "pedestrian" normal science may prove more beautiful than the paradigm-shaking alternative. Because of, not in spite of, its authors' forward-looking orientation,\textit{Regulation and Deregulation} is an unfortunately ahistorical law school text. Therein lies my final and perhaps harshest objection. Not only does this casebook pay insufficient attention to recent trends and current controversies in economic regulation; it ignores this subject's roots and traditions. The notion of historical cycles, perhaps the most renowned metaphor in regulation,\textsuperscript{230} is altogether absent. Rapidly though this field has evolved, some themes do recur. Those are the landmarks of the regulatory canon. As Pete Townshend might say, "Meet the new boss, same as the old boss."\textsuperscript{231} And as Jimmy Page and Robert Plant might respond, "The song remains the same."\textsuperscript{232}

One might absolve these casebook editors for failing to plunge into contemporary regulation with sufficient depth. In any legal setting, lack of thoroughness is a pardonable sin. Dullness, on the other hand, is not. Plowing through this volume of law fosters renewed appreciation for Oliver Wendell Holmes's celebrated "page of history."\textsuperscript{233} Or even a page of fiction: The\textit{Octopus}, Frank Norris's turn-of-the-century epic about farmers and the railroad trusts, offers at least comparable insight into regulation's political vagaries and human factors, with vastly greater entertainment value.\textsuperscript{234} No less than other forms of legal literature, law school casebooks should contain

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acknowledges for a time as supplying the foundation for its further practice”).
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\textsuperscript{229} Cf John Keats, \textit{Ode on a Grecian Urn}, in \textit{The Complete Poems} 344, 346 (John Barnard ed., 1973) ("Beauty is truth, truth beauty,"—that is all / Ye know on earth, and all ye need to know.").

\textsuperscript{230} See, e.g., Marver H. Bernstein, \textit{Regulating Business by Independent Commission} 74 (1955) ("The life cycle of an independent commission can be divided into four periods: gestation, youth, maturity, and old age."); John K. Galbraith, \textit{The Great Crash}, 1929, at 71 (2d ed. 1961) ("[R]egulatory bodies, like the people who comprise them, have a marked life cycle. In youth they are vigorous, aggressive, evangelistic, and even tolerant. Later they mellow and in old age . . . they become . . . either an arm of the industry they are regulating or senile."); Charles F. Phillips, Jr., \textit{The Regulation of Public Utilities} 180 (3d ed. 1993) (describing the "history of public utility regulation" as "consist[ing] of three major phases—legislative, judicial and administrative"). More generally, see Grant Gilmore, \textit{The Ages of American Law} (1977); Arthur Schlesinger, Jr., \textit{The Cycles of American History} (1986).


\textsuperscript{233} New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921); see also Oliver Wendell Holmes, Jr., \textit{The Common Law} 1 (1902) ("The life of the law has not been logic: it has been experience.").

\textsuperscript{234} See Frank Norris, \textit{The Octopus: A Story of California} (1901). To be sure, this is an unfair comparison. I believe \textit{The Octopus} to be as indispensable in a course on regulated industries as Upton Sinclair, \textit{The Jungle} (1906) is in a course on food and drug law.
what Holmes called the "echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law." In a body of law best described as "The Regulator with a Thousand Faces," perhaps wisdom comes only to those "who [have] long heard the music." "Radio . . . Listen to the radio" — "And we'll have memories for company / Long after the songs are sung."