The Challenge of Regulatory Excellence

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Abstract

Regulation is a high-stakes enterprise marked by tremendous challenges and relentless public pressure. Regulators are expected to protect the public from harms associated with economic activity and technological change without unduly impeding economic growth or efficiency. Regulators today also face new demands, such as adapting to rapidly changing and complex financial instruments, the emergence of the sharing economy, and the potential hazards of synthetic biology and other innovations. Faced with these challenges, regulators need a lodestar for what constitutes high-quality regulation and guidance on how to improve their organizations' performance. In the book Achieving Regulatory Excellence, leading regulatory experts across various disciplines seek to provide the guidance regulators so often lack, and to elucidate what it means to be an excellent regulator. This introductory chapter sets the stage for defining regulatory excellence by clarifying regulators' primary challenges, functions, and ultimate goals. The chapter also emphasizes that even though regulation is widely associated with technical expertise, excellent regulators must also focus on "people excellence" by building an internal culture that fosters and reinforces humility, openness, empathy, and a steadfast commitment to public service.

The Challenge of Regulatory Excellence

Cary Coglianese*

In his bestselling book, *Better*, physician Atul Gawande explains why medical professionals must strive to achieve excellence: quite simply, he says, because "lives are on the line." Gawande also notes that doctors "face daunting expectations" in situations where the appropriate "steps are often uncertain" and with technical knowledge both "vast and incomplete." Doctors are nevertheless "expected to act with swiftness and consistency" and to "work humanely, with gentleness and concern."[1]

Gawande could just as well have been writing about regulators. Few government professionals today work as vitally as regulators do on the front lines of human welfare. Around the world, regulators are playing key roles in high-stakes efforts to protect their societies from widespread harms associated with economic activity and technological change, all while simultaneously promoting, or at least not unduly impeding, economic growth and development. Not only do regulators work with many lives very much on the line, but they also face daunting societal expectations, with vast and uncertain challenges that call for swift, consistent action as well as humane, empathic interaction with the public and the businesses they oversee. They are confronted as well with the need to integrate and achieve multiple objectives in a manner consistent with democratic principles and the best available scientific knowledge.

Excellence has long been a human aspiration, in every field of endeavor. Ancient Greek philosophers called it *arête*: "virtue" or, in what is thought the better translation, "excellence."[2] For the ancient Greeks, excellence was the key to human fulfillment, a vital aspiration for citizens and rulers alike. Today, *arête* has assumed a much different and narrower meaning, as mountaineers now use this term to refer to the knife's edge of a mountain ridge. Yet that meaning actually captures well the challenge regulators face in striving to achieve excellence. Like the mountain climber traversing an *arête*, the regulator seeking excellence also has to navigate carefully along a narrow path, facing criticism for regulating both too harshly and too laxly, where one false step could produce serious adverse consequences.

Regulators working in all domains of economic and social policy continue to confront long-standing problems, such as controlling monopolistic pricing, reducing threats to public health, avoiding environmental damage, and preventing financial calamities. They now face new regulatory demands too, whether in response to rapidly changing and ever more complex financial instruments, the emergence of the sharing economy, or the potential hazards of synthetic biology and other innovations. In the face of both new and old risks associated with different forms of economic activity, regulators must routinely make difficult judgment calls in the face of the conflicting demands that society places on them. Society wants the benefits of risky economic activity, but not the costs. In addition, with the rise of social media and expanding access to information on the Internet, the social and political climate within which regulators conduct their

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This paper was prepared for chapter 1 of *Achieving Regulatory Excellence* (Cary Coglianese, ed., Brookings Institution Press).

work has changed, sometimes dramatically. While most regulatory officials previously labored outside the public glare, many such officials today, in offices that no one had previously heard of, find themselves embroiled in highly visible policy conflicts—or at least they know that they are being watched more closely by a demanding public as well as by industry, nongovernmental organizations, legislators, and courts.

Confronted with public pressures and competing demands, regulatory officials need a lodestar for defining high-quality regulatory performance, and they need sound guidance about how to improve their organizations' performance. They need to know in what direction to aim and how to determine whether they are making progress. These needs motivate this book. Its contributors are internationally renowned scholars working in the fields of management, law, economics, criminology, sociology, political science, and risk analysis. They have been asked to place themselves in the shoes of the leaders of regulatory organizations and to explicate what it would entail for those organizations to achieve excellence, or at least to be the best regulators they can be. In other words, *what makes a regulator excellent?*

The open-ended nature of this question has presented each contributor with a significant intellectual challenge.[3] Scholars and policy analysts normally ask well-defined, incremental questions, gradually gaining analytical precision, and building slow but steady momentum in advancing knowledge. This approach is both a laudable and a valuable feature of the scientific and policy analytic enterprise. But scholars and practitioners also benefit from creative reflection and efforts to articulate bigger visions.[4] This book takes the latter approach and seeks to expand, synthesize, and innovate thinking about regulation, with the aim of giving its readers—government officials, practitioners, scholars, and informed citizens—much-needed insight about what it means (and what it takes) for a regulator to excel.

The intellectual challenge the contributors confront in this volume is more than theoretical. The ideas they develop hold vital practical significance. Thoughtful, in-depth consideration of regulatory excellence is long overdue and will likely continue to be needed for decades to come. This book clarifies what regulatory excellence means, and it offers general guidance for those regulators who undertake the climb toward its summit. In today's complex, globalizing economy, we should hope that regulators everywhere will join in such a journey.

What Regulators Do

A "regulator" can refer to an individual employee or official, such as an individual inspector or the head of a regulatory body. But "regulator" can also refer to public or governmental *institutions.* This book focuses on regulators as public institutions established to solve problems by implementing and enforcing laws or policies, among other tactics, in order to steer the behavior of individuals and organizations. Examples of regulatory institutions abound in all countries, at both the national and subnational level of governments: the Alberta Energy Regulator, the Australian Competition and Consumer Commission, the Autorité des Marchés Financiers (or the French Financial Markets Authority), the U.K. Civil Aviation Authority, and the U.S. Food and Drug Administration, to name just a few.

The ways that these regulators seek to solve problems vary, but by definition they tend to involve the application or enforcement of *regulation*. A regulation is typically understood as a *rule* backed up by *consequences*.[5] To implement a regulation, regulators often issue permits or approvals upon an applicant's demonstration that the criteria specified in the applicable rules have been satisfied. For example, the U.S. Food and Drug Administration approves new drugs upon finding them to be safe and effective. Regulators also inspect and monitor the behavior of the individuals and entities subject to governmental rules, and they check to ensure that the outputs of that private behavior comply with the rules. The U.K. Drinking Water Inspectorate, for instance, both monitors drinking water quality in England and Wales and inspects water suppliers for compliance with mandated protocols. When regulators find that rules have not been followed, they may take a variety of actions to respond, from affirmatively helping the noncompliant entities come into compliance to punitively taking enforcement actions and imposing fines.

But regulators are not only rule appliers and rule enforcers. They also take a variety of other actions—from educating to subsidizing to adjudicating disputes, all in an effort to solve the problems they have a responsibility to address. The U.S. Environmental Protection Agency, for example, devotes considerable effort to public education and has created dozens of voluntary programs designed to encourage businesses to improve their environmental performance in ways that go beyond mere compliance with regulations. In addition, regulators gather information and produce research. They engage with different segments of the public, interacting not only with the regulated industry and other government officials but also with a myriad of individuals and organizations interested in or affected by the work they do.

Through their many different types of actions, regulators seek to respond to immense societal challenges. The specific problems any regulatory institution aims to solve will depend on the mandate it has been given by political leaders, with different regulators tasked with solving different types of problems. That is why there are different fields of regulation and different regulatory institutions associated with virtually every sphere of the economy: aviation safety regulation, banking regulation, consumer product regulation, drug regulation, environmental and energy regulation, food safety regulation, and so forth.

Although regulatory problems come in many varieties associated with nearly every part of life, the major justifications for regulation are classically grouped into three categories that fall under the concept of *market failure* and its three main types:[6]

— *Concentrated power*. Markets fail either when competition does not exist or when it breaks down. If left unchecked, monopolies can generate higher prices or reductions in service and access. Regulators that protect competition by combating price fixing and market dominance, or that regulate prices and services of natural monopolies like public utilities, are often referred to as "economic regulators." Institutions that regulate the prices of water, electricity, and natural gas are often justified as a response to the problem of concentrated market power.

— *Externalities*. Markets work best when the prices of goods and services reflect their full costs and benefits. But some market activities have spillovers; that is, their costs (or benefits) are borne (or enjoyed) by third parties who are not involved in transactions for the relevant goods or services. Environmental pollution is a classic example of a negative externality, as the costs of pollution are imposed on community members who are not compensated by market transactions with the entity creating the pollution. If negative externalities are left unaddressed, the goods and services associated with the externalities will be overproduced; firms will invest too little in methods for reducing those externalities.

— *Information asymmetries*. Markets also depend on the parties to economic transactions having full information about what they are contracting over. But in many situations, one party to an economic transaction lacks access to relevant information. A patient who buys medication, for example, seldom knows as much as a pharmaceutical company does about the medication's effectiveness and its side effects. Some regulators mandate disclosure to close the information gap.

Regulators also address many other kinds of problems, even if those problems do not fit neatly within the three categories of market failure. For example, regulatory scholars increasingly call attention to cognitive biases that prevent people from behaving in ways that serve their best interests, which may justify certain kinds of regulatory interventions.[7] In addition, regulators have been set up to protect civil rights, promote equity, and combat discrimination—all ways of advancing values selected by democratic legislatures but that are less easily justified by an appeal to the concept of market failure. Often a regulatory institution will be charged with solving a combination of several different types of problems at once.

Different regulators tackle different problems and oversee different industries, and their place in a system of government, such as their degree of separation from the legislature can also differ.[8] Some are headed by a single director, while others are headed by a multimember body. Some rely on funding from the legislature through normal governmental appropriations, while others are funded through fees collected from industry. Most regulators can set their own standards, norms, and directives to fill in gaps or provide clarity to laws created by legislatures or other policymaking bodies, but the nature and degree of regulators' rulemaking authority can vary from one regulatory domain to the next.

Variation in the design of regulatory institutions and in the problems they are charged with addressing means that no single, simple formula for success can apply across the board to all regulators. Indeed, even in the same jurisdiction and policy domain, regulators frequently confront a need to balance or choose among multiple or competing objectives, making any simple recipe for success elusive. And yet, despite regulators' varied mandates and institutional structures, regulators around the world still share some features that make it reasonable to think of them collectively and to consider their shared challenge of achieving excellence.

Common Features of Regulators

Across the world's democracies, regulators share at least four commonalities: (1) a delegated mission; (2) tremendous discretion combined with public accountability for the use of that discretion; (3) complex, dynamic problems; and (4) a typically diverse set of regulated firms with interests at odds (at least to some degree) with those of the regulator. These four common features offer important implications for achieving regulatory excellence.

Mission. No matter what industries or types of problems regulators address, regulators everywhere must solve problems in a way that delivers public value, such as by solving market failures. Each regulator's mission will be defined largely by its legislative mandate. In pursuing this mandate, the regulator has an overarching responsibility to act in ways compatible with the overall good of society.

Discretion with Accountability. All regulators possess discretion. The day-to-day responsibility of implementing and enforcing laws brings with it a degree of discretion over the regulator's priorities, including what aspects of a problem to focus on or what rule violations to target or overlook. In democracies, regulators are also accountable for how they use their discretion. Accountability runs through to other governmental authorities, including the legislature, as well as to the regulated industry, rights holders, community interests, and ultimately the broader public.

Complex, Dynamic Problems. Regulators tend to face some of the most difficult challenges in society – ones that often present value tradeoffs. These problems frequently involve complex technological operations, social interactions, and new technologies—the very sorts of problems about which there exists a great deal of uncertainty. Accident avoidance, for example, is a common regulatory objective, but the sources of accidents can be both legion and interactive, making it difficult to foresee every pathway that might lead to accidents in systems with highly complex interactions of many moving parts. Regulatory problems are almost by definition problems that markets cannot solve. They also are often the problems that legislatures cannot solve either, whether for lack of expertise or lack of will. After all, if legislatures could solve all problems on their own, societies would not need regulators. Sometimes the only way legislatures can act is to build political coalitions based on broad or even unrealistic principles, such as principles that combine mutually contradictory or at least competing objectives into a single but ambiguous regulatory "mission."[9] When this happens, legislators are in effect telling regulators to surf the crest of a treacherous wave, but then leaving it up to the regulator to figure out how to stand up on the surfboard and do all the balancing and adjusting needed to stay afloat.

Regulated Entities. Success for regulators—unlike success in many other fields of endeavor, such as eminence in the arts or sciences—depends to a large extent on the choices and actions of others, namely, regulated entities. Those regulated entities, usually businesses, have at least five important characteristics that affect the work of the regulator. First, regulated entities can be highly diverse, comprising both individuals and organizations. The U.S. Securities and Exchange Commission, for example, regulates both individual stockbrokers and large multinational corporations that issue stock. Second, many regulated businesses are themselves large complex organizations that often use advanced technologies as part of their industrial operations (such as nuclear reactors, to pick one example). The regulator is, in an important sense, a "meta-manager" of regulated organizations: managing their managers. Third, many regulated firms operate in a competitive market environment and, as a result, are constantly innovating with new technologies, operations, and products. This dynamism presents challenges for regulatory overseers, who must strive to remain current. Fourth, regulated firms are themselves institutions that produce social value. Regulated businesses are employers in their communities and produce valued goods and services that make life possible and worthwhile. Although their private interests are not always fully aligned with the public interest—hence market failures—regulated firms' conduct is seldom banned outright, unlike criminal behavior, which is enforced by police officers. Normal business activities, whether automobile manufacturing, electricity transmission, or air transportation services, are *regulated*, not treated as something like narcotics trafficking, which is banned altogether. Finally, regulated firms are made up of thinking, strategic managers. The world-class violinist does not have to worry about her violin actively moving its strings to avoid her fingers or the bow. Regulatory enforcement officials, in contrast, find themselves engaged in a dynamic, strategic interaction with those upon whom their success depends. The imperfect alignment of regulated firms' private interests with the regulator's and public's interests gives firms reason to act strategically, complying with the letter but not the spirit of the law—or even trying to evade detection altogether.

The combination of the four common features of regulators makes the attainment of regulatory excellence different from, and often much more difficult than, excellence in other domains. To an extent greater than most other professions or endeavors, a regulator's performance is ultimately affected by those who reside outside the regulatory institution itself. It is dependent on a diverse and dynamic collection of other individuals and entities: not just regulated entities, but also legislatures and elected officials, regulatory beneficiaries and their representatives, advocacy groups, and other interested segments of the public.[10] These diverse actors will seldom share the same goals, and minority opinions and groups will exist that merit consideration. The dependence of the regulator on these other actors should be plain to see, as the political metrics of any specific regulator's success will depend on those other actors' goals (however conflicting they may be), while its attainment of success against those metrics will crucially depend on choices made by those within the regulated industry. The entities within that industry will themselves often vary greatly in size and capacity (large vs. small, firms vs. individuals) as well as in their willingness to cooperate (responsible compliers vs. recalcitrant laggards).[11]

Furthermore, regulators must often operate under changing conditions. Regulated firms are not static; in a competitive business environment they face constant pressure to innovate. Scientific knowledge changes with time, with a full understanding of a new technology's risks often lagging well behind technological change itself. Disruptive technologies emerge that upset well-established and well-understood economic patterns. For example, once widespread distributed energy production becomes possible with advances in solar and battery technology, the role for electric utility regulators will be dramatically altered. Public preferences can also shift over time, as can electoral and legislative coalitions, even if laws themselves are not amended.

All of these factors—dependency, diversity, and dynamism—combine to make excellence for regulators very different from excellence in other professional domains. They do not make regulatory excellence unattainable, but they do make the task of regulation daunting and can make it hard sometimes even to know when excellence has been achieved.

How Regulators Are Like Parents

It may help to see that a regulator's challenge is not unlike that of a parent, for many of the reasons just discussed. Success for both a regulator and a parent is in an irreducible sense out of their hands; success for each is *dependent*. Even parents who are by all accounts excellent (caring, nurturing, and wise) can have a child who turns out to be self-centered, rude, needy, or indolent.

Likewise, examples abound of highly successful, self-actualizing individuals who had parents who were, if not abusive, at least neglectful and decidedly subpar.

In addition, as parents with more than one child can attest, different children—even twins—have different personalities and different needs. They are *diverse*. The best way to guide one child's growth may not work as well for another child, even within the same family. Although fairness may require a degree of horizontal equity, parenting still requires recognizing children's differences and showing a willingness to adjust to meet each child's needs. Obviously children are *dynamic* too, in that they change as they grow. How a parent treats a three-year-old will not be the best way to treat that same child at the age of ten, twenty, or thirty.

Regulators and parents have another thing in common: they only partially determine outcomes. In other words, as important as they can be in shaping behavior, whether of regulated firms or children, respectively, each is not the only important force affecting behavior. Children's behavior, and their ultimate success in life, will be shaped by more than just their parents. Nature (genetic predispositions or other ingrained qualities, such as personality) and environmental influences (teachers, peers, and the larger culture) matter. Similarly, much more than just the regulator's behavior influences the behavior of regulated individuals and organizations. Regulated firms have their own version of "nature"—their organizational culture and other internal factors.[12] They also respond to a variety of external factors in addition to regulation, including customer and community pressures. It is sometimes said that a regulated firm operates under more than just a regulatory license; it must comply with an economic license and a social license too.[13]

Recognizing the myriad nonregulatory factors that affect outcomes for a regulator leads to two implications for regulatory excellence. First, to be successful, regulators will often need to adapt their strategies to account for differences in these other economic and social factors. Regulators will likely need to vary their levels of inspections, for example, during different stages of the economic cycle, perhaps inspecting more frequently during times of economic distress. On the other hand, regulators may need to inspect less frequently those firms that are located in denser social networks where others—proxy "inspectors," such as unions, business competitors, or community groups—are keeping watch.[14]

Second, even when they take economic and social factors into account, regulators and those who evaluate them should recognize that they will not always be able to control completely regulated firms' behavior or its resulting outcomes. Internal, economic, and social factors will always matter, and to the extent that they overwhelm or counteract factors under the control of the regulator, even the best regulators will not be able to prevent all problematic behavior or eliminate all undesirable outcomes.

In the end, regulatory excellence is not the same as perfection. Even though managers of excellent regulatory organizations will undoubtedly seek perfection, the reality is that even within the best organizations mistakes sometimes happen, some of which might be tragic and catastrophic. No regulator can guarantee that, among the many employees and managers within the firms in a regulated industry, no one will ever make a mistake. Nor can regulators guarantee that no one on their own staffs will make mistakes. And they should not claim to. After all, sometimes mistakes provide valuable opportunities for knowledge generation.

Regulating is itself a risky business, with risks from acting as well as risks from not acting. A regulatory organization with an extreme culture oriented around the avoidance of all mistakes would mistakenly delay acting at all. Too much risk aversion on the part of a regulator will be no more conducive to regulatory excellence than too much risk taking.

Three Faces of Regulatory Excellence

In considering what makes a regulator excellent, different contributors to this volume view a regulatory organization from three vantage points, focusing at different times on its organizational *traits*, its *actions*, and the o*utcomes* it achieves. In this respect, the contributors are not unlike other analysts and professionals who work for or interact with regulators. The three perspectives on a regulatory organization constitute three faces of regulatory excellence. Each is vital. Indeed, Adam Finkel argues in chapter 11 that regulatory excellence requires an alignment of all three faces so that they reinforce each other.[15] Keeping the three faces of regulatory excellence in mind will help in understanding the various visions and prescriptions found throughout the chapters in this book.

When excellence is conceived in terms of the *traits* of a regulator, the focus is not on specific actions or outcomes but rather on a general "state" of the regulator—a standing set of tendencies, values, and resources on which the organization has to draw or a posture that it generally holds in conducting its day-to-day operations and affecting outcomes in the world. Adjectives such as "strong," "well-funded," "adequately staffed," "credible," "honest," and "legitimate" can be used to describe the regulator's traits as an organization.

Another way to think of excellence lies in the type of *actions* a regulator takes, whether in issuing rules, inspecting facilities, prosecuting violators, or undertaking other day-to-day work. Adjectives sometimes used to describe a regulator's actions include "vigilant," "serious," "reasonable," "evidence-based," and so forth. Excellent actions may also be described in terms of specific types of best practices—for example, "an excellent regulator targets the worst risks," "an excellent regulator uses flexible regulatory instruments," "an excellent regulator adopts a problem-solving rather than a punitive approach to enforcement," and so forth.

Ultimately, the traits of a regulator, as well as its actions, should lead to publicly valued *outcomes*, such as reduced safety risks or improved market efficiencies. After all, that is what makes people want to define excellence in terms of certain traits and actions, because they think those traits and actions are connected to excellent outcomes. A regulator possessing the trait of strength, for example, is thought to be more likely to achieve protective outcomes. A regulator who acts by using flexible regulatory instruments is expected to achieve more cost-effective or efficient outcomes.[16]

Desirable regulatory outcomes often define regulatory success. Sometimes these outcomes are substantive ones, which can be characterized by criteria such as *effectiveness* (solving a problem or achieving a desired outcome), *cost-effectiveness* (achieving a specific level of a desired outcome – namely, a reduction in the problem – at a low cost), *efficiency* (balancing problem reduction with other concerns, such as costs, so as to achieve an optimal level of reduction in the problem), and *equity* (resulting in a fair distribution of the costs and benefits of regulatory action, either across segments of society or over time). In addition, process-oriented outcomes often matter too, such as *legitimacy*, *credibility*, and *trustworthiness*. Some of these process-oriented adjectives are the same as ones used to describe general traits of a regulatory organization, but they can also describe the outcomes of specific processes. For example, an evaluator might ask whether a regulator's public hearings leave members of the public feeling that they were listened to and respected, and hence that the process resulted in a sense of legitimacy held by those affected.

Traits, actions, and outcomes all have a close bearing on each other. Traits can help reinforce certain kinds of actions, while consistency in actions over time can help determine traits. Both traits and actions, in turn, should affect outcomes. Given how all three faces interact, it is clear that the challenge of regulatory excellence is multifaceted. To create and sustain excellence, regulatory leaders must build and maintain an organization that fosters the kinds of regulatory and operational actions that lead consistently to superior performance. This means that a regulator's leaders must give at least as much attention to how they manage their organizations as to what kinds of regulatory policies they adopt and what types of enforcement strategies they follow. These leaders must work to define a clear mission to their organizations, ensure that they possess adequate financial and human resources, and maintain a culture that values the public interest over expediency or the primary advancement of industry's interests.

When it comes to their actions, regulators must proceed intelligently and follow, whenever possible, evidence-based practices. Among the important actions an excellent regulator takes are smart priority setting, sound problem solving, and empathic public engagement. Some actions will expressly aim at achieving *substantive* outcomes by changing the behavior of regulated entities. These actions will involve the design of regulatory instruments, choosing appropriately from among traditional "command-and-control" approaches as well as more flexible forms of performance-, market-, management-, or information-based approaches. They will also include decisions about how to target enforcement resources, how to conduct inspections or other oversight, and what types of consequences (penalties or rewards) to deploy for the desired compliance or deterrence objectives.

Other actions will expressly aim at procedural or process outcomes. Given how much a regulator's success is dependent on others, the ways that a regulator interacts with industry, with concerned members of the public, and with other governmental entities will prove instrumental to its attainment of excellence. All things being equal, the more opportunities for engagement the better, and earlier opportunities will almost always be better than later ones. Those who are interested in regulatory decisions should have opportunities both to learn about what the regulator is planning to do and to provide input. The regulator should not just "talk at" the public but should strive to listen carefully to all those who have information and perspectives to contribute, without bias toward one set of interests over another. Listening, of course, is not the same as agreeing. Every interest group should not (and probably cannot) be made equally satisfied with a regulatory decision. But regulators should still be respectful and empathic to all, especially to those adversely affected by its decisions. In particular, regulators should provide the public with clear, transparent reasons for their decisions.

Regulatory Excellence as "People Excellence"

Regulation is widely associated with technical expertise. After all, the issues regulators confront are highly complex and demand in-depth knowledge of science, engineering, technology, economics, and more. To achieve excellence, regulators must obtain detailed mastery of the technical aspects of their work and the operations of the industries they oversee. Even if they cannot match industry entirely in technical research and development, they must ensure they have the in-house capability to assess the actions and associated risks of industry operations sufficiently to be able to oversee the industry.

Yet as vital as it is for a regulator to possess adequate technical skill and knowledge, such expertise is only one necessary component of regulatory excellence. By itself, it is not sufficient. To move from good regulation to excellent regulation, the regulator also needs to master the people side of regulation.[17] Regulation, at its core, is relational. It is motivational. It is fundamentally about affecting people's behavior. The regulator is seldom *directly* fixing problems; rather, it is working with and through members of the public to identify problems that need to be prevented or redressed, and then working with and through the people in the businesses it regulates to shape, steer, and change their behavior and to motivate them to prevent and redress problems. Moreover, the problems regulators seek to redress are ones that affect other people, outside of the industry, who take great interest in the work of the regulator, who want to know what it is doing about those problems, and who want to have a voice in the regulatory process. The regulator also undertakes its work in a setting that involves other people interested in that work who serve in other governmental institutions, whether as elected or appointed officials, judges, or auditors. The regulator, finally, is itself an organization filled with people who need to be managed, motivated, and led effectively because what each employee does reflects on the regulator and affects its performance.

It should be apparent by now that regulators seeking to achieve regulatory excellence need to focus on "people excellence." In part that means, of course, that the people serving in regulatory organizations need to be technically knowledgeable and highly competent. But these organizations also need to possess and sustain an internal culture that fosters and reinforces humility, openness, empathy, and a steadfast commitment to public service on the part of all the people who serve in the regulator's name—and who serve on behalf of the public to which the regulator is accountable. Only if the people working in a regulatory authority are committed to doing their utmost to deliver public value, and to learning and improving in their ability to deliver that value through respectful engagement with others, can a regulator hope to achieve true excellence.[18]

The Trail Ahead: Defining, Seeking, and Assessing Regulatory Excellence

For regulatory professionals around the world, the trail ahead will never be an easy one. This book offers inspiration and guidance for improving the practice and performance of regulation. Its purpose is to inform public officials as well as members of the public, students of regulation as well as scholars of public management. It is intended to spark reflection as well as to impart practical guidance and insight. Its lessons are, of course, necessarily general ones about leadership and management in a regulatory context; this is not a "how-to" manual covering the myriad specific techniques and concrete knowledge that regulators working in particular fields need to master. Rather, it offers meaningful but intentionally "big picture" perspectives on regulatory leadership applicable to virtually any regulatory domain anywhere in the world, as useful for those at a national banking authority as at a local zoning board. Many of the ideas presented here have already found a receptive audience among leaders in fields as varied as public education and public utility regulation.

The remaining chapters in this book are organized into three sections, each demarcating three main challenges that any regulator confronts on its path to the summit of excellence: understanding what it is that *defines* excellence for a regulator, then knowing what steps to take to *seek* excellence, and finally being able to *assess* how much progress it has made. All three of these challenges—defining, seeking, and assessing—are related to each other and cannot be separated entirely, but the emphases provided in the chapters that follow do offer the reader thoughtful expert advice about what regulatory excellence entails, how to achieve it, and how to know how well a regulator is doing. Written by authors from different disciplines, countries, and substantive specialties in regulation, these chapters offer a variety of views—many of them compatible with one another, but also some with differing emphases—concerning each of the three challenges of regulatory excellence.

In the first section, the contributors advance broad, often ambitious, visions for defining regulatory excellence. In chapter 2, John Braithwaite emphasizes the importance of excellent regulators making transformational impacts on industry and even throughout society in ways that create significant public value. He cautions against focusing too much on the quality of the rules on the books, and instead urges that excellent regulators are those who assume responsibility for and end up solving society's most important problems. In a similar spirit, Wendy Wagner argues in chapter 3 that excellent regulators follow President Theodore Roosevelt's advice to keep their "eyes on the stars" (that is, prioritize the advancement of the public interest) while also keeping their "feet on the ground" (maintaining expert, accessible, and fair decision processes). Wagner emphasizes that the best regulators meet a series of vital process benchmarks that ensure that regulatory decision-making exhibits robust public engagement, well-reasoned decisions, and sound information-gathering strategies. Kathryn Harrison, in chapter 4, goes further to argue that process virtues, such as procedural fairness, transparency, and honesty, are the "fundamental underpinnings" of regulatory excellence in democratic societies. For Harrison, robust and fair democratic engagement provides not the exclusive measure of regulatory excellence, but one that technical experts within regulatory authorities too often overlook at their peril. In chapter 5, John Graham and Paul Noe urge regulators to go beyond a focus on fair process and ensure that in the end they actually achieve outcomes that significantly advance the well-being and overall welfare of citizens. Graham and Noe acknowledge that procedural fairness is a necessary condition for excellent regulation, but they say that getting the substance right and ultimately promoting individual well-being throughout society is what determines whether excellence has been achieved. Ted Gayer, in chapter 6, argues that the best regulators show humility and even some degree of restraint before making substantive decisions, making sure to be guided by thoughtful consideration of scientific evidence and proceeding with the recognition that ill-considered regulation can cause its own kinds of harms. He offers suggestions for regulators to improve their capacity for rigorously assessing the quality of the evidence available to them when they make their decisions. Whether those decisions involve setting standards or targeting firms for inspection, regulators must assess and manage risks, which leads Bridget Hutter, in chapter 7, to argue that excellent risk-based regulation requires, in addition to sound technical and scientific analysis, careful consideration of a wide range of social, economic, and political values related to risks. She calls attention to the widening of the regulator's decision-making environment in today's interconnected world. In chapter 8, Robert Baldwin uses the concept of lucidity, which he defines as a clarity of approach in delivering on the essential tasks of regulation, to argue that the excellent regulator is defined by how attuned it is to its setting, how intelligent it is in knowing what it needs to achieve, and how dynamically it responds to changes in its environment.

With these definitional insights about regulatory excellence established, the chapters in this book's second section provide guidance for how a regulator should go about seeking to achieve excellence. Drawing on practices in the business world as well as on his experience leading a regulatory agency with combined economic and social regulatory responsibilities, Daniel Esty in chapter 9 outlines key strategies for achieving regulatory excellence, including a clear vision, thorough analysis, and willingness to innovate. Shelley Metzenbaum and Gaurav Vasisht in chapter 10 distill the essential ingredients for regulatory success down to a well-defined mission, adequate funding, sound information, and thoughtful judgment in selecting tools to solve regulatory problems. In chapter 11, Adam Finkel steps back and, after reconsidering the many underlying virtues of an excellent regulator, argues that regulatory excellence depends both on an alignment in a regulator's traits, actions, and outcomes and on finding the "sweet spot" on a spectrum of virtues that compete with each other. Neil Gunningham, in chapter 12, tackles what it takes for regulators to achieve excellence in their compliance and deterrence strategies, arguing that while common wisdom has implored regulators to select a single strategy, the best regulators deploy different strategies that they combine in varying ways, depending on the context. In chapter 13, David Vogel provides a focused consideration of three case studies of successful regulation, finding that the excellent regulatory officials in these cases worked to maintain public confidence, strove for continuous learning, and interacted constructively with regulated industry. David Levi-Faur builds on regulators' need for learning in chapter 14, where he proposes that regulatory excellence requires regulators to draw on diverse forms of expertise, including knowledge of history and political science. In chapter 15, Howard Kunreuther and I consider how another societal risk management tool—insurance—provides a model for regulation as well as opportunities for building effective public-private partnerships that can contribute to regulatory excellence. In chapter 16, Angus Corbett wraps up the advice for regulators who seek excellence by arguing that successful regulators will adopt a systems orientation, using their resources to find and exploit leverage points to influence systemic change in ways that achieve public goals.

The book's final section turns to the challenge of assessing regulatory excellence. The kind of learning and continuous improvement that contributors emphasize as an inherent component of regulatory excellence demands that regulators regularly and systematically take stock of their progress. It is not enough to try to achieve excellence; especially in a fast-changing world, regulators need continually to assess their performance and adapt as needed. Toward this end, Donald Moynihan, in chapter 17, offers regulators a set of practical but research-based performance measurement principles to use as they measure their progress along the path toward excellence. Among other things, Moynihan cautions against making too strong a connection between measures of performance and incentives for regulatory employees. In the final chapter, chapter 18, I distinguish the measurement systems needed for a regulator to become excellent from measurement systems that purport to gauge whether a regulator is excellent, arguing that systems of the former kind (measurement *for* excellence) are more important than those of the latter (measurement *of* excellence). This closing chapter serves as a reminder of this book's underlying premise, namely that regulators can do better by paying more attention to learning how what they are currently doing is advancing public policy goals, hindering them, or neither. Only by understanding better what works and what does not, and then by taking steps to adjust their practices accordingly, can regulators meet the challenge of regulatory excellence.

Conclusion

The roles that regulators perform are vital to society, but the work they do is hard work. Just regulating well is demanding and difficult. Achieving excellence requires more. It requires full, consistent, and superlative mastery of all the technical, analytic, and social tasks involved in the enterprise of regulating. Not only do today's regulators oversee complex technologies and business practices during the course of their work, but they also operate in complex social, economic, and political systems where their success is ultimately defined and shaped by their interactions with others, including, in the end, regulated entities. Moreover, regulators do not operate in a static environment. Regulatory excellence requires listening attentively to changing public concerns. It requires constantly learning on the job. It also requires boldness and visionary leadership. The excellent regulator cannot stay in one place, content to have mastered the past or the present. The world changes, its problems change, its science and technologies change, its economic conditions change, and ultimately its social fabric can change too. In such a world, regulatory excellence demands forward momentum. It is not a static achievement.

Acknowledgments

For helpful comments on this chapter, I am grateful to Bill Finan and Adam Finkel and the two anonymous reviewers of the book manuscript.

Notes

[1] Atul Gawande, *Better: A Surgeon's Notes on Performance* (New York: Picador, 2008), p. 4.

[2] Will Durant, *The Story of Philosophy: The Lives and Opinions of the World's Greatest Philosophers* (New York: Simon and Schuster, 1991).

[3] This challenge was not eliminated for those contributors who have held high-level positions in the past within government agencies (for example, Braithwaite, Esty, Finkel, Graham, Metzenbaum, Noe, and Vasisht). Regulatory practitioners are too often focused solely on the weeds, each within their individual policy silos, while "regulatory excellence" calls for at least some thinking closer to the level of the Platonic ideal.

[4] On professional self-reflection, see Donald A. Schön, *The Reflective Practitioner: How Professionals Think in Action* (New York: Basic Books, 1984).

[5] Cary Coglianese, Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy (Paris: OECD, 2012) (www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf). See generally Frederick Schauer, *The Force of Law* (Harvard University Press, 2015).

[6] For a discussion of market failure as a justification for regulatory intervention, see W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington Jr., *Economics of Regulation and Antitrust*, 4th ed. (MIT Press, 2005); Office of Management and Budget, Circular A-4: Regulatory Analysis (September 17, 2003) (www.whitehouse.gov/omb/circulars_a004_a-4/). The concept of market failure provides an analytical and policy justification for regulation; it does not necessarily provide an historical or political economy account of why a particular set of economic activities actually came to be regulated.

[7] Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New York: Penguin, 2008); Alberto Alemanno and Anne-Lise Sibony, eds., *Nudge and the Law: A European Perspective* (Oxford, U.K.: Hart, 2015).

[8] See, for example, Kirti Datla and Richard L. Revesz, "Deconstructing Independent Agencies (and Executive Agencies)," *Cornell Law Review* 98 (2013): 769.

[9] At the limit of contradictory demands, regulatory organizations have sometimes been charged with the dual tasks of regulating an industry while also fostering its growth and profitability. Sometimes such a dual mandate is given to the same entity (such as the former U.S. Atomic Energy Commission), while at other times it falls to several offices or divisions within the same larger organization (such as the U.S. Department of Agriculture).

[10] Commentators agree that a regulatory body is only one institutional entity within a larger governmental and societal system. Sanford V. Berg, Best Practices in Regulating State-Owned and Municipal Water Utilities (Santiago: United Nations Economic Commission for Latin America and the Caribbean, 2013), p. 12; United Nations Economic Commission for Europe, Risk Management in Regulatory Frameworks: Towards a Better Management of Risks (Geneva: UNECE, 2012); Ashley C. Brown and others, Handbook for Evaluating Infrastructure Regulatory Systems (Washington: World Bank, 2006), p. 17 (http://siteresources.worldbank.org/EXTENERGY/Resources/336805-1156971270190/HandbookForEvaluatingInfrastructureRegulation062706.pdf).

[11] Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982); Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press, 2003).

[12] Jennifer Nash and Cary Coglianese, “Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions,” *Law & Policy* 30 (2008): 73–107 (http://ssrn.com/abstract=1085058).

[13] Gunningham, Kagan, and Thornton, Shades of Green; Dorothy Thornton, Robert A. Kagan, and Neil Gunningham, “When Social Norms and Pressures Are Not Enough: Environmental Performance in the Trucking Industry,” *Law & Society Review* 43 (2009): 405–36 (http://dx.doi.org/10.1111/j.1540-5893.2009.00377.x); Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, “Social License and Environmental Protection: Why Businesses Go Beyond Compliance,” *Law & Social Inquiry* 29 (2004): 307–41(http://dx.doi.org/10.1111/j.1747-4469.2004.tb00338.x).

[14] On the value of proxy inspectors, see generally Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

[15] A regulator can only truly be said to be responsive (a trait) if it makes major policy decisions by soliciting public input (an action) and members of the public actually believe that the regulator is trying to listen (an outcome).

[16] Cary Coglianese and Lori S. Bennear, “Flexible Approaches to Environmental Regulation,” in Michael Kraft and Sheldon Kamieniecki, eds., *The Oxford Handbook of U.S. Environmental Policy* (Oxford University Press, 2012).

[17] Deirdre Hutton, “The Role of Stakeholder Relationships in Regulatory Excellence,” *The Regulatory Review*, July 27, 2015, www.theregreview.org/2015/07/27/hutton-regulatory-excellence/.

[18] On the meaning of public value and its primacy for governmental organizations, see Mark Moore, *Creating Public Value: Strategic Management in Government* (Harvard University Press, 1997); Mark Moore, Recognizing Public Value (Harvard University Press, 2013).