
What Is Regulation?

Barak Orbach*

People hold strong views about regulation, but do they know what “regulation” means? National Federation of Independent Business (NFIB) is a landmark in regulation jurisprudence, yet the NFIB Court was divided over the meaning of the term “to regulate.” Long ago, John Stuart Mill observed that “we do not [always] understand the grounds of our opinion. But when we turn to . . . morals, religion, politics, social relations, and the business of life, three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favor some opinion different from it.” The controversy and confusion about regulation illustrate the phenomenon. This Essay explores the meaning of the term “regulation.”

People hold strong views about regulation, but do they know what “regulation” means? *National Federation of Independent Business (“NFIB”)*¹ is a milestone in regulation jurisprudence, yet the *NFIB* Court was divided over the meaning of the term “to regulate.” Disagreeing on whether Congress has authority to mandate minimum health insurance coverage, the Justices presented two opposite, yet firm views about whether the phrase “to regulate” can mean to require activities.² This fundamental disagreement led the Justices to a debate about the question whether a health insurance mandate is equivalent to “address[ing] the diet problem by ordering everyone to buy vegetables.”³

* Professor of Law, University of Arizona College of Law. www.orbach.org. This essay is part of a large project on regulation that includes several papers and a casebook, *REGULATION: WHY AND HOW THE STATE REGULATES* (Foundation Press, 2012).

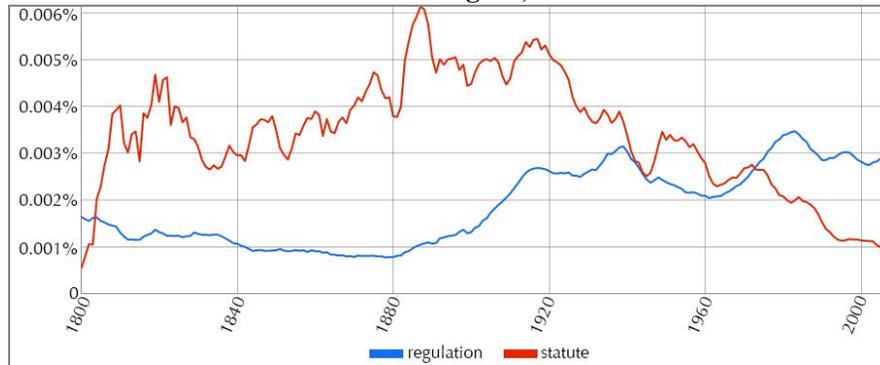
1. *Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012).

2. *Id.* at 2586-90 (Roberts, C.J.) (arguing that the power to “regulate” something does not include the power to create it, and “the natural understanding that the power to regulate assumes there is already something to be regulated”); *Id.* at 2621-25 (Ginsburg, J., concurring in part and dissenting in part) (arguing that the power to regulate includes the power to compel activities); *Id.* at 2644 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (arguing that the phrase “to regulate” “can mean to direct the manner of something but not to direct that something come into being”); *see also* *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011), *abrogated by NFIB* (“At the time the Constitution was fashioned, to ‘regulate’ meant, as it does now, ‘[t]o adjust by rule or method,’ as well as ‘[t]o direct.’ To ‘direct,’ in turn, included ‘[t]o prescribe certain measure[s]; to mark out a certain course,’ and ‘[t]o order; to command.’”).

3. *NFIB* at 2588 (Roberts, C.J.); *see also id.* at 2591 (Roberts, C.J.) (reframing the proposition to purchases of “cars and broccoli”); *id.* at 2619-20, 2624-25 (Ginsburg, J., concurring in part and dissenting in part) (discussing the proposition); *id.* at 2650 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (same).

During the past century, substantial resources have been invested in the politics and scholarship of regulation (see Figure 1).⁴ Nonetheless, the term “regulation” appears to escape a clear definition.⁵ Although regulation has been one of the most controversial topics in law and politics, it has also been one of the most misunderstood concepts in modern legal thinking.

Figure 1: Frequency of the Words “regulation” and “statute” in U.S. Publications in English, 1800-2008



Source: Google Ngram.⁶ Trends in the frequency of the word “regulation” in U.S. publications roughly illustrate changes in the attention the topic has drawn. The use of the word “regulation” in printed publications has substantially grown since the creation of federal agencies and the rise of the regulatory state in the late 1880s. It declined after the New Deal and rose again with the emergence of the critique of economic regulation and expansion of social regulation.⁷ Since the early 1970s, the word “regulation” has been used more than the word “statute” in U.S. publications.

4. See generally Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401 (2003); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

5. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 7 (1982) (stressing that his book makes “no serious effort . . . to define ‘regulation’” and this choice is a limitation of the book); Staff Paper, U.S. CONGRESSIONAL BUDGET OFFICE, *THE NUMBER OF FEDERAL EMPLOYEES ENGAGED IN REGULATORY ACTIVITIES* 1 (1976) (“There is no single accepted definition of what constitutes regulation by the federal government.”); Jacint Jordana & David Levi-Faur, *The Politics of Regulation in the Age of Governance*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* 1, 3 (Jacint Jordana & David Levi-Faur eds., 2005) (“[I]t would be futile and somewhat nonsensical to offer one authoritative definition of the notion of regulation that holds across the divides.”); BARRY M. MITNICK, *THE POLITICAL ECONOMY OF REGULATION* 1 (1980) (“The concept of regulation is not often defined; . . . it is not often discussed as a concept. It has no accepted definition.”); ANTHONY I. OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* 1 (1994) (“The expression ‘regulation’ . . . is not a term of art, and unfortunately it has acquired a bewildering variety of meanings.”); William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1071 (1994) (“Despite a vast academic literature and constant public usage, [the concept of] ‘regulation’ defies close circumscription.”); see also Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990).

6. For the methodology and its limitations, see Jean-Baptiste Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*, 331 SCI. 176 (2011).

7. Social regulation refers to regulation of externalities. Primary examples are environmental and safety regulations.

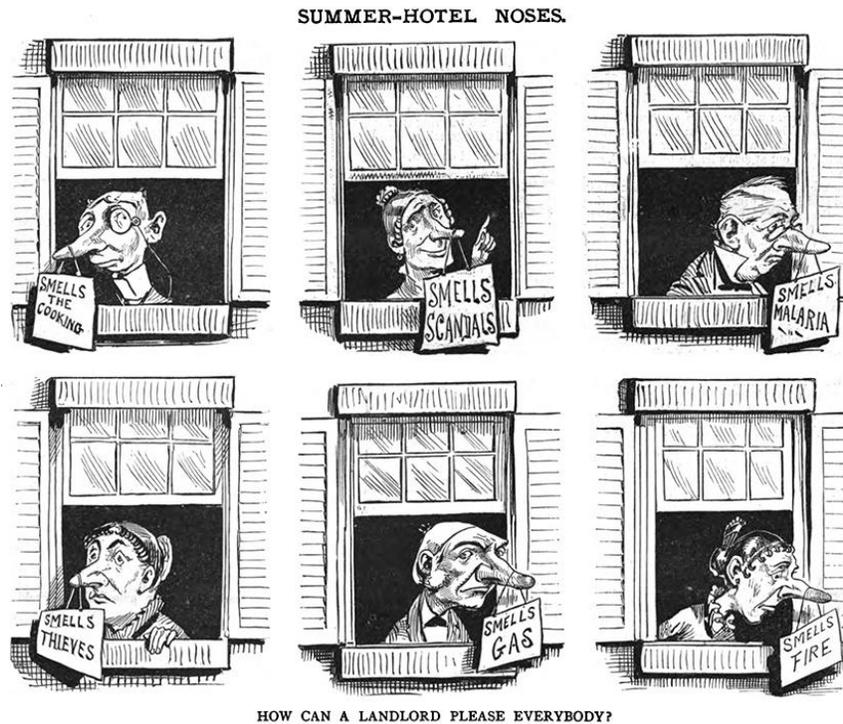
What is Regulation?

The evasive nature of the term “regulation” is largely a product of confusion between two unrelated matters—the abstract concept of regulation and opinions about the desirable scope of regulatory powers or desirable regulatory policies. People intuitively understand the word “regulation” to mean government intervention in liberty and choices—through legal rules that define the legally available options and through legal rules that manipulate incentives. But too often, ideologies and preexisting beliefs dictate perceptions as to what intervention means and whether intervention is needed. This pattern results in inconsistent preferences for regulation and obscures the understanding of the term. It is not uncommon that individuals who express contempt of government regulation are proponents of intrusive regulation that serves their values,⁸ while individuals who advocate for government regulation reject notions of regulatory tradeoffs.⁹ The Supreme Court’s debate over the meaning of the phrase “to regulate” in *NFIB* illuminates the phenomenon.¹⁰ Scholars who grappled with the meaning of the term “regulation” produced various definitions for the meaning of intervention or followed the path of using their own personal beliefs to explain the concept, indirectly creating informal definitions.

8. See, e.g., RON PAUL, *LIBERTY DEFINED* 1-2 (2011) (“Some people believe that being pro-choice is being on the side of freedom. . . . I believe that the moral consequence cavalierly accepting abortion diminishes the value of life.”).

9. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004); MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY* (2012).

10. See also OGUS, *supra* note 5 at 1 (“[W]hen, in the rhetoric of the day, politicians and others refer to the stifling effect . . . of ‘regulation’ . . . , they clearly do not have . . . a broad concept in mind.”).

Figure 2: Perceptions of the Role of the Regulatory State

Source: Puck Magazine, August 6, 1884.

A few examples of the confusion between perceptions of regulation and the understanding of the concept as government intervention may be helpful.

The legal concept of “regulation” is often perceived as control or constraint. For example, the definitive legal dictionary, *Black’s Law Dictionary*, defines “regulation” as “the act or process of controlling by rule or restriction.”¹¹ Similarly, *The Oxford English Dictionary* defines “regulation” as “the action or fact of regulating,” and “to regulate” as “to control, govern, or direct.”¹² To many people, “control” connotes “restrictions,” although control may have other meanings.

Regulation often imposes no restrictions, but enables, facilitates, or adjusts activities, with no restrictions. Examples of such regulations include the supply of roads, health and emergency services, public education and public libraries, welfare benefits, reliefs to victims of natural disasters and bailouts to failed institutions. Such services *directly* influence (or “adjust”) conduct of individuals and firms. In the abstract, all government actions supposedly influence conduct of individuals and firms, but not necessarily directly. For

11. BLACK’S LAW DICTIONARY 1311 (9th ed. 2009).

12. 13 THE OXFORD ENGLISH DICTIONARY 524 (2d ed. 1989).

What is Regulation?

example, activities related to national defense and foreign policy tend to have only indirect influence on conduct of individuals and firms.¹³

Lawyers frequently use the word “regulation” in reference to rules of administrative agencies. This habit tracks the executive branch’s terminology.¹⁴ For example, Executive Order 12,866, which requires federal agencies to engage in cost-benefit analysis when “deciding whether and how to regulate,” defines “regulation” as “an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.”¹⁵ This meaning of the word mirrors another common perception of the term “regulation,” but surely does not capture the entire spectrum of regulatory instruments. Much of our regulatory landscape does not originate in administrative agencies.¹⁶

Another common perception of “regulation,” or at least a popular reference to regulation, equates the concept with laws that serve interest groups.¹⁷ Economist George Stigler popularized this view, arguing that “regulation is acquired by the industry and is designed and operated primarily for its benefit.”¹⁸ Richard Posner offered a more refined version of this perception: “[R]egulation [is] a product allocated in accordance with basic principles of supply and demand . . . [and] we can expect a product to be

13. See, e.g., Staff Paper, U.S. CONGRESSIONAL BUDGET OFFICE, THE NUMBER OF FEDERAL EMPLOYEES ENGAGED IN REGULATORY ACTIVITIES (1976); ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION 2 (1999) (“Regulation is often thought of as an activity that restricts behavior . . . (a ‘red light’ concept) but influence of regulation may also be *enabling* or *facilitative* (‘green light’).”).

14. Daniel P. Kessler, *Introduction* to REGULATION VS. LITIGATION 1, 1 (Daniel P. Kessler ed., 2010) (“[One approach] [m]odern capitalist societies take . . . to controlling market failures . . . relies on relatively specific rules developed and enforced by administrative agencies. In this approach, bureaucrats with technical expertise monitor private parties to ensure compliance. . . . This [approach] defines what is often described as ‘regulation.’”)

15. Exec. Order No. 12,866 § 3(d), 3 C.F.R. 638 (1993), *amended* by Exec. Order No. 13,258, 3 C.F.R. § 204 (2003) *and* by Exec. Order No. 13,422, 3 C.F.R. 191 (2007), *reprinted as amended* in 5 U.S.C. § 601 (2006), *revoked* by Exec. Order No. 13,497, 3 C.F.R. 218 (2010). Executive Order 12,866 replaced Executive Order 12,291, which President Reagan issued in February 1981 and included the same definition.

16. For example, law made by courts—common law—is a traditional form of regulation. See ANDREW P. MORRIS ET AL., REGULATION BY LITIGATION (2008); REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002); Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts): An Analytical Framework*, in REGULATION VS. LITIGATION 11 (Daniel P. Kessler ed., 2010); see also *Freedom Holdings, Inc. v. Spitzer*, 358 F.3d 205 (2d Cir. 2004); *Sanders v. Brown*, 504 F.3d 904 (9th Cir. 2007); *The T.J. Hooper v. Northern Barge Corp.*, 60 F.2d 737 (2d Cir. 1932).

17. See also Barak Orbach, *Invisible Lawmaking*, 79 UNI. CHI. L. REV. DIALOGUES 1 (2012).

18. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGM'T SCI. 3, 3 (1971); see also GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 3 (1963) (Studying the establishment of the Interstate Commerce Commission and its early years and concluding that “regulation itself was invariably controlled by leaders of the regulated industry, and directed toward ends they deemed acceptable or desirable”); Sam Pelzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211 (1976).

supplied to those who value it the most.”¹⁹ But, of course, not all regulations serve industries.²⁰ Even when the regulator is captured by industries, it is far from clear that lack of regulation would be better for the public.²¹

So what does regulation mean? We return to the starting point—the intuitive understanding of the word “regulation”: government intervention in the private domain *or* a legal rule that implements such intervention. The implementing rule is *a binding legal norm created by a state organ that intends to shape the conduct of individuals and firms.*²² The state organ, the *regulator*, may be any legislative, executive, administrative, or judicial body that has the legal power to create a binding legal norm. This general definition is broader than “restrictions,” “rules promulgated by administrative agencies,” “laws that serve interest groups,” and related common perceptions of the word “regulation.”

The definition refers to “intervention in the private domain,” rather than “intervention in choices” because of the ambiguity of the latter. Many forms of regulations intend to improve the ability of individuals to make choices, without imposing any restrictions on those choices.²³ Do such regulations intervene in choices? Theoretically, we can regard any influence on conduct as interference with choices. However, the philosophical inquiry into the meaning of interference with choices is unlikely to establish any consensus with practical implications. For all practical purposes, regulation certainly means intervention in the private domain.

The definition of regulation as intervention in the private domain is quite old. Already in the mid-nineteenth century, John Stuart Mill casually used the word “regulation” to describe “governmental intervention in the affairs of society” and laws that implement such intervention.²⁴ Mill argued that “[n]o subject has been more keenly contested in the present age” than “the limits of the province of government.” He posited that the source of controversy was

19. Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT SCI. 335, 344 (1974). Over the years, Judge Richard Posner’s views of regulation have evolved and changed. *See, e.g.*, RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY 1-2 (2010) (“[C]apitalism is not a synonym for free markets. It is a name given to a complex economic system with many moving parts. [Some of those parts] include a system of laws for protecting property and facilitating transactions, institutions for enforcing those laws, and regulations designed to align private incentives with the goal of achieving widespread prosperity.”); Posner, *supra* note 16, at 12 (“From a normative economic standpoint[,] the goal of regulation, whether by courts or by agencies, is to solve economic problems that cannot be left to the market to solve.”).

20. PREVENTING CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., 2012).

21. *See, e.g.*, Robert W. Harbeson, *Railroads and Regulation, 1877-1916: Conspiracy or Public Interest?*, 27 J. ECON. HIST. 230 (1967).

22. *See, e.g.*, David P. Baron, *Design of Regulatory Mechanisms and Institutions*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1349, 1349 (Richard Schmalensee & Robert D. Willig eds., 1989) (“Regulation involves government intervention in markets in response to some combination of normative objectives and private interests reflected through politics.”).

23. *See* Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism.”* 151 U. PA. L. REV. 1211 (2003).

24. JOHN STUART MILL, 2 PRINCIPLES OF POLITICAL ECONOMY 525-71 (1848).

What is Regulation?

largely an ideological divide between two groups in society—the supporters of interference [who believe the government should act] wherever its intervention would be useful” and the “laissez-faire school [that believes] the province of government [should be] restricted . . . to the protection of person and property against force and fraud.”²⁵ Reflecting on such beliefs, Mill pointed out that “on every subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons. . . . [W]e do not [always] understand the grounds of our opinion. But when we turn to . . . complicated [subjects], to morals, religion, politics, social relations, and the business of life, three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favor some opinion different from it.”²⁶ Mill’s account of perceptions of regulation and their formation is timeless.

Consider Mill’s discussion of “the sale of poisons.” It can illuminate how people conflate their views of desirable regulatory policies with their understanding of regulation. Mill declared that it was “a proper office of public authority to guard against accidents.” Therefore, he argued, “[i]f poisons were never bought or used for any purpose except the commission of murder, it would be right to prohibit their manufacture and sale.” Mill recognized, however, that products might be complex. For example, poisons may “be wanted not only for innocent but for useful purposes, and restrictions cannot be imposed in the one case without operating in the other.” Mill thus recommended that “a precaution [such as] labeling [of] the drug with some word expressive of its dangerous character, may be enforced without violation of liberty: the buyer cannot wish not to know that the thing he possesses has poisonous qualities.”²⁷

Lawmakers and courts have long attempted to implement this seemingly straightforward regulatory approach. Only in 1906, after decades of debate, did Congress pass the Pure Food Act, outlawing the manufacture and sale of “any article of food or drug which is adulterated or misbranded.”²⁸ Several poisons, such as tobacco products and unsaturated fatty acids (“trans fats”), are still legal and their regulation has been and remains controversial. Although the unequivocal adverse health effects of tobacco and trans fats have been known for decades,²⁹ lawmakers and courts have been reluctant to acknowledge that it

25. *Id.* at 525.

26. JOHN STUART MILL, ON LIBERTY 66-67 (1859).

27. *Id.* at 171-73.

28. See JAMES HARVEY YOUNG, PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906 (1989); Peter Temin, *The Origin of Compulsory Drug Prescriptions*, 22 J. L. & ECON. 91 (1979); . . . see also Sam Peltzman, *The Health Effects of Mandatory Prescriptions*, 30 J. L. & ECON. 207 (1987) (criticizing restrictions on sales of medications).

29. See, e.g., U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, SMOKING AND HEALTH (Jan. 1964); Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 N.E. J. MED. 1601 (2006) (surveying the literature).

is the “proper office of public authority to guard against accidents.”³⁰ Regulatory attempts to mandate restrictions on sales or to require disclosures have encountered hurdles and objections.³¹

Certain food additives offer an example of “complex products”: they have “useful purposes,” but may become cancerous (“poisonous”) when consumed at excessive levels. The 1957 Delaney Clause strictly banned all food additives having the potential of “induc[ing] cancer in man or animal.”³² Another category of contemporary complex products that have useful purposes, but can be rather “poisonous” if used excessively is that of financial instruments, like credit cards, mortgages, and securities.³³ Although all financial bubbles are the direct outcome of excessive debt, the regulation of financial instruments enabling the accumulation of debt is controversial.³⁴ These two examples illustrate the tendency to oversimplify complexities to align regulatory policies with preexisting beliefs.

Mill’s discussion of the tradeoff between bans and disclosures illustrates the significance of choices among regulatory measures to individual liberty. In practice, however, choices follow ideologies and personal values that do not always focus on individual liberty. For example, by passing the Stolen Valor Act of 2005, Congress chose to outlaw lies concerning being “awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”³⁵ In *United States v. Alvarez*,³⁶ the Supreme Court considered the potential “poisonous” effects of such lies and the choice to ban them, rather than publicly disclose the recipients of such awards to expose “liars.” Relying on the traditional principles of “marketplace of ideas,” the majority ruled that “[t]he remedy for speech that is false is speech that is true,” and stressed that “when the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives.”³⁷ Three

30. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1845 (2009) gave the FDA authority to regulate tobacco products.

31. The FDA started requiring trans fats disclosures only in 2003. Food & Drug Administration, Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims, 68 Fed. Reg. 41434 (July 11, 2003). In 2007, New York City introduced a ban on trans-fat in food establishments. See *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009); *Roark & Hardee LP v. Austin*, 522 F.3d 533 (5th Cir. 2008); *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266 (D.D.C. 2012); *Walgreen Co. v. San Francisco*, 185 Cal. App. 4th 424 (2010).

32. 21 U.S.C. § 348(c)(3). See *Less v. Reilly*, 968 F.2d 985 (9th Cir. 1992). In 1996, Congress passed the Food Quality Protection Act, excluding pesticide residues from the scope of the Delaney Clause.

33. CARMEN M. REINHART & KENNETH ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2009); ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE 2* (2d ed. 2005).

34. See, e.g., NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, *THE FINANCIAL CRISIS: INQUIRY REPORT* (final report, Jan. 2011); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

35. 18 U.S.C. § 704(b).

36. 132 S. Ct. 2537 (2012).

37. *Alvarez*, 132 S. Ct. at 2550-51 (internal citation omitted).

Justices, however, felt that bans would be superior to disclosure measures in protecting the public from harm.³⁸ In *NFIB*, delivered in the same week, these three Justices expressed hostility toward government regulation, noting that “Government regulation typically imposes costs . . .—especially regulation that prohibits economic behavior.”³⁹ Still in the same week of June 2012, these three Justices also reaffirmed their support in *Citizens United*,⁴⁰ in which the majority struck down restrictions on political spending by corporations and unions, equating such restriction to “an outright ban, backed by criminal sanctions,” and declaring that “these prohibitions are classic examples of censorship.”⁴¹ Such sharp contradictions in the approach toward specific regulatory instruments (e.g., bans and censorship) expressed by the same individuals are not uncommon.

Why are approaches to regulation are so incoherent? Studies in psychology affirm an inconvenient truth: people tend to be dismissive of and reject information that conflicts with their own beliefs.⁴² Specifically, people who hold strong opinions are likely to evaluate facts and empirical evidence in a biased manner.⁴³ This well-documented tendency has profound effects on communication and political polarization.⁴⁴ This human tendency also explains common perceptions of regulation and approaches toward specific regulatory measures. Regulatory measures, being legal instruments that may interfere with choices, are always inconsistent with some people’s beliefs. But, as Justice Holmes pointed out, “pretty much all law consists in forbidding men to do some things that they want to do.”⁴⁵

Of course, there is some truth in most perceptions of regulation. Regulation may be used to require or proscribe conduct; it may come in the

38. *Id.* at 2559 (Alito, J., dissenting) (arguing that the Stolen Valor Act’s ban on false claims about military decorations was not protected by the First Amendment and databases listing actual medal recipients “will not work”).

39. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2645 (2012). (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (Justice Kennedy did not dissent in *Alvarez*).

40. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (Roberts, Scalia, Kennedy, Thomas, Alito, JJ.). For the significance of *American Tradition Partnership*, see Orbach, *Invisible Lawmaking*, *supra* note 17.

41. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 897 (2010) (Kennedy, J.).

42. *See generally* Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 *J. ABNORMAL & SOCIAL PSYCH.* 129 (1954); Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 *BEHAV. & BRAIN SCI.* 57 (2011); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. OF GEN. PSYCH.* 175 (1998).

43. *See generally* Charles G. Lord, Lee Ross & Mark R. Lepper, *Bias Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 *J. PERSONALITY & SOC. PSYCH.* 2098 (1979).

44. *See generally* James Andreoni & Tymofiy Mylovanov, *Diverging Opinions*, 4(1) *AM. ECON. J.: MICROECON.* 209 (2012); Roland Bénabou & Jean Tirole, *Self-Confidence and Personal Motivation*, 117 *Q. J. ECON.* 871 (2002); Avinash K. Dixit & Jörgen W. Weibull, *Political Polarization*, 104 *PROC. NAT’L ACAD. SCI.* 7351 (2007); Barak Orbach, *On Hubris, Civility, and Incivility*, 54 *ARIZ. L. REV.* 443 (2012); Barak Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 *CONNECTICUT LAW REVIEW* 1 (2011); Rajiv Sethi & Muhamet Yildiz, *Public Disagreement*, 4(3) *AM. ECON. J.: MICROECON.* 57 (2012).

45. *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

form of administrative rules; it may serve interest groups; and it may generate waste.⁴⁶ However, like Mill's complex products, most things that have "useful purposes" can turn "poisonous" when abused. Holding or expressing one-dimensional perception of regulation is an over-simplistic way to view or present the world. In politics, the academia, and everyday life, this approach is still rather common and poisonous in itself.⁴⁷

Regulation is state intervention in the private domain, which is a byproduct of our imperfect reality and human limitations. We have regulations only because "poisons" do exist, and regulation may have "poisonous effects" when misused. A ride on the road to serfdom entails recognition that "[t]he capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world."⁴⁸

We live in a complex world of finite resources, in which the pursuit of self-interest often fails the individual and causes harm to others. These imperfections and limitations are the primary motivation for regulation—to promote economic efficiency, environmental sustainability, morality, and the general welfare of the public. The same imperfections and limitations, however, also guarantee the imperfect nature of regulation. Our human flaws allow, for example, the promulgation of excessive and redundant regulations, and enable the adoption of regulations that serve interest groups. Society's challenge, therefore, is to acknowledge that imperfections and limitations impair decisionmaking, communication, and trade, and to utilize legal institutions to address them. In other words, we should accept the fact that regulation is here to stay, and work to maximize its benefits and minimize its costs.

46. See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right.")

47. See, e.g., MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* (1979); William Voegeli, *The Meaning of the Tea Party*, 10 CLAREMONT REV. BOOKS 12 (2010); Kenneth J. Arrow, *Two Cheers for Government Regulation*, HARPER'S MAG., Mar. 1981, at 18 (borrowing Jakob Burckhardt's reference to the "terrible simplifiers" to describe the regulatory agenda of Milton Friedman, Ronald Reagan, and other critics of government regulation); Jill Lepore, *Tea and Sympathy*, NEW YORKER, May 3, 2010, at 26; Ben McGrath, *The Movement*, NEW YORKER, Feb. 1, 2010, at 40..

48. HERBERT SIMON, *MODELS OF MEN* 198 (1957) (defining bounded rationality). In *The Road to Serfdom*, Friedrich Hayek acknowledged that the "adequate organization of certain institutions like money, markets, and channels of information . . . can never be adequately provided by the private enterprise—but it depends, above all, on the existence of an appropriate legal system." He nevertheless argued that "[i]t is by no means sufficient that the law should recognize the principle of private property and freedom of contract." F. A. HAYEK, *THE ROAD TO SERFDOM* 87 (Bruce Caldwell ed., 2007).