AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY

Issue Brief

Missing a Teachable Moment: The Obama Administration and the Importance of Regulation

By Lisa Heinzerling

November 2011

All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

Missing a Teachable Moment: The Obama Administration and the Importance of Regulation

Lisa Heinzerling[*]

On January 18, 2011, President Obama issued an Executive Order directing agencies to prepare plans to review their existing rules to decide whether any of the rules should be "modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."[1] In August, the White House announced the results of the agencies' initial work on what has come to be known as the regulatory "look-back": hundreds of planned reforms saving at least $10 billion in regulatory costs, plus a continuing promise to do more.[2]

Both the Executive Order and the announcement of agencies' final plans focused almost entirely on the costs, and not the benefits, of regulation. While both items nodded to the importance of regulation, the gesture was terse, qualified, and abstract. In the Executive Order, President Obama stated that "[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." Likewise, the announcement of agencies' plans explained that "[w]e will continue to eliminate unjustified regulatory costs, and thus strengthen our economy, while taking sensible, cost-effective, evidence-based steps to protect public health and welfare." The side-by-side pairing of regulatory benefits—such as health, safety, and welfare—with regulatory costs not only softened the acknowledgement of the benefits of regulation, but also put regulatory costs on a par with those benefits. Moreover, the abstractness of the benefits as described by the President—"public health, welfare, safety, and our environment"—makes them pale in comparison to the vivid concreteness of billions of dollars in savings.

The White House's more general public statements about the regulatory look-back focused even more lopsidedly on regulatory costs rather than on benefits, with benefits appearing as almost an afterthought to the larger discussion of regulatory costs.[3]

My purpose here is not to quarrel with the regulatory look-back itself; it does make sense to consider whether we can trim some existing rules to save costs, yet still achieve our public-regarding goals. My aim, instead, is to suggest that the administration missed a moment to teach the public a basic lesson about regulation: why we engage in it and what it does for us.

---

[*] Professor of Law, Georgetown University.

[1] Executive Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

[2] *Final Regulatory Reform Plans Will Save Money, Reduce Waste*, THE WHITE HOUSE BLOG (Aug. 23, 2011), http://m.whitehouse.gov/blog/2011/08/23/final-regulatory-reform-plans-will-save-money-reduce-waste [hereinafter *White House Blog*].

[3] Cass R. Sunstein, *Washington Is Eliminating Red Tape*, WALL ST. J. Aug. 23, 2011, *avaialable at* http://online.wsj.com/article/SB10001424053111903596904576518652783101190.htm; *Eliminating Job-Sapping Federal Rules through Retrospective Reviews – Oversight of the President's Efforts: Hearing Before the House Committee on Small Business*, 112th Congress (testimony of Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).

For better or worse, however, all is not lost: the ongoing attacks on the regulatory state give the Obama administration an ongoing opportunity to explain why we regulate in the first place and what the benefits of doing so are. In the rest of this Issue Brief, I offer a sketch of the principles that should guide this conversation. To preview, these are: (1) like much of law in general, regulation often prevents people from hurting other people; (2) the good consequences of regulation range all the way from saving money to saving lives; and (3) surprisingly, special care is needed in discussing rules that save many lives, as strange inversions of concern can occur when large numbers of lives are at stake.

I. Humans Hurting Humans

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[4]

Recent debates over the scope and shape of the regulatory state have fixed on the second insight in James Madison's famous passage, while ignoring the first. Proposals to rein in administrative agencies—to slash their budgets, veto their rules, undo their legal authority—are offered as though rules governing human behavior produce all costs and no gains. They proceed as if people will not hurt other people if government steps aside. People are angels, in other words, outside of government; they mostly just go about their business, not trying to hurt anybody. We gain nothing by constraining their behavior.

Lost in this vision are three simple facts.

First, people are not angels. It is not just that people can be cruel and vindictive. It's also that they can be greedy, selfish, careless, and callous. Even when they do not set out to harm other people, they can end up doing so through greed and neglect. The financiers who helped bring the U.S. economy to its knees did not mean to hurt anyone; BP and Transocean didn't want the workers on the Deepwater Horizon oil rig to die; U.S. utilities would surely prefer that the pollution from their power plants did not kill thousands every year. A great deal of human suffering, in fact, has nothing to do with maliciousness and everything to do with avarice and indifference. But pursuing profit in the face of a known risk to others is not angelic.

Second, given that people are not angels, a basic purpose of government is to protect people from being hurt by other people. And, far from illegitimately constraining freedom, law actually promotes freedom when it protects people from being hurt by other people. As John Locke, whose views on the purposes of government greatly influenced this country's founding generation, put it: "Where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law."[5] Participants in current debates over the regulatory state seem to forget that "regulation" is just another word for "law," and that law is a predicate for human freedom.

---

[4] THE FEDERALIST NO. 51 (James Madison).
[5] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

Third, protecting people from being hurt by other people is also the predominant purpose of the kinds of regulation now under the most vociferous attack: health, safety, consumer, and environmental regulation. Consider the example of the Clean Air Act, perhaps the most embattled source of regulatory authority in government today. The terms "public health" and "public welfare" appear like mantras throughout the Clean Air Act; at its core, the Act aims to protect people from dying or falling ill, or suffering other, welfare-based harms such as damage to water, soils, crops, and wildlife, due to air pollution. What is more, by targeting specific sources of pollution and by generally requiring that these sources do their level best to control their pollution, the Act aims to prevent the people in charge of these sources—the ones who choose the mechanisms of pollution—from hurting other people. Seen in this light, the Clean Air Act and other similar modern laws follow in a direct line from the Framers and their ambitions for government, by constraining human behavior in a way that promotes human freedom.

When the Obama administration talks about regulation, it should emphasize not only the end point to be achieved—protection of public health, for example—but also the causal link between that end point and human behavior. To speak only in terms of public health or welfare or safety without connecting the dangers for public health, welfare, or safety to human behavior—as President Obama's Executive Order on regulatory review does—is to lose the deep moral dimension of the regulatory state. It is like talking about robbery without mentioning the robber.

This moral dimension also disappears when regulatory costs are put on a par with regulatory benefits or even, as in the Obama administration's formulation, seemingly elevated above them. In pledging to "continue to eliminate unjustified regulatory costs, and thus strengthen our economy, while taking sensible, cost-effective, evidence-based steps to protect public health and welfare,"[6] the administration appeared to make public health and welfare protections subservient to alleviation of regulatory costs. Protection of public health and welfare, in this formulation, must be very well behaved: sensible, cost-effective, evidence-based. It must know its place, if you will. This has the moral equation backwards. Where the costs come from measures taken by people to stop hurting other people, they are not on the same moral plane as the injuries avoided when the hurting stops.

To see how this framing could start to change the conversation on regulation, think about the famous "train wreck" supposedly threatened by the Environmental Protection Agency's pending and upcoming rules relating to power plants. These rules run the public health and environmental gamut. The rules would: limit emissions of sulfur dioxide and nitrogen oxides, pollutants responsible for thousands of premature deaths every year from the power sector alone; limit emissions of mercury and other hazardous pollutants, pollutants linked to everything from neurological disorders in children to cancer in adults; phase out unlined and structurally precarious coal ash impoundments, like the one that three years ago unleashed a flood of toxic sludge on Kingston, Tennessee; control greenhouse gases warming the planet; limit the killing of billions of fish and other organisms by the structures used to cool massive amounts of water; and remove toxic pollutants from discharges into the nation's waters. We know how to limit at least some amount of all of these harms; we know how to limit virtually all of some of them. The

[6] *White House Blog, supra* note 2.

owners of these plants know this, too. There are a limited number of plants at the common center of all of these rules. Indeed, from the viewpoint of these few plants, the collective force of the rules might be an impending "train wreck." Yet consider these plants from the perspective I have just been discussing. Here are a rather small number of power plants that we know are harmful along almost every dimension of public health and the environment. Many do not have modern pollution controls despite the known harms of the pollution they emit. Seen in this way, the plants themselves are the train wreck.

II. Dollars, Lives, and Everything in Between

In talking about why we regulate and what it does for us, it is also important to talk about the exact harms that will befall people if we do not regulate. That is, in addition to talking about the human role in these harms, we should also talk about the harms themselves.

These harms are many and varied.

One category of harms avoided through regulatory intervention provides an especially clear-cut counterpoint to the economic costs of regulation: sometimes, consumers and others directly lose money in the absence of regulation. Or, put another way, regulation sometimes *saves people money*. When the Federal Trade Commission (FTC) sued a marketer of dietary supplements for offering "free trials" of dietary supplements that came paired with recurring charges that were very difficult to avoid, it took aim at a problem that cost consumers over $30 million in one year alone; and this is just one of some 60 like cases brought by the FTC in the last decade.[7] Likewise, when the FTC cracked down on companies making false promises of employment and business success to people who were unemployed or otherwise falling behind in the economic downturn, it sought to control practices that also cost consumers tens of millions of dollars; the agency charged that one company alone had bilked consumers out of $40 million.[8] Rules issued in the last 20 or so years by the Department of Energy, setting efficiency standards for household appliances, will have saved consumers over $100 billion by 2030.[9]

Far from taking money out of consumers' pockets, these kinds of legal efforts put money back in them – or make sure it does not leave in the first place. It should be pretty straightforward to explain this category of good regulation. Even here, however, the Obama administration has sometimes equivocated. In reviewing a proposed rule, jointly authored by EPA and the Department of Transportation, to regulate the greenhouse gas emissions and fuel efficiency of automobiles, the White House's Office of Management and Budget requested language suggesting that—despite the substantial savings in fuel costs offered by the proposal—"the magnitude and even the direction of the net private economic impact" of the new standards "remains unknown."[10] In other words, even though consumers would save money in fuel costs

[7] Press Release, Federal Trade Commission, Court Orders Internet Marketers of Acai Berry Weight-Loss Pills and "Colon Cleansers" to Stop Deceptive Advertising and Unfair Billing Practices (Aug. 16, 2010), *available at* http://www.ftc.gov/opa/2010/08/acaicolon.shtm.

[8] Press Release, Federal Trade Commission, FTC Steps Up Efforts Against Scams That Target Financially-Strapped Consumers (Mar. 2, 2011), *available at* http://www.ftc.gov/opa/2011/03/emptypromises.shtm.

[9] *The Standard Setting Process*, DEPARTMENT OF ENERGY, http://ees.ead.lbl.gov/node/2.

[10] Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454, 49,723 (Sept. 28, 2009).

(more money than the standards would impose in costs for new technology and the like), OMB wanted the agencies to speculate that perhaps the proposal would make consumers economically worse off. No wonder that the Obama administration can seem ambivalent about the benefits of regulation; it doubts them even when they are staring it in the face.

Regulation can also save people money more indirectly. When a person does not have to go to the hospital because a rule has reduced the air pollution that would have made her sick, or when she does not miss work for the same reason, the rule has saved her the expense of a hospital visit or wages lost due to missed work. Similarly, when a person does not have to go to the hospital or miss work because – although she has been in a car accident – a vehicle safety feature mandated by a rule protected her from serious injury, the rule has saved her money. Indeed, in examples too numerous to list here, rules that protect health and safety also protect pocketbooks, as they alleviate the costs of doctor's visits, medicines, hospital stays, lost work days, and other interventions and disruptions associated with ill health and inadequate safety.

Here, too, the Obama administration has sometimes gotten a little tangled. The economic analysis for EPA's proposed rule on mercury and other hazardous air emissions from power plants posits that the effects of mercury on IQ points are in one respect a good thing – they save people money that, if the IQ points had not been lost, would have been spent on education![11] Here is EPA's subtle description of its method: "The approach expresses the loss to an affected individual resulting from IQ decrements in terms of foregone future earnings (net of changes in education costs) for that individual."[12] To put the point plainly, losing IQ points is bad in one respect because it likely means lower future income, but it is good in another respect because it likely means less schooling and thus lower educational costs. This part of EPA's analysis plays only a tiny role in the overall results of the economic analysis,[13] but it is nonetheless tellingly ambivalent about the consequences of regulation. Better, I think, to grasp the nettle and say the following: we do not believe that having fewer educational opportunities as a consequence of pollution is a good thing.

The astute reader may interject at this point with a question: how could the administration take the position that saving money in one context (energy efficiency, say) is beneficial, while saving it in another (educational expenditures) is not? Notice, first, that the administration seems to have had a harder time explaining why saving money on fuel costs was a good thing than it had concluding (without elaboration) that saving money on education was a good thing. Apart from that, however, the point here is that one must sometimes call upon deeper values to determine whether a bookkeeping column shows a cost or a benefit. To speak both sensibly and passionately about the importance of regulation, the Obama administration must come to understand this idea.

[11] *Regulatory Impact Analysis of the Proposed Toxics Rule: Final Report*, ENVIRONMENTAL PROTECTION AGENCY (March 2011), 5-63, 5-103, http://www.epa.gov/ttn/ecas/regdata/RIAs/ToxicsRuleRIA.pdf.
[12] *Id.* at 5-62.
[13] National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 25,078, 24,976 (May 3, 2011), Table 28 (showing results of economic analysis).

Beyond saving money, directly and indirectly, regulation also protects people from harms that are not fully captured as "money saved." Cancers of all kinds, heart attacks, asthma attacks, and more are prevented by environmental rules. Occupational safety rules can help prevent people from being electrocuted or crushed by heavy equipment. Vehicle safety rules can help drivers not back over people (especially children) who are difficult to see in an ordinary rearview mirror. The full range of human illness and suffering alleviated by regulation is huge.

Again, the Obama administration could be saying more. In addition to tallying the total numbers of heart attacks, asthma attacks, cancers, electrocutions, crushings, back overs, and more, prevented by its rules, the administration should be describing these consequences in their full human dimension. For someone who has never suffered a heart attack, for example, it may be easy to dismiss such an event as transient or unimportant beyond the immediate discomfort, disruptions, and expense. But studies have shown long-term consequences beyond what one might expect, such as significant increases in depression and even post-traumatic stress disorder following heart attacks. Elaborating upon the whole range of consequences that can flow from this kind of adverse event would be helpful in understanding the whole range of good consequences of regulation.

Regulation also, of course, often prevents (or at least forestalls) the ultimate adverse event, death. In this domain, it is especially important to remember the link between human behavior and human harm; our legal and ethical norms make proceeding in the face of known and avoidable risks of death an especially egregious form of behavior. Yet sometimes even large numbers of saved lives fail to persuade the anti-regulatory crowd that regulation is a good idea; the embattled EPA rule on industrial and commercial boilers is expected to save as many as 6600 lives, yet embattled it remains. Strangely, statistics alone may be more lulling than moving.

III. Statistical Lullabies

> "The doctor remembered the plague at Constantinople that, according to Procopius, caused ten thousand deaths in a single day. Ten thousand dead made about five times the audience in a biggish cinema. Yes, that was how it should be done. You should collect the people at the exits of five picture-houses, you should lead them to a city square and make them die in heaps if you wanted to get a clear notion of what it means. Then at least you could add some familiar faces to the anonymous mass. But naturally that was impossible to put into practice; moreover, what man knows ten thousand faces?"[14]

A strange inversion can occur when one tries to speak in numerical terms about the benefits of regulation, especially health, safety, and environmental regulation: the more people who are protected from dying or falling ill, the less we seem able to grasp the magnitude of the problem. It is easy to understand an intervention that saves the life of someone right in front of us. It is unthinkable not to save the little girl trapped in the well. But to save thousands from dying due to air pollution? Merely appreciating the magnitude of the loss is, as Camus reminds

[14] ALBERT CAMUS, THE PLAGUE 38 (Stuart Gilbert trans., Vintage Books 1991) (1948).

us, hard enough. We need some visual marker, like picture-houses or city squares, to help us understand how many people thousands of people actually are. We also need to find "familiar faces" in the "anonymous mass," lest we convince ourselves the faces are not real, or not fully human. But it is hard to find familiar faces in analysis that turns on probabilities and statistics, and that cannot tell us who will die.[15]

As far as possible, the administration should aim for detail over abstraction here as well. One way to achieve a more sensitive accounting would be to explain in some detail how the people we are helping would have died if we had not helped them; this would add some human texture to the numerical array. Another way to avoid the lulling effect of statistics would be to compare the numbers offered in regulatory analysis to numbers that people already seem to grasp; one might, for example, compare the number of lives saved through a regulatory measure to the total population of a prominent town, or to the number of lives lost due to more salient events like murder. The idea would be to avoid the strange trap of believing that lives described in statistical terms are not lives at all.

IV. Conclusion

While directing agencies to trim costs from their regulatory programs, the Obama administration missed an opportunity to talk about why we regulate and what regulation achieves. How much better it would have been if the administration had led with an affirmative recognition of the important purposes of regulation and a detailed accounting of the good consequences that come from its own regulatory efforts: money saved, health protected, lives not cut short. This positive message would have helped to slip regulation back into its proper ethical joint, as a corrective to the behavior of people who are not angels. Making the affirmative case for regulation would also have political benefits, insofar as it might both help to blunt the political case *against* regulation and show the tangible good consequences of policymaking in the Obama administration. Finally, leading with the positive case for regulation also would have opened up the discussion to include more than a dreary list of costs cut and programs trimmed. Focusing first on regulatory purposes also would have allowed for a meaningful conversation about the things we have *not* done to protect people from harm caused by other people. For good or ill, however, the continuing attacks on the regulatory state give the administration a continuing opportunity to articulate how human well-being, and freedom itself, are protected through law.

[15] For further discussion of this problem, *see* Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV 189 (2000).