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Democratizing the Federal Regulatory Process: A Blueprint to Strengthen Equity, Dignity, and Civic Engagement through Executive Branch Action

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Democratizing the Federal Regulatory Process

A Blueprint to Strengthen Equity, Dignity, and
Civic Engagement through Executive Branch
Action

Archon Fung, Hollie Russon Gilman, & Mark Schmitt

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About New America

We are dedicated to renewing the promise of America by continuing the quest to realize our nation's highest ideals, honestly confronting the challenges caused by rapid technological and social change, and seizing the opportunities those changes create.

About Political Reform

The Political Reform program works towards an open, fair democratic process, with equitable opportunities for full participation, in order to restore dynamism and growth to the American economy and society.

Contents

Democratizing the Federal Regulatory Process	5
Introduction	5
Limitations of Cost-benefit Analysis	6
Building Benefits for the Greatest Good	8
Building Inclusive Processes	9
Implementation	10
About the Discussion	11

Democratizing the Federal Regulatory Process

Introduction

While legislation tends to get more attention, the regulatory process within the executive branch is at the core of day-to-day democratic governance. Federal regulation and rule-making engages dozens of agencies and affects every American. In writing the rules and regulations to implement laws, revise standards, and exercise the substantial authority granted to the presidency, the agencies of the federal government set directions, priorities, and boundaries for our collective life. At times, the regulatory process has moved the country in the direction of greater justice, equality, and security. At other times, it has pulled us in other directions, often with little public engagement or debate.

The Biden-Harris administration acknowledged the centrality of the regulatory process with two actions on the President's first day in office. The first called for modernizing the regulatory review process, particularly the central oversight role of the Office of Information and Regulatory Affairs (OIRA).¹ The second was an executive order calling on the federal government to support underserved communities and advance racial equity.² Four months later, the Office of Management and Budget (OMB) released a request for information (RFI) on best practices for federal agencies to prioritize equity and ensure that programs and policies reach underserved communities, including developing new outcome measurements for the regulatory and rule-making process.³

These two initiatives together lay the groundwork for a reorientation and modernization of the regulatory process to move it in the direction of equity and justice. As this journey begins, OIRA and agency regulators have much to learn from on-the-ground leaders and scholars already doing innovative work to incorporate equity and more inclusive engagement in shaping public policy.

One priority in modernizing regulatory review is to improve the federal government's understanding and incorporation of difficult-to-quantify impacts of policy, such as the effects of policies and regulation on human dignity and the health of communities. For several decades, the regulatory process and particularly the role of the Office of Information and Regulatory Affairs (OIRA) has relied on quantitative analyses, particularly cost-benefit analysis, as its primary tool in evaluating environmental, health, workplace safety, and other areas. This method weighs the future benefits of a regulation, such as life-years saved, against the costs, whether to the public or the entities affected by regulation. While traditional cost-benefit analysis remains an appropriate tool for many purposes, scholars of the regulatory process have long argued that the regulatory process would better serve the interests of the public if it were

informed by other factors, including broader effects on equity and community well-being, resilience and justice, and full recognition of unintended consequences.

To understand the challenges to and advantages of a reformed regulatory review process, New America's Political Reform Program and the Ash Center for Democratic Governance and Innovation at Harvard University's John F. Kennedy School of Government convened a group of academic experts from across the country to share their findings on the state of regulatory review and to identify alternative measures of not just the cost of regulations, but also the distributional impact of their costs and benefits. These experts specialize in administrative law, economic analysis, public participation, and regulatory review, and their work covers policy areas including patent law, healthcare, and environmental justice.

This conversation focused first on the changes that could be made within the framework of cost-benefit analysis, and then on reforms that would go beyond cost-benefit to new modes of analysis. Much of the discussion centered around ensuring that regulations appropriately benefit and do not harm vulnerable or marginalized communities.

Limitations of Cost-benefit Analysis

The discussion began with scholars acknowledging some of the disadvantages associated with cost-benefit analysis. The method notably fails to capture a broad range of important and valuable (but difficult-to-quantify) benefits. Even within the framework of cost-benefit analysis, it can be difficult to distill the predicted effects of complicated policy rules and technical issues into a single, dollar-based measurement of value. However, broadening the scope further to include values such as human dignity and the health of communities would involve qualitative measures, value judgments, and even non-consequentialist (i.e., deontological) considerations at both the agency level and at OIRA.

Together, these considerations highlight how focusing on the greatest good submerges or undermines efforts to achieve equity. Participants argued that additional considerations are essential when considering and assessing how various communities could be affected by a policy or regulation. The limitations of standard cost-benefit analysis are also especially apparent for policy challenges like climate change. Many of the costs and benefits of actions taken today happen so far in the future that traditional analysis would give them only nominal weight at any positive discount rate. Even for other policies with payoffs occurring sooner, the appropriate discount rate to use is itself a subject of great controversy.⁴

The panelists then suggested approaches within the framework of cost-benefit analysis that respond to these difficulties, such as weighted values or adjusting discount rates. But some participants suggested that approaches adapted from economics, with its utilitarian orientation and focus on efficiency, too often work to the disadvantage of vulnerable, marginalized, or discrete groups who may lack the cohesion to influence governmental processes. Of course, a competent analysis should include everyone's benefits and costs, but because dollars are the unit of measurement in cost-benefit analysis, those with low incomes and non-monetary values will receive low weights in the totals. Incorporating perspectives from other disciplines such as public health and environmental science—and examining processes of public participation in addition to the consequences of various rules, could open new ways of reckoning both costs and benefits.

Incorporating Equity and Distributional Effects

Although participants discussed several ways to improve cost-benefit analysis, the scholars all identified a need for the regulatory process to incorporate tools that go beyond cost-benefit, both in terms of analysis and process.

Any regulatory policy produces winners and losers, and individuals affected are likely to experience substantial differences in these gains and losses. Cost-benefit analysis seeks to equalize gains and losses on the margin, but the absolute levels will vary widely. These differences are of particular concern if a large share of the overall costs is borne by vulnerable or less organized communities who obtain few of the benefits. Furthermore, sometimes benefits are concentrated on a small number of people or organizations, while costs are spread widely. In other cases, the opposite is true. As pointed out above, using dollars to measure benefits and costs disadvantages the poor because their expressed willingness to pay to achieve a benefit or avoid a cost is likely to be lower than the well-off simply because of their poverty.

Cost-benefit analyses of regulations should consider the impact of regulations on the markets for regulated products. Pure financial transfers cancel out, however, and should not be counted. Declines in profits are an example. Nevertheless, such estimates commonly appear as part of the analysis of regulation and its impacts. Such studies often do not as explicitly emphasize the underlying statute's intended benefits and outcomes and counterfactuals. For example, if regulation is estimated to increase the cost of a product, analysts often fail to fully incorporate the costs of the absence of that regulation. Our panel raised examples. Policies that demand that each new regulation be combined with the repeal of one or two existing regulations are a clear illustration of this problem. In labor law, a regulation might increase the cost of production, but without it, workers such as agricultural workers or gig workers are at risk. Similarly, while providing translation support in healthcare environments for patients with limited English may increase costs, not providing translation would limit the ability to achieve intended healthcare outcomes. Concerns about increasing

prices may be to the benefit of lower-income Americans. As these examples indicate, however, those who bear the costs of lower prices are often those belonging to marginalized communities. The consequences of the absence of regulation may be invisible, and the benefits of regulation already in force may also become an invisible part of the background.

Additionally, participants identified a need to capture concerns regarding distribution and equity through a multidimensional approach that could account for distributional effects across income, race, ethnicity, and gender. Participants noted that attending to such concerns is particularly important as some policies' distributional effects are the very point of the policy in the first place, such as in environment, housing, or education, where policy aims to lift those least advantaged by history and the market economy. Ultimately, better data are necessary to understand the distribution effects of such policies.

Building Benefits for the Greatest Good

The experts also noted that regulations often have unintended, spill-over benefits or costs for people not initially targeted by those regulations. For example, participants noted that the improved accessibility mandated by the American Disabilities Act (ADA) had many unintended benefits for society more broadly. As one outcome, public spaces that added ramps and other mobility devices not only benefited differently-abled people, but also seniors and people with young children in supporting their ability to work and move through society. A traditional cost-benefit analysis might miss these ancillary advantages, although, in principle, they should be included. Indeed, administrative rules aimed to improve access for differently-abled people—absent legislation—may not have passed cost-benefit muster because mobility benefits to a relatively small proportion of people entails substantial costs to many businesses and other organizations. Of course, some policies might have unanticipated negative consequences. The point here is that if the values at stake are not anchored in cost-benefit analysis, that should be clearly stated and be the basis for a policy that asks the public to sacrifice or incur added costs for particularly disadvantaged groups or for benefits to be realized only in the distant future.

Participants noted that congressional legislation often aims at many values that are not easily reconciled with cost-benefit analysis and even operate against its central logic, e.g., the Endangered Species Act and the ADA. Some argued for more capacious approaches to regulatory review that would enable agency analysts to achieve greater alignment with the values that legislators seek to advance.

Utilitarian values underlie cost-benefit analysis in regulatory review: the greatest good for the greatest number of people. But, as the panelists pointed out, in most cases no single variable can measure the greatest good. Many variables involved

in public policy represent competing interests, and many are dependent on each other. And trying to maximize net benefits over competing variables measured using different metrics is an impossible task. Equity cannot be incorporated by simply adding distributional weights to a standard cost-benefit analysis. Better data would help but cannot substitute for exercises in judgment that cannot be reduced to a technocratic formula.

Participants noted that a conversation on these issues is timely, as the pandemic has laid bare the inequities in society. It also showed the complexities of public policy—particularly the fragmentation of some public programs and the absence of many others aimed at family and economic security that are basic features in most other countries. The resulting gaps in social services and protections reflect biases in favor of those whom society has deemed worthy of those benefits and protections, such as those deemed deserving Temporary Assistance for Needy Families. A regulatory framework that focused on identifying and redressing those gaps could ensure that benefits are not only measurable, as the cost-benefit analysis attempts to provide, but could also provide benefits that are more broadly shared.

Importance of Autonomy and Dignity

In addition to urging the use of models that better capture distributional impacts, participants also noted the importance of factors and values that are essential to societal benefits, such as justice, fairness, individual autonomy, and dignity. Although difficult to quantify, participants argued that balancing and including such values in the analysis of regulation was necessary and overdue. Looking at autonomy in particular, it is important for people to have both the information and the true autonomy to make decisions for themselves. For example, assessing the cost-benefit ratio of a rule that would add information about the negative health consequences of tobacco to the packaging might focus on whether the cost of adding that information would be less than the benefit accruing from those who quit or reduce smoking because of that information. But, even if smoking rates do not go down enough to justify the costs to tobacco companies of changing their packaging, individual autonomy, and ability to choose, regardless of what choices are actually made, might increase as a result of additional information. In this way, the utilitarian and consequentialist methods of cost-benefit analysis cannot easily incorporate values such as human dignity and autonomy often associated with deontological, non-consequentialist perspectives.

Building Inclusive Processes

Cost-benefit analysis is usually a closed process managed by a few subject-matter experts often working with statistical models. Participants agreed that it was essential to open that endeavor and create mechanisms that would create a more

inclusive discussion and incorporate the voices of those most affected by policy. In particular, the scholars discussed the need to ensure individuals and non-governmental organizations systematically had an opportunity to participate.

Opening up the process could provide essential benefits for the transparency of government. Such deliberative mechanisms are also necessary to create clear links between policy considerations and fair and competent procedures, changes that could create publicly inclusive dialogue, improve policy outcomes, build legitimacy, and strengthen crucial democratic practices.

Although public participation may seem like a lofty effort for the federal government, experts also argued that legal tools to do so already exist. The notice and comment procedures required for rulemaking under section §553 of the Administrative Procedure Act (APA) provide the basic legal framework. The APA applies to most regulatory rulemaking procedures in the core executive and in the independent agencies. It requires public notice, an open-ended call for comments, and a statement of reasons to accompany the final rule. Civil society groups and individuals already take advantage of these procedures along with the industries subject to regulations. Reforms to increase participation could be incorporated into the APA process, especially requiring outreach to affected communities, however diffuse.

Furthermore, the Paperwork Reduction Act (PRA) of 1995 includes transparency mechanisms (such as substantive disclosure requirements for patents or the Freedom of Information Act) and deliberative mechanisms that provide public dialogue about policy (including peer review processes, OIRA mechanisms for meeting, and public comment process). Public participation of this kind does not need to be an alternative to cost-benefit analysis, but making it accessible and incorporating other insights can help legitimate the result of the regulatory process. Ultimately, it would also provide citizens with more agency in their government, outside of elections. Future discussions will focus on this aspect of regulatory reform.

Implementation

Finally, participants discussed the difficult work of implementing such changes to improve this analysis and process. Many experts worried about adding unnecessary or additional burdens to agencies, preferring to build capacity by using pre-existing processes and analysis to bolster this effort. For example, one participant noted that the Department of Health and Human Services produces a report analyzing racial and ethnic health disparities, which could be used as an analysis tool moving forward. Another option could be engaging agencies through participatory assessment mechanisms annually focusing on distributional concerns and equity. Along with more participation, a transparency

process is essential to legitimating measurement, and the lack of such a process is amongst the significant challenges to cost-benefit analysis.

About the Discussion

Participants

Archon Fung, Winthrop Lafin McCormack Professor of Citizenship and Self-Government, Harvard Kennedy School (*moderator*)

Susan Rose-Ackerman, Henry R. Luce Professor of Jurisprudence, Emeritus, Yale Law School and Department of Political Science and Professorial Lecturer in Law, Yale Law School

Bernard Bell, Professor of Law and Herbert Hanooh Scholar, Rutgers University

Renee Landers, Professor of Law & Director Health Law Concentration and Faculty Director, Masters of Science in Law Life Sciences Program, Suffolk Law School

Melissa Luttrell, Assistant Professor of Law, College of Law, University of Tulsa

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Hollie Russon-Gilman, Fellow Political Reform Program, New America

Mark Schmitt, Director Political Reform Program, New America

Elena Souris, Policy Analyst Political Reform Program, New America

Agenda-setting Questions

- What do you think are the most important “blind-spots” of cost-benefit analysis (CBA) as currently practiced by US government agencies in regulatory analysis and review?
- One common criticism of CBA is that it fails to capture valuable kinds of benefits which are difficult to specify appropriately or quantify. Are there any such benefits that concern you especially (e.g. dignity)? Are there models or methods that you regard as better suited to capturing such benefits?

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What are some ways to better capture concerns about distribution and equity in CBA? One possibility is to weigh benefits according to the income or wealth of beneficiaries. Are there dimensions of justice and equity that such weighting fails to capture? Are there alternative weights, or methods, which would better capture such concerns?

- CBA has been criticized for status quo bias - costs and benefits are measured according to the present state, which may itself reflect past injustice and inequity. Do you have thoughts or suggestions about how/whether modernized regulatory analysis should account for status quo bias?
- What do you think should be done to modernize regulatory review in the rubric of broadened or appropriately modified CBA? Are there values or challenges that you think require regulatory review to go beyond the framework of CBA.
- CBA is often viewed through the disciplinary lens of economics. Can you think of ways in which other disciplines - e.g., sociology, anthropology, psychology, political science - should be brought to bear in modernizing regulatory analysis?
- To what extent should agencies adopt a unified framework for making distributional and equity determinations? To what extent should their determinations vary based on the populations they serve or industries they regulate?
- What resources, kinds of expertise, and capacities do agencies need to conduct regulatory analysis and review that is more attentive to distributive and equity concerns?
- Do you know of particular agencies - or offices within agencies - whose practice of regulatory analysis and cost benefit analysis does a particularly good job of capturing the values in Biden's EO on Modernizing Regulatory Review and Analysis?

Additional Readings

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Melissa Luttrell, "The Case for Differential Discounting: How a Small Rate Change Could Help Agencies Save More Lives and Make More Sense," *William & Mary Policy Review* 3 (February 2011): 80-128, [source](#).

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Renée M. Landers, Bethany Cole, Bruce Vladeck, "Medicare's Current and Future Role In Reducing Racial and Ethnic Health Disparities," Health Affairs Blog, March 23, 2020, [source](#).

Susan Rose-Ackerman, *Democracy and Executive Power: Policymaking Accountability in the United States, the United Kingdom, Germany, and France* (Yale University Press, forthcoming October 2021).

Susan Rose-Ackerman, "The Limits of Cost/Benefit Analysis When Disasters Loom," *Global Policy* 7(S1) (May 2016): 56-66.

Susan Rose-Ackerman, "Putting Cost-Benefit Analysis in its Place: Rethinking Regulatory Review" *University of Miami Law Review* 65 (Winter 2011): 335-356, [source](#).

Notes

1 White House, *Modernizing Regulatory Review*, President Joseph R. Biden, Jr., Washington, D.C.: 2021. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/>

2 Executive Order 13985 of January 20, 2021, “Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.” <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>

3 Office of Management and Budget, *Methods and Leading Practices for Advancing Equity and Support for Underserved Communities through Government*, Shalanda Young, OMB_FRDOC_0001-0291, Washington, DC: OMB, 2021. <https://www.federalregister.gov/documents/2021/05/05/2021-09109/methods-and-leading-practices-for-advancing-equity-and-support-for-underserved-communities-through>

4 Discount rates are a method of valuing costs or benefits in the future. See David Roberts, “Discount Rates: A Boring Thing You Should Know About,” *Grist*, Sept. 24, 2012.



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