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MIKE LIVEMORE: Welcome to the *Free Range Podcast*, I'm your host Mike Livermore. This episode is sponsored by the Program on Law, Communities, and the Environment at the University of Virginia School of Law. With me today is Ganesh Sitaraman, a Law Professor at Vanderbilt, and Shelly Welton, a Law Professor at the University of Pennsylvania.

They are both experts in the areas of regulatory policy among many other topics, and they along with a couple of co-authors have published a new case book-- *Networks, Platforms, and Utilities*, that we'll discuss today. Hi, Shelly and Ganesh, Thanks for joining me today.

GANESH SITARAMAN: Thanks for having us.

SHELLY WELTON: Yeah, thanks.

MIKE LIVEMORE: So part of what we want to talk about today is this wonderful new case book that you and a couple of other folks have put together-- *Networks Platforms and Utilities: Law and Policy* is the title.

And I'll admit, it's not for me a typical podcast topic, a case book. But this is really an unusually important and interesting example of the case book genre. So I think we can have a really interesting-- and I expect a really interesting conversation to discuss.

But maybe just to situate us in the-- and especially for the non-lawyers in the audience. We can explain a little bit about what a case book is and how they kind of broadly fit into the law school curriculum. So if you're just explaining to someone on the street, what is a case book? What would your answer be to that? Shelly, why don't you start us off?

SHELLY WELTON: Sure. So I mean, casebooks are the academic bedrock of law school classes. And I will say our casebook is a little different than maybe your average case book. So maybe I'll just say a little bit about your average case book and then say a little bit about how our approach might differ.

But so a casebook-- you'd get a case book for your corporations class and a different one for your criminal law class. And they're a collection of all of what some group of authors view as the seminal cases that you need to read to understand a field of law.

And so they're typically heavily edited cases with maybe a little bit of explanatory text connecting them. But really, the way that traditionally law has been taught is through a method that relies on these edited cases as source materials that you draw the major lessons that a professor wants their students to take away from the class.

So heavy on reading actual judicial opinions with a little bit of linking text. Now, I will say our case book does have a lot of that kind of primary source material in the form of cases. But it's more historical than your average case book and does a lot more linking history and case law together for some reasons that maybe we can get into.

MIKE
LIVEMORE: Great. Yeah. And maybe just to-- again, just to kind of situate the project. So there's kind of standard casebooks on contracts and torts and criminal law and the like. And there's not a standard set of casebooks on networks, platforms, and utilities.

So what are those things and how does that fit into-- I mean, how does that make sense as a topic for a casebook?

GANESH
SITARAMAN: Well, the thing I would start with is just that networks platforms and utilities as a field is something that was actually really important in both legal scholarship and education for a very, very long time. Really the 19th and most of the 20th century, this was one of the most important classes in law school.

It went by different names, at different times. So if you had taken this course in the late 19th or early 20th century, it might have been called the Law of Common Carriers or the Law of Public Service Corporations. In the early part of the 20th century, it would have been Public Utilities Law.

After World War II, the name switched to being called Regulated Industries Law. And then it ultimately kind of fell out of the legal curriculum, legal scholarship as a coherent field as well. What the field always included was studying areas that are not necessarily ones that are going to be the most competitive.

And these are areas that have a lot of public purpose attached to them. They often are monopolistic or oligopolistic. They're infrastructural areas. And so the big sectors that we talk about when we talk about networks and platforms and utilities are transportation, communications, energy, money and finance, and tech.

And we could talk a little bit about why those are the ones we include and don't, but as a basic overview when we talk about networks, platforms, utilities law, that's what we're talking about. It's those sectors that are something like utility like in our society and that makes them different from goods that you might just buy at a convenience store or furniture or any of the other things that we think of in a market economy that are less infrastructural.

MIKE
LIVEMORE: Yeah, great. And I think this is-- as you note, this is what makes this casebook really interesting is in a sense it's kind of resuscitating or it's making a claim about resuscitating kind of an area of law, an area of scholarship, a way of thinking about a thing about legal institutions.

And so I think of this casebook as different from the run of the mill. And that it's kind of more explicitly political in certain ways, not necessarily partisan political. And there's a way in which all casebooks are political documents because they're making arguments and they're discussing views about the law.

But in a way, this casebook kind of needs to make the case for itself as well. And there's not really a contemporary competitor. As you note, the area of the law has kind of fallen out of favor in the law school curriculum.

So if I was going to encapsulate the political argument-- the case for the casebook in some sense, it's that we shouldn't be ashamed of utilities law. Like we-- or that broadly the law that governs networks, platforms, and utilities, that this is an important area of law. It's a good area of law. It's one that we should study. It's one we should think about. And so yeah. I mean, is that a fair characterization of the case for the casebook?

SHELLY

I think that starts to build the case for the casebook, and you're right that we are not ashamed of this area of law.

WELTON:

I guess I would also maybe situate it a little bit in our political moment and in the history of what's happened.

So as Ganesh talked about the topic of regulated industries really fell away as a law school subject as deregulation took hold in the actual economy in the '70s through the '90s and onward. And one of the reasons that I was really interested in being a part of this book is-- well, two things really.

One is that I think that there was a lot of scholarly attention paid to making the case for deregulation. And then these ideas took hold in the real world and did a lot of work and in some cases a lot of damage. And I don't think there was such interest in a scholarly project following up on deregulation.

And so we now are 40 to 30 in some fields years out from that project. And so one of the things I was really interested in doing is just asking how has it gone, right? We've taken very different approaches to deregulating different sectors. I think we've seen widely varying results, and it felt like it was time to take stock.

Oh, and which brings me to the other point, which is that it's not like these infrastructure industries went away because the case book went away, or the topic went away, or scholarly attention went away. And so each of these has been sort of muddling along at various stages of regulation or deregulation in ways where it feels like-- it's not clear to me why we stopped paying attention to these industries as a field. Because the challenges have persisted.

And indeed, we've gotten a lot of new industries where the challenges are really acute. So the last time that this casebook was written, we had the internet, but barely. And we certainly had nothing like the dominant internet platforms that we see today.

And so there's both I think a lot of work to do talking about what has happened in this sort of traditional infrastructure industries in ways that just have been neglected in the last several decades. And thinking about what should we do with the rise of this new set of industries that's presenting a lot of the same classic problems that plagued earlier, more traditional infrastructure industries.

GANESH

SITARAMAN:

I would just add to that. I think Shelly's got it exactly right. And I would just add it's the new industries like tech, but it's also the old industries too that got deregulated. So if you think about pick your ripped from the headlines topic, it's flight cancelation ins and all the crisis issues in the airlines.

It's the lack of access to broadband in rural areas. It's railroad problems, which we saw recently in East Palestine, Ohio, which we saw last fall with the labor issues, which we saw during the pandemic, it's Maritime shipping issues which we also saw during the early part of the pandemic as a major issue.

It's bank crises that are ripped from the headlines week to week. These are all areas that were regulated through these kinds of tools that then were deregulated. There are all areas where we have real problems today and people want to how should we think about solving these problems?

And I think part of our theory of the book is that, one, we should be willing to learn from the lessons of the past. How did people regulate them before? What worked and what didn't? What did deregulation do? What worked about that and what didn't? And what can we do today based on more evidence and more evidence from more sectors?

We shouldn't be just drawing lessons from one place or another. We should try to learn across these different sectors about the legal tools to get a better handle on what kinds of legal tools might work well to solve what kinds of problems under what kinds of conditions.

And so in that sense, I think we think that this is really a set of tools also that have just fallen out of the policy imagination at a time when-- whether it's tech or whether it's more traditional transportation or other infrastructural industries, we're really hungry for answers to how to solve what are quite acute problems.

**MIKE
LIVEMORE:**

Yeah. I mean, it's completely true that, as you know, a lot of what we talk about these days are in the kind of popular political discourse-- are very traditional in a sense, regulatory issues. I mean, talk about traditional-- like problems with the railways, [CHUCKLE] that's about as traditional of a regulatory issue as one can imagine.

And I do want to get into the details of the toolkit and the broader principles that you use to animate the book. But I just wanted to maybe just dwell for one more moment on this kind of intellectual history almost of this project, and the kind of rise and fall of Public Utilities Regulation as an academic subject.

And part of it is we've been talking about the law school curriculum and what courses get taught and taken by law students. But there's also-- you both have mentioned scholarship as well. And that's another interesting just kind of phenomenon-- is that a lot of scholarly attention kind of drifted away from this area.

And I think there's an interesting story there. And notwithstanding the fact that everyone I think in the last 30 years kind of recognized that this was an important area of the law in the sense of it had real-world consequences, cases get litigated, judges make decisions, the Supreme Court issues decisions that are broadly in this area from time to time.

So it was it's an active area of law, but it's one that scholars weren't more focused on. So I'm going to offer like maybe the traditional case for why that might be. And I want to elicit the response.

So what I would imagine a traditional kind of justification for that lack of scholarly interest would be something like this area of law is a mess. It's vestigial. It's based on outdated ideas. It's inelegant and slapped together. It lacks core principles. It's a cover for capture and special interest extraction.

At best, it's a necessary evil in places where we can't for practical reasons-- the market can't penetrate, and we can't foster competition. But it's kind of always the second best and it's not fun to think about for that reason. So anyway, if that's the traditional ding on this area of law, what would your response be?

**SHELLY
WELTON:**

I think that you're right, that you could track the Wayne and scholarly interest to a lot of the big attacks on public utility law. And even just sort of government administration more generally, that came out of the law and economics movement and a lot of public choice scholarship that made government not just seem like unsexy, which it kind of always was. But like really the problem itself.

And so you saw this turn to markets. And when I think about something like how this happened in electricity, once you turned to markets in electricity, you had very sort of particular discreet problems of how you make a market for this good, that's pretty strange to treat as your average commodity through the markets.

And so I think a couple of things happen. One, scholars were really disenchanted about writing about the field as a whole because it had been so denigrated and sort of thoroughly decimated, both in the academic literature and then as a political project.

And then second, I think people got quite caught up in the details of how particular fields worked. So you really started to see a lot of energy. Law scholarship emerged during this time-- to think about how do you design a good electricity market? What does it look like? How does it function? But without connecting the dots across fields.

And I wonder if there's a way when we sort of took down commissions and this idea that we have agencies playing a robust role, that we also sort of scattered scholarly interest into discrete topics without making these big picture connections. I think that's part of the story. And I'm sure Ganesh has more to add.

GANESH

SITARAMAN:

Yeah. So I think you had a really great encapsulation of what the critique of the field is. And I would want to Zoom out in two ways. So the first thing I would say is the critique that you offered is a really great distillation of a certain ideological mood that I think was quite dominant over the last 40 years, but is coming to an end now. And really was exceptional in American history.

I mean, the field of NPU law regardless of the name that you want to call it in history, a lot of the principles and tools that we're talking about go back hundreds of years. They go back to the founding of the country.

And if you're looking at laws of common carriage and some of the particular detailed laws and practices we're talking about in the book as well, they're really go back to English statutes and English common law all the way back to the 13th century.

So on one level, you could say there was enthusiasm for NPU tools and law from the 13th century until about the 1960s and the '70s. And then there was this short period of time for the last 50 years where people were quite skeptical and had all the critiques that you offered.

And so I think if you think about this in the intellectual history, there was a lot of enthusiasm for thinking about these tools as ways to solve problems in the 19th century. It's why we got to the Interstate Commerce Commission and regulation across a whole bunch of these sectors that were then improved upon, that people mobilized around, that people built movements to get passage of these new statutes.

And that really crested in the progressive and New Deal eras in the first part of the 20th century. And so I think there was a very different view about all of these things then.

Then we have as you and I suspect many of your listeners know, this kind of move that a lot of people associate with the Chicago School, with Law and Economics, with neoliberal ideas to move-- as Shelley said, towards more of a market-based approach to things, and to disfavor both thinking about government and thinking about regulation.

Now some of this was partly because of the Cold War and the stark questions of capitalism versus communism. Some of it was a backlash to the New Deal. There's a whole set of intellectual history and historical reasons why this emerged when it did.

But I think what happened was we ended up in a period where thinking about how to do things as a public was quite disfavored. And that's what leads to the approach that-- the critique that you offered.

So I think one, is we need to put that in historical context. Two, is it's quite shocking. Each of the elements, I think of the critique that you noted, because really in some ways the critique is almost totally backwards as we talk about in the book as compared to being a second best or something that's really not an ideal kind of form of regulation.

One thing we talk about in the book is why should we have NPU law? And some of the purposes of it include-- we need law to actually build these kinds of systems at scale. We want continuity of service and reliability of these systems. We want to have a country in which we have access to a lot of these infrastructural resources and in which we want to promote commerce and industrial development.

And if you don't have electricity just to go back to Shelley's example, how are you going to be engaged in commerce? How are you going to be engaged in communications? How are you going to be engaged in any part of national or international or even really local life these days?

And that's a really essential proactive, productive, positive vision for the world that you might have. And if electricity seems too antiquated in 1930s, ask the question today about broadband.

I mean, if you live in an area of the country that doesn't have broadband, or if you're just driving through a rural area and you don't have broadband. That's really frustrating. Having a positive vision for how do we get there-- regulation in these areas was part of that story in history. So I think there's a real positive part.

Second, what you mentioned, the kind of elegance versus inelegance. That's also a quite shocking, I think statement. When you study some of this stuff, one of the surprising things I think when we went through and were doing each of the sectors here is how elegant these statutory systems were.

And how they actually were largely focused on creating structural rules that were simple, easily administrable, and didn't require a lot of super complicated compliance and details in order to figure out as a member of industry what to do, or a lot of very, very complicated tailored behavioral regulations about what's allowed or not allowed.

And once you have deregulation in a lot of these areas, what we end up with are building regulatory systems trying to solve the same problems, but that require hundreds of more pages of both laws and regulations in order to get at the same things.

Because now you're playing whack-a-mole on every possible different behavioral problem that some industry might be going into, as opposed to having a clearer actually more elegant set of rules. Even if sometimes a little over or under-inclusive.

And then the last point that I'll just make is on the question of capture. And one of the things that really was a core part of what pushed people away from this mode of governance-- both on the left and on the right-- was the sense that industries were capturing government and getting the regulators to do their bidding.

And this is a real question for institutional design, for people who think about government, for people who think about how we should think about regulation and public policy just generally. And part of the assault on the field was not just the Chicago School critique about regulatory capture, but was Ralph Nader and people on the left also arguing that these agencies were captured and were doing the work of industry over consumers.

So I certainly don't in any way want to diminish that level of critique. But at the same time, it's not really a solution to say we should have no form of law or governance at all. Because there might be a risk of capture.

Because the absence of legal rules, the absence of having a regulatory system means you have a whole bunch of other problems in the economy, which might range from monopolistic enterprises, exploiting individuals, exploiting workers, increasing prices, curtailing innovation, preventing downstream positive economic activity.

There are lots of problems that emerge. And so, we have this challenge of-- there are bad's on both sides. We need to figure out how do we actually govern these things. And there's always going to be trade-offs, and we need to think about them, I think creatively. But the main lesson I would say is we shouldn't throw out an entire set of legal tools and principles; an entire history of how they worked and how they didn't, and when they worked and didn't just because sometimes there might be capture in some of the areas.

**MIKE
LIVEMORE:**

Yeah, great. And maybe just to kind of dig in a little bit about the-- again, it's partially framing. But it kind of gets us into what are those tools and what are those goals kind of specifically. So as you both note, there was a big anti-regulatory movement that happens in the '60s, comes to really fruition in the '70s, and obviously Ronald Reagan's election in 1980.

And broadly speaking, there was a couple of different buckets of regulatory approaches that were under fire as you note this in the casebook. So one is what's sometimes referred to as social regulation, which I think is a lot of people-- again, walking around the street might think of as regulation.

So environmental regulation, workplace safety, public health, that kind of stuff. And then there's the economic-- what is sometimes referred to as economic regulation which is what you're focused on in this case book. And so maybe we could just-- for purposes of just explanation, clarify-- So I teach environmental law, which is kind of very classic social regulation.

And energy law course is a kind of very classic economic regulation. And I would say the goals of environmental law are things like protecting public health from externalities associated with industrial production or managing human interactions with the environment.

Energy law is-- just to take that as an example-- has a different set of concerns along the lines that you're both mentioning continuity of service, expanding access. There's concerns about how monopoly regulated monopolies are acting vis-a-vis consumers.

So how do you draw this distinction between the kind of economic regulation-- which is what you're focused on in this case book versus the social regulation that we might think of under the Clean Air Act? Shelley, maybe you could just start us off there since I'm giving an energy example, which is going to naturally tee you up.

**SHELLY
WELTON:**

Yeah, fair enough. So I will say for starters, I don't love the categories of social regulation versus economic regulation. And we use them in the book because I think a lot of people find them useful shorthands.

I think one of the points we want to make, though, is that economic regulation is social regulation in many ways. Like what we're trying to do when we do economic regulation is not just strictly economic in the way that somebody might traditionally think of the terms. But has all kinds of deep equity implications and democratic implications.

So I don't want to let the categories parse this too far. But generally speaking, I think that you're right that there are big differences between how we structure something like environmental law and something like energy law.

And one of the big distinctions is that typically these kinds of social regulations, like environmental laws, apply across a wide range of industries and just kind of layer on top of whatever else they have going on a set of requirements for them to meet.

When we're thinking about economic regulation, one of the moves that we try to make in the book is to suggest that there's a certain functional category of industries that need a special kind of regulation.

So you often hear these called infrastructural industries. We take the approach that there's not a bright line set of industries that's in and out. But instead, there's a set of characteristics that a certain group of industries have and you can debate at the boundaries exactly which ones those are.

But the ones that Ganesh started off by mentioning are kind of the classic core set. This set of industries has special characteristics that make it quite difficult to manage without the kind of tools that we have long used to regulate them.

So these tend to be industries-- we suggest just a set of functional characteristics that these industries often exhibit that make them both foundational for commerce and a good life and quite hard to leave on their own. So it's things like having monopoly characteristics.

So being the kind of industry where a larger scale makes you able to operate more cheaply. It's industries where having a big interconnected system makes it work a lot better.

So things like if only a few people had a telephone, it wouldn't be that useful. The fact that it's a big network makes it much more useful. It's industries where there's a big potential for competitors to race each other into the ground.

So I don't that I should walk through all of the characteristics right now. But the fundamental idea of economic regulation is that there's a core set of industries that are both important for building a strong economic system and building a strong democracy, and promoting justice and equality that need a special set of regulations to make sure that they're serving the functions that the people want them to serve.

MIKE
LIVEMORE:

Yeah. Great. And maybe just to kind of put a fine point on the distinction. When we regulate the energy sector in the way that you're describing and through the tools that we're talking about, which I think we should just get right into the tools to make that somewhat more concrete.

The goal is not to improve air quality, generally speaking? It's to improve the quality of the energy sector kind of qua. The delivery of electricity or kind of whatever it's core. It's not really about managing the externalities of the industry.

It's about managing the industry itself as itself. And putting aside some-- whatever external effects they might have. Which then, again, kind of conceptually gets plunked over into this social regulation under the Clean Air Act, for example. Even if-- obviously, we might be able to problematize that distinction to some extent.

GANESH

Yeah. I would say I think that's right. And I think one way to think about it for people who are new to thinking about this is it's in some ways about the structure of the market and the structure of industry.

SITARAMAN:

So it's an industrial organization and market structure question. So how many firms are there going to be in an industry? And where are they going to be located? And what kinds of activities are they going to partake in? At what prices? And what kind of services are they going to offer? And do they have to serve everyone?

These are not normally the questions we would ask of some company that's going to be making Frisbee's or coffee mugs or sofas. We wouldn't ask those questions very often. But we do in these areas. And when we think about those, that's really what a lot of these tools are about. Is how do we think about those market structure questions?

And I think Shelly is exactly right that there isn't a clean line between these things and what people call social regulation. Because obviously if you're thinking about regulating externalities or achieving social aims, when you do that, you're influencing the shape of the market and its structure and the operations of firms.

And similarly, when you're shaping market structure operations and so on, that will have huge impacts on a variety of social goals, benefits, harms, and externalities as well. So there's porous boundaries, of course, between the two. But I think that's one way to look at.

It's not as much about specific behaviors as it is about how do we think about the structure of this industry and the basic rules for a firm that's going to operate in it.

MIKE

LIVEMORE:

Great. Yeah. And again, maybe we can actually render this even more concrete. So one of the really interesting features of this casebook is there's a list of-- I mentioned earlier that one of the critiques of the field is that it lacks governing principles or core motivating ideas.

And so the casebook I think addresses this critique by highlighting some of these cross-cutting principles. And some of that is the toolkit. So things like rate setting is a regulatory tool that is used in a lot of these contexts.

And of course, that's a good classic one that many at least traditional economists would say we don't like setting prices. That's not a good thing for government to do. But I think the claim would be that in these special cases, actually we need to do this, for whatever reason.

But maybe even to take something that's also kind of equally traditional is that you raise as a category access and service rules. Like who gets access? The service providers have to provide access and in certain ways and so on. And this is something that a regulator might have something to say about.

And an example in the environmental context where there is this kind of complex relationship between the pure economic regulation and the social regulation would be a rule like a net metering for solar panels.

So this is basically the idea is in jurisdictions that have something like net metering. If you put solar panel on your house, the utility has to buy back or buy electricity from you at a of price. And so that is-- I take that to be an access rule-- although you can correct me if I'm wrong there.

I would also take that to be a pretty traditional form of economic regulation that's relevant as a kind of a NPU-style regulation. But it also is clearly has social consequences. So maybe we could just unpack how you all are thinking about this in that context of that specific rule about something like net metering.

**SHELLY
WELTON:**

Sure. Maybe I should take a stab at net metering. Net metering is a really hot topic these days. And it's a very, very complicated one that I think you're right. Gets at so many of the challenges that we're thinking about.

So on its surface, I think net metering sounds great. Like we think it's a good thing if people want to put solar panels on their roof. It is good for the system as a whole because we want to make it cleaner. And so a lot of states have given very generous incentives to people to put these solar panels on their roof in the form of buying the electricity from these households at quite a generous rate.

Now, if you step back and you think about electricity and access as a whole, and let's just go a little historical for a minute. One of the big challenges with building out an electricity system was that it doesn't cost the same amount to serve every household.

Like think about a really dense urban area where you just string a few wires and you've got a lot of people hooked up versus a very rural area where it takes a lot of transmission poles and distribution lines between houses, cost more money.

Utilities traditionally have wanted very much to serve those dense areas, where they can make a lot of money and not serve the rural areas. And so one of the NPU tools that has evolved to force utilities essentially to take on reasonably sized service areas are these rules about providing universal service within your service territory and providing non-discrimination in rates.

So you can't charge somebody more because it costs a little bit more to hook their house up. And there's a whole other story to be told about utilities not moving into rural areas and the need for cooperatives to serve those areas. But I will set that aside for now.

So you have this electricity system that has traditionally been based on this idea that everyone in a service territory pays the same price, gets the same quality of service and that's what we require of our utility. Net metering comes along and states start to let people hook up their systems and get these rates.

And it's putting really interesting stressors on this concept of electricity as a networked good. So you see people putting on solar panels, getting paid a lot of money. That money has to come from somewhere because we have a rate base.

And so the allegations raised have been that typically more affluent consumers put solar panels on their home. And because they're getting these very generous rates, it's raising the prices for others in the system that often can't afford to or don't structurally have the ability to put solar panels on their homes.

And so on the one hand, I think it's wonderful that we've come up with an innovative tool that has gotten a lot of uptake of rooftop solar. On the other hand, I think there are real access and Justice questions that get raised when you deviate from this idea of everyone paying the same price for the same service.

And ultimately, I think the potentially very interesting question for electricity law going forward is are we going to see people start to put storage systems with their solar panels and disconnect from the grid? And that leaves the rest of the grid for a smaller base of people that are less affluent. And you could start to see how this really might squeeze the model.

So I think this is a really nice example of a tension point where you can see the benefits of NPU law really working to keep a stable system going for everyone. And the ways in which you start to disrupt that, you really throw into question both the stability and the fairness of the whole system.

**MIKE
LIVEMORE:**

And I think that this example on the prospect that you raise at the end there of folks disconnecting also is really interesting. And there is a tight relationship between the area of law that we've been talking about and concerns around competition.

So electricity utility is often a monopoly provider in a local area. And so there are questions about, OK, how is that monopoly going to act? Are they going to take advantage of their monopoly position? Offer higher rates than would be ideal from a consumer's perspective? Or worse service, or not provide service to some folks?

Because they don't face competitive pressure. Maybe they would if they did face competitive pressure. So maybe Ganesh you could talk a little bit about the relationship in this area of law that you're interested with antitrust or anti competition.

Like there's a lot of overlap, but obviously there's quite a few kind of unique areas that are distinct to the different fields.

**GANESH
SITARAMAN:**

Yeah, it's a great question. And in some ways my answer will inevitably be oversimplified here just because there's really a rich set of discussions and debates over how to think about the balance between regulation and antitrust or competition law in each of these sectors and across them.

But to simplify a little bit, I think there's a couple of ways that we can imagine the relationship. So one is that these two areas are at once substitutes and complements.

So you could imagine saying you antitrust is in competition policy or law are the rules that we have for markets that are going to work well as competitive markets.

We're going to have lots of players. We're going to have lots of competition. It's going to be fierce and ferocious. And it's like what you study in economics. There's no barriers to entry really. And they'll there'll be good competition that'll work pretty well as long as we have some policing of the boundaries of certain practices. And that's where antitrust laws come into play.

You could then say there are these other sectors. The NPU sectors in which we really shouldn't expect competition to discipline the market very well. That's because there are network effects. There are economies of scale. There are natural monopoly issues, high capital costs for investment.

There's barriers to entry. There's a range of other dynamics going on that will mean that the market's not going to provide the services that we want it to provide. And then on top of that as we've talked about, there are a bunch of positive goods that as a society we want to achieve because of their positive externalities or spillovers or just for other kind of social, political, and economic reasons.

Access, for example, as we just talked about on the electricity front. And so for those reasons, we're going to use a regulatory model instead of a competition model. So that's I think one very big picture way-- is that these two things are really two sides of an anti-monopoly toolkit, where you might say, we're really worried about big firms having and wielding too much power. Both in the economy and in our society.

And so on the one side of the coin, we're going to break them up. On the other side of the coin, we're going to let them stay big. But we're going to regulate them and watch them very, very closely. And so that's one way you could think about these things.

I think one of the really interesting things that we found in doing the book is you really get this sharp sense of how important these industries have been to antitrust. A lot of the really foundational cases in antitrust are actually NPU cases. Standard Oil is a pipelines case. Terminal Railroad is about a railroad terminal. Philadelphia National Bank is a banking case. The *Verizon versus Trinko Telecom Case*.

Throughout the book we've got a lot of examples of places that you'd be studying these cases in an antitrust class. But the sectors they're dealing with are NPU sectors. And a lot of the issues that are underlying, you could have addressed through statutory regulation in a way that law traditionally has addressed them.

I think another interesting thing that we've found throughout the book is that you regularly see courts in antitrust cases reinventing NPU rules in the remedies in their cases to try to address the antitrust violations.

And so there's a real way in which, for some sectors these two areas of law are just very closely related. If you don't have regulation in them, you might be bringing an antitrust case because there's a competition problem. And the remedies you're going to get are going to look very similar to things you might have gotten if you were applying the NPU toolkit as a legislature or as a regulatory agency.

**SHELLY
WELTON:**

Just to add one point on top of what I think was a great explanation from Ganesh. One of the things that you see both when you trace some of these core NPU industries through their antitrust cases and through deregulation is you see this impulse to break up a lot of these industries and you see it fail. Like we've just had massive re consolidations across a lot of the industries that one of the theories was, let's just import competition and make the markets work.

And a lot of these, I think because of some of their core facets that we talk about and have started to get into here, just aren't that well suited for competition as a remedy. And so I think here's where we really see NPU law as a critical complement in those situations where, for various structural reasons, competition doesn't seem to be an antidote to the challenges that are being faced.

**MIKE
LIVEMORE:**

Yeah so this is a kind of a nice segue into I think another kind of interesting question in this area of law, which is, what should the overall goal and some very meta sense be of government decision makers in contexts like you're describing. Where either for social reasons or for physical reasons having to do with just the Nature of the good that's being delivered.

You're going to have a small number of actors. And if left to their own lights, they're going to engage in practices that are not that socially beneficial. They're going to extract wealth for themselves and it's not going to be ideal from a social perspective. And so one question then is, OK. So now we're going to regulate. [CHUCKLE]

We're going to have someone who's in charge of this. They have the toolkit at their disposal. So they can say set rates. They can require firms to offer their services on a non-discriminatory basis. They can require equal access. They can mandate the quality of the service. Things like ensuring that the grid is not going to fall apart.

So they can have regulations along those lines in the electricity context. And so one question-- I would, again, just be curious about your take on this is I can imagine one style of argument that would run something along the lines of, OK, this gets us back into the second best mindset.

So it's like, OK, we're stuck with these monopolies and it doesn't make sense to break them up because they're not as effective. They're not as good, and they'll just reconsolidate. It's just very inefficient.

And so we're going to have them, we're going to regulate them. And so what we should do as regulators is generate the outcomes that would be generated to the extent that we can were the competition to operate in this market.

We want the rates that we would get if there was competition. We want the quality of service that we would get if there was competition. And we want the distribution of costs and benefits to look the same as if there was-- So we want to replicate what would occur in a hypothetical competitive market. So that's one way that one might approach the regulatory task.

And then there's everything else. There's all the other social values or considerations or whatever else that you might try to accomplish as a regulator. And I'm curious both your take on it, if the book itself has a take on this question. I suspect it's a little bit agnostic.

But then just generally in the field, what are some of the views about how to approach this task of being a regulator in an NPU context.

GANESH

SITARAMAN:

Yeah. So I'll start. To be honest, let me-- I think I don't really have a necessarily strong view about this. And so maybe Shelly will have a more thought-through approach. I think in the book we don't take a specific position on exactly the economic comparison question that you said.

I personally find it somewhat puzzling as an approach to think about these problems. Though I'm very much open to be persuaded why I'm wrong to be puzzled by it. But the reason why I find it puzzling is once you understand how the dynamics of an industry work in a way that shows that competition is not viable, what does it even mean to say we want to imagine a world in which there was competition in an area where there can't be competition.

So I just think about examples where there's significant network effects or to Shelly's example where there's lower cost to serving an urban area with electricity and high cost to serving a rural area.

What we know is that competition will mean the rural area doesn't get served, and there's a lot of competition for the urban areas. I just don't what it means to say that's the outcome, then that we want to replicate through a regulated system. It just seems like a weird way of phrasing it to me.

And I understand that's how people want to think about it from an economics perspective. But I've always found that a little bit puzzling. I think it's very hard to take political economy out of the system. And by that, I mean, just thinking about the broader dynamics and considerations that are not just economic, but are also social, political and otherwise in terms of our goals.

And I think we should have a more holistic approach generally. So that is to the extent we have one in the book. That is the approach. We don't say there is a single goal that regulators should be trying to achieve when doing this.

We talk about a range of things that regulators will be working to, and a range of purposes that NPU law can serve, including some of the ones I talked about earlier promoting commerce, expanding access.

Some are economic curbing monopoly and oligopoly abuses. You know, subpar service quality, high prices, low output, discrimination between multiple different users who are similarly situated, avoiding destructive competition.

I mean these are all goals that we talk about. And so I think if you're a regulator, a key part of what's going on in any of these areas is understanding the dynamics of the industry. Understanding the problems it faces, understanding what the tools are and what they're meant to do.

And so I think that's how I would think about it rather than a kind of single approach. Because one of the things that I think is important about this area is that when you look back at these statutes throughout our history-- you could take the Communications Act, you could take the Civil Aeronautics Act, any of these areas.

They're really systems and they're not a single regulatory provision that's solving a single problem. There are some of those, but they're comprehensive statutes that cover a whole range of industrial dynamics, and they have interacting parts. And so there's really a system of how to think about governing this whole space that applies.

And I think that's an important thing both for students to learn. And so one of the things I like about the class is we can teach governance as a system, and interactive effects between different components as opposed to just teaching one problem, one solution.

And I think that's in some ways a more realistic way about how our world actually works. It's a complex, dynamic system that we live in, where lots of changes to one area will affect other areas. And these are areas where the law has understood that and tried to adapt to that.

And I think that's the way I like to think about it, which is a bit more pluralistic and I think system and maybe interactive than let's put aside these other things and let's try to replicate a version of the economy that we is not going to work in this area.

But maybe Shelley has a different view. And I'm-- like I said, well open to be persuaded that there's a good way we could try to replicate competition in these areas.

SHELLY
WELTON:

No. I completely agree with you that I've long been baffled by this notion that we're trying to replicate competition in fields where we've just acknowledged that competition is going to be utterly unfeasible.

I do think there's an interesting conversation about-- and Mike, I think your question got at this really nicely about-- OK, so we're in a world where we've acknowledged the competition won't work and you can't replicate something that you already acknowledged won't work.

But what do we want to do with the tools we have at hand? And I think you see this tension at work, right? In big questions like, how much do we want to cross subsidize? So just to come back to the electricity space, which I know the best.

There has long been a conversation about should industrial users pay lower rates because they're doing good things that we want them to do at different times of day than residential consumers, who need their power when they come home from work. And when they get up in the morning and want it to be there at exactly that time.

So I do think there's big questions within rate design in particular over how do we want to trade off and value various uses against each other? How much do we want to make sure that we're paying a flat rate across different consumers that might actually have different cost bases?

The bigger point that I think maybe I'd like to make is just that I think one of the beauties of having a system of networks, platforms, and utilities law is that you can democratically determine the answers to a lot of these questions. They can morph over time. There can be discussion and deliberation. You can write the laws to shape your goals.

And I think nowhere do we see this more than with climate change having become a pressing challenge and now putting a new set of requirements upon utilities regulators who are being asked, in addition to making the system reliable and affordable and delivering a fair return to utilities to make it clean.

And it's a goal we've imputed and they're working with it. And they're making it. They're struggling and figuring out how to make a system that can respond to this new goal. And I think that in a way is the beauty of this regulation is that you can have these Democratic conversations about what you want these systems to accomplish, and then figure out how you use the tools to do that.

MIKE
LIVEMORE:

Yeah. Great. I mean just to be clear with my question, I don't think the idea would be-- for folks who hold this view, it wouldn't be that you would try to replicate competition in a context where you can't get competition. It would be how do you think about the goals that you're trying to achieve as a regulator?

And what are you trying to maximize essentially? But Shelly, the point that you raised there is that we can deliberate over those goals in this context, right? It's not something we have to decide once and forever, and they can change over time and so on.

So maybe we could turn to probably the last set of issues that we'll be able to cover, governance. So towards the beginning of our conversation, we raise the specter of capture and special interest influence and that may not be a sufficient reason given the need for this style of regulation to jettison the whole field.

Nevertheless, though, it raises a set of concerns that we might be able to try to think about how to address. I think one of the tricky issues that economic regulation-- as we've been talking about it-- has faced is that it tends to be pretty insider baseball.

So if we talk about energy regulation, for example, it is so complicated. It's the decision-making. It's in kind of obscure fora. So we can have a democratic conversation, but it's a highly technical area and that may impede the ability of regular folks to participate.

So yeah. I'm curious how you guys think about that. How do we get the kind of robust conversation and deliberation over the ends of regulation, the goals that we have that we might want to achieve in the sectors and through regulatory policy, given some of the inherent difficulties due to the technical nature of the fields, their narrow ambit and the like?

**GANESH
SITARAMAN:**

Well, let me start and just say, first, I think we want to think a little bit about-- when we say they're technical, how technical? And why are they so technical? And so, it's true. I think energy regulation is a technical and complicated field. For anybody who's thinking about deliberating in the public sphere, securities regulation done by the SEC, is also a complicated and technical field. [CHUCKLE]

And yet that seems something that is workable, and people work on that who are experts in that area. And there's discussions about it so. So on one level, the law has lots of technicalities and there's lots of people who are involved in these things at different levels. And so I don't think that's special here.

Even to your point about teaching environmental law. Once you get into the details of what standards are we talking about for pollution control, it gets very acronym heavy and technical there too.

And yet, the environmental movement has existed with people deliberating, debating, mobilizing, pushing, without necessarily needing to know all the detail of how to calculate the parts per million for various pollutants in the air or what the difference is between a MACT Standard and some other standard.

And honestly, it's been so long since I took environmental law. I'm not even sure if MACT Standard is a real one or if I'm confusing that and it's a BACT Standard or something else. But that's precisely the point.

**MIKE
LIVEMORE:**

Don't worry, there's both. There's both.

**GANESH
SITARAMAN:**

There's both? That's what I thought.

[LAUGHTER]

I thought they were both. Great. But that's the point. Is that stuff is technical, and yet there are tons of people who are parts of organizations like the Sierra Club or the Sunrise Movement or conservation groups or other things who are interested in environmental questions and pollution control and are mobilized around it.

And so I think the question that we should think about is what are the things that we can deliberate on in this area? And there are a lot of them, even if there are some technical pieces too. So one example that we have in the book is airlines, which were regulated as a public utility from the 1930s until the 1970s.

Haven't been regulated in that way since after the big airline Deregulation Act. And I think we see a lot of people now who are really frustrated when they fly and they ask questions like, why do I have to go through a fortress hub where one airline has 80% market share? Why are the prices so high? How come there's not as much competition? We only have four big airlines.

And they can also ask questions like why is this airline leaving my city altogether? I mean, we've seen dozens of cities across the country since the pandemic lose service from one airline or all airlines altogether, in terms of daily service. And these aren't necessarily just the tiniest cities. These are reasonable sized and pretty big cities like Toledo, Ohio, for example.

So those are things where I think could easily imagine people being angry and mobilized to say, hey, we need to do something different here. And we need to regulate these entities, and we need to push for those rules. Now, obviously once we get into the details of the rules, it's probably going to be like an environmental law, something where you're going to need lawyers and economists and others who are working on the technical parts.

But I do think because these areas touch so many pieces of the foundations of our lives, a lot of them really are things where we can mobilize and where people can deliberate. I'll say one last part about this, which is even if there isn't kind of a consumer or user-based mobilization, a lot of these areas are ones where the entities that are quite affected in a serious way are businesses, and sometimes small businesses, farmers.

So when you think about railroads, when you think about maritime shipping, small business people and farmers-- people who are trying to get goods and product out, they engage with the transportation system on freight quite extensively and understand how important it is for their businesses.

And even if you or me the end consumer doesn't see that stuff, they see it. And so there's also the possibility of movements of farmers, of small businesses, of others who interact with those systems even if you or I as end users tend not to. And I think those are folks who could also be mobilized to think about some of these areas as well.

SHELLY
WELTON:

Yeah. I think that was a great answer. I don't have a lot to add. I mean, except to say a couple things. One, I agree the tension is real. There have been some very interesting efforts at the Federal Energy Regulatory Commission recently to explore, how do we do robust participation in a sector that is quite technical.

I think if anything, the move to markets has exacerbated the technicalities of this industry and the opacity of it in ways where I think the cure was certainly worse than the disease in terms of figuring out how to intervene and participate in the electricity system as it exists now versus under a more robust form of regulation.

The other thing I'll say is the most powerful public participation that I've ever seen in the energy system was a series of conversations that the New York Public Service Commission held with low-income ratepayers across New York State. They just went and had listening sessions, and they asked people that were having real struggles paying their electricity bills to come in and tell their stories.

And they did for hour after hour after hour. And I think it was incredibly powerful and moving to many of the commissioners that were there listening to these stories, and ultimately pushed New York towards adopting more of an income sensitive method of pricing electricity.

And so it's not easy, but I also I agree with Ganesha these are places where these systems have really dramatic impacts on people's everyday lives and their ability to thrive. And so it's not a place I think that's any more disconnected or need be more disconnected than other areas of the economy.

MIKE Great. All right. Well, I mean it's all super fascinating stuff. I appreciate we're kind of at the end of the hour here.
LIVEMORE: So I appreciate you guys taking the time to chat with me today. It's a super interesting intervention. The sexiest case book that's come out in a while. [CHUCKLE]

And so it's generated a lot of buzz, a lot of conversation. And so congratulations on a great project. And yeah, again, thanks for the really interesting conversation.

GANESH Thanks so much. And if you're OK with it, we may actually want to put on the blurb for the back of the book, the
SITARAMAN: sexiest case book that's come out in a while.

[LAUGHTER]

I don't think any of us have heard that one before, but that's a great endorsement. So we appreciate it.

MIKE You're welcome to it.
LIVEMORE:

SHELLY Thanks so much for having us.
WELTON:

MIKE And listeners, if you enjoyed this episode, let us. You can give us like, a rating, subscribe to the podcast and
LIVEMORE: follow us on social media. It'd be great to hear from you. Till next time.

[AUDIO LOGO]