

The Law of Regulation and Justice

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At the core of our current legal system is constitutional law and the common law. That's historically the core. And it's conceptually the core of our legal system. Around it are securities regulation, consumer law, labor law, banking law, communications law I could keep going are the various sectors in which regulation takes place. Now the thing that I want you to notice is that regulation takes place in sectors, whereas the core of constitutional law and common law does not take place in sectors. So just to give you sort of a practical example of that, if you were writing a brief about fraud, and you were talking about common law of fraud, you could legitimately cite a case about a used car dealer turning back speedometers. That it has to be intentionally done in order to constitute fraud. You could say that as to what someone has to say in a prospectus for offering new securities. That it has to be intentionally done. The misstatement has to be intentional in order to constitute fraud. But out here in the sectors, you cannot do that. You cannot cite an interpretation of rule 10b-5, past pursuant to the securities acts by the Securities and Exchange Commission, as authority for what should be done in, let's say, the Truth in Lending Act out here in consumer law. They're in totally different acts. They proceed on totally different bases. The interpretation of the words of the act are what you have to start with. And you don't have a general principle that you can carry over. These lines are hard lines preventing you from moving. Whereas down here in constitutional law and common law, you can move around because things are stated at a very high level of, very high level of abstraction. Now why does the regulatory system look that way? All right? Partly, it's the way we pass statutes in this country. Statutes don't happen in sort of slow, nice, gentle increments of thoughtful people sitting there in the capitol building.

You all know that. Statutes happen in great bursts when the political push finally gets strong enough to have something happen. And then it's usually in reaction to some specific problem in some specific sector of the economy or the society. And then the statutes typically delegate to an agency. And the agencies only have partial authority. Right? So this is the National Labor Relations Board. This is the Federal Reserve System. And this is the Securities Exchange Commission. So the statutes happen in sectors. They delegate in

sectors. And finally, we might say there is some constitutional logic behind that, as well. The statutes, except in foreign affairs and military things I guess I can't say 100%. Ninety-some percent say that the signature that you need to make the regulation effective is the signature of the Secretary of such and so, not the President of the United States. And those of you who follow the confirmation hearings on Capitol Hill will know that that's actually pretty important because it means there's another person between the president and something happening. And what that additional person, how independent that person is going to be, is the subject of many weeks of dispute right now. So the powers split up. It's split up in separate agencies established at different times for different purposes. And that's an entirely different idea from the common law slowly accreting as the judges slowly decide decisions based on precedent and trying to fit into the world that fits together. Now my question is, what are we going to do about justice in all these sectors? The Leg Reg course, and for that matter, the Administrative Law course, pretty much treats that as only a procedural question. The thing that is uniform from labor law to consumer law to securities regulation is the Administrative Procedure Act. It's the notice and comment process. It's due process hearings. It's procedural stuff. But the question I want to put is, are there substantive principles of justice that would move around, that would allow us to treat this as less sectorized, if I could put it that way.

So historically, the big attempt at that was the regime of substantive due process. Not the new substantive due process of *Roe v. Wade*, but the old substantive due process of *Lochner*. The courts tried to unify their view of the justice of all these various statutes in the beginning of the regulatory regimes through the doctrines of substantive due process. And that worked by conceptualizing the market as a regime of freedom, of liberty, and then saying you could only go a little bit past what the common law allowed before you reached the cutting-off point as to what the courts would say was constitutionally acceptable. Right? Now that, by understanding the market as a regime of liberty, or understanding the question of regulation as how much can liberty be infringed upon, the courts inevitably and they were quite open about this accepted economic inequality. They just said, what we care about is the freedom of the thing. We're not looking at how much inequality is the result. Now if you wanted to defend that *Lochner* regime I don't imagine there are many people in this room who want to but just to say what the defense would look like, you could defend it as simply on a liberty basis. You could say, we don't care about equality. All we care about is each transaction is free, we will accept the result of the 10th transaction or the 12th transaction or the 15th transaction, as long as each one is not under duress. And that's essentially the view, for those of you who might have read it, of Robert Nozick's *Anarchy, State and Utopia*. Alternately, if you wanted to defend it as a substantive justice principle, if you wanted to say, yeah, it generates a lot of inequality, but yeah, that's OK because that's just, then you make essentially a desert argument. It's the same, in structure, the same argument as she worked harder than he did, therefore she deserved the better grade.

Except the structure here is, she was a better capitalist than he was, and therefore she deserves more money. Right? That, essentially, is the argument of Herbert Spencer. That the economic world is a world of Darwinian competition and survival of the fittest. So what the substantive due process people were doing, the justices who use that view I don't say it's

indefensible. I will say, historically, the defenses didn't work very well. Right? Historically, the liberty defense was subject to the obvious complaint that we're talking about the 10th, 12th, or 15th free transaction, when we know that most of history is full of force, mayhem, duress, whatever you want to call it. It just isn't the way it happened. And on the substantive side, people said, well, maybe the people who are good at the market deserve more, but they don't deserve that much more. And maybe the people who are bad at the market deserve less, but they don't deserve that much less. So I'm just using this as kind of an illustration of how you could have a theory that says, this stuff all operates in the same universe. Even though, as I said at the beginning, the way we talk about the law is it's separated. So what are the possibilities today? The going possibility in terms of actual institutional embodiment today is cost-benefit analysis. Right? Or to give it a fancier name, utilitarianism. Right? I assume a lot of you are familiar with the Executive Order 12866. It's the thing that sets up the OIRA review process. And it says that all federal regulations have to meet all major federal regulations have to meet a cost-benefit test. The benefits have to outweigh the cost. Now there's a whole literature on how you figure that, but that's the basic idea. And the problem with that, from the point of view of justice, is that utilitarianism, or cost-benefit analysis, is a comparison of totals. It's the total cost to everybody in the society or maybe everybody in the world, compared the benefits to everybody in the society or maybe everybody in the world.

And we don't care for cost-benefit analysis who gets what. We only care about how much they get when we add it all together. So that's the way things stood with the Reagan administration empowerment of the OIRA process. Now Clinton, when he got into office, changed it so that the formal statement of the matrix now is, do a cost-benefit analysis and then compare all the benefits and all the costs, including distributive effects. So the formal statement of it now and this has been continued through Bush and through Obama and who knows what's going to happen now, but at least at the moment it's still with governing rule. Now there's a real problem with that, intellectually, in that it doesn't tell you how you're supposed to consider the distributive effects when you count up all the costs and all the benefits. There's no intuitively obvious way in which you measure what is the let's say monetary value, because that's what you're ultimately trying to compare here. What's the monetary value of inequality, or the monetary cost of inequality, or monetary cost of this much inequality compared to that much inequality? It may be literally an apples and oranges proposition that you can't put together. But I'm also worried about what I understand to be the way this is actually done. So judging from what Professor Sunstein has written about it which I can't say I've read all of, because nobody can read all of what Professor Sunstein is able to write the basic idea that OIRA has been using, at least when he was head of it, is that if there is a regulation, which is not quite cost-benefit justified so the costs are a little bit more than the benefits figured in the ordinary way, but the regulation would really benefit poor people then there's a chance that they would say, well, we'll let this one pass. That's my understanding of how they're bringing in distributive effects. Not by actually working some big total number, but by sort of using it as a little bit of a thumb on the scale.

If that's the process, it's subject to what seems to me a very big defect, which is it only goes one way. In other words, it says, well, this regulation isn't quite cost-benefit justified. Here's a little bit of distributive effect. We'll put that on the scale and we'll justify it. What about all the regulations that go the other way? The regulations that are completely cost-benefit justified? And if I understand the OIRA process, the sentence I just stated is the end of it. They're completely cost-benefit justified, period. The power plant rule will save this number of lives. Those number of lives times the \$7 million or \$9 billion or whatever we calculate, the value of statistical greatly overwhelm the cost to the power plant operators, case done. If it's cost-benefit justified in other words, nobody's asking but maybe it's got bad distributive effects. Just because it's cost-benefit justified, if we care about distribution, it might be something really bad happening. Right? It might be that oh, I don't know it might be that all the people who own houses along the seashore are rich. And therefore when the ocean rises the predicted one foot that it's going to rise because the glaciers melt because we didn't stop the power plants from spewing forth, all we're doing is saving rich people's summer homes. I don't say that it's true. I'm just imagining. But if we really care about distribution, shouldn't we be caring about this stuff which is cost-benefit justified as well as the stuff which isn't cost-benefit justified? Shouldn't we be asking the distributive question across the board rather than only for rare instances where it's some kind of special wild card in the situation? So I try to imagine what that would look like? And I'm totally unsure of the following, but here is just for something to think about. All right? Suppose we started with John Rawls's Theory of Justice. So to turn a really sophisticated long book into one sentence, suppose we started with the proposition that inequalities are justified only if they make the worst-off people in the society better off.

In other words, inequalities are justified if they have a sufficient incentive effect or a sufficient power that the whole society gets richer, and the people at the bottom get richer than they would have been if the inequality hadn't been allowed. All right? That's Rawls's test for a legitimate inequality. Now as he's discussing it, it's meant as a criterion to be applied to the whole social system. No one ever votes on a regulation or statute which is the whole social system. So can we take that down to particular proposed rules or particular proposed statutes? And so I'm wondering whether we could invent an inequality impact statement. Whether it would be possible to do the work accompanying each proposed major regulation, let's say, that there be a cost-benefit analysis. But then could there also be a statement as to what its impact would be in terms of rich and poor in the society? So I don't know the answer to that. All right? There are some real problems in doing it. The predictive problems are very tough. And just to say a couple of places where you might have seen some analysis of the kind that I'm talking about that you'd have to do, there's a real dispute whether rent control does or doesn't advantage poor people in rent-controlled apartments over the long term. And there's a real dispute as to whether imposing a minimum wage does or doesn't help the poorest wage earners in the society, over the long term. So it's not something where you can just sort of say, well, it's a minimum wage. That helps the poor. It's a much more complicated question than that. But you know, cost-benefit analysis is considerably more complicated than just sort of how many dollars is it going to cost tomorrow. So I think it's a technical problem there. I think if we worked at it,

we might reduce the technical uncertainties enough that we'd say we got some value out of having such an impact statement.

I think there would be a real normative question, too, which is suppose we had an inequality impact statement. What would we be looking for? Now Rawls says what we should look for is what happens to the very poorest people in the society. The political lingo that at least was used by, as I understand it, both sides in the last election is, what's the impact on the average person in the society, AKA the middle class, and not the poorest person. So we might have a dispute as to where we're worried about the impacts coming. But at least we would have something to talk about, it seems to me, in comparison to the just, sort of, well, the costs are this. The benefits are this. Let's go. So I put that forward to you as a proposition. That if you wanted to do something to sort of say, what would make this a more general sense of social justice, that that might be a way of moving from the current fixation on just cost-benefit analysis to something bigger. Failing that, in the present situation and I go back to this because you're in law school, so we've got to pay attention to how things are argued in the law at the moment in the present situation, what you have is a separate statute and a separate agency in each sector. And what we are then forced to do in terms of justice is to argue what was the actual political compromise evidenced by this statute, or in this statute, or this statute. And then we can have an argument whether we're talking about the words of the statute or the legislative history of the statute, or whatever. But we're taking the justice concerns and we're just knocking them back to how do we understand this statute. We don't even have a canon of construction that says, in cases of doubt, choose the more equal interpretation. There is no such canon. We go back to what do we understand Congress to have done at the magic moment when this started.

And if you like your legal system makes sense, to be coherent, you hope for better than that. That's what I have to say. I'm happy to take some questions. AUDIENCE: Do you push students toward what you think are just solutions? So, I mean, you began with a number of current-day controversies. And all these have a legal apparatus surrounding them. So you get to class, you're talking about various things. Do you self-consciously push people toward what you think would be a socially beneficial outcome, conclusion? PROFESSOR RAKOFF: Well, there AUDIENCE: Should one? If you don't, should one do that? PROFESSOR RAKOFF: I was going to say, there are lots of monitors of the truthfulness of what I'm about to say, in the audience. I would say a two-part answer you should ask about what is the just solution. And you should be latitudinarian in what you will accept as answers to that question. So you will accept the fact that there's more than one answer to that question. But that the question should be put. Is that responsive? AUDIENCE: Sort of. So you ask the question, you accept that different people are going to have different thoughts. But do you yourself, I mean, you have a position. You have, you know, you're ideologically situated. You have your own views as to how you think the good society should, you know, be set up. Do you feel that you should push people toward what you think would be a good thing? PROFESSOR RAKOFF: No. I think my responsibility as a professor is to not do that. Do you differ? One notices the old Socratic trick of AUDIENCE: So if you're surrounded by a group of students who have ideas that you think show backwardness, you don't feel that you need to help them along, nudge them towards good, nudge them towards enlightenment? What's wrong

with that? PROFESSOR RAKOFF: I mean, I would think that I'm obligated to do that for every student. That is to say, in the sense of, here's what people would say in objection to what you have to say. How are you going to meet it? What are you going to do to answer it? I guess I am an old-fashioned liberal on this issue, that students have the right to be where they are, and I don't have the right to mess with that.

That was a tough question. AUDIENCE: Hi. I was particularly interested in what you were talking about well, you just threw it out there rent control. And I think that is actually maybe a good thing, particularly coming from Boston. But I'm wondering if we could maybe achieve more social justice if we re-imagine the different economic classes. I don't really feel like we have much of a middle class. I feel like it's been pretty much gutted. And so let's use rent control, for example. So some of my students are here. So they might not know what rent control is. It's limiting how much the landlord can raise the rent. So if we just said, OK, rent control. I think if we could somehow bring it back, or some kind of version of it, I don't think it would just benefit the group that we call poor. I think it would also benefit middle class, or even what we might even perceive as upper middle class. Because the rents have gotten so crazy. The wages I'm not even talking about just raising the minimum wage but just people who have what were traditionally good jobs, but they're just not making good money in light of the skyrocketing costs. So do you think we should re-imagine the different economic classes to maybe find better solutions, or at least have more interesting discussions? Because it's not just the poor that need help. It's the people who we keep on saying are middle class, but they're not really middle class. But they're not maybe poor. PROFESSOR RAKOFF: So that's a question of sort of political ideology, as well as statistical fact. I mean, my understanding is roughly 80% of American society, if you ask them what are you, would answer, I'm middle class. Right? So that seems statistically wrong, right? But you know, has both a mystifying aspect to it and a solidarity-creating aspect to it.

And I'm not quite sure how you measure those. So I do think if we started to do the kind of analysis that I'm talking about, it would have to be more sophisticated than simply poor, middle class, rich. I do agree with that. AUDIENCE: I wonder why equality is a separate standalone factor that you're considering. Why isn't it just one other factor we need to put in into the cost consideration? Because I know it sounds quantitatively difficult to do, but eventually the reason why we don't want equality inequality it's because of the social tension it creates. So I just want to know why it shouldn't be part of the cost calculation. Instead you want to make it a standalone factor. PROFESSOR RAKOFF: The cost-benefit analysis that's traditionally done has a very narrow view of what counts in life. What counts in life is what someone has figured out how to monetize. And this is very hard to features of social solidarity are, at least my understanding of it are very hard to monetize. So I completely agree with you. If you were doing cost-benefit analysis as sort of like, what do people really care about, then it would come out with a rather different set of what are costs and benefits from what is done when they get down to the technical work of doing it. So I'm just trying to move beyond the technical aspect of it. AUDIENCE: Hi. So I just have I want to pick up, follow up on the first question. The problem to me seems to be that this is always an issue of competing values. So and it picks up a little bit on this inequality question. So we had something called environmental impact assessments, also, right? So you're

supposed to count what the impact is, et cetera. So we put all of these different things in the mix. But the problem is, where do these values come from? Am I just, as a student, am I just supposed to come at it from my life, from my family, what I believe? Where am I, if not, if I'm coming to class, am I sort of bringing these in already? Where are they being formed and forged? And if you're not guiding them, and all you're doing is enabling me to think about different sort of values that all of us place on things, then what? How do we eventually, as a society, decide? How do things get sort of, you know, how does one regulation versus another, privileging one set of interests versus another, get made? PROFESSOR RAKOFF: Well, that's a tough question.

It was tough when he asked it, and it got tougher when you asked it. I mean, clearly, the school stands for some kinds of values at a process level. Right? So clearly, for example, we actually believe in real facts rather than alternative facts. Right? And we also believe in hearing the other side of something before we go ahead and make our decision. So the question of whether a teacher knows enough to tell you, this is what's good in life, or this is how the society ought to be organized, I don't think I know enough. I mean, if you're talking to me casually over lunch, I'll give you an opinion that I wouldn't give in class. But I don't think that teachers are that strikes me as propagandizing, because I don't think I know enough. Do you have a different view? Do you think I ought to do more? AUDIENCE: I actually think so. I definitely think that there is, when you've weighed different things in the balance, as you're saying, there is a way to privilege I mean, if the thing is the most, the poorest in society, the most unequal. I mean, if those are values that we hold dear, I think there is a way to push to bring those in. Just as I think the environmental movement, for example, had to do a lot to push the idea that we have to care about the planet that we're on. PROFESSOR RAKOFF: Well, I do think that what I did here today is pushing to take more seriously distributional effects of regulatory things. I think that's true. But if someone said to me, well, no. I don't believe in that. I believe in the free market, unregulated, because that's what I believe in.

Or I would say, well, why do you believe it? But I wouldn't say, go to some other classroom. AUDIENCE: That's right. But then could you point out to that same person that, look at the effects of when you run it this way, completely unregulated. And then look, this is what's happening as a result of this when you did this. Or, you know, we pollute our rivers, or whatever we do. And then have them reconsider. So I'm just trying to figure out if there's that sort of dialogical sort of process going on of where you are pushing the boundaries of you can't just believe what you're saying you believe. How do you justify what you believe? AUDIENCE: For years, you and I have had arguments every year about boilerplate in contracts, form contracts, how should the legal system deal with form contracts. PROFESSOR RAKOFF: That's true. AUDIENCE: Now you don't tell me, get out of the class, you know, leave the lunch table. We go back and forth, year after year after year. You push. You push. I push back. But you have a view. Now I mean, don't you have a view about frankly all of the important subjects that you talk about? And you, I mean, don't you push them? Now how you push them, the question of how you might try to persuade people over to your view, I mean, it might be totally counterproductive to go too far. You might look, you know, you might look, people might, you know, just turn off their minds if they think that you're

preaching in a condescending way or if you're a know-it-all, or everything. But what's wrong with people simultaneously trying to illuminate a subject, but at the same time, pushing a political project, whether the political project be anti-racism, whether the political project be anti-sexism, whether the political project be anti-discrimination against gay people, you see the point. PROFESSOR RAKOFF: Well, the way you say what's wrong, I'm not prepared to say it's wrong if some other teacher took a different approach to it than I did. So I'm not going to say that I'm necessarily know I'm right.

To me, it counts a lot that everybody does feel comfortable in the classroom, that everybody does when I say go to another classroom, that's overstating it but that everybody feels they have a place in the classroom. And in most contested things, that means that the teacher doesn't say, I know one side's right and the other side's wrong. AUDIENCE: Could I push you just one more time? You're talking about a subject and somebody says, with all due respect, I don't mean to offend anybody. You know, I don't mean to hurt anybody's feelings. But it's clear to me that, you know, men are superior and should run things. What does one say? Well, you know, is that just another idea among many ideas? And well, that's your view. Or is that an idea that should prompt some other response? PROFESSOR RAKOFF: That's a tough one. It's tough because it is, to some extent, an attack on other people in the classroom. And therefore, to some extent, a teacher's job is to stand against part of the class attacking another class, another part of the class, in that respect. But when I'm standing here thinking, so do you just say, nah? Or do you say, what would make you think that? Do you say, you know, do you give a little room for the explication, or just stop? I'm not sure. AUDIENCE: This is a question for both of the professors. I'm wondering if you think that there can, or should be any sort of bifurcation might be too strong a word but different roles of the professor as a scholar and as an individual who has a presence on campus and who may be developing sort of theories and practical applications, versus the person who's in the classroom leading this sort of discussion. And whether there ought to be, in terms of this question of trying to manifest or push a certain value system. PROFESSOR RAKOFF: Well, to go to the point that Randy and I always argue about over lunch so I wrote a long article, which had the good consequence of getting me tenure a long article about why boilerplate was junk.

He has a misguided opposite view. But when I assign that in contracts, if I'm teaching contracts, I always assign also Randy Barnett's article, which sort of goes right after my article in the way that Randy Kennedy would if he were there in person. So I do think that I ought to do that. I don't think I should just assign my view and not assign the opposite, the opposite view. AUDIENCE: I just kind of want to observe. It's just interesting to me that maybe this is part of the answer of why this is so challenging and why we don't regulate in this way with the general principle is because in this room we've kind of devolved into process, even as we're trying to talk about this. And kind of now we're asking the question of how do we talk about values and what's the fair way to do this process. And that's just interesting to me as someone who heard this idea about how we've taken the notions of justice in each of these regulatory agencies and reduced it to process. And then we're just very vulnerable to that, is kind of my observation. AUDIENCE: Hi. I just wanted to say that growing up for me, it was never an issue or a problem with values, you know, which values

are the better set. I think it's just a matter of creating a space where people, like you said, I strongly agree with your kind of philosophy of creating a space where just people feel comfortable expressing themselves. It's not the job of an educator to impose his or her beliefs on the students. And I think that it's important to kind of help people see, if you're going to do anything, help people see that, OK, well, we can all agree that racism is bad. Or we should be able to agree that racism and discrimination of different kinds is bad. But that there are different ways to go about combating that. And I think that's the better place to kind of start from. Because I feel like things have become very polarized. And unfortunately, that's crept into places of learning.

And I think that that's one of the last places you should ever find such polarization, such kind of standoffs between ideologies. It's a place of look, you know, places of learning, or places of critical thinking, independent thinking. And that's how it should remain.

AUDIENCE: Since we seem to be having a discussion about pedagogy, I was wondering if Professor Kennedy and Professor Rakoff wouldn't mind giving their perspectives on the role of the other students in the room when a student says something like what Professor Kennedy said. Because you've talked about the role of the educator, but what do you conceive of the role as students? And how does that impact your role as an educator?

PROFESSOR RAKOFF: So the other students in the room are incredibly important in the educational process around here. I mean, I'm not a lecturer. I'm someone who thinks that what you really need is a discussion on pretty much everything that we talk about. Obviously, the other students in the room would be entitled to have quite strong opinions about that, even if I feel that I should be a little bit modulated. So I would certainly allow for that. I think that the people who have very strong opinions and state them in ways that other people can hear them get further than people who have very strong opinions and state them in ways that other people can't hear them. So I think I might quickly put down some ground rules for the discussion. But I think that it would be worth discussing.

AUDIENCE: Two points. One, on the question of the teacher, I mean, everybody has beliefs, aims, and so long as they're upfront about it, I think that's perfectly fine. I think, you know, I think a great university, yeah. So-and-so teaches such and such. He's an anarchist. So-and-so over there is a socialist. So-and-so is a free marketeer. No problem. And by the way, they're going to bring that into the classroom. And people might think that they're not, but they are. And my position would be, what's wrong with that? And some of the people who are most effective at doing that are very careful to make sure that the people who see differently have space and, you know, and their own ideas are challenged.

Because when their own ideas are challenged, oftentimes the most persuasive. As for other students, especially in law school, it seems, for me, I never feel frankly protective of the students. Students in law school are, I mean, it would be one thing. I'd have a different view of an elementary school. I'd have a different view of a high school. If you're in law school, you're an adult. Not only you're an adult, but you're within months of having people's lives and property in your hands. I think that every law student should have the wherewithal to speak up. I don't feel at all protective. I push what points I want to push, but I'm very impatient if a student comes back, you know, after class and says, you know, I felt, you know, put upon. I think that every student should have the wherewithal to speak their

minds and defend themselves. I don't think that it's incumbent upon me to be defensive of other students at all.



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