

Citizen Participation in Regulation 1.0

A Supplement to the Interactivity Foundation Discussion Guidebook: The Future of Regulation

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Many areas of regulation seem remote to citizens. Sometimes that is because of the complexity of some regulatory subject matter (technical matters that require understanding of science are one such area of frustration). Other times it is the scale of regulation that keep citizens at arms length (it is difficult for citizens to participate in national regulatory processes that have little or no public notice outside of the *Federal Register*). In some cases citizens are simply confused about what regulation is, seeing it as part of a perplexing jumble of laws and court decisions, not as distinct part of government operations that combines administrative, legislative, and judicial functions.

For the purposes of this supplement to *The Future of Regulation guidebook*, we will consider **regulation** to consist of **functions of the executive branch of government that carry out the details of administrative agency oversight and enforcement of matters delegated to that agency**. Regulation is the implementation of laws passed by the *legislative branch* where there is recognition that spelling out the specifics is difficult and beyond the expertise of the *legislative branch* and the *judicial branch*. In other words, where those other branches might be overwhelmed by complexity or a volume of mundane detail, there has been a tendency to assign *rulemaking* and *administrative enforcement* to a regulatory agency.

The range of things that might be accomplished by regulation is quite large, but includes some basics such as *development of standards, issuance of licenses and permits, setting of rates, monitoring for compliance, planning, investigation of complaints, issuance of citations for violations, and conducting hearings to determine penalties and corrective measures*. The areas of public concern covered by regulation are also extensive, with the public largely aware of things like utility rates, zoning, and food safety. But there is usually less awareness of the regulatory side of public health, emergency management, economic development, financial transactions, and other areas that might not touch individuals directly.

Policy Possibilities for Citizen Participation in Regulation

- A. Make the System Work— Reinvigorate Current Participatory Approaches
- B. Empower Public Interest Advocates— Create Citizen-Guided Institutions with Professional Staffing and Adequate Resources
- C. Promote Direct Citizen Regulation—Enlarge the Public’s Role in Regulation
- D. Transition to In-Direct Citizen Regulation—Extend Representative Democracy Principles Into Regulation
- E. Rely on Citizen Juries Where Possible—Encourage Community Members to Decide Matters of Responsibility and Liability

Glossary of Terms

Administrative enforcement - levying of penalties of issuance of corrective orders by agencies, not courts

Citizen grand jury - a non-actionable, non-governmental organization that assumes a responsibility upon itself to accuse an individual or groups of individuals of having committed actionable crimes, in a similar aim as that of official grand juries.

Corrective measures - actions taken to prevent the recurrence of an event that caused the problem initially

Development of standards - The process of setting thresholds for conduct or triggers for enforcement often involving measurements and generally agreed upon scientific findings

Due process - the regular administration of the law, according to which no citizen may be denied his or her legal rights and all laws must conform to fundamental, accepted legal principles, as the right of the accused to confront his or her accusers.

Federal Register - a bulletin, published daily by the U.S. federal government, containing the schedule of hearings before Congressional and federal agency committees, together with orders, proclamations, etc., released by the executive branch of the government.

Investigation of complaints - agency examination of possible breaches of conduct on violation of standards

Issuance of citations for violations - often a lower form of sanction (something like a traffic ticket) that an inspector or investigator can issue on the spot

Issuance of licenses and permits - agency determinations around such activities as ability to participate in a profession, operate a business, and construct buildings, or similar activity

Judicial branch - the branch of government charged with the interpretation of laws and the administration of justice; the judiciary

Jury instructions - the set of legal rules that jurors ought follow when deciding a case. Jury instructions are given to the jury by the jury instructor, who usually reads them aloud to the jury.

Legislative branch - the branch of government having the power to make laws; the legislature

Monitoring for compliance - ongoing agency activity to that conduct to existing standards or follow-up observation after an administrative order

Nullify - to render or declare legally void or inoperative

Ombudsmen - a government official who hears and investigates complaints by private citizens against other officials or government agencies.

Planning - the preliminary "vision" that establishes a framework for subsequent activity, often in land use and zoning

Private Attorneys-General - informal term usually used today in the United States to refer to a private party who brings a lawsuit considered to be in the public interest, i.e., benefiting the general public and not just the plaintiff.

Rulemaking - In administrative law, rule-making refers to the process that executive and independent agencies use to create, or promulgate, regulations. In general, legislatures first set broad policy mandates by passing statutes, then agencies create more detailed regulations through rulemaking.

Setting of rates - agency determination of pricing or pricing ranges, as in utility rates

Whistleblower - a person who informs on another or makes public disclosure of corruption or wrongdoing.

Policy A: Make the System Work—Reinvigorate Current Participatory Approaches

Regulation was not initially designed as a system of insiders and technocrats. Modern regulation was, in large part, a response to the abuses of patronage and political corruption in the administration of public agencies. Regulation has many features that provide a framework for transparency and citizen input. Over time some of these features have grown “rusty” and poorly understood. Some would argue that regulatory agencies were often “captured” by the very interests they were meant to regulate. It may also be the case that weakened civil society institutions and increasing complexity contribute to a lessening of public involvement and alertness.

This policy approach takes the view that the legal and political systems that serve as the foundations for regulation can and must be made to work on behalf of the public interest. The legislative branch establishes frameworks for regulation, the executive branch carries out regulatory administration and enforcement, and the judicial branch may be resorted to when there are questions about the meaning of the regulatory frameworks or issues of due process in the application of regulations.

Most systems of regulation have built-in systems of public notice of regulatory meetings, publications explaining regulatory operations and procedure, and opportunities for the public to comment in writing or to appear at meetings or hearings. Regulatory agencies are typically subject to the general laws on open records and open meetings. This does not mean that regulatory processes are easy for citizens to navigate. Indeed, much of the public (and many of those subject to regulation) feels that regulation is a maze that they become easily lost in.



Policy A: Make the System Work—Reinvigorate Current Participatory Approaches

As with many areas of democratic governance, regulatory systems seem to function as intended when the public at-large, civic organizations, and the media are paying attention and are prepared to act. This has been accomplished in some cases by ongoing public interest organizations that monitor regulatory matters of constant interest or by ad hoc community organizing around specific regulatory issues. Petitioning, demonstrations, and even civil disobedience have also made regulators aware of public sentiment and shaped the direction of regulatory action.

This policy approach takes the position that citizen responsibilities include awareness of and engagement with regulatory systems and a willingness to demand that they live up to our values of fairness. Citizen discussion of ways to improve the basics of citizen participation in current regulatory systems produced the following points:

- *Provide additional opportunities for members of the general public to serve on regulatory boards and committees.*
- *Expanded Whistleblower protections in regulatory settings for regulatory agency staff and regulated industry employees.*
- *Enlargement of opportunities for citizens to recover legal expenses and damages resulting from improper regulatory action.*
- *Expanded capacity for citizens and civic organizations to intervene and act as Private Attorneys-General when agencies fail to enforce regulation.*
- *Require that legislative bodies with audit and review responsibilities conduct top-to-bottom periodic oversight and reporting on regulatory operations.*

Notes

Policy B: Establish and Empower Public Interest Advocates—Create Independent Intervention Capacity Within Government or In Quasi-Governmental Organizations

Monitoring of regulatory action often demands expertise and extensive time commitments. Where large bodies of economic or scientific data must be evaluated or where experts must be hired or consulted, the citizen or small business is at a clear disadvantage. Not so with the large regulated interest with its lawyers, accountants, and technical personnel. Some would argue that is precisely these matters of scale, resources, and complexity that have made regulation inhospitable to citizens. Others might say that the primary answer to these difficulties lies not in citizens banging their heads against regulatory walls, but in professionalizing and institutionalizing public interest advocacy that is capable of acting on behalf of citizens.

A number of democratic governance systems rely on independent representatives to pursue citizen grievances and untangle bureaucratic difficulties. This function often has combined investigative, advocacy, and public education roles. Some see these roles as aids to navigating governmental processes.



Policy C: Promote Direct Citizen Regulation—Enlarge the Public’s Role in Regulation

Regulation is often thought of as the opposite of town hall democracy, with emphasis on expertise as opposed to majority rule. Many regulators have had negative experiences with the public: disruption of agency proceedings, low-information citizen participation that ignores established procedure and precedents, and unrealistic expectations of what can be accomplished in the regulatory process. Regulators may feel scapegoated by elected officials who establish regulatory frameworks and then dodge responsibility for the consequences of the outcomes of regulation. Yet it may be possible and even beneficial to apply democratic practice to certain areas that are currently subject to conventional regulation. Such direct citizen participation in regulation may be helpful where the public’s will and desires are key measures of whether regulation is “successful”. And regulators may find that democratic practices may remove them from the “blame game”.

Enlarging the citizen role in regulation by direct public participation in establishing rules, setting enforcement priorities, and assessing penalties may prove too complex for certain areas of regulation. It is hard, for example, to imagine how one might do this at the national level in areas like financial regulation or national security. It is easier to imagine how this might be accomplished at the local level or even at some state or regional levels. It might be suggested that in many cases direct citizen regulation will not be an entirely black and white matter of do it or do not. Some regulatory agencies may have subcomponents or functions that are easily “democratized”, while other parts of the regulatory mission may pose significant challenges to public participation.



Policy D: Transition to Representative Democratic Regulation—Rely on Our System of Representative Democracy to Select Our Regulators

In contrast to Policy C, this policy approach is indirect, relying on elections and other citizen expressions of preferences to choose those in charge of regulation. It would transfer what is now the appointive power of the executive branch (and occasionally the legislative branch) in selecting the chief regulatory officers to the voters. Citizens would evaluate and express preferences for candidates for regulatory offices in manners similar to other elected public offices. A case may be made that some regulatory officials perform functions that should be held to a high degree of accountability to the public. When such officials are the “employees” of an elected executive branch official—who might be responsible for a number of diverse regulatory agencies— such accountability is more difficult to achieve.



The case for such a representative democratic transition is that there would be the possibility of more direct accountability to the voters, more exposure of the key regulatory issues at stake, and more scrutiny of the professional qualifications and ethical standards of potential regulators. Where Policy C was seen as most workable at the local level by citizen discussants, Policy D was seen as an intermediate step that might prove workable for some state level regulatory frameworks.

An example of how this approach might work that was frequently mentioned was the regulation of public utilities. Utility rates and the creation of utility infrastructure are often of great interest to citizens and business. Yet in systems where elected executive branch officials appoint the chief regulators (who sometimes serve beyond the terms of the elected executive branch official) it can be difficult hold the agency regulators to account. The executive branch official may not be able to “un-appoint” the agency regulator and it may be unfair and unwise to vote elected executive branch officials out of office when they are otherwise performing their duties.

Policy D: Transition to Representative Democratic Regulation—Rely on Our System of Representative Democracy to Select Our Regulators

Citizen discussions also produced a sense that the selection of democratic regulatory officials would benefit from some separation from typical partisan election processes. It was thought that nominees for regulatory office should usually be non-partisan, that they should be vetted and rated by independent panels of related professionals, and that, in some cases, qualifying credentials (licenses, certifications, etc.) should be required. Discussions produced the following possible elements of this policy approach:

- Elect the chief regulatory officials in areas of regulation the public deems vital and where accountability is thought important to the public interest.
- Provide for minority party representation where the regulatory body has multiple members and is elected in partisan elections.
- Fund the campaigns of candidates for regulatory office through modest amounts of public financing and publicly-sponsored forums that tend to focus on candidate qualifications and vital regulatory issues.
- Subject candidates for regulatory office to strict disclosure requirements concerning any connections to or financial holdings in the businesses subject to the regulatory body in question.

Notes

Policy E: Rely on Citizen Juries—Develop A Hybrid Model that Uses Citizens as Fact Finders

In contrast to the broad public participation in the general regulatory processes of Policy C, this policy approach relies on citizens to decide individual cases of regulatory enforcement in way similar to juries in court trials. Some discussions of this approach initially thought of Policy E as an expansion of the traditional legal frameworks of Policy A, while other discussions saw the citizen jury as a possible implementation of Policy C. Further developmental discussions by test groups arrived at treatment of the citizen jury as a special case that relies on an old common law institution within the context of modern regulatory decision-making.

Citizen juries might be used in certain areas of regulation where determinations of fault or intent rests on the credibility of those cited for regulatory violations. Did violation occur or not? Who is responsible? What weight should be given to evidence and mitigating circumstances? Such a system of regulatory enforcement might confine itself to relatively simple determinations by a citizen jury of “yes” or “no” questions. Or a citizen jury might follow the more complex patterns of trial courts and have jury instructions that mandate certain findings if the jury answers questions one way as opposed to another way. It may also be the case in such a system that the citizen jury is assessing not only the character and reliability of those cited for regulatory violations, but of the character and reliability of the regulatory officials involved in the case.



Policy E: Rely on Citizen Juries—Develop A Hybrid Model that Uses Citizens as Fact Finders

This policy approach could act as a check on arbitrary and over-zealous regulatory enforcement that violates community sensibilities. Citizen jurors may detect patterns of abusive enforcement, overly technical application of rules to minor infractions, or cases where regulatory agencies have enlarged the scope of their enforcement powers beyond a common sense reading of the rules. Citizen juries may well acknowledge that a regulatory violation has indeed occurred, but the behavior of the regulators is more outrageous than the cited behavior of the violator. We could allow citizen juries to in effect nullify regulatory citations, as is sometimes the case with charges in criminal trials where juries may decide to not convict a defendant, even where evidence supports the charge.

Use of a citizen jury system raises many other issues about how such juries would be set up and administered. Citizen juries might be smaller in size than the twelve-member bodies (with possible additional alternates) that we might first think of. They might be formed to make a finding in a particular case or they might be empaneled to hear a variety of cases before a regulatory agency over the course of a number of days. There may even be room within this approach for a citizen grand jury, where a group of citizens may be empaneled to hear evidence in matters involving patterns of ongoing activity and might issue findings on whether further regulatory enforcement is justified. Developmental discussion of these structural and administrative issues focused on the following:

- Eliminate barriers within statutes and constitutions that might prohibit or limit this delegation of decision-making authority to citizens.
- Create fair systems of selection of citizen jury members for regulatory matters that provides for participation of diverse elements in the community population.
- Restrict the scope of challenges to potential citizen jury members, perhaps only allowing a challenge for a direct conflict of interest or relationship to a party in the controversy.
- Consider whether—in some regulatory cases—citizens with relevant qualifications or experiences might be empaneled as an expert jury.
- Develop educational materials that prepare citizens for participation in regulatory juries.

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