



**PENN PROGRAM ON  
REGULATION**

## **Regulating by the Stars**

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There is an old cliché that there are two things you never want to see made – laws and sausages. And although laws and regulations differ in their institutional means of production, the sausage-making analogy may be even more apt for decision-making by regulatory authorities. After all, the whole regulatory process is built on a conglomeration of potentially unsavory inputs. For example, in order to push through any decision, regulators must summarize and streamline information, solicit input from all relevant parties, respond to prods from elected officials, and ultimately produce a rule that – like the legislative process that created it – is inevitably more compromise and ad hoc politicking than synoptic decision-making.

However, precisely because of this sausage-making quality, reformers have sought to clean up the regulatory process over the last two decades by imposing numerous external checks on the quality of the agency outputs. Around the world, these oversight requirements include, variously, inviting private challenges to the quality of the agency’s information, mandating assessments of the effect of rules on small businesses, demanding cost-benefit analyses of significant rules, limiting agencies’ information requests issued to private parties, and imposing dozens of other requirements.<sup>1</sup> A variety of generic output measures – such as number of rules or the number of pages of rules – have been deployed in an effort to ensure that the quality of the agency’s rules are palatable to a democratic system.

Yet when regulatory excellence, and not just regulatory serviceability, is the endgame, numerous experts in decision-making theory insist that instead of adding new procedural requirements or tracking generic output measures, the best way to make progress is to focus on just a few core management objectives.<sup>2</sup> Identifying a single or several “principal” objectives or “simple goals” helps keep a decision-process on track and moving in a productive direction.<sup>3</sup> Performance measures and other oversight checks on a decision are then calibrated, however approximately, to these end goals. Indeed, without this calibration, output metrics and oversight mechanisms run the risk of serving more as distractions from or obstacles to excellence rather than means for regulatory advancement.<sup>4</sup>

In identifying these all-important end goals for administrative process, it is U.S. President Theodore Roosevelt’s adage to “keep your eyes on the stars, and your feet on the ground” that supplies the central directive.<sup>5</sup> The best regulators possess an unwavering commitment to the overarching goal of advancing the public interest at every turn in the regulatory journey (the “stars”). This focus on advancing the public interest also brings out the best in regulatory creativity, entrepreneurship, and inventiveness. But these accomplishments must also be grounded. Indeed, among the most important features of excellent regulating is the development of decision processes that are as expert, accessible, and fair as possible – a commitment that may require analytical and procedural inventiveness. In modern times, it has also become clear that an excellent regulator must go beyond Roosevelt’s adage and ensure an ability to move forward even in spite of the morass of regulatory procedures and requirements. In other words, excellent

regulators must keep their eyes on the stars, their feet on the ground, and make sure that those feet can move through the logistical quagmires of contemporary governmental bureaucracy.

## **Regulators: Finding their Institutional Place**

Excellent regulators find themselves operating in hotly contested political environments where legitimacy and accountability are up for grabs. While this paper is no place to repeat, much less attempt to cover the ground identifying the normative place for regulatory agencies in government, it is difficult to discuss the qualities of excellent regulators without first at least mapping regulators' general institutional role.

As an institutional matter, agencies must retain some independence from the electoral process while remaining responsive and ultimately deferential to elected officials.<sup>6</sup> By combining staff expertise with a deliberative approach to policy analysis, regulators offer a different perspective and line of engagement with policymaking.<sup>7</sup> This perspective offers an important dimension to the democratic machinery that otherwise might be driven by the urgent demands of well-financed interest groups and the crisis-of-the-day.

The regulator generates this distinctive voice in the democratic dialogue by implementing bottom-up (as opposed to top-down) techniques of analysis and then subjecting that analysis to diverse scrutiny. Specifically, the regulator must produce analyses that take all relevant information into account, use well-established methods, and provide reasons for its choices.<sup>8</sup> The regulator must also adopt a deliberative decision-making process that engages the public, affected groups, and experts throughout the rulemaking.<sup>9</sup> In following this analytic-deliberative process, the regulator fulfills an "integrative function" that serves to "blend demands from past democratic coalitions with those from current democratic coalitions to produce a policy output at a consistent level."<sup>10</sup> And at least in theory, maintaining that separation between the regulator and elected officials is central to advancing regulatory excellence and protecting the integrity of the regulatory voice in democratic decision-making.

However, it is easy to imagine how this agency independence is vulnerable to being coopted or manipulated. Well-heeled special interests and political actors might rig an illusion of independent analysis that is, in fact, beholden to their views. In anticipation of this appropriation, the regulator must establish formalistic ways to protect against these subterranean intrusions. In protecting their independence by creating rigorous deliberative records and providing reasons, excellent regulators endeavor to provide some protections against serving as little more than handmaidens to politicians.

Consistent with this institutional role, the regulator's primary responsibility is to provide a rigorous, bottom-up analysis of the issues and set their choices within this record. The excellent regulator is accordingly relentless in establishing a complete understanding of the issues, identifying the best choice among all available options, and explaining how, exactly, it accomplishes its work. Thus while the regulator's ultimate decision should be as equitable and efficient as possible, the final measure of regulatory excellence is grounded in the thoroughness

and accuracy of the regulator's record and the justification provided for regulatory decisions.<sup>11</sup> In this way, the regulatory body fulfills its institutional role to the best of its abilities.

Roosevelt's adage resonates heavily in this type of value-focused orientation. By keeping their eyes to the "stars," excellent regulators constantly ensure that their analysis and goals advance the public interest. By remaining grounded, excellent regulators also ensure that they have mastered the available information and evidence and used it as a foundation for policymaking. Political officials can trump their regulatory choices, but only after excellent regulators have established a rigorous, grounded record in a way that speaks truth to power.

These qualities of regulatory excellence should not minimize other more generic qualities of excellence that run through all managerial positions. The heads of regulatory bodies are managers, so all the qualities of an excellent manager are also apropos for an excellent regulator, including, but not limited to, the ability to lead and inspire a large staff; the ability to mentor and nurture talent; the ability to stand behind controversial decisions but remain strategic and alert to roadblocks; relentlessness in surmounting obstacles; and perseverance and integrity.<sup>12</sup> However, since these qualities of excellence are well-traveled ground in managerial studies, they are not discussed in this essay despite their ultimate importance in excellent regulation.

### **Eyes on the Stars: Advancing the Public Interest**

Since regulators act on behalf of the public at large, the lodestar for all regulatory decisions and processes is to ensure that the public is deriving some sort of tangible benefit. Much like James Madison's ideal statesman, the excellent regulator will "refine and enlarge the public views" in order to "best discern the true interest of their country."<sup>13</sup>

Yet advancing the public interest – while seemingly uncontroversial as an end goal – is especially difficult in the high stakes, highly technical world of regulation. Consequently, truly excellent regulators must ensure that their policies are informed by all affected parties, that the public is not only solicited but engaged, and that the resulting decisions are justified. Each of these steps is discussed in greater detail below.

#### *Identifying all Interests and Public Considerations*

An excellent regulator must map out each of the significant interests affected by a decision and ensure that they are engaged or, at the very least, represented in the decision process. For example, in a rule setting toxic air pollution standards, the public interest includes, at the very least the general diffuse public which is affected in some way by the toxin at issue, communities living close to the major sources of the pollutants, future generations (if some effects, like the accumulation of toxins, are irreversible), as well as the regulated industry. Accordingly, the excellent regulator is fully committed to developing a complete record for the decision process that ensures this broad constellation of significant perspectives are weighed against each other in a rigorous way.

Unfortunately, in the United States this seemingly obvious quality of excellent regulation – namely that the regulator is ever-vigilant in locating and accounting for all affected interests –

is largely lost and maybe even discouraged in regulatory practice today.<sup>14</sup> U.S. administrative processes instead situate the regulator as a passive recipient of public input. The quasi-market model for participation holds regulators legally accountable only when they ignore written comments by individuals or groups during a discrete “comment period.”<sup>15</sup> If affected groups or clearly at-risk interests do not formally weigh during this window, their concerns can be legally ignored. Furthermore, if the agency *does* take the concerns of affected groups into account despite their absence from the rulemaking record, they may find themselves in hot water with groups that submitted comments formally: if the two interests are competing, siding with the unexpressed complaint over the formal complaint (even if the interests of the former outweigh the interests of the latter) is grounds for a lawsuit. In other words, rather than weighing options and interests, the agency has the incentive to reward the squeaky wheels, who not coincidentally tend to be the most well-financed groups.

Exacerbating this passive design of administrative process is the fact that, while some regulatory decisions attract the full range of affected parties like moths to a light, in numerous instances the interests most affected – particularly underrepresented communities and future generations – are dormant and at risk of being passed over. In the leading theories of regulatory participation, now both several decades old, both James Q. Wilson and William Gormley modelled the likelihood of inadequate engagement by the diffuse public on many regulatory issues which directly and significantly affect their interests.<sup>16</sup>

The Wilson-Gormley models, shown in Table 1, are supported by empirical research that reveals that even the narrowest conception of public interest is absent from the deliberation over about half the rules in federal health and environmental regulatory programs in the United States.<sup>17</sup> Those living in the polluted areas, for example, rarely provide comments or articulate their interests. And even their self-appointed public interest representatives are able to weigh in on only about half the rules and are badly outnumbered when they do submit comments. For example, in one set of rules – air toxic standards – the public interest nonprofits were not only absent from half the rules, but when they did engage, they were vastly overpowered by industry in the number of comments filed (14 to 1).<sup>18</sup> Moreover, they were essentially absent from all extensive discussions leading up to the proposed rule that occurred between the agency and industry; in that category, for every 87 communications the agency logged with industry, nonprofit groups logged in less than one communication.<sup>19</sup> Given these findings, one does not need a particularly sophisticated theory of public interest to conclude that the engagement and agency pressures are lopsided in ways that lead to significant gaps in the consideration of all affected interests.

In light of this combined theory and experience, an excellent regulator must find ways to adjust and compensate for the inevitable lack of civic engagement, particularly by poor communities, future generations, and the diffuse public – the beneficiaries for much of the regulatory state. Ensuring rigorous engagement by all affected groups may be best accomplished by subsidizing participation of underrepresented groups. For example, the goal of comprehensive and meaningful engagement by all significant, affected groups necessitates that their concerns be logged into the record with meaningful, detailed comments that can be litigated later

**Table 1:  
Models of Regulatory Politics**

Model A: James Q. Wilson

		Costs	
		<i>Concentrated</i>	<i>Dispersed</i>
Benefits	<i>Concentrated</i>	<u>Interest group politics</u> Fights over specific kinds of regulation (e.g. railroad freight rate regulation or telecommunications, or wage bargaining in public sector). Both sides can easily mobilize.	<u>Client politics</u> The only case in which Mancur Olson's collective action should work (e.g. import restrictions, lobbying for tax breaks, lobbying for targeted funds).
	<i>Dispersed</i>	<u>Entrepreneurial politics</u> Class action suits against concentrated interests might be an example. So too might be restricting tobacco sales, and tax cuts in general.	<u>Majoritarian politics</u> Pure appeals to public goods (e.g., public smoking bans)

Model B: William Gormley

		Complexity	
		Low	High
Saliency	High	Hearing Room Politics	Operating Room Politics
	Low	Street-Level Politics	Board Room Politics

in the event they are ignored by the agency. This record will thus not only inform the agency but constrain even excellent regulators from drifting too far from the overarching national interest.

Because the system works in this problematic way that ignores the underrepresentation of affected groups, the excellent regulatory must make a point to identify and engage significant, under-represented interests at the very beginning of the policymaking exercise as well as in the middle and at the end. For example, in the development of a proposed rule, the excellent

regulator finds a way to ensure that impacted but thinly financed groups weigh in in the development of the various regulatory proposals. Ideally, their influence will be equivalent to the influence of other significant groups, like industry, and not outstripped by virtue of their limited resources. Creating this balance in influencing the agency's development of regulatory proposals might even require a limit on participation, at least during the informal policy-development stages, so that one set of groups cannot outspend or out-influence others.

If representatives of at least some of these diffuse groups cannot be found in the existing nonprofit community or grassroots organizations, then the excellent regulator will create ombudsmen or other external advisors to advocate for their interests in their absence. This representation will obviously be incomplete, but in such matters perfection should not be the enemy of progress. It is far better to have some formal presence than none at all.

The point at which these various forms of supplemental representation become necessary necessarily requires further specification, although in cases where some important groups are routinely underrepresented relative to others, the excellent regulator will develop processes that automatically assume that added representation is needed and intervene only to eliminate appointed advocates where their representation is duplicative.

In some policy settings, of course, mapping and engaging the full range of affected parties will take care of itself. Particularly in cases of especially controversial or salient issues, all of the significant interests may engage full-throttle, making the life of the excellent regulator much easier. In these instances, the excellent regulator need only ensure that he adequately considers and balances the interests at stake (as discussed below), rather than also ensuring they are represented in this first place.

Finally, the excellent regulator will identify ways in which various policy options might impose consequences on future generations that are irreversible. Public health and environmental issues in particular involve potentially irretrievable losses. And yet counting on existing groups and representatives to voluntarily account for these future concerns is unrealistic, particularly if one considers the added collective action problems entailed in representation. Hence a rigorous assessment of the adverse consequences that could flow to future generations is vital to an excellent regulator; without such an inventory, these costs are at risk of being neglected entirely.

### *Engage the public in the journey*

Since a regulator must make decisions that affect large segments of society, the regulator should engage the public in the journey. It is not enough for the choices to be made with the public interest in mind – the agency's work must also engage and inform society, including those groups who might otherwise be under-represented even though they are impacted by agency decisions.

At a bare minimum, regulators must ensure that the most important factors and bases for their decision – as well as their decision itself – are shared openly and accessibly within the wider community. For example, in complex, science-intensive rules governing air toxics, the

purpose of regulation is to minimize air toxic exposures in industrial corridors. Since communities living in these corridors are the primary beneficiaries, an excellent regulator will educate the community as to the evidence and options to ensure they are able to engage in the deliberations in a meaningful way. Limited time and resources obviously constrain what is possible for even the most excellent regulators, but, with their eyes to the stars, these regulators appreciate that each step in their decision-making processes presents an opportunity for education and outreach.

It is worth noting that, again, the dominant trend may not be towards this excellence in outreach and education but in the opposite direction. Because regulators, at least in the US, are subject to lawsuits and because meaningful engagement of all affected interests is neither a requirement nor an implicit incentive in the design of the process, regulators tend to write rules in ways that are difficult for even the most expert audience to decipher.<sup>20</sup> Gaps in the evidentiary record are regularly understated. And assumptions and other judgments made in order to reach a solution may be difficult for third-parties to identify and understand. The end result, then, is a rulemaking process that can become more alienating than illuminating for affected parties. The excellent regulator must consequently resist the impulse to follow the path of least resistance; education and outreach are central to the excellent regulator's mission.

#### *Explain the Final Decision in Light of the Diverse Interests Affected*

Once the diverse interests of the public have been engaged and represented (including that most widely-ignored group, future generations) the excellent regulatory authority must, lastly, provide a cogent and accessible explanation for its choices in the record and defend it to the best of its ability. In this way, the public interest is advanced through good faith efforts at maximizing public benefits and minimizing inequities, inefficiencies, and long-term damage.<sup>21</sup>

Rather than a full synoptic analysis – an approach that Charles Lindblom and others maintain is both unrealistic and impossible – the excellent regulator compares a full range of policy alternatives with regard to their impact on diverse groups in the hope of finding a policy that clearly advances the welfare of all, particularly the diffuse public. Options are qualitatively assessed by comparing the pros and cons of various alternatives from a public-based perspective.<sup>22</sup> Because of the imbalance in resources and engagement, moreover, the excellent regulator adopts default assumptions that err on the side of the diffuse public and future generations.<sup>23</sup> These defaults are sensible both because the public is the primary beneficiary of regulation and since their interests are inevitably underrepresented as a result of free-rider problems. And while there is no formalistic method for balancing diverse views, the excellent regulator explains the underlying comparisons as best he can to improve both the rigor and comprehensiveness of the analysis. Blind spots in the consideration of important interests and future concerns are also identified more easily as a result of the regulators' candid explanations. Advancing the public interest thus becomes a good faith effort rather than a mechanical calculation.<sup>24</sup>

When confronted with uncertainties, the excellent regulator also adopts policies that encourage the production of new information from those best able to produce it. Penalty-default rules thus apply in regulatory policy; when some parties enjoy superior access to information, the

excellent regulator will ensure that the rules are situated in ways that extract this information and encourage additional research and knowledge accumulation from these well-positioned parties.<sup>25</sup>

Finally, the excellent regulator stays on this celestial course even in difficult times and in the face of challenging circumstances. Lawsuits, motions for reconsideration, political pressures brought from elected officials, and other battles can serve to cause lesser regulators to drift, sometimes quite far, from their overarching public goal. Excellent regulators will not only resist being driven by these forces, they will make extra efforts to embrace and advance the public interest and to take up the cause of process reform voluntarily, despite the impediments and disincentives. Only in the most exceptional cases will regulators be forced to abandon their public-interested outcomes. However, when they do have to forgo the public good, the excellent regulator is vigilant about pointing out not only the shortfall, but the institutional incentives that played their part in the defeat in order to prevent recurrence.

## **Feet on the Ground**

Regulatory agencies are considered the grounded, expert analysts in most government systems and it is therefore critical that they employ exemplary deliberative processes that are informed, accessible, and equitable. If agencies do not have their feet on the ground, even the most ingenious and public-advancing policies will lack democratic legitimacy and political support.

### *A Commitment to Professionalism and Expertise*

Excellent regulators will develop decision processes that build on and engage the top experts in the field to ensure that the information used in regulatory decisions is as rigorous as possible. Science-intensive rules, for example, should meet, if not exceed the standards for scientific reliability set in the scholarly community. This expert engagement should also help underscore those decisions, choices, and issues that fall outside empirical knowledge in order to highlight their political nature.

The US Environmental Protection Agency's (EPA) revised process for setting national ambient air quality standards illustrates this type of excellent, empirically grounded approach.<sup>26</sup> The process is broken into four distinct analytical stages – scoping, literature search, modelling, and policy implications – and at each of these stages, the public is provided with at least one opportunity to offer comments.<sup>27</sup> EPA also draws on the larger expert community by tasking them to author attributed literature reviews so that their own contributions are acknowledged and rewarded. Finally, EPA solicits iterative peer review throughout each step of the process and responds, on the record, to comments it receives. Indeed it is common for EPA to run its drafts through peer reviewers several times in order to ensure its decision-making is as grounded as possible. Through this vigorous vetting, EPA's process becomes heavily mediated by the views of the operative expert community. Excellent regulatory processes – particularly for science and technical decisions – are thus marked by a full-fledged commitment to organized, vigorous skepticism from a broad and diverse group of experts and affected parties. Indeed, the regulatory process could not be complete without this meaningful organized skepticism.

But EPA's analytical processes do more than just offer expert feedback and ensure that that feedback is incorporated into agency choices – they also help to isolate the work of the staff from the work of political appointees. That is, while the EPA's political staff and sister agencies help set the agenda by framing the questions that arise from the existent scientific evidence, it is the EPA's technical staff members who summarize the current literature and develop multiple models for each decision the agency could make.<sup>28</sup> The technical staff is also firewalled from political pressure at these grounded stages of literature review and model development: political officials can offer comments, but only on the record. Finally, after that work is done and the reports are reviewed publicly by scientific experts and the public, then the political process can click in and select models and choices that advance the political official's view of the best resolution. However, even this work will be laid atop a clear evidentiary record and thus will not be able to misrepresent what the evidence reveals. With a reliable evidentiary record in place, the inevitable policy judgments will be more difficult to camouflage as technical algorithms or other nonjudgmental choices.

### *Accessible and Transparent Decision Processes*

The excellent regulator understands its audience is the public at large and endeavors to communicate its analyses meaningfully with them. Rather than provide the bare minimum required by law, the excellent regulator is committed to transparency that advances the public interest. Accordingly, the excellent regulator will claim deliberative process protections sparingly rather than as a matter of course. The excellent regulator will create strong presumptions against other exceptions to open access to information, such as permissive trade secret policies or reflexive national security privileges. And most importantly, the excellent regulator will proffer accessible explanations and records that the public can understand and access, rather than burying core assumptions in the technical minutiae.

Excellent regulators are also completely candid about their internal deliberations, even when they involve compromises. The excellent regulator will thus resist the temptation to misrepresent the role of backroom negotiations if the negotiations played a meaningful role in a decision. For example, if a President, Minister, or another political actor changes the terms of a rule, the excellent regulator will ensure that the agency's decision-making is explained and linked to the record to ensure that the agency's own processes are not being manipulated or obfuscated.

### *Adaptive Regulation*

Excellent regulators constantly recalibrate their programs to ensure that the right processes, standards, and approaches are working. Foibles in requirements are corrected. Assumptions that turn out to be too generous – or conversely assumptions that turn out to be too stringent – are updated. Regulatory excellence requires the agency to devise means for identifying important, significant changes in public attitudes, technology, scientific techniques, and a whole range of other developments that must be confronted to ensure their ruling advances the public good in the long-term. Furthermore, because the goal is nimble reform, this recalibration process should be fluid, voluntary, transparent, and not laden with formalistic requirements.

While attentive regulators remain attuned to significant technological or policy shifts that may affect their regulatory programs, they also exercise their expert judgment in deciding when or whether a shift in policy warrants a change. In this way, the excellent regulator is able to distinguish fires from fire drills and avoids fostering a policymaking environment in which priorities are renegotiated on a daily basis.

### **Forward Movement and Not Getting Stuck in the Mud**

The regulator's overarching task is to take care that the laws are implemented and enforced consistent with the broad directions laid down by the legislature, and to do so in ways that engage society in a larger conversation about the challenges ahead. But to accomplish this, the regulator must move relatively swiftly. Mapping affected interests and summarizing the relevant evidence can be done simultaneously, and each can be equipped with stopping rules that produce realistic goals for focusing and limiting the searches. Engagement and education of affected parties must also be realistic given time and resource constraints and are likely to serve more as starting points for a larger political dialogue than the means to reach definitive conclusions.

As regulators focus on summarizing the best available evidence and engaging all significant interests, many other existing regulatory requirements not only become superfluous, but counterproductive. Escalating paperwork and procedural barriers will tend to ossify the productivity of excellent regulators without producing countervailing benefits.<sup>29</sup> Of course, these requirements may not need to be wholly eliminated in order to allow regulatory excellence to occur (exceptional people and teams can do exceptional things). But it is critically important to remember that some of the overarching qualities of the excellent regulator require it to swim against the tide of these existing institutional requirements. Indeed, an excellent regulator will identify the various ways that its effort to follow the "stars" is being impeded by often well-meaning procedural requirements and, in so doing, will contribute to a larger conversation about ways that regulatory processes more generally should be revised and reinvented.

An excellent regulator tasked with advancing the public interest in today's world must also be creative, determined, entrepreneurial, and able to seize any opportunity given to him. Excellent regulators are *not* robots; they instead navigate various impediments in order to service the public along with accomplishing their legislative mission. This can mean advancing regulatory goals in ways that are not conventional or jumping frames and taking risks in a way that is guided only by their desire to benefit the public interest. Some agencies, for example, may find they can set policies more swiftly and effectively through enforcement cases or recalls than rulemakings.<sup>30</sup> The US Occupational Safety and Health Administration suggests that parties reveal conflict of interest disclosures in their submissions, a novel approach that borrows from scientific journals.<sup>31</sup> The US Office of Information and Regulatory Affairs developed a practice of prompting agencies to identify ways to advance the public interest within their mandates while minimizing the amount of time and money expended.<sup>32</sup> In a statutory mandate that required EPA to set elaborate health-based treatment standards for disposing toxics on land, EPA recognized the failure of predecessor programs and adjusted their practices to use the much simpler technology-based standards instead.<sup>33</sup> Some agencies may realize that, as they consider

promulgating rules on different issues, not all issues may be ripe for new rules or the communities might be too divided to engage in all issues at once. As a result, a creative agency may promulgate a series of rules, knocking off a new issue every several years without attempting to resolve all controversial issues in a single rulemaking.

Excellent regulatory entrepreneurs also remain aware of the larger political, regulatory, and legal context within which they operate. For example, an excellent regulator seizes on opportunities to advance one of the many public-oriented projects when the political conditions are right. Rules that have been sitting in the pipeline can be pushed to the top of the agenda when they prove valuable to prevent crises or disasters that have made headline news. Different presidential or legislative priorities may also cause some innovative ideas to be more promising than others. If President Obama's electoral campaign was based on improving the integrity of agency science, for example, then innovations that advance public health programs could use that criterion to prioritize some projects over others in the short run. Excellent regulators never give up on projects, but they do have political savvy and know which issues are ripe and which issues will need more time in the pipeline based on the political climate and cultural climate.

Although excellent regulators will work at the outer edge of what is possible, they will also respect hard legal constraints and will not violate the letter of the law. Excellent regulators instead are careful to identify and respect the line between soft impediments that undermine public-benefitting regulation and hard legislative constraints. However, they continue to innovate and imagine possibilities up to that hard edge of statutory limitations. Indeed, they may, and perhaps should, call attention to legal limits or advocate for renewed thinking about the appropriate regulatory design when it operates in ways that undermine the public interest. Finally, an innovative regulator appreciates that many of the best ideas will emerge from talented staff members who are familiar with the issues and not from top-down edicts from bureaucrats and politicians. Consequently, excellent regulator leaders will work to inspire their staffs to be creative, energetic, and well-informed. In order to foster this professional climate, the excellent regulatory official will provide rewards for those who solve challenges that advance the agency's mission of enhancing the public interest. Employees who do exceptional work – not simply in volume but in originality and outside-the-box thinking – will be singled out and compensated accordingly. Those who simply work through their file folders and punch the clock without infusing their own, creative ideas into the work will be thanked but redirected into less significant positions within the agency.

### **Implications for Performance Measures**

In light of these aspirational goals, how can we determine whether an agency regulator is emerging as excellent or is instead falling short of our expectations? The varying contexts, situations, and dynamics (not to mention budgets, political pressures, external conditions, interest groups, and legal constraints) make it not only difficult but treacherous to try to institute formal “measures” of excellence into regulatory processes. Moreover, innovation – one of the two most important features of agency policy – flies out the window as the agency becomes judged externally by measures that may impede creative problem solving, pragmatism, and original thinking on substantial public challenges.

More simplistic “output” measures designed to measure the quality and quantity of the regulator’s work could also frustrate his efforts to think outside the box. For example, a focus on lowering pollution levels could prevent the exploration of processes that abandon the use of certain chemicals entirely. Perhaps even more problematic, excellent regulators may not be able to control the output on which they are measured. Despite courageous and innovative policies, poor results may be achieved for any number of reasons that have nothing to do with the choices the regulator has made. Imperfect output measures thus run the risk of erroneously classifying excellent regulators as second-rate – a result that discourages and demoralizes excellence rather than rewards it.

Several basic procedural benchmarks – rather than substantive measures – may nevertheless be helpful in identifying and rewarding excellent regulators: a kind of “minimum bar” any excellent regulator should have to meet. For example, an excellent regulator must necessarily provide a rigorous and accessible statement of the evidence – ideally one that has been subjected to critical scrutiny by the public and experts. An excellent regulator must also identify all affected interests, including future interests, and ensure their views are recorded into the record in a rigorous, legally-backed way. Finally, an excellent regulator must explain its decisions against the evidentiary and deliberative record. This does not ensure that all decisions hew to this record – only that the regulators’ ultimate choices can be evaluated in light of the options. Table 2 below offers a preliminary template for these and related process steps according to whether the regulator is bad, good, or excellent.

Beyond process benchmarks, incentives for excellence may be encouraged by spotlighting the worst examples of regulatory practice to discourage repeat performances. Examples of subpar regulation could include:

- Documentation that key public beneficiaries of rules are not engaged or were not solicited to participate in decisions that affect their interests.
- Agency rules that involve political decisions that were misleadingly presented as predominantly technical or scientific in nature.
- Inaction in effectuating mandates in ways that are not explained solely by budget limitations or other unmovable constraints and that undermine the legislative goals of advancing the public interest.
- Judicial decisions reversing and remanding agency rules because they not only violate the terms of the statute but undermine the interests of underrepresented groups.
- False or fabricated reasoning on the part of the regulator.

In addition to highlighting negative practices, some positive examples of excellent regulation could also be identified by a neutral, expert group of analysts to hold out as models of excellent regulation. These positive case studies could highlight ways regulators succeed in advancing the larger public interest, remain grounded, and overcome obstacles. Regulators who engaged in problems with creative approaches or resolutions, for example, might be selected out as particularly excellent.

**Table 2:  
Regulatory Process Benchmarks**

Stage in Decisionmaking	Type of Regulator		
	<i>Bad</i>	<i>Good</i>	<i>Excellent</i>
Public engagement/deliberation	Passive	Outreach for obvious blind spots in participation	Educates and engages all major affected parties and includes a rigorous assessment of potential implications for future generations as well as underrepresented, significant groups.
Technical analysis	Inseparable from and occurring with political deliberations	Kept distinct from political deliberations by instituting peer review on technical reports	Technical staff is firewalled with multiple rounds of public and peer review on their accessible reports
Bridging uncertainties	Adopt views of the dominant commenter	Ad hoc but transparent explanations	Create default rules that create incentives for future information production
Methods for choosing policy outcomes	Analysis is largely divorced from the needs of significant affected groups	Analysis hinges on identifying the best option based on the major interests affected	Analysis follows the “good” path but also includes defaults that compensate for underrepresentation of significant groups
Reason-giving	Work backwards from ends to justify the means	Provide cogent reasons from the record	Provide publicly accessible explanations that are honest and candid and that also explain choices forgone with equally accessible explanations. Also identifies where external institutions and political pressures altered the outcome when appropriate.

## Conclusion

An unwavering commitment to the public good, a grounded and rigorous decision process, and an ability to make progress regardless of context and circumstances are the keys to regulatory excellence. And even though the concept of the public good will change with circumstances and regulators, basic process goals – such as engaging the most significant affected groups – are unequivocally at the core of the mission. Attaining excellence is difficult, but recognizing it shouldn't be.

## Notes

<sup>1</sup> For a list of such requirements in the United States, see Mark Seidenfeld, “A Table of Requirements for Federal Administrative Rulemaking,” *Florida State University Law Review*, vol. 27 (2000), p. 533. Similar requirements have been recommended and implemented in varying degrees throughout many developed economies. See, e.g., Organization of Economic Cooperation and Development, “Regulatory Reform in OECD Countries: Reports by Subject,” *available at* <http://www.oecd.org/regreform/regulatoryreforminoecdcountriesreportsbysubject.htm>.

<sup>2</sup> E.g., Ralph L. Keeney, *Value-Focused Thinking: A Path to Creative Decisionmaking* (Cambridge, MA: Harvard University Press, 1992), pp. vii-ix, 29-30, 44-51 (1992)

<sup>3</sup> Charles E. Lindblom, “The Science of ‘Muddling Through,’” *Public Administrative Review*, vol. 19 (1959), p. 79; Keeney, *Value-Focused Thinking*.

<sup>4</sup> *Ibid.*; cf. Sidney A. Shapiro and Ronald F. Wright, “The Future Of The Administrative Presidency: Turning Administrative Law Inside-out,” *University of Miami Law Review*, vol. 65 (2011), p. 577.

<sup>5</sup> Theodore Roosevelt, “Speech at Groton School,” May 24<sup>th</sup>, 1904 (<http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o285148>)

<sup>6</sup> Peter L. Strauss, “The Place of Agencies in Government: Separation of Powers and the Fourth Branch,” *Columbia Law Review*, vol. 84 (1984), pp. 578-80.

<sup>7</sup> Colin Scott, “Accountability in the Regulatory State,” *Journal of Law and Society*, vol. 27 (2000), p. 57.

<sup>8</sup> Emily Hammond Meazell, “Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science,” *Michigan Law Review*, vol. 109 (2011), p. 733.

<sup>9</sup> Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Belknap Press, 1996), pp. 12-16.

<sup>10</sup> Dan Wood and Richard Waterman, *Bureaucratic Dynamics: the Role of Bureaucracy in a Democracy* (Boulder, CO: Westview press, 1994), p. 145.

<sup>11</sup> *Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013); *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355 (D.C. Cir. 2002).

<sup>12</sup> Andrew J. DeBrin, *Essentials of Management*, 9<sup>th</sup> edition (Independence, KY: Cengage Learning, 2011), pp. 1-35, 345-506.

<sup>13</sup> James Madison, "The Federalist No. 10," in *The Federalist*, edited by Cass Sunstein (NY, NY: Barnes and Noble Classics, 2006).

<sup>14</sup> Kevin Stack, "The Paradox of Process" (forthcoming 2015); Wendy Wagner, "Participation in Administrative Process," in *Comparative Law and Regulation: National, International, and Transnational Perspectives*, edited by Francesca Bignami & David Zaring (Northampton MA: Edward Elgar Press, forthcoming 2015).

<sup>15</sup> Administrative Procedure Act, § 706(2)(a)

<sup>16</sup> James Q. Wilson, *The Politics of Regulation* (NY, NY: Basic Books 1980), p. 367; William Gormley, "Regulatory Issue Networks in a Federal System," *Polity*, vol. 18 (1986), p. 607.

<sup>17</sup> Jason Yackee and Susan Yackee, "A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy," *Journal of Politics* vol. 68 (2006), p. 128.

<sup>18</sup> Wendy Wagner, Katherine Barnes, and Lisa Peters, "Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards," *Administrative Law Review* vol. 63 (2011), pp. 128-29.

<sup>19</sup> *Ibid.* at p. 125.

<sup>20</sup> See generally Wendy Wagner, "Administrative Law, Filter Failure, and Information Capture," *Duke Law Journal* vol. 59 (2011), p. 1321.

<sup>21</sup> Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (NY, NY: The New Press, 2005), p. 212.

<sup>22</sup> *Ibid.* at 812-27

<sup>23</sup> David M. Driesen, "Cost-Benefit Analysis and the Precautionary Principle: Can they Be Reconciled?," *Michigan State Law Review*, vol. 2013 (2013), p. 771.

<sup>24</sup> E.g., Lindblom, *Muddling Through*.

<sup>25</sup> Ian Ayres and Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," *Yale Law Journal*, vol. 99 (1989), pp. 87, 91.

<sup>26</sup> National Research Council of the National Academies, *Review of the Environmental Protection Agency's Draft Risk Assessment of Formaldehyde* (Washington, DC: National Academies Press 2011), p. 156.

<sup>27</sup> Wendy Wagner, "Science in Regulation: A Study of Agency Decisionmaking Approaches," Feb. 18, 2013 (<http://www.acus.gov/report/professor-wendy-wagners-science-project-report>).

<sup>28</sup> *Idid.*, pp. 36, 39-40

<sup>29</sup> E.g., Curtis W. Copeland, "Length of Rule Reviews by the Office of Information and Regulatory Affairs," Dec. 2, 2013 (<http://www.acus.gov/sites/default/files/documents/Copeland%20Report%20CIRCULATED%20to%20Committees%20on%2010-21-13.pdf>); General Accounting Office, *Chemical Assessments: Low Productivity and New Interagency Review Process Limit the Usefulness and Credibility of EPA's Integrated Risk Information System* (Washington, DC: Government Printing Office, March 2008).

<sup>30</sup> Jerry Mashaw and David Harfst, *The Struggle for Auto Safety*. (New Haven, CT: Yale University Press, 1990).

<sup>31</sup> Occupational Safety and Health Administration, Occupational Exposure to Respirable Crystalline Silica; Proposed Rule, 78 Fed. Reg. 56274, 56274 (2013).

<sup>32</sup> John Graham, et al., "Managing the Regulatory State: The Experience of the Bush Administration," *Fordham Urban Law Journal*, vol. 33 (2005), p. 974.

<sup>33</sup> *Hazardous Waste Treatment Council v EPA*, 886 F.2d 355 (D.C. Cir. 1989).

## **Regulating by the Stars**

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University of Texas School of Law

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Wendy Wagner is the Joe A. Worsham Centennial Professor at the University of Texas School of Law. She earned her law degree from Yale Law School, clerked for the Honorable Albert Engle of the U.S. Sixth Circuit Court of Appeals, and served as an honors attorney in the environmental enforcement section of the Department of Justice before joining academia in 1992. Wagner's research focuses on the intersection of law and science, with particular attention to environmental policy, and she has authored two books and dozens of articles on the general topic of regulatory science. Wagner is also working on an empirical study of the administrative process, with support from the National Science Foundation. Outside of her academic duties, Wagner has served on several National Academies of Science committees, the Bipartisan Policy Center Committee on Regulatory Science, and as a consultant to the Administrative Conference of the U.S. (ACUS) on a study of the agencies' use of science. Wagner is a member scholar of the Center for Progressive Reform.