



**PENN PROGRAM ON  
REGULATION**

**Beyond Process Excellence:  
Enhancing Societal Well-Being**

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Paper Prepared for the  
Penn Program on Regulation's  
Best-in-Class Regulator Initiative

June, 2015

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There is much confusion among academics, regulatory practitioners, and stakeholders over what it means for a regulator to be excellent. The confusion is so great that we suspect that there is greater consternation over process – how regulations are made – than the substantive outcomes. The confusion is so ingrained in both law and regulatory practice that regulatory programs frequently are not even designed to objectively determine – before or after enactment – whether a regulation enhances societal well-being.<sup>1</sup> We believe that this confusion is both a symptom and a cause of a large void in the architecture of administrative law: there is no generally-accepted legal framework to require regulators to balance tradeoffs and design regulations that do more good than harm.

For more than twenty years, the Organization for Economic Cooperation and Development (OECD) has been promoting the use of regulatory impact analysis (RIA) and related analytic tools to increase the focus of regulators on overall societal well-being. Key OECD recommendations include a centralized regulatory oversight body in each country, a rigorous process of ex ante RIA, and some “look-back” process to modernize existing regulations. The response in Europe has been a “better regulation” movement that has made progress at the EU level and in some countries (e.g., the United Kingdom and the Netherlands).<sup>2</sup> But the quality of RIA in Europe is highly uneven.<sup>3</sup> In the developing world, progress toward better regulation has been even slower, although the World Bank has played a constructive role with its annual “Doing Business” report.<sup>4</sup> More recently, pro-environment interests have begun to see merit in promoting benefit-cost analysis in the developing world.<sup>5</sup>

Although executive directives have exhorted regulators to maximize societal well-being, political and institutional resistance is so strong that we believe it necessitates the enactment of judicially enforceable legislation requiring regulators to do more good than harm. In the United States, there is a longstanding presidential directive that agencies design regulations so their benefits justify the costs, but it does not trump presidential and interest group politics.<sup>6</sup> Moreover, many regulators proceed from one regulation to the next without much focus on understanding the outcomes of their work; insofar as regulators are concerned about results, the yardstick tends to be whether they hear complaints from organized interest groups, judges, or elected officials. That is a pretty weak filter since, when citizens experience good or bad outcomes in daily life (e.g., a change in the price of gasoline or a new safety feature in their car), they rarely realize whether those outcomes relate to regulatory action or other factors.

Process considerations are by no means trivial or unimportant. They include adherence to the statutory language that authorizes agency action, as well as requirements around public and stakeholder participation and transparency about decision-making

rationales. Process also encompasses political considerations such as whether the regulatory action is consistent with the priorities of a president or prime minister and, more crassly, whether the regulatory action advances the electoral interests of the political leadership or the (usually partisan) allies of the political leadership in the legislature.

As important as process considerations can be, the most important outcomes of regulation are the impacts on citizens, businesses, and other organizations, and the social, economic, and natural environment. We presume the key outcomes are those that influence well-being, where well-being is understood to be determined by the overall welfare of citizens, as well as the distribution of that welfare. The quality of the natural environment, for example, is judged by the humans who experience it, recognizing that humans have a strong interest in the welfare of other species as well as the welfare of future generations. Likewise, the outcomes for citizens are of primary concern, but those citizens may have interests in the well-being of noncitizens in the nation state or in other nations.

In drawing a sharp process-outcome distinction, we do not intend to suggest that procedural requirements are unrelated to the quest for good outcomes.<sup>7</sup> When the U.S. Congress gave federal courts the power to overturn “arbitrary and capricious” regulatory actions, for example, it presumably did so – at least in part – with an eye toward protecting society from the perverse outcomes that could flow from “arbitrary and capricious” regulations. A similar outcome-related justification could be made for other procedures that mandate public participation, transparency, and respect for legislative or administrative priorities.

In this paper, we argue that procedural criteria of regulatory excellence are relevant and important but should be understood as only the bare minimum: fidelity to process is the beginning rather than the end of the inquiry into regulatory excellence. The more important dimensions of excellence, which we acknowledge may be philosophical-ly and scientifically more challenging, relate to the substance of the regulatory design and the ultimate impacts of a regulation on societal well-being. To be more responsive to well-being, regulatory procedural requirements should be supplemented with requirements that emphasize well-being. This issue is being raised in Europe as well as the U.S.<sup>8</sup> One might argue, with some irony, that in this paper we are advocating process reform to improve the substantive design of regulations and their outcomes for society. We would put it differently: we believe that administrative process needs to be supplemented with legally enforceable administrative substance requirements to ensure that regulations do more good than harm.

### **Societal Well-being and Current Procedures: The Disconnect**

Although pursuing regulatory excellence based on societal well-being is not easy, procedural requirements alone are likely to have an imperfect relationship to well-being. A well-being approach to regulatory excellence is consequentialist because it presumes that the ultimate determination of regulatory excellence requires understanding how the

regulator – through its rules – affects well-being. If one relies entirely on procedural notions of excellence, one either does not need to address consequences or one needs to have confidence that procedural requirements deliver excellent consequences. But a definition of regulatory excellence that restricts itself only to an open and participatory process provides no bulwark against the institutional and political forces that can all too frequently diminish, rather than enhance, societal well-being.

Since the current body of procedural requirements in many countries (including the U.S.) were adopted without considering explicitly the well-being approach to regulatory evaluation, it takes a large “leap of faith” – or an “invisible hand” in regulatory politics – to believe that current procedures maximize societal well-being. We believe – and show in this paper with U.S. case studies – that regulatory politics can have the opposite effect. And if the U.S. is not sufficiently outcome-oriented, the problem likely is more acute around the world, where RIA practices are less rooted in the political and legal culture.

A regulator’s well-being inquiry has three major components: (1) the physical consequences of the regulation for citizens (often mediated through impacts on businesses, the environment, and so forth), (2) the valuation of those consequences (typically based on what citizens would prefer if they were well informed), and (3) a distributional check to ensure that, once aggregated, the distribution of societal well-being is acceptable (or, preferably, optimal).

Theorists argue that these steps can be embedded in a social welfare function, where social welfare is determined by the well-being of each citizen and an aggregation system to account for distributional preferences (a special case is a function where the well-being of each citizen is weighted equally). Yet existing regulatory procedures in many countries are not well designed to implement the well-being criterion, and interest-group and electoral politics too often can undermine well-being.<sup>9</sup>

### *High-Quality Scientific and Technical Information*

To achieve excellence, regulators need access to the best available scientific and technical information, including objective and unbiased interpretation of that information. Unfortunately, regulatory procedures can fail to encourage, or even allow, regulators to gather the best available evidence and engage in the close coordination between scientists and regulators needed to achieve well-designed regulations. In a regulatory system where interest-group and electoral politics are dominant concerns, the quest for high-quality scientific and technical information can be diminished.

Although regulators possess substantial technical resources to assist in estimating the consequences of regulatory alternatives, the best available expertise is not necessarily located in the regulating agency. For example, when there was public concern about “sudden acceleration” in Toyota cars in the U.S., the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation (DOT) realized that there were technical issues best addressed by another federal agency, the

National Aeronautics and Space Administration. When the U.S. Environmental Protection Agency (EPA) regulates the energy industry, agency professionals sometimes seek (or at times resist) the technical contributions from analysts at the Department of Energy (DOE), because DOE has greater expertise on some questions. In the field of chemical risk assessment, DOE, the Department of Defense, and the Food and Drug Administration (FDA) have argued in various cases that EPA did not properly use the best available science, and in some cases the National Research Council of the National Academy of Sciences has concurred with the criticism of EPA.<sup>10</sup>

When the U.S. Office of Management and Budget (OMB) reviews a proposed rule, it includes other relevant agencies, but current regulatory procedures do not always require or encourage the regulator with legislative authority to give emphasis to – or even consult with – other regulators that have better access to relevant data and expertise. In the U.S., the White House – practicing a unitary theory of the Executive Branch -- typically discourages one agency from making public criticisms of the technical work of another agency. A promising approach would be for regulators to seek advice on – or peer review of – regulatory science by qualified experts organized by institutions that are separate from the regulatory body. Yet at present, one cannot have great confidence that the first step in the well-being criterion – projecting the physical consequences of regulation – are handled with excellence since regulators are not expected to rely upon the best experts inside and outside of government.

There are greater hurdles to regulators using scientific and technical information submitted by regulated entities, even when that information is the most relevant and authoritative. Regulatory procedures sometimes treat scientists and engineers in regulated entities as if they were more biased than experts in academia, think tanks, consulting firms, or the government. No compelling evidence supports such a general claim of bias, especially if regulators scrutinize the general quality of information they obtain through different sources, such as the replicability of experiments and transparency of models. Looking forward, regulatory excellence requires sound decision making when scientific and technical information is uncertain, that is, when there is a cost (or risk) of waiting for improved scientific information. The value-of-information (VOI) framework, a close cousin of benefit-cost analysis, is well suited to addressing this pervasive dilemma, but it is rarely used by regulatory agencies. The VOI stance provides a more promising framework for harmonizing U.S. and European regulations than does uneven application of a subjective precautionary principle.<sup>11</sup>

### *Determining the Preferences of Informed Citizens*

The valuation of the physical consequences of regulation is typically performed in monetary units, facilitating an “apples to apples” comparison of benefits and costs. Using methods such as revealed preference and stated preference, regulatory analysts strive to ensure that plausible monetary values are assigned to physical consequences.

The social sciences are making progress with these methods, but significant uncertainties remain, as indicated by the contemporary controversy over the “social cost

of carbon” (i.e., the estimated monetary damage to society of emitting a ton of carbon dioxide into the atmosphere). One of the key inputs to this calculation, the social discount rate for converting future consequences into present value, remains a source of contention among professional economists. There is some effort in the U.S., led usually by OMB, to require best-available valuation methods and numerical values (e.g., OMB Circular A-4 on “Regulatory Analysis”), but such efforts are not routinely updated or followed. Regulatory agencies are not legally required to use OMB-recommended methods nor to explain to courts why they may have deviated from OMB guidance.

Some Western-trained economists and libertarians confuse valuation efforts by assuming that consumer preferences observed in real-world markets are necessarily the preferences that should be honored by regulatory analysts implementing the well-being criterion. The assumption is fine in most cases, but there are exceptions when it is apparent (or likely) that the preferences revealed by consumers or workers are based on factual errors, poorly-explained information, misperceptions, ill-considered emotions, or faulty reasoning processes. On the other hand, it is reasonable to ask how regulators themselves can overcome such basic human frailties; the reason is presumably because the regulator has access to specialized knowledge and training (e.g., to the findings of decision science and behavioral economics) and has practice in dealing with issues that consumers may confront less frequently. Thus, it is imperative that regulators pursue their craft in an objective and unbiased manner. A judicially enforceable requirement to do more good than harm would help maintain that focus.

### *Aggregation and Distributional Concerns*

The least developed area in the well-being criterion is distributional weighting, and in the U.S. and elsewhere, the design of the regulatory system is questionable on this point. Current procedural requirements often do require special consideration of specific interest groups, sectors, or subpopulations (e.g., small businesses, children, aboriginal groups, state and local governments, farmers and so forth), but such requirements seem to reflect interest-group politics more than a well-grounded philosophical stance on the fairness-based design of a social welfare function. Organized interest groups already are well represented through “notice and comment” procedures, public hearings, and face-to-face meetings with staff at regulatory agencies and oversight bodies like OMB, but the interests of the unorganized public (especially lower-income citizens, non-union workers, ordinary taxpayers, and consumers) have remarkably little weight in current regulatory processes. Fortunately, many current requirements for RIA or benefit-cost analysis provide some voice for the interests of the unorganized.

On the other hand, there are serious limitations of the regulatory review process. In the U.S., OMB review typically occurs late in the game, after the agency has determined the course of action it wants to take. (In fact, agencies too often treat benefit-cost analysis as a post-hoc justification for regulatory proposals that were designed with other motivations.) OMB is given more power in some presidential administrations than others. OMB also is short on staff and not backed up by any judicial review of agency compliance with the Executive order on regulatory review or the Circular A-4 analytic

guidelines. Perversely, presidential politics sometimes causes agencies and OMB to be deployed in a direction that could undermine societal well-being. And there is a large volume of “stealth regulation” that occurs without any OMB review or benefit-cost justification, and much of this activity is permissible under current procedural requirements.<sup>12</sup>

In fact, specialized U.S. procedures already have been established to facilitate “regulatory negotiation” whereby organized interest groups (e.g., trade associations, labor unions, and environmental groups) can meet and draft a proposed regulation for consideration by the responsible agency. Once such interest groups agree on an approach, it is difficult for an analysis of societal well-being to have much impact. Thus, there may be a disconnect between those who value regulatory negotiation and societal well-being.

### *Key Regulatory Design Issues*

In many cases, the issue is not whether to regulate. Regulators rarely launch a regulatory initiative that has no merit because markets are working perfectly. Nor is it common for regulators to fabricate economic and scientific information to justify a regulatory intervention where regulation is unnecessary.

The more prevalent questions concern the breadth and stringency of regulation, the proper choice of regulatory instrument, and the coordination of national regulation with related rules at the state, local and international levels. It can be challenging to overcome political opposition and enact a stringent regulation even when called for by the well-being standard, but a strong benefit-cost ratio can make a difference.<sup>13</sup> Despite these key questions, many process requirements (e.g., consultation with various stakeholders) relate only to the procedural steps through which the regulation is developed, not to the substantive issue of whether the regulation as designed increases societal welfare. Thus, current and often-advocated procedures are insufficient for implementation of the well-being criterion and the meaningful attainment of regulatory excellence.

### **Regulatory Case Studies: The Good, the Bad and the Ugly**

To illustrate the preceding conceptual themes, we present some brief regulatory case studies from the United States. Some of the cases highlight good practice for regulation that promotes societal well-being; others reveal shortcomings of process alone.

#### *Trans-Fat Labeling for Foods*

A strong body of experimental and epidemiological evidence links the trans-fatty acid content of food to a risk of coronary heart disease. In February, 1994, the Center for Science in the Public Interest (CSPI), a nutrition and health advocacy organization, petitioned FDA to include trans-fat on nutrition labels and set limits on the amounts of trans-fat in foods. Recognizing the growing body of evidence, the FDA finally proposed

in November, 1999, that the standard food label be modified to include information on trans-fat content.

FDA's benefit-cost analysis showed that such a change would lead many companies to reduce the trans-fat content of their food products. The benefits from reduced heart attacks (about \$2.9 billion per year) would more than pay for the extra labeling and food-processing costs (up to \$275 million per year, then declining after the third year of compliance).

During the transition from the Clinton to the G.W. Bush administrations, FDA's momentum behind the trans-fat rule petered out. The well-organized baker and processing associations had filled the rulemaking record with numerous critical comments. The Bush administration was slow to appoint an FDA Commissioner. Only one consumer group, CSPI, was working the issue aggressively, but they had limited stroke in conservative administrations.

Despite the lack of support, based on the strength of FDA's benefit-cost analysis, OMB decided to publicly prompt FDA to finish the trans-fat rulemaking.<sup>14</sup> When FDA did so in 2003, the rule helped stimulate a much broader movement in the U.S. and abroad to reduce the trans-fat content of foods offered everywhere from grocery stores to fast-food restaurants. Simply disclosing information helped transform the grocery store aisle into a platform for companies to compete on the healthy attributes of their food products.

FDA's trans-fat labeling rule illustrates how faithfulness to the criterion of societal well-being can lead to favorable regulatory outcomes. Those outcomes might not have occurred – or at best would have occurred years later – under the model of interest-group pluralism that underpins much of the current procedural design of the regulatory system. One might argue there was a lack of leadership at FDA, but there is no question that a favorable RIA helped to break the impasse.

### *Reducing Interstate Transport of Air Pollutants*

During the George W. Bush administration, the U.S. EPA issued the "Clean Air Interstate Rule" (CAIR) that required coal-fired power plants to reduce by 60-70% the emissions of sulfur dioxide and nitrogen dioxide, pollutants that can be transported long distances and form smog and soot. (A similar regulatory program was enacted in Europe – called Clean Air Strategy Europe – with a RIA reaching similar conclusions). Although CAIR was expensive (about \$1.9 to \$3.1 billion per year), EPA estimated that the benefits – primarily avoidance of premature deaths from fine particle exposure – were 30 times greater than the costs. Using more conservative (yet plausible) assumptions about benefits, OMB estimated that the benefit-cost ratio would be 3 to 1. OMB and EPA together argued unsuccessfully in the Bush White House, on benefit-cost grounds, that the sulfur cap should be placed at a 90% reduction level rather than at 70%.

The federal courts ultimately slowed implementation of the CAIR rule for legalistic reasons that are inconsistent with the societal well-being criterion. EPA under the Obama administration re-issued the rule with somewhat greater coverage and stringency but also has run into judicial obstacles. Absent a statutory well-being requirement, litigation of rules often veers off in directions of questionable public value.

CAIR also illustrates how regional politics can contribute to regulatory outcomes inconsistent with faithful implementation of a societal well-being standard. If benefit-cost analysis supported a 90% sulfur reduction, why wouldn't the Bush EPA enact it? The answer to this question may be informed by an appreciation of how regional politics in "battleground states" influences presidential politics.

George W. Bush was elected president in November 2000 by the narrowest Electoral College margin in modern political history. While the national press made much of Bush's victory in Florida (because of the controversy over "hanging chads" and the 5-4 Supreme Court decision against a Florida recount), Bush's 52-46% victory in West Virginia (with its five Electoral College votes) was equally crucial to his election. In fact, Bush's defeat of Vice President Al Gore in West Virginia was the first win by a Republican presidential candidate in that state since 1928.<sup>15</sup>

The economy of West Virginia is heavily dependent on coal, which primarily is used to generate electricity. Throughout the 2000 campaign, Bush pledged his support of "clean coal" as an energy source and successfully painted Gore as an enemy of coal. During Bush's first term, there was a strong reluctance in the White House to issue burdensome regulations that might cause electric utilities to shift from coal to natural gas.

There certainly were principled policy concerns about over-regulating energy (e.g., fuel diversity, the reliability and affordability of gas when prices were high before the fracking revolution, and the need for affordable gas in manufacturing). It did not help EPA's cause that its 30:1 benefit-cost estimate was viewed skeptically in the White House. Although the rule had a plausible case using more realistic estimates, there was room for varying interpretations, which illustrates the importance of agencies using objective and unbiased analysis in determining societal well-being.

However, it was apparent that Bush would fight hard to keep West Virginia when he sought re-election in 2004. One way Bush succeeded was by moderating regulatory burdens on coal. Without a legal mandate to maximize societal well-being, electoral politics can trump such an outcome.

#### *The California Zero-Emission Vehicle (ZEV) Mandate*

When Barack Obama campaigned for the White House in 2008, one of the base constituencies he courted was the network of West Coast advocates seeking to commercialize the electric vehicle (EV). The network includes organized pro-car environmentalists and their donors, California-based venture capitalists with interests in battery and electric drive-train technology, companies that produce the chargers and

recharging stations (also based in California), investors in Tesla (the darling of EV companies), and Silicon-Valley entrepreneurs who see EVs as a symbol of technological progress. To appeal to EV enthusiasts, Obama pledged to put 1.0 million plug-in vehicles on the road by 2015, and to force automakers to achieve an average of 50 miles per gallon or more in new vehicles by 2025.<sup>16</sup>

When Obama took office in January 2009, he promptly delivered on his pledges. Obama's first budget supported the generous EV tax credits that Congress initiated in 2008. Depending on the vehicle's design, an EV purchaser was made eligible for tax credits of up to \$7,500 for vehicle purchase costs and up to \$2,000 for the costs of purchasing and installing home chargers. On the supply side of the market, DOE – under the 2009 Recovery Act – allocated \$2.1 billion in subsidies for battery manufacturing projects, vehicle component production, construction of production facilities, and community-based EV demonstration projects. Billions more in federal loan guarantees for EVs were granted to companies such as Ford, Nissan, and several suppliers.<sup>17</sup>

On the regulatory front, EPA and DOT undertook a joint rulemaking to increase the average fuel efficiency of passenger vehicles from 35.5 miles per gallon in 2016 to 54.5 miles per gallon by 2025. The EPA-DOT rulemaking was supported by an elaborate benefit-cost analysis. Tucked in the rulemaking were two little-noticed provisions for EVs that were not subjected to any benefit-cost analysis.

First, DOT/EPA encouraged vehicle manufacturers to comply with the tighter MPG requirements by installing EVs – rather than more cost-effective technologies such as the conventional hybrid engine (e.g., as commercialized by Toyota in the Prius) or the clean diesel engine (e.g., as championed by German vehicle manufacturers).<sup>18</sup> To tilt the compliance incentive toward EVs, DOT/EPA allowed vehicle manufacturers to count EVs as two vehicles instead of one in their MPG compliance calculations for the early years of the 2017-2025 program. Moreover, in the carbon-control aspect of the DOT/EPA rule, EVs are not penalized for any of the carbon dioxide emissions they induce at power plants by consuming electricity. EVs effectively are treated as ZEVs.

Second, and more importantly, in 2009 DOT/EPA granted a waiver to California (and nine states aligned with California) under the Clean Air Act to proceed with the ambitious California ZEV program.<sup>19</sup> Vehicle manufacturers selling into California must offer an increasing number of ZEVs for sale from 2018 to 2025, reaching a minimum of 15% of new vehicle sales in 2025. And California-based Tesla, as a “low-volume” manufacturer, is exempt from ZEV burdens but is permitted to sell its ZEV credits to other manufacturers, thereby boosting its troubled balance sheet.

The California Air Resources Board (CARB) did publish a rudimentary benefit-cost analysis of the ZEV mandate. It concluded that it would take roughly the ten-year life of a vehicle for the energy savings of a ZEV to pay for a ZEV's initial \$10,000 cost premium.<sup>20</sup> A variety of the technical assumptions used in CARB's analysis likely would not have passed muster under OMB's guidelines for regulatory analysis, Circular A-4.

More importantly, CARB's analysis focused only on the well-being of California; the analysis was not done from a national perspective.

EPA's waiver decision for CARB should have been subjected to a national benefit-cost analysis, with OMB review. Under the Clean Air Act, other states are permitted to sign on to the California ZEV program if they wish. About ten (including New York, Massachusetts, Oregon and Washington) have done so. Thus, the California ZEV mandate now covers more than one quarter of all new vehicle sales in the U.S. EPA's ZEV waiver for California was a multi-billion decision with national economic ramifications.

Moreover, car dealers find it very challenging to sell ZEVs, despite all of the subsidies and incentives (e.g., California grants HOV lane access to ZEVs). A ZEV not only is more expensive than a conventional hybrid or diesel-powered car, but also has limited range (less than 100 miles for most pure EVs) and takes four hours to charge (assuming the user has upgraded their garage to a Level-2 home charger).<sup>21</sup> Accordingly, manufacturers likely will have to cut prices on ZEVs to comply with the California mandate and compensate for the losses by raising prices on non-ZEV vehicles.<sup>22</sup> The resulting welfare losses will not be confined to California and the other ZEV states. Those losses will be felt partly by consumers and stockholders in all states and partly in the form of reduced compensation and layoffs of workers where plants are located (e.g., Mexico, Japan, Germany, Missouri, Ontario, Michigan, Alabama, Tennessee, Kentucky and Indiana).<sup>23</sup> Few employment losses will occur in ZEV states because those states have no vehicle assembly plants and few supplier plants.<sup>24</sup> Finally, the ZEV program may not produce any significant environmental benefits because the market interactions between the ZEV mandate and the 54.5 MPG federal mandate were not analyzed carefully. If a manufacturer is compelled to sell an additional ZEV into the California market, it can count that ZEV twice (!) in its MPG compliance calculation at the federal level. That means the manufacturer may sell an additional gas-guzzler and still comply with the 54.5 MPG mandate. Adding the ZEV mandate to a federal program that encourages ZEVs could, under plausible assumptions, cause more carbon pollution than federal program by itself (with or without the 2-for-1 sweetener).<sup>25</sup>

The sobering story of the California ZEV program illustrates the need for a legally enforceable mandate for regulators to do more good than harm. The quality of the benefit-cost decision must be scrutinized carefully, such as through robust judicial review, since regulators and their reviewers will be constrained from checking a poorly-analyzed campaign pledge of a president or prime minister. A national benefit-cost requirement backed by judicial review would check the executive's misuse of regulatory power for base-pleasing purposes and promote meaningful regulatory excellence.

### **Implications and Prescriptions**

The foci of administrative procedures (e.g., faithfulness to statute, transparency as to the rationale for decisions, opportunity for public/stakeholder participation) are not objectionable if understood as minimum standards for excellence that must be coupled

with a substantive focus on well-being. An exclusive focus on administrative procedure, though, allows enormous weight to organized interest groups and politicians' policy preferences, neither of which is always a good proxy for societal well-being.

The first distortion, familiar to scholars of regulation, is the influence of interest-group politics (often in the form of "rent seeking"). History suggests that the legislature will be particularly vulnerable to the wishes of well-organized special interests that draw support from several regions of the country. Elected executive officials are certainly not immune from interest-group capture either, as illustrated in the case of the ZEV mandate.

The second distortion follows from this last point. Although it is often viewed as legitimate ("democratic") for regulatory policy to reflect the priorities and electoral interests of elected politicians, especially national leaders, their views may have little to do with overall societal well-being. In the United States, the president's policy preferences are increasingly treated as legitimate because he is the only elected official in the U.S. who represents the entire nation, in contrast to individual senators or representatives who will focus on the interests of their states or districts. The issues are different in a parliamentary system, where the executives are drawn from the parliament, but still national ministers are sometimes granted greater deference because they are seen to represent the entire nation.

Unfortunately, there are ominous trends that may motivate chief executives to give relatively less attention to societal well-being than they might have in the past. At least in the United States, the contemporary bout of partisan polarization may lead chief executives to act contrary to societal well-being. Under polarization, chief executives are perceived as leaders of their political party as much as leaders of the country as a whole.<sup>26</sup> (In this respect, the U.S. is beginning to resemble a two-party parliamentary scheme). That induces a particular presidential focus on the policy preferences of party activists, partisan-oriented media professionals, and party-oriented donors, as they are the most politically active and they offer cues to the ordinary partisan voter who does not pay as much attention to politics. As a result, chief executives work at least as hard at "base politics" (pleasing and turning out the faithful) as they do appealing to the median voter (the true independent or moderate). Once elected, chief executives may seek policies that reward their base even if the policies are questionable from the perspective of societal well-being, as illustrated by President Obama's commitment to a ZEV mandate.

If a chief executive from one party makes regulatory policy for societal well-being that happens to please interest groups aligned with the opposing party, there may be little political benefit. President Bush's decision on labeling foods for trans-fat content raises this issue, and there are certainly pro-business regulatory decisions by President Obama that were not effusively praised by the business community. The inability of chief executives to count on any public praise for decisions unless they are base-pleasing measures is a strong disincentive to focus on societal well-being.

A third distortion occurs because of the tremendous significance of electoral politics. The distorting effects of electoral politics on regulatory policy are particularly

acute in the United States, as illustrated by President Bush's defeat of Al Gore in West Virginia and relatively restrained regulation of coal in the Bush administration. In parliamentary systems, similar distortions arise from the ways votes are counted and coalition governments are formed.

A fourth distortion arises in many democracies because of the much too frequently non-competitive nature of general elections. In the U.S., the president is elected not by the national popular vote but by Electoral College votes in a dwindling number of "battleground states": Colorado (9), Florida (27), Iowa (7), New Hampshire (4), New Mexico (5), Nevada (5), Ohio (20), Virginia (13). As a gross rule of thumb, both parties have a good shot at 160-180 Electoral College votes with any decent presidential candidate. Most of the contested campaign occurs in ten or fewer swing states with about 90 Electoral College votes. The victors are encouraged, due to a re-election mindset that seems to pervade among both elected leaders and their advisors, to spend their terms in office focusing on policies that might give them an edge in subsequent elections in those battleground states. This distracts from a focus on societal well-being, which is the proper definition of regulatory excellence.

We close with two proposals consistent with OECD recommendations and recent developments in the EU to give greater voice to societal well-being in legislative and executive deliberations. First, to promote greater substantive regulatory excellence, legislatures should recognize the essential role that they play in regulatory policy and take the modest step of imposing RIA requirements for new legislation. The establishment of dedicated offices within legislative bodies to implement those RIA requirements not only would provide benefit-cost information to legislators on regulatory legislation, but also could help in overseeing the work of regulatory agencies and providing analytic comments on rulemakings, particularly those that seem to have a weak benefit-cost rationale. Second, legislatures or other oversight institutions should supplement current rulemaking procedures with administrative *substance* requirements focused on societal well-being. Ideally, legislatures should make it crystal clear to reviewing courts that regulations should not pass muster unless they do more good than harm.<sup>27</sup>

## Notes

<sup>1</sup> OECD. *Report on Regulatory Reform*. Paris, France. 1997.

<sup>2</sup> Jonathan Wiener. "Better Regulation in Europe." *Current Legal Problems*. 59. 2006, 447-518.

<sup>3</sup> Claudio M. Radaelli and Fabrizio De Francesco. *Regulatory Quality in Europe: Concepts, Measures, and Policy Processes*. Manchester University Press. Manchester, UK. 2007.

<sup>4</sup> World Bank. *Doing Business*. Annual.

<sup>5</sup> Michael A. Livermore and Richard L. Revesz. *The Globalization of Cost-Benefit Analysis in Environmental Policy*. Oxford University Press. New York, New York. 2013.

<sup>6</sup> President Carter issued Executive Order 12044 requiring benefit-cost analysis for major rules, followed by Reagan E.O. 12291, Clinton E.O. 12866, and Obama E.O. 13563.

<sup>7</sup> On how administrative procedures can lead to good outcomes, see Steven P Croley. *Regulation and the Public Interests: The Possibility of GOOD Regulatory Government*. Princeton University Press. 2008.

<sup>8</sup> Alberto Alemanno. A Meeting of the Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control. *European Public Law*. 17(3). 2011, 485-505; Alberto Alemanno. "The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward." *European Law Journal*. 15(3). 2009, 382-401.

<sup>9</sup> For a classic statement of how interest-group politics and rent seeking detract from the cost-benefit state, see C. Boyden Gray. "Obstacles to Regulatory Reform." *University of Chicago Legal Forum*. 1997, 1-11.

<sup>10</sup> Cheryl Hogue. "EPA's Efforts Endorsed." *Chemical and Engineering News*. 92(20). May 19, 2014, 26-27.

<sup>11</sup> On how Europe and the U.S. differ on science-based regulation, see Jonathan B. Wiener, Michael D. Rogers, James K. Hammitt, Peter H. Sand (eds.). *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe*. Resources for the Future Press. Washington, DC. 2011.

<sup>12</sup> John D. Graham, Cory R. Liu. Regulatory and Quasi-Regulatory Activity Without OMB and Cost-Benefit Review. *Harvard Journal of Law and Public Policy*. 37(2). Spring 2014, 425-445; Paul R. Noe and John D. Graham, "Due Process and Management for Guidance Documents: Good Governance Long Overdue," *Yale Journal on Regulation*. 25. Winter 2008, 103.

<sup>13</sup> Richard L. Revesz and Michael A. Livermore. *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health*. Oxford University Press. 2008.

<sup>14</sup> Judith Weinraub, "The Hidden Fat; Some Scientists Have Known About the Dangers of Trans Fats For More Than Two Decades. What Took the Government So Long?," *The Washington Post*, F1, Sept. 10, 2003.

<sup>15</sup> Michael Barone. *Almanac of American Politics*. 2004, 1709.

<sup>16</sup> Margaret Kriz. Is Obama's Goal of Putting One Million Plug-In Hybrids on the Road by 2015 Achievable? *National Journal*. May 2, 2009.

<sup>17</sup> John D. Graham, Joshua Cisney, Sanya Carley, John Rupp. No Time for Pessimism about Electric Cars. *Issues in Science and Technology*. 31(1). Fall 2014, 33-40.

<sup>18</sup> On the superiority of conventional hybrids, see Jeremy J. Michalek, Mikhail Chester, Pauline Jaramillo, Constantine Samaras, Ching-Shin Norman Shiau, Lester B. Lave. Valuation of Plug-in Vehicle Life-Cycle Air Emissions and Oil-Displacement Benefits. *Proceedings of the National Academy of Sciences*. 108(40). October 4, 2011, 16554-16558; Shisheng Huang, Bri-Mathias S. Hodge, Farzad Taheripour, Joseph F Pekny, Gintaras V. Reklaitis, Wallace E. Tyner. The Effects of Electricity Pricing on PHEV Competitiveness. *Energy Policy*. 39. 2011, 1552-1561.

<sup>19</sup> U.S. EPA. California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption of California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles. 74 *Federal Register*. July 8, 2009, 32,744.

<sup>20</sup> California Air Resources Board/California Environmental Protection Agency. Staff Report: Initial Statement of Reasons: Advanced Clean Cars: 2012 Proposed Amendments to the California Zero Emission Program Vehicle Regulations. ES-2. 2011, <http://www.arb.ca.gov/regact/2012/zev2012/zevisor.pdf>.

<sup>21</sup> Sanya Carley, Rachel M. Krause, Bradley W. Lane, and John D. Graham, "Intent to Purchase a Plug-In Electric Vehicle: A Survey of Early Impressions in Large US Cities," *Transportation Research Part D: Transport and Environment*, vol. 18 (2013), pp. 39-45.

<sup>22</sup> A price war in the EV industry has already begun. Jeff Bennett, "Volt Falls to Electric-Car Price War," *Wall Street Journal*, August 6, 2013, p. B1.

<sup>23</sup> John D. Graham, Cory R. Liu. "Regulatory and Quasi-Regulatory Activity Without OMB and Cost-Benefit Review," *Harvard Journal of Law & Public Policy* 37(2). Spring 2014, 425, 431-439.

<sup>24</sup> See "Ten Busiest North American Assembly Plants." *Automotive News*. January 12, 2012.

<sup>25</sup> Lawrence H. Goulder et al. Unintended Consequences from Nested State and Federal Regulations: The Case of the Pavley Greenhouse-Gas-Per-Mile Limits. National Bureau of Economic Research. Working Paper #15337, 2009.

<sup>26</sup> Alan I. Abramowitz. *The Disappearing Center*. Yale University Press. 2010.

<sup>27</sup> Caroline Cecot, W. Kip Viscusi. Judicial Review of Agency Benefit-Cost Analysis. Working Paper #14-31. Vanderbilt University Law School, Law and Economics. Nashville, Tennessee. 2015, forthcoming in *George Mason Law Review* (finding U.S. courts reviewing benefit-cost analyses for some regulatory decisions are doing so competently).

## **Beyond Process Excellence: Enhancing Societal Well-Being**

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June 2015

### **Acknowledgments**

This paper is released as part of the Penn Program on Regulation's Best-in-Class Regulator Initiative which is supported by the Alberta Energy Regulator. A subsequent version of this paper will appear as a chapter in the forthcoming volume, *What Makes a Regulator Excellent* (Cary Coglianese, ed.), to be published by the Brookings Institution Press. Additional work related to this project is available online at [www.bestinclassregulator.org](http://www.bestinclassregulator.org).

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