Rethinking Regulation

Preventing capture and pioneering democracy through regulatory reform

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April 2016

ROOSEVELT INSTITUTE
REIMAGINE THE RULES

Executive Summary

A more inclusive economy depends on an inclusive political process. Regulatory agencies are central institutions in economic policymaking, yet regulators remain vulnerable to undue political influence from established business and industry interests. How then can we reinvent regulation to be more accountable and responsive to the public at large? This white paper provides a progressive framework for addressing the problem of regulatory reform. The paper argues that instead of seeking to undo regulations or further insulate regulators, we must instead pursue reforms that expand participation and representation for a more inclusive set of stakeholders within the regulatory process itself.

The paper begins with a brief history of different attempts at reforms to ensure regulation serves the public interest, from the New Deal's faith in expertise to the rise of procedural statutory requirements for regulation to the attempts by both left and right to respond to the charges of capture in the later 20th century. The paper then highlights two particular episodes of democratizing reform efforts: the War on Poverty in the 1960s and 1970s, and more recent innovations in participatory governance in the U.S. and internationally. These episodes suggest some ways in which governance can harness democratic participation and representation to improve accountability and responsiveness.

The paper then offers specific policy recommendations for reinventing progressive regulation by incorporating these democratizing strategies. In particular, the paper calls for reforms that: (1) institutionalize stakeholder representation within regulatory agencies; (2) empower grassroots citizens to drive monitoring and enforcement of rules; (3) update the procedural and presidential oversight requirements for agencies to enable greater participation; and (4) expand and rethink the staffing, resources, and structure of agencies to facilitate participation.

Introduction

Contemporary economic policy has failed to address the pervasive and growing crises of inequality, underemployment, and declining opportunity that have been escalating in recent decades. Recent research highlights that economic inequality is not a product of "natural" market forces, but of deeper structural disparities in political power and voice. As a result, policies themselves are skewed, structuring markets in ways that produce severe economic imbalances. As the political clout of business and economic elites increases, economic policies tilt in their favor, to the detriment of ordinary Americans.[1] A more inclusive economy therefore depends to a great degree on a more inclusive political process. Nowhere is this basic mechanism of disempowerment—or the need for greater political accountability and responsiveness—more apparent than in the day-to-day functioning of the modern regulatory state.

Regulatory institutions—from the SEC to the Federal Reserve to the EPA—bear the primary responsibility for actually drafting and implementing most public policy. Regulatory agencies are charged with the granular work of making markets function, setting and enforcing the basic rules of the game on everything from insider trading and financial regulation to labor and environmental standards. This responsibility is magnified in an era where, whether owing to political gridlock or posturing, legislatures increasingly tend to produce broadly framed statutes (if they pass a bill at all), leaving regulators to fill in many of the details of actual policy.

But just as legislative policy tends to favor the interests of economic and business elites, so too are regulatory agencies prone to such special-interest "capture." Big finance has been extraordinarily successful in using the regulatory process to water down the impact of Dodd-Frank financial reform. The same story can be seen in labor regulation, environmental regulation, and elsewhere.[2] This kind of industry and elite influence sometimes operates as a direct function of greater organization and political pressure on the part of business and elite interests. But more subtle mechanisms are at work in this skewed regulatory regime as well. As policymakers share social and economic backgrounds with economic elites to a greater degree, their own assessments of economic conditions and policies become skewed away from working-class and middle-class interests.[3] Policymakers' increasing reliance on industry members for data, information, and cooperation in devising policies creates another vulnerability exploitable by sophisticated interest groups.[4]

These disparities in political power skew public policy in ways that further marginalize racial minorities, women, and poorer citizens. This problem of "capture"—the ability of particular interest groups to skew public policy in their favor—has been a long running concern for critics of the modern regulatory state. But where conventionally the charge of capture has been used to motivate calls for deregulation by conservatives, or efforts to further insulate regulatory experts from outside influence by liberals, this paper suggests a different response. Regulatory capture and elite influence can be counteracted by reforms that expand the countervailing power of communities to advocate for their views, bringing it to a level closer to that of more established and sophisticated interest groups.

Achieving a more equitable economy therefore requires that we also reinvent the institutions charged with the day-to-day task of writing, enforcing, and revising regulations. Just as we seek political equality in elections, campaign finance, and legislatures, so too must we develop mechanisms to achieve a more equitable and inclusive political process within the regulatory state. Conventionally, we might think about regulation as a top-down, expert-driven process insulated from ordinary democratic politics. But instead, regulation might offer a process through which affected constituencies can gain a greater say—and in so doing, help push the substance of regulatory policy in more equality-promoting directions.

Regulatory reform offers an opportunity to do more than merely mitigate pathologies of capture and special-interest influence. Done right, the regulatory process can be transformed into a dynamic, constructive arena that actually expands democratic participation and inclusion. By institutionalizing stakeholder representation and countervailing power, the regulatory process can be a major force for addressing disparities in political power and promoting democratic participation and inclusion, thereby helping drive more equitable economic policies.

This white paper provides a brief history of attempts to ensure regulation serves the public interest (Part I), addresses the ways that the experience of the War on Poverty and recent experiments in participatory governance might inform regulatory reform today (Part II), and offers some policy recommendations for democratizing regulatory governance (Part III).

I. Regulation and the public interest: A brief history

"The administrative process," proclaimed James Landis, speaking at Yale University in 1938, "is, in essence our generation's answer to the inadequacy of the judicial and legislative process."[5] A leading young law professor and former clerk of Supreme Court Justice Louis Brandeis, Landis was already celebrated as one of the architects of the Securities and Exchange Commission (SEC), which he would later chair. The SEC was the poster child for the New Deal's dramatic new experiment in creating aggressive, expert-based regulatory agencies to tackle the problems of the Great Depression. The Depression had made clear that markets could not "self-regulate"—but Congress and the courts were not up to the task of managing a complex modern economy efficiently and effectively. Legislatures were too beholden to special-interest politics and pressures, while courts were too bound to archaic legal doctrines. Instead, Landis argued, modern governance demanded a new institutional strategy: reliance on insulated experts, given expansive authority by Congress to promote the common good through scientifically-grounded policymaking. Such agencies would be better suited to adapting to complex, rapidly changing conditions, and serving the general public interest. "It is easier to plot a way through a labyrinth of detail," explained Landis, "when it is done in the comparative quiet of a conference room than when it is attempted amid the turmoil of the legislative chamber or a committee room."

To harness the benefits of such expertise, policies needed to be crafted by regulatory agencies that, although created by Congress and overseen by the judiciary and the elected executive, enjoyed broad delegation of power and relative independence. Indeed, rather than restraining agencies through narrow grants of power and tight oversight, Landis preferred to give agencies a relatively free hand, relying instead on the agencies' professionalism, expertise, and independence, as well as the beneficial effects of publicizing agency policies and their justifications, to ensure that they served the common good.

The New Deal did much to consolidate this particularly technocratic vision of regulation into the fabric of the modern state, and into our political imagination. As historian Alan Brinkley notes, late New Dealers in particular sought to address economic policy issues through centralized, technocratic regulation. These New Dealers were thus "coming to a common vision of government—a vision of capable, committed administrators who would seize control of state institutions, invigorate them, expand their powers when necessary, and make them permanent actors in the workings of the marketplace."[6]

Subsequent waves of regulatory reform have evolved against this baseline. On the one hand, there is the aspiration of regulation as a way of achieving the public good through neutral, expert-based policymaking, particularly given the complexities of the modern economy. But this hope is balanced against two recurring (and related) fears: first, the fear of administrative overreach—what many New Deal–era lawyers castigated as "administrative authoritarianism"—and second, the fear of special-interest capture, the hijacking of such administrative authority in the service of private, not public, interests.

These concerns motivated three distinct waves of regulatory reform.

First, unease from the legal community led to some early judicial restraints on FDR's expansion of regulatory power, most notably when the Supreme Court struck down the National Recovery Act in 1935 in Schechter Poultry Corp. v. United States. For legal traditionalists, regulatory agencies raised deep constitutional concerns about transferring too much legislative authority outside of Congress and into agencies that had broad powers of policymaking, implementation, and adjudication. These concerns gave rise to the 1946 Administrative Procedure Act (APA). The legislative debate over the APA revolved around this central concern about preventing unchecked agency action and the risk of special-interest influence and corruption. The APA created a universal set of procedures required of all agencies undertaking rulemaking or adjudication actions. Through such procedural constraints, the hope was that the APA would rein in excessive agency authority and limit special-interest influence, thereby ensuring that regulation would serve the public good.

By the 1960s, however, faith in agency expertise had declined, and courts and legislators began to experiment with a different strategy for making sure that regulators served the public interest: expanding the representation of different stakeholder groups within the regulatory process itself. Through revised judicial doctrines of due process and of standing, and through statutory participation rights, these reforms sought to expand the diversity of interests represented within agency policymaking. Such reforms were themselves a response to growing fears about special-interest capture, as well as a newfound skepticism that expert regulators alone could identify and pursue the common good as faithfully as Landis and the New Dealers initially hoped. Meanwhile, new legislation such as the Freedom of Information Act made agency deliberations more readily transparent to the public, while citizen suit provisions in statutes such as the Clean Air Act made it easier for citizens to challenge agency decisions in court.

The civil rights movement also played an important role here. Community organizations seeking to promote racial justice began to target the institutions responsible for poverty alleviation, social welfare, and economic policy. For these advocates, poverty was a matter of disparate power; until African-Americans and poor people could have more direct representation and participation in local and federal regulatory bodies, poverty policy would systematically fail to address structural inequalities. These convictions shaped Lyndon Johnson's War on Poverty, which created statutory requirements that antipoverty programs experiment with "maximum feasible participation" when developing and implementing policies. Owing to these influences, administrative law in the 1960s and 1970s took as its goal "the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision."[7]

This effort, too, proved short-lived, and by the late 20th century this "interest representation" framework was seen as a failure, more likely to create gridlock and induce capture than to prevent it through genuine accountability and inclusive participation. Indeed, by the 1980s, a new mentality of conservative skepticism about regulation had become dominant. The "public choice" school of economics argued that regulatory agencies were intrinsically prone to special-interest capture, as well-organized interest groups would necessarily have the sophistication and self-interest to trump the needs of the more diffuse and less-attentive general public. If agencies were fatally flawed—and if, as was becoming the norm, policymakers saw markets as more efficient and self-regulating—then the public good would be better served by the outright dismantling of regulatory systems. At the very least, it was claimed, regulation should instead take the form of permissive partnerships with private industry, allowing for greater self-regulation.

This trajectory shapes contemporary discussions of regulatory reform. On the one hand, the specter of this deregulatory critique looms large: the fear that agencies are too ineffectual, too prone to capture. On the other hand, prior efforts to bind agencies to the public good, whether through increasingly convoluted and lengthy procedures or through greater interest representation, have had mixed results. The challenge—and opportunity—for regulatory reform today is to develop an alternative model of regulation that creates more room for genuine democratic inclusion and participation, and in so doing can help drive a more equitable policy agenda.

II. Envisioning democratic regulation

In response to the deregulatory fervor of the 1980s and 1990s, contemporary defenses of regulation have tended to revolve around two strategies.

First, modern regulatory reformers have turned to the new developments in social science, economics, and cost-benefit analysis to attempt to provide a more objective foundation justifying regulation. Leading scholars such as Cass Sunstein, who himself would later become the chief "regulatory czar" as the head of President Obama's Office of Information and Regulatory Affairs, have argued that cost-benefit analysis can be more flexible than simply counting economic impacts. Instead, analyses should incorporate assessments of equity, environmental repercussions, and other more qualitative outcomes to provide a fuller, objective picture of which regulations are truly socially beneficial.[8] Thus tailored, cost-benefit analysis purports to provide objective proof and legitimacy for regulations, ensuring that they did in fact serve the public good, and overcoming conservative attacks that regulation would be overly costly and serve only special interests.

Second, and related, regulatory reformers appeal to the role of the elected presidential administration in ensuring sufficient oversight and accountability for regulators. In this "presidential administration" model, regulators need not necessarily base their decisions purely on expertise; rather, the central issue is to ensure that regulatory agencies are directly accountable to the president, who, as a democratically elected official, has the authority and legitimacy to shape agency policy agendas.[9]

These two strategies—relying on modern forms of expertise or on the oversight of the elected executive—recall, albeit in a more chastened and minimalist form, the regulatory vision of the New Deal era. But rather than doubling down on expertise and executive oversight, regulatory agencies have an untapped potential to act as sites of democratic inclusion and participation. By engaging a wider range of stakeholders in a productive and participatory policymaking process, regulation can help combat special-interest capture by empowering countervailing forces within the regulatory process itself. This strategy in turn can transform regulation into not just a servant of statutory mandates, but an active space where stakeholders and civil society groups can start to remedy the disparities of political power that skew our policymaking system more generally.

How can we institutionalize this idea of democratic regulation—of institutionalizing countervailing power within the regulatory state? We can find some clues for future reform in the history of the War on Poverty, and in more recent global experiences in participatory governance.

Democratic regulation 1.0: The experience of the War on Poverty Community Action Program

Though often dismissed as a failure, this participatory strategy in the War on Poverty actually created some very real avenues for empowering African-Americans, the urban poor, and other stakeholder groups, in turn enabling the accountability of economic and political elites (albeit briefly). Understanding the exact lessons learned from the War on Poverty can help us pioneer a more modern, and ultimately effective, strategy of participatory regulation.[10]

While the bulk of the 1964 Economic Opportunity Act (EOA) focused on new entitlement programs for job training, work-study, and access to legal services, the real radical innovation in the War on Poverty was its commitment to grassroots participation as a way to mobilize community leaders to hold the bureaucracy itself accountable to its poverty-reduction mandate. Formally, the EOA created community action programs, providing funding for community groups to become mobilized in two main ways: first by creating local boards consisting of local government officials and representatives from business, local community groups, and minority and low-income stakeholders; and second, by involving community organizations in the implementing and service-delivery aspects of operating poverty-reduction programs such as training centers and legal services clinics.

This approach of "maximum feasible participation" was rooted in a conviction that poverty was itself a matter of political disempowerment, not just of insufficient income, and that therefore the only way to combat poverty was to empower poor people with direct voice in the shaping, governing, and implementing of poverty programs. Only through such direct empowerment could the poor hold the bureaucracy accountable—and redress the traditional disparities of political influence in local government.

In many ways this political strategy for reducing poverty proved effective. By creating institutionalized sources of political power and leverage, the community action approach inspired many local community organizations to channel funds toward expanding membership, providing services, and mobilizing constituencies as a political force in defense of poverty-reducing policies. Even where local groups were denied representation on community action boards by local elites, the institutional commitment to representation created a potent foundation for exerting political pressure on policymakers.[11]

In some programs, these institutionalized avenues for direct participation dramatically changed the dynamics of the policies themselves, making them more effective at promoting economic equity. The Community Reinvestment Act (CRA) of 1977 offers a compelling example. Primarily focused on reducing lender discrimination against minority borrowers, the CRA owed much of its success to an enforcement regime that borrowed from the experience of community action. Under the CRA, federal agencies examine financial institutions on the basis of their success in meeting local and minority credit needs. These rankings, in addition to public comments on the CRA activities of these firms, were then considered when financial regulatory agencies examined merger applications and requests by these firms to open and close new branches. A critical component of this review process involved community members themselves: Local groups could ask to review a firm's CRA records, comment on its CRA activities, and file challenges requesting federal inspections for firms that failed to meet community credit needs. Because firms needed a good CRA score in order to get regulatory approvals for mergers, these community challenges were surprisingly powerful in incentivizing firms to respond.

The evidence suggests that banks have, as a result of the CRA, changed their behavior, forming multibank Community Development Corporations, investing in locally based Community Development Financial Institutions, and dedicating special units to focus on meeting the needs of local low- and moderate-income borrowers within the geographic area of the bank orders or branch. This economic impact is partly the result of increased participation in enforcing the CRA mandate. The CRA bolstered local community involvement both by incentivizing banks to lend to local businesses, and by empowering community-based organizations as local brokers who could match worthy borrowers with willing banks. In a number of cities, the CRA's provision allowing community groups to invoke federal regulatory involvement helped catalyze a broader effort among community organizations to organize and expand their engagement with local banks. The background threat of federal regulatory enforcement incentivized banks themselves to engage with these community groups and negotiate for mutually agreeable community lending programs.

The failures of the War on Poverty Community Action Program are rooted in political conflict over the very goals of participation and community action in the first place. As community action programs catalyzed the mobilization of grassroots constituencies to advocate for more accountable and equitable economic policies, the backlash from local power elites—from the political establishment to business interests—led to systematic efforts to defund and dismantle community action.[12] Ultimately, the problem was a lack of alignment over the importance of community action itself. Federal officials saw participation as a more surface-level strategy to generate cooperation and consensus among stakeholders, whereas the civil rights and welfare rights movements saw it as a mechanism for reclaiming greater political power over economic policymaking. State and local governments, meanwhile, saw the directive for formal representation of the poor as a categorical threat to their own authority and control of patronage networks.[13] Even the founders of the program in the Johnson administration often operated under vastly different motivations and visions for how significantly the program should invest in poor people's political power, as opposed to merely providing welfare services.[14] As a result of these tensions, while more than 1,600 community action boards were established by 1968, covering two-thirds of the nation's counties, by 1974 most of the funding for the most active programs had been withdrawn, with new restraints from Congress and the dismantling of the Office of Economic Opportunity, the federal office charged with creating and coordinating community action across the country.[15]

The War on Poverty thus suggests some important elements for how to harness the potential of democratic participation as a form of countervailing power to hold regulators accountable to a wider range of stakeholders and to help drive more equitable economic policies. First, there is a value to creating institutionalized forms of representation for the poor, minorities, and other underrepresented interests. Second, where civil society actors can play a constructive role, for example in monitoring and enforcing standards, they can be a part of making regulation both more accountable and more efficacious.

Indeed, this strategy of leveraging community participation in monitoring the degree to which regulators and businesses alike follow and enforce existing standards has become a more widespread tool for empowering communities and holding policymakers accountable in a variety of contexts. The global community and advocacy group Slumdwellers International, for example, uses such participatory monitoring and audits as critical mobilization and advocacy tools, empowering urban slum communities to monitor public officials, track progress on promises for addressing basic infrastructure needs, and assert property rights of slumdwellers who would otherwise be uprooted to make room for urban development projects.[16] In the U.S. context, similar participatory monitoring strategies are being employed to track developer and city commitments to local hire and community development promises around large-scale urban redevelopment projects.[17]

The critical challenge for these models to work, however, is to secure the buy-in and cooperation both from government officials and from community groups. As the War on Poverty's failure indicates, where officials themselves reject the core premise of participation, it is difficult to sustain these procedures. Similarly, where communities are not organized and mobilized through advocacy and membership-based organizations, there is no countervailing voice that can exert this kind of pressure and credibly claim to speak on behalf of these communities when policies are made.

From participatory governance to regulation

Another source of valuable ideas for transforming regulation comes from abroad, in the growing literature and practice around innovations in participatory governance. Over the last 20 years, there has been an emerging set of tools and best practices for how to increase participation and make it actually effective in driving a regulatory or policymaking regime, including integrating public participation with more traditional forms of bureaucratic expertise.

Consider for example two modal examples of participatory governance: "micropublics" such as citizens' juries and other small-scale deliberative fora; and the case of participatory budgeting.

In deliberative micropublics, a small number of lay citizens are selected randomly and then tasked with working with state policymakers and experts to devise a policy solution to a particular social problem, whether involving large-scale policies such as health-care system design or local concerns such as environmental deterioration or crime and safety. These deliberations are carefully moderated and structured to provide lay citizens with various briefings on the relevant issues. The citizens then debate and deliberate, formulating a policy response in consultation with experts and state officials.[18] Citizens' juries have been used in a variety of high-stakes instances, from a rewriting of British Columbia's constitution to the formulation of health-care policies in countries belonging to the Organization of Economic Cooperation and Development.[19]

In participatory budgeting, the structured interactions between citizens, policymakers, and experts is similar. However, the lay citizen participants are not randomly selected, but are representatives elected from within their local district after a series of awareness-raising town hall meetings in which residents are briefed on the procedure, and then vote for representatives to the budgeting committee. The policy committee's recommendations are then sent back to the residents of the district for approval by referendum.[20]

Both of these approaches are increasingly being used in the United States. Groups such as the Participatory Budgeting Project are working with governments and local stakeholders to implement participatory budgeting in cities across the country. Local governments from New York to Chicago have started to use participatory budgeting to allocate discretionary funds at the ward or city council level. Other cities are starting to use participatory budgeting more directly to decide core budgetary issues.[21] Similarly, micropublics are becoming a more common strategy for policymakers to engage stakeholders in the early stages of policymaking. In a model similar to that of other regulatory agencies, the Consumer Financial Protection Bureau convenes stakeholders through its online RegulationRoom platform to help formulate focus areas for future regulations and to source ideas for how to help key constituencies.[22]

These participatory processes share a common focus on engaging citizens in solving concrete problems—for example, the crafting of a budget, or the formulation of a particular policy issue—often in areas with which the participants themselves have direct experience and interest. In formulating responses to these problems, participants work in tandem with experts and decision-makers, who can offer advice and relevant information.[23] The principle is that for participatory governance to work well, participants must (1) be empowered to make actual decisions; (2) be situated alongside other stakeholders and policy experts to highlight a wider range of issues and implications; and (3) be placed in a curated and structured context and process that facilitate deliberation and concrete policy judgments.

III. Policy recommendations

The economic crisis of inequality and growing disparities of economic opportunity are rooted in disparities of political power. Because of the vast discretion and importance of regulatory institutions in formulating and enforcing policy regimes at the granular level, the regulatory state is an important front line in trying to restore political equity, which in turn can help ensure more economically equitable policy. Conventionally, we have relied on a combination of internal expertise and external actors such as the executive branch, Congress, or the courts to ensure that agencies are responsive to the public good. The above discussion by contrast points to an enticing alternative possibility: that regulatory agencies can be transformed to serve as a more inclusive political space for democratic participation.

Such democratic regulation is also a necessity, critical to addressing the risks of capture and elite influence that continue to bedevil regulation in a variety of contexts, from labor to environment to transportation. By engaging and empowering more diverse stakeholders to shape regulations and help monitor and enforce rules, we can institutionalize greater forms of countervailing voice within regulatory agencies, as a check on the kinds of capture that skewed financial regulations before the crash.

A democratic approach to regulatory reform could be applied not only to federal agencies but also to local government bodies that address important policy issues. Such an approach could consist of four elements.

(1) Institutionalize modes of stakeholder representation within regulatory agencies.

Agencies can be reformed to include more direct forms of stakeholder representation, creating a more inclusive regulatory process and thereby driving more equitable economic policy. Perhaps the boldest expression of this reform strategy is the recent "Fed Up" campaign initiated by the Center for Popular Democracy. Fed Up, in addition to demanding a greater focus on unemployment from the Fed, also calls for more direct representation of worker and consumer interests in governance and decision-making within the Federal Reserve.[24] Similarly, some scholars have taken this idea of dedicated representation further, advocating the creation of a dedicated public interest council in financial regulation, an independent governmental entity comprised of experts and public advocates charged with conducting investigations, proposing policies, and auditing the regulations proposed and implemented by other financial regulatory bodies, all in an effort to magnify and channel the countervailing interests of citizens and prevent the capture of financial regulatory bodies by sophisticated industry players.[25]

Countervailing citizen interests can be represented through "proxy advocacy," by which a regulatory office is created with the explicit mission of representing the needs of a particular demographic of citizens—such as consumers, veterans, or farmers—through advocacy, providing information to other regulators, and navigating the rulemaking process with an eye to protecting these interests.[26]

Stakeholders may thus be represented by individuals or by community-based organizations that advocate on their behalf. In creating these advocacy offices or other forms of representation, laws can specify which constituencies should be represented, and what qualifies an individual or group to count as a representative of that constituency. These mechanisms are not immune to the risk of capture or cooption—but, as suggested above, the creation of an institutionalized office voicing a particular constituency's needs, combined with a mobilized and engaged civil society organization working with that constituency to engage with policymakers, can provide some protection against the risk of capture.

Dodd-Frank already includes a variety of mechanisms to enhance representation of key stakeholders such as shareholders, consumers, and homeowners through a mix of advisory boards and dedicated offices charged with representing otherwise diffuse and politically marginal groups.[27] The Consumer Financial Protection Bureau (CFPB) itself can be understood as partly a form of proxy representation: while the agency operates as a traditional expert-based rulemaking body, it also works hard to engage the public in general and consumer advocates in particular to identify issues in need of policy solutions, in effect channeling consumer interests in a regulatory ecosystem that often leaves ordinary people out of view. These activities are partly the result of statutory directives: the CFPB has within it dedicated offices for community affairs, and for outreach to and engagement with constituencies that may have particular needs but are often overlooked in financial regulation policy, such as veterans, students, and pensioners. But this focus is also partly a result of the agency's character and ethos, as a product of the consumer rights movement in its most recent post–financial crisis form.

Pushing this idea further, we might create offices for "regulatory public defenders," charged with identifying and articulating the needs and views of affected but underrepresented groups.[28] These regulatory offices would act not as neutral experts, but as representatives of a particular social interest, identifying and channeling its concerns within the broader ecology of regulatory agencies and the policymaking process. Such an agency could help underrepresented social groups participate in and put pressure on regulatory policy debates on an equal level with more sophisticated insider-interest groups.

(2) Empower grassroots citizens to drive monitoring and enforcement of rules.

Through greater participation, citizens can act as diffuse networks tracking the degree to which regulatory bodies in fact implement their policies effectively. Building on the example of the CRA, such participation can check the manipulations of private actors by facilitating regulatory enforcement, while also protecting against potentially lax enforcement by regulators themselves. A number of NGOs have pioneered the use of citizen networks as a way to monitor and track the implementation of policies in a variety of contexts, from economic development programs to the identification of infrastructure gaps in reconstruction after natural disasters.[29] As noted earlier, other groups have used participatory monitoring to pressure local governments to increase investment in marginalized communities such as the slumdwellers in India.

An even more aggressive mode of participatory engagement would tap citizens to ensure governmental accountability by devising their own performance goals, indicators, or targets, which can then be used to evaluate the performance of policymakers and implementation.[30] This capacity to devise standards and then monitor state performance—through auditing by civil society groups, issuing report cards, and diagnosing blockages, slowdowns, or failures of implementation—is an important contributor to increased accountability and responsiveness.[31] Government can play an important role here as well, by financing and committing to the publication of data, metrics, and scorecards that track public policy outcomes and activities.

Government policies can be made amenable to such participatory monitoring through further design features: first, providing the means for citizens to monitor outcomes, such as the articulation of standards that outline the goals of the policy and the collecting of data or other metrics on outcomes; second, providing citizens with real leverage by empowering them to trigger actual policy and enforcement proceedings; and third, making these findings and activities public.

(3) Issuing a new Executive Order on participatory regulation.

These techniques of representation and participatory monitoring can be institutionalized by statutory reform. Arguably, federal administrative law is in dire need of an updated statutory scheme for administrative process; the Administrative Procedure Act is over 60 years old. But given the limitations of today's Congress, a more fruitful path may be the issuing of a new Executive Order on regulatory process.

Each presidential administration has conventionally issued a regulatory process Executive Order that usually reaffirms prior orders requiring agencies to pursue cost-benefit analysis. As a result, there already exists a legal and institutional infrastructure through which the executive branch incentivizes expertise and monitors regulation, through the Office of Management and Budget, the Office of Information and Regulatory Affairs (OIRA), and the guidelines of Executive Orders 12866 (issued by President Clinton) and 13563 (issued by President Obama). An alternative structure for regulatory review might require more of agencies at the initial policymaking stage in terms of participatory engagement and consultations, while tasking OIRA with reviewing not just the technocratic policy analysis but also whether agencies have adequately complied with such participatory requirements. Executive Order 13563, the latest on Executive branch standards and procedures for regulation, includes language on the importance of participation in the regulatory process but does not specify either substantive standards for such participation nor explicit forms of review and monitoring by OIRA. A new Executive Order could, for example, establish baseline procedures and standards to systematize ad hoc agency practices of citizen participation and stakeholder consultation by, for example, instituting formal requirements for agencies to convene such forums, and requiring that these forums be comprised of representatives from specified constituencies.[32]

(4) Staffing and structuring agencies to facilitate participation.

Finally, agencies themselves have a large role to play in fostering this kind of democratic regulation through their own decisions about staffing and internal process and structure. Agencies have significant discretion already to convene stakeholders and engage participants in their rulemaking or enforcement regimes. Pioneering agency heads can deploy this discretion to create the kinds of representation and participation outlined above within their agencies, even in the absence of statutory or Executive Order direction.

More important, productive participation is not an automatic guarantee; rather, it requires significant investment on the part of the convenors. Agencies themselves should invest greater staff resources in facilitating and fostering such participation. As the literature on participatory governance underscores, to make participation effective and integrate it with more conventional forms of expertise in policymaking, three critical tasks will require intensive work: curating participatory and deliberative meetings, providing briefings for the participants on the relevant data and issues, and facilitating discussion to lead to concrete, usable recommendations. Each one demands a particular set of skills and a significant investment of staff time and resources—not to mention agency budgets. Yet agencies, by and large, tend not to invest in these skills or tasks. If we take democracy in regulation seriously, we will have to start staffing and structuring agencies accordingly. Indeed, we may be well served by some scholars' proposals to create subgroups within agencies dedicated to developing participatory processes, training agency staff, and monitoring success.[33]

IV. Conclusion

These proposals can help make regulation more inclusive and democratic. The imperative to do so is not just because of the intrinsic value of democratic participation; rather, it is an urgent necessity to address both economic and political inequality. Regulatory policies are essential to making the economy work in an equitable way. But for these regulations themselves to serve the public interest, the regulatory process must also be inclusive of all affected constituencies. Reinventing regulation through greater democratic participation and engagement offers one way of addressing these structural inequities.

Endnotes

[1] See, e.g., Bartels, Larry, 2010, Unequal Democracy: The Political Economy of the New Gilded Age NJ: Princeton University Press; Hacker, Jacob and Paul Pierson, 2011, Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class New York: Simon & Schuster; Gilens, Martin, 2014, Affluence and Influence: Economic Inequality and Political Power in America NJ: Princeton University Press; Gilens, Martin and Benjamin Page, 2014, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens" Perspectives on Politics 12:3.

[2] See, e.g., Carpenter, Daniel and David Moss, eds., 2013, Preventing Regulatory Capture: Special Interest Influence and How to Limit It UK: Cambridge University Press.

[3] See, e.g., Carnes, Nicholas, 2013, White Collar Government: The Hidden Role of Class in Economic Policy-Making IL: University of Chicago Press.

[4] See, e.g., Kwak, James, "Cultural Capture and the Financial Crisis," and McCarty, Nolan, "Complexity, Capacity, and Capture," in Carpenter and Moss, eds., Preventing Regulatory Capture.

[5] Landis, James. 1938. The Administrative Process. New Haven, CT: Yale University Press.

[6] Brinkley, Alan. 1989. "The New Deal and the Idea of the State." Pp. 85-121 in The Rise and Fall of the New Deal Order, 1930-1980, edited by Steve Fraser and Gary Gerstle. NJ: Princeton University Press.

[7] Stewart, Richard. 1975. "The Reformation of American Administrative Law." Harvard Law Review 88:8.

[8] See, e.g., Sunstein, Cass, 2013, "The Real World of Cost-Benefit Analysis: Thirty-Six Questions (And Almost As Many Answers)," Harvard Public Law Working Paper 13-11, available online at papers.ssrn.com/sol3/papers.cfm?abstract_id=2199112.

[9] See, e.g., Kagan, Elena, 2001, "Presidential Administration," Harvard Law Review 114.

[10] For several recent analyses of the positive political effects of the War on Poverty and their implications for today, see, e.g., Melish, Tara, 2010, "Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty," Yale Human Rights and Development Law Journal 13; Cazenave, Noel, 2007, Impossible Democracy: The Unlikely Success of the War on Poverty Community Action Programs, Albany, NY: SUNY Press.

[11] See, e.g., Orleck, Annelise and Lisa Hazirjian, 2001, The War on Poverty: A New Grassroots History, 1940-1980, Athens, GA: University of Georgia Press.

[12] Id.

[13] Melish, "Maximum Feasible Participation of the Poor," 28.

[14] See, e.g., Gillette, Michael, 2011, Launching the War on Poverty: An Oral History, UK: Oxford University Press.

[15] Melish, "Maximum Feasible Participation of the Poor," 26-27.

[16] See Xavier de Souza Briggs, 2008, Democracy as Problem Solving: Civic Capacity in Communities Across the Globe, Cambridge, MA: MIT Press.

[17] See, for example, the Oakland Army Base redevelopment agreement and its use of community organizations to monitor compliance with local hiring and community investment objectives.

[18] See generally, Fishkin, James, 2011, When the People Speak: Deliberative Democracy and Public Consultation, UK: Oxford University Press; Goodin, Robert and John Dryzek, 2006, "Deliberative Impacts: The Macro-Political Uptake of Mini-Publics," Politics and Society 34; Goodin, Robert, 2008, Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn UK: Oxford University Press.

[19] See, e.g., Fishkin, When the People Speak.

[20] See generally, Russon-Gillman, Hollie, 2013, "The Participatory Turn: Participatory Budgeting Comes to America," Harvard University unpublished Ph.D dissertation; Fung, Archon, 2011, "Reinventing Democracy in Latin America," Perspectives on Politics 9; Baiocchi, Gianpaolo, Patrick Heller, and Marcelo K. Silva, 2011, Bootstrapping Democracy: Transforming Local Governance and Civil Society in Brazil (Redwood City, CA: Stanford University Press.

[21] Russon Gillman, Hollie. 2016, Democracy Reinvented: Participatory Budgeting and Civic Innovation in America. Washington, DC: Brookings / Cambridge: Ash Center for Democratic Governance, Harvard University.

[22] Farina, Cynthia, Hoi Kong, Cheryl Blake, Mary Newhart, and Nik Luka. 2013. “Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project.” Fordham Urban Law Journal 41(5):1527-80

[23] Fung, Archon and Erik Olin Wright. 2013. “Thinking About Empowered Participatory Governance.” Pp. 15-23 in Deepening Democracy: Institutional Innovations in Empowered Participatory Governance, edited by Fung and Wright. London and New York: Verso.

[24] Fed Up campaign http://whatrecovery.org.

[25] Omarova, Saule. 2011. “Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation.” Journal of Corporate Law 37(3):621-74

[26] See, e.g., Daniel Schwarcz, “Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation,” in Carpenter and Moss, eds., Preventing Capture (examining case studies of how proxy advocacy and tripartism has helped mitigate the risk of capture in state-level insurance regulation).

[27] See, e.g., Dodd-Frank Act § 901-911 (to be codified at 15 U.S.C. § 78) (creating an Investor Advisory Committee, which is tasked with advising the Financial Stability Oversight Council (FSOC) on regulatory reforms to protect investors comprised of a mix of representatives of various stakeholder interests, such as state governments, senior citizens, and pension funds, in addition to relevant experts—including an Investor Advocate, who is explicitly empowered to head an advocacy unit within the network of financial regulatory agencies); Dodd-Frank Act § 915 (to be codified at 15 U.S.C. § 80b-11 note) (empowering the Investor Advocate to lobby the SEC for policies favorable to investor interests); Dodd-Frank Act § 919D (to be codified at 15 U.S.C. § 78d) (creating a forum for individual investors to lodge complaints and report lapses in financial regulations); Dodd-Frank Act § 973-976 (to be codified at 15 U.S.C. § 78) (establishing a Municipal Securities Rulemaking Board, comprised of experts and representatives of brokers, investors, and the general public, to set standards for municipal securities advisors).

[28] See Mariano-Florentino Cuellar, 2005, “Rethinking Regulatory Democracy,” Administrative Law Review 57.

[29] There are a number of new community organizations that focus on empowering citizens by enabling them to monitor government service delivery for economic development, post-conflict reconstruction, and natural disaster relief projects. See, e.g., Ushahidi (ushahidi.com) and Development Seed (developmentseed.org/about). Other groups focus on monitoring of government performance by, for example, enabling citizens to monitor bribery and corruption. See, e.g., I Paid A Bribe (ipaidabribe.com).

[30] See, e.g., Melish, “Maximum Feasible Participation of the Poor,” 89-98.

[31] Id.

[32] Bingham, Lisa. 2010. “The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance.” Wisconsin Law Review 350-6 (proposing language for a new executive order).

[33] Sabel, Charles, and William Simon. 2011. “Minimalism and Experimentalism in the Administrative State.” Unpublished manuscript, on file with author, Pp. 27-30; also Cuellar, Rethinking Regulatory Democracy 491-97.