

# Regulation, Ethics and ‘Policy Technology’<sup>1</sup>

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## I Setting the Focus

It will be helpful initially to get a fix on what we are taking *regulation* to be.

This is worth doing because, so often, what counts as regulation is taken for granted, especially when people are arguing that it offers crucial solutions or constitutes intolerable interference. Often such discussions focus on a particular case – “regulations” issued by the FDA for example – and ask whether the regulations that prevail are the best ones and indeed whether things would be better if there were no regime of drug regulation at all. This approach involves restricting the scope of the topic in two ways: first, it narrows the domain (to some specific area of policy); and second, it conceives of regulation as a distinctive business of *governments*. Both such restrictions are, we think, important to call into question.

Imagine that you are a staunch libertarian (this will of course be a stretch for many of us). You are, let us suppose, an exponent of the ‘minimal state’. You think that government’s role should be restricted to specifying and enforcing basic rights (both personal and property); setting the rules determining which among those rights are alienable and which not; and for the alienable ones, specifying what rules apply to (voluntary) exchanges. It is, we think, obvious that this set of (minimal state) rules – the specification of property rights and the rules for the exchange of property -- represents in itself a *regulatory* regime. Moreover, when you recognize the proclivity of governments to intervene in the outcomes of individual interactions *beyond* setting up the basic rules of your favored libertarian order<sup>2</sup>, you might think it appropriate and necessary to have additional regulations in place that explicitly forbid such interventions, in the hopes of preventing them.

In this spirit, you might usefully distinguish between ‘constitutional’ and ‘intra-constitutional’ regulations – between those regulations that *constitute* the regime and those regulations that

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<sup>1</sup> We are grateful to John Hasnas for providing the incentive to think about the ethics of regulation. Truth be told, without his invitation, we likely would not have spent much time thinking about these issues. In the event, we found it thoroughly enjoyable and rewarding. An early version of this paper was discussed with a terrific group of people at The Ethics of Regulation Symposium at the Georgetown Institute for the Study of Markets and Ethics. We are especially grateful to Kendy Hess, John Hasnas, Harrison Frye, and Andrew Cohen for the questions they raised and the points they made at that workshop.

<sup>2</sup> WS Gilbert (of G & S fame) puts the requirement nicely in *Iolanthe*, when he observes that

*“...while the House of Lords withholds its legislative hand,  
and noble fingers have no itch  
to interfere in matters which  
they do not understand,  
then bright will shine Great Britain’s rays  
as in Queen Bess’s glorious days”.*

*operate within* the regime so constituted.<sup>3</sup> So, for example, a determination of property rights structure and a set of rules for exchange (in cases where the rights are not inalienable) would be a constitutional regulation, whereas laws that set the speed limit on roads or that compel people of a certain age to do two years of military service would be intra-constitutional. You might then allow that constitutional regulations are necessary while rejecting the legitimacy of intra-constitutional regulations.

Alternatively, perhaps you are an even more extreme libertarian than the aforementioned. Perhaps you support a world in which there is no explicit collective agent at all – no body charged with the enforcement of your preferred rights structure and/or appropriate rules for exchange. You may believe that such matters would be best managed by social norms – ones that are internalized by participants and/or enforced by the pressure of social esteem. There seems after all little doubt that social norms can, sometimes, serve to replicate the effects produced by government regulations, for good or ill. Often, it seems, social norms work effectively to regulate behavior in salutary ways that no law or government requirement could hope to do. As Mill noted, social norms can be a powerful force that operates outside and beyond government action to make the world better. Yet, as he also noted, they are so powerful that we need to protect against the “tyranny of prevailing opinion and feeling” and “moral coercion of public opinion.”<sup>4</sup> In noting the latter, Mill was understandably concerned that political theorists thinking about coercion too often ignore the coercive role that social norms and popular opinion can play, failing to appreciate that they can be as tyrannical as any regulatory regime implemented and administered by governments.<sup>5</sup>

We have focused temporarily on libertarianism simply to bring into relief the idea that even those firmly against government regulations will discover that morally relevant regulatory environments are almost inescapable. In the process, we have put in play what we regard as two important distinctions: that between constitutional and intra-constitutional government regulations; and that between government and non-governmental regulatory mechanisms. The first of these is familiar from other work (including that of Buchanan) and we shall not pursue it in further detail here. The second is a little less familiar, or at least less often noted, and we shall want to say a little more about it. However, neither of these distinctions – though useful in elaborating the domain of enquiry here – provide a working understanding of regulation itself as a phenomenon.

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<sup>3</sup> This is a distinction, for example, that James Buchanan emphasizes in the ‘constitutional political economy’ strand of his public choice project – and corresponds to Rawls’ distinction between matters relevant to the ‘basic structure’ and other matters. See Buchanan and Tullock (1962) and Rawls (1971).

<sup>4</sup> John Stuart Mill, “On Liberty,” (1859), in The Collected Works of John Stuart Mill, Vol. XVIII, J.M. Robson, Ed., (University of Toronto Press, 1977), p. 220, and p. 223, respectively.

<sup>5</sup> Here we are inclined to distinguish between popular opinion playing a role in regulating peoples’ behavior and it being tyrannical, since we think it might serve to regulate without being tyrannical. We also think that public opinion might prove destructive without being a form of regulation. Indeed, we think public opinion is often not a form of regulation, even though people often regulate themselves in light of it. At the same time, we think it important to recognize that public opinion is sometimes a mechanism for regulation.

At the most general level, as we see things, we find *attempts* at regulation anywhere we find someone or something exercising control as a means to some end or in pursuit of some outcome. The regulation is *successful* when that exercise of control achieves the end or brings about the outcome hoped for (at least to some degree). This characterization clearly fits government regulation, both the constitutional and intra-constitutional regulations of government, where control (legislative, administrative or otherwise) over the relevant rules and requirements are used to restrict, adjust, or prompt the actions of those who fall within the government's sway. When the regulations do actually have the desired impact, they are successfully regulating; when they do not – when for instance they create perverse incentives that undermine their purpose or simply prove ineffectual – there may be an exercise of control in pursuit of an end, and so an attempt at regulation, but not successful regulation.

This characterization of regulation fits, we believe, the case of social norms and popular opinion when those norms or opinions are promulgated or promoted as a means of influencing peoples' behavior. When they do influence behavior in the intended way, the attempted regulation is successful; when they do not, the regulation, though attempted, has failed.

Significantly, we think, the characterization also fits the phenomenon of self-regulation, which involves an individual exercising control (over what she focuses on, promises herself, or chooses) in an attempt to influence her own behavior (successfully or not), either in light of her judgments about what is worth doing or for some other end.

And finally, the characterization fits the purely mechanical role of thermostats in controlling the operation of an air-conditioning unit as a means (not always successful) of maintaining the temperature of a room. In all of these cases, one thing is exercising control over something – the rules, the social norms, one's focus, the operation of the A/C unit, to achieve some end or outcome.

Some features of this characterization merit emphasis. First, regulation is undertaken with a purpose in mind. It need not achieve the purpose with which it is associated in order to be an attempt at regulation: rules banning the sale of certain drugs may fail to eliminate them from the (black) market just as, on a very hot day, a thermostat may fail to reduce the temperature to the set degree. Laws and thermostats may render certain things illegal, or keep the air-conditioning unit running; but the laws and the thermostat might nonetheless fail to bring about the intended outcome.

Second, the characterization talks of exercising control for the sake of an end. The control we have in mind is neither absolute nor fail-safe. Rather it is the (more or less limited) control legislatures have to pass laws, individuals have to make decisions, and thermostats have to change the flow of electricity. This control is mundane, often limited, and sometimes tenuous, yet noticing it is important if we are to understand who or what might be doing the regulating.

In that connection, consider that social esteem operates by virtue of the desire on the part of actors to garner the good opinion of others and to avoid their bad opinion. Observers register

the relevant features of others (often the behavior of others) and form opinions of and attitudes towards those they observe.<sup>6</sup> But the observers' attitudes are typically formed not in order to secure a particular outcome and, often enough, the expression of those attitudes is similarly not done in order to secure a particular outcome. Still, these attitudes and their expression can play an important role in the regulation of behavior. In these cases, though, the regulation is being done by the people who adjust their own behavior so as to secure the approval (felt or expressed) of others.

Of course, people do also *express* their esteem publicly, partly with the intention of changing the behavior of others, with more or less success.<sup>7</sup> Indeed, provided that it is common belief within a given community that people disapprove of x-ing, no-one need even *express* disapproval – it will be enough that it is widely believed that disapproval is connected with x-ing. In this way, there can be very strong incentives for individuals to conform to prevailing norms without anyone really needing to exercise control and so with no one actually regulating the behavior of others, even as they regulate their own behavior in light of (what they take to be) the prevailing norms. Perhaps individual observers in general can be held to account for the attitudes they do have. Conceivably the evaluative attitudes of observers that enforce the 'tyranny' of the majority are themselves defective; perhaps individual actors can be held to account for their caring too much about the opinions of others. But the phenomenon of social esteem and its influence (perhaps considerable) on behavior does not seem to us always to be an instance of regulation. Nonetheless, once A seeks to mobilize the forces of esteem to secure some end – perhaps by enhancing publicity, perhaps by changing the evaluative attitudes on which esteem depends – then A *is* involved in an attempt at regulation (as we understand it).

## II The Value vs. the Ethics of Regulation

This general characterization of regulation leads us to think the right questions to ask about the *value* of regulation starts with thinking about when, if ever, one thing controlling another, as a means to an end, is valuable. We think the thermostat example is sufficient to show that regulation is, sometimes, valuable. Of course, regulation's overall value depends on the value of what it produces (counting both intended and unintended consequences) and the costs of putting it in place and maintaining it.

Importantly, though, thinking about the VALUE of regulation is not the same as thinking about the ETHICS of regulation. No doubt the ethics of various activities, including regulation, is sensitive to the values at stake; but thinking about ethics in particular seems, to us, to narrow the domain of discussion in interesting ways, by focusing attention on cases where moral

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<sup>6</sup> "Observers" should be interpreted broadly here. People can form attitudes towards others on the basis of hearsay. So, for example, most people esteem Einstein for his genius without ever having read anything by him and without the capacity to understand his papers even if they did read them.

<sup>7</sup> As well as possibly garnering esteem for themselves, to the extent that A's attitudes can themselves be an object of esteem (and disesteem!)

agents (or others with moral standing) are in play.<sup>8</sup> In these cases, questions of rights, duties, and responsibilities are all relevant in ways that enrich dramatically the complexity of the considerations that matter morally. Who has a right (or a duty) to regulate others? Who has a right to be free from regulation from whom? Who has a responsibility to use power how? These questions, combined with questions about the value of regulation in specific contexts, are, to our mind, the important ones to answer whenever one is interested in ethics and the moral *justification* of (this or that) instance or kind of regulation.

We do not propose to answer them here. Indeed, having marked off the extent to which thinking about the ethics of regulation introduces considerations that are often left to one side when doing cost-benefit analyses that focus on value, we turn to exploring a bit what we think of as some of the policy-technologies regulation (broadly construed) might use. We do this recognizing that they all invite the same moral questions that are faced by any attempt to regulate – that is to use what control one has to change -- the behavior of others in pursuit of one's ends.

We assume that no one actually holds that all regulation, nor that all regulation of moral agents, including by the agent herself, is morally unacceptable. Yet we recognize that some people do (at least seem to) hold that no regulation, by one person, or group of people, of another person or group, is acceptable.<sup>9</sup> We are not ourselves sympathetic to any such claim, but we recognize as a serious burden justifying who is permitted to regulate others, as is determining which ends are legitimate and which not, and which costs are too much to bear and which not. It is a burden we shirk here -- in confidence that these are liftable burdens, at least in principle. The weight of this burden, though, is what raises special concerns about government regulation and the often coercive use of power it involves.

For our purposes here, the question is not whether to be for or against regulation *tout court* – but what kind of regulation/regulatory system to be for, when legitimate ends can permissibly be pursued. As a result, our interest is in

- I. what *process(es)* of regulation (whether by government or via social forces or still other means, if such there be) may justifiably be used; and

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<sup>8</sup> Ethical questions arise when moral agents are doing the regulating, or are being regulated, or both. They also arise, we think, when they are just in a position to influence regulation (and not actually actively regulating) or when they are affected by regulation, though not themselves being regulated,

<sup>9</sup> One might, at least in principle, think that one person, or group of people, controlling another is always objectionable, or that one person, or group of people, controlling another as a means to some end, is always objectionable. In that case, one would be, as we understand it, against all interpersonal or social or political regulation. Having that view is one thing; successfully acting on it is another. Yet it is difficult to see how one could even attempt to do anything about regulation without oneself exercising self-regulation. Being against regulation as a blanket position seems to travel with a commitment not to actively oppose it.

- II. what the appropriate *domain* of regulation might be -- whether actions-within-rules or the rules themselves; or attitudes rather than actions (and if so, attitudes concerning what).

These strike us as interesting and important questions. Yet, as we see it, they do not exhaust the landscape. In what remains, we want to focus on a further distinction – one that is routine in public economics circles but has, we think, wider application. This is a distinction operating at the intra-constitutional level within a more or less established market order. It is the distinction between mechanisms that operate on quantity as against those that operate through the pricing system.

### III Restrictions vs. Incentive Manipulation

It will help for the purposes of argument in this section to narrow the scope by considering the case of some policy issue, operating at the ‘intra-constitutional’ level of determination. Consider approaches to limiting greenhouse gas emissions (gg). Within public economics circles, it is common to think of “regulation” as a specific *form* of policy intervention (that impose restrictions or requirements), to be distinguished from policies that operate via the fiscal system (taxes and subsidies). In light of what we have said above, it should be no surprise that we think all these policies, whether they impose restrictions (or requirements) or levy taxes (or introduce subsidies) are all, in an important sense, attempts to regulate the behavior or choices of those who fall within the gamut of the policies. That said, consider three kinds of policies that might be introduced concerning gg-emissions:

1. A government might settle on a target of aggregate emissions (G) less than the status quo and allocate entitlements-to-emit to given emitters in some way so that the total amount of gg so permitted equals the target. Anyone who has an entitlement can release gg’s into the atmosphere up to the level entitled: anyone without an entitlement is prohibited from emitting at all.
2. A government might make those entitlements tradeable in part or in whole (as in a so-called ‘cap-and-trade’ system). This means that the value of an entitlement to each recipient is not the profit it would make on the output produced under that entitlement but rather the profit that would be made if the entitlement fell into the hands of the most profitable gg-emitters. If transactions costs were negligible, all entitlements would find their way to the set of emitters who would make ‘most efficient use’ of the entitlements.
3. A government might impose a proportional tax on gg emissions at a rate designed to limit the total amount of gg released to G.

Policy 1 operates directly as a quantity restriction; policy 3 operates through the price structure. By changing the 'carbon<sup>10</sup> price', all individuals are given an incentive to reduce their carbon emissions. All three, let's suppose, achieve the specified target G of emissions, albeit for different reasons, through different incentives, and with slightly different effects. To aid in the comparison, we stipulate that the aggregate level of emissions is identical across policies (though usually policy-makers are not in a good position to determine what level of tax is required to achieve an emission level of G). For those who consider G to be the normatively relevant parameter<sup>11</sup>, policies 1 and 2 have the advantage over 3 of reducing the risk of over-shooting (or under-shooting) the target level.

One property of policies 2 and 3 that economists regard as attractive is that the reduction of emissions to G is secured at minimal aggregate cost in terms of valued output forgone. The policies distribute total emissions in the 'most efficient way': under 2, as under 3, each will reduce emissions up to the point where the cost to her of the last unit of emissions is exactly equal to the tax rate (or emission price). Under 1, by contrast, unless the allocation of entitlements is such that no trading of emission rights would occur with a shift to policy 2, or no increase in production of GG would occur with a shift to policy 3, there will be a net efficiency loss as compared with achieving that same policy objective (target G) via another policy instrument.

Consider for example, a particular emitter business that receives a substantial emission entitlement under policy 1. That emitter will clearly have no incentive under this policy to reduce its emissions below the entitled level. It will have an incentive not to exceed its allotted entitlement because it will face a hefty fine if it does so. Under the tax by contrast, it will have an incentive to reduce its emissions that is constant across all levels of emission. (That is also the case under policy 2 because it can always sell its emission rights to others: the value to it per ton of entitled emissions is the price it can get for that ton in the open market, as distinct from using the entitlement itself.) This then is one important difference between 1 and 2/3: the latter provide an incentive to each emitter to reduce emissions throughout the entire range of emissions. The former provides any such incentive only in the immediate neighborhood of the threshold its entitlement specifies.

But there remain some important differences concerning the manner in which the cost of reducing emissions is spread across the community. Clearly, under policies 1 and 2, permissions to emit are a positive asset. To see this, begin by observing that under policy 3, the taxes will generate additional revenue. That revenue might be used to reduce rates of other taxes or

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<sup>10</sup> More generally, the gg emission price – though the language of issues here is usually phrased in terms of carbon.

<sup>11</sup> This is a contestable claim. Economists are inclined to the view that the normatively relevant parameter is the marginal social cost of emissions and that the 'optimal' level of emissions is that which emerges when the tax rate is set to equal that marginal social cost. If that is a valid claim, then making G the basis of policy is to invite gratuitous error. (Optimal G\* requires not just information about that 'marginal social cost' but also about how much other value is forgone at the margin in reducing emissions. This latter information is not required under the 'optimal tax' because producers make the relevant calculations in responding to the tax: policy-makers do not need to guess at that information.)

spent in other ways.<sup>12</sup> By contrast, policies 1 and 2 distribute the equivalent of that revenue across those who receive the emission rights, in direct relation to the extent of emission permissions any particular individual/entity receives. The precise distributional consequences of this difference cannot be determined without specifying the use of the (extra) revenue in public hands; but it is less than totally obvious that the best distribution, all things considered, of such revenue is to give it to the entities that are doing the polluting. After all, the total amount is rather more than would be required to fully compensate the polluters for lost profit and misses the opportunity to use those resources for another purpose.

Of course, policies 1 and 2 offer the regulator the opportunity to distribute those emission rights in such a way as to buy off opposition to the restrictions the policies impose. If there are elements among the emitters who are better politically organized than the general taxpayer, then restrictive policies will prove more politically popular than the tax alternative. The political equilibrium level of emission reduction is therefore likely to be greater under policies imposing restrictions than under those involving taxation.<sup>13</sup> Indeed, affected firms will be positively enthusiastic for the restrictive policies because it will mean an *increase* in the revenue that accrues to those firms. And over a considerable range they will be the more enthusiastic the more stringent the reductions in emission levels are. This is an aspect of environmental policy that is not lost on the 'climate lobby'. Some economists think that a carbon tax is the best policy instrument for securing reduced emissions, but the implicit coalition between affected businesses and the climate lobby has proven more politically powerful than the economic 'experts' in lots of jurisdictions. Given the natural incentive for all countries to 'free ride' on global emission efforts, it may be that policies imposing direct emission restrictions are indeed a 'second-best' policy option from the world's point of view.

The upshot of the foregoing discussion is to draw a distinction between two kinds of policy: that which operates by specifying or restricting the quantity, and that which operates by changing the 'price' of, an activity. On our broad definition, both would qualify as 'regulations' since both involve exercising control in order to secure an outcome (in the gg case by altering behavior). But they do so in rather different ways and for different actors. Quantity restrictions (or "regulations" in standard policy lingo) operate categorically: they specify some quantity (either in aggregate as in the gg emissions case, or individually as in, for instance, the speed limit case) that is acceptable, usually with the presumption that quantities above that level are inadmissible (although sometimes specifying quantities *below* the stipulated level as inadmissible<sup>14</sup>). In this way, quantity restrictions impact the behavior only of those individuals who would otherwise violate the restriction. And they broadly treat all would-be violators alike: the requirement for all is to get the level down (or up) to the permissible.<sup>15</sup>

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<sup>12</sup> That same effect could be achieved by auctioning off the emission rights. The benefit to any recipient of such rights under schemes 1 and 2 is just the amount that those recipients would have had to pay in order to secure those rights for themselves.

<sup>13</sup> This is a point made convincingly by Buchanan and Tullock (1975).

<sup>14</sup> Minimal allowable leaving age from compulsory schooling would be an example.

<sup>15</sup> Penalties for violation may distinguish between minor violations and egregious ones (as it tends to in the speeding case). Insofar as the penalty is a function of the degree of violation, it becomes more like a 'price' policy.



Price effects seek to alter the cost of pursuing an activity through the entire range so that at every level of performance, the penalty or incentive for additional action remains more or less the same. To the extent that price effects are secured via taxes or subsidies, they are revenue-generating or revenue-using. Thus, price-based policies differ from quantity-based ones in two respects: they affect third parties (viz taxpayers, when we are talking about government regulation) either positively or negatively; and they generate incentives for all participants and over the entire range of performance. Quantity restrictions have no direct revenue implications; and they focus incentives at and/or around a particular level of performance.

#### IV Standard vs. Non-standard Public Goods

The superiority, on efficiency grounds, of continuous trade in rights/obligations imposed by restrictive policies on efficiency grounds is not completely general. It depends on the nature of the end being pursued. In particular, in the emissions case, the assumption is that the relevant parameter is the aggregate level of emissions – essentially independent of who does the emitting. This may be a reasonable assumption in the gg emissions case because a low-gg atmosphere looks to be an entirely *standard* ‘public good’ for which only the aggregate of individuals’ contributions (in this case the aggregate levels of emissions) matters. But not all public goods are standard in this sense.

Within public goods, however, it is useful to distinguish two limiting cases that contrast with the ‘standard’ case: the “weakest link” and the “best shot” cases.

The weakest link case is typified by the issue of dyke maintenance. Each farmer along the river bank has the responsibility for the dyke that falls on her own land. The capacity to withstand periodic floods depends on the strength and height of the weakest/lowest portion of dyke. If the dyke is breached anywhere, the swollen waters will flood in and destroy the crops on all the farms along the river. The critical observation here is that the marginal value of individual A raising his dyke level, when B’s level lies below A’s original one, is zero. The public good is not the *aggregate* of dyke heights, but the minimum of them: dyke-maintenance is a setting in which  $G = \max\{\min(G_A, G_B, \dots)\}$ , where G is the output of the relevant public good.<sup>16</sup>

An obvious alternative limiting case is where  $G = \max\{\max(G_A, G_B, \dots)\}$ . This case is typified by the ‘dragon-slaying’ case where the task is to select one’s best individual fighter to engage the dragon (where, by stipulation, only one fighter is allowed). A less artificial example might be contests like the Olympic Games. The international competition does not ask whether the average Jamaican can run faster than the average Portuguese; what is at issue is whether Jamaica’s fastest runner (over the relevant distance) is faster than Portugal’s fastest. Investment of time and energy and training resources will accordingly be focused on the tiny number of individuals who show exceptional talent in the relevant activity. Research into a

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<sup>16</sup> See Hirshleifer (1983) and Cornes (1996) for more detailed analysis.

vaccine (or treatment) for COVID – and indeed discovery in science more generally – might be thought of as another example of best shot public goods.

The critical issue in distinguishing conventional public goods from weakest link and best shot public goods is the additivity of other's inputs: if our efforts can simply be added to yours to produce an aggregate such that the distribution of that aggregate across the individual components is irrelevant, then the standard public goods case applies. Scientific research may of course involve super-additivity: it may be that a research team consisting of the smartest and second smartest scholars can produce a higher quality research product than a single 'super-smart' individual. (The marginal product of the smartest individual might be larger if she is in a team with the second smartest.)

The relevant point here is that in any case where the distribution of contributions across individuals is relevant then restrictive policies may be superior to taxation (or general incentive manipulation), supposing that the appropriate distribution can reliably be identified. So, for example, whatever the correct height of the optimal dyke might be, the dyke height will at least be identical along its length. To achieve that end, a regulation specifying a dyke height for all farmers looks to be a more appropriate policy tool than say a uniform subsidy to all farmers to increase their own individual dyke heights.

This discussion of varieties of public goods recommends two questions about optimal policy response:

- a) Does the policy appropriately differentiate among different individuals (if such differentiation is desirable)?
- b) Does it provide marginal incentives to 'improve' performance over the entire range?

These properties are conceptually independent – call the first, individual-sensitivity; call the second, margin-sensitivity.

Non-re-tradeable licenses can differentiate among individuals but do not work to provide marginal incentives. Taxes/subsidies, meanwhile, provide marginal incentives but are usually not set up to differentiate among individuals. One can certainly imagine policy instruments that exhibit both: Individually specific tax rates, if properly chosen, would fit both requirements. However, we know of no instance in which a tax regime presents different taxpayers with an individuated rate structure. Nor do we suppose that governments are particularly good at setting tax rates that are likely to provide the appropriate marginal incentives.

What restrictive policies often do is to specify a level of performance in the relevant domain that is reasonably acceptable. Policies of this sort go with the standard deontic structure of two categories: permissible/ impermissible; and a corresponding three-valued metric:

permissible/impermissible/required (the latter, when not doing the specified activity is impermissible).

## V Operating Via Social Norms and Esteem

When we are considering intra-constitutional matters of government policy, the distinction between policies that impose restrictions (“regulations” narrowly construed), on the one hand, and taxes and incentives, on the other, does not mark a normatively significant difference in itself, and we consider them both forms of government regulation. What the distinction does highlight is an important issue of ‘policy technology’.

There is a corresponding issue of ‘policy technology’ in the case of social norms, as between norms that require (or forbid) certain behavior or attitudes and norms that punish (or reward) certain behavior or attitudes. Whether we are talking government regulation or social norm construction, the important question, when thinking about regulation in pursuit of some end, is what approach will best achieve the end, all things considered... where some of the things to be considered are moral.

It may be helpful to illustrate the different ways in which social esteem can operate here by a couple of simple examples.

Consider the practice of washing hands after use of the toilet. Are people more likely to wash their hands if there are others around? A study in New York public restrooms suggests they are. The study considered two conditions: when a user was in the restroom with another person present and when a user was in the restroom alone.<sup>17</sup> In the former case, 80% of subjects washed their hands; in the latter only 40% did. A number of lessons can be taken from this example – the importance of ‘publicity’ to the operation of esteem; the fact that esteem effects operate even in a setting of anonymity (after all, the users of the toilet are not known to each other and cannot report to others in a manner that bear on a person’s reputation); the fact that these users are ordinary folk (and precisely not members of an aristocratic ‘honor culture’). But for our purposes here, the object of interest is that esteem (or disesteem) is assigned on the basis of the performance (or not) of a specific act. When you fail to wash your hands after going to the toilet, you are commonly taken to have violated a norm of hygiene -- which (it seems) is why people are more reliable in washing their hands when they are observed by others. Yet, we suspect, there is little or no esteem return from washing your hands more assiduously – and until COVID norms came into play, no particular disesteem associated with fairly perfunctory performance. Perhaps what constitutes a ‘satisfactory washing’ can change under the influence of circumstances; but it is the perception of compliance with what the norm requires that determines whether you are subject to (dis)esteem or not. Esteem effects operate in a ‘regulatory’ form, at least to the extent that people regulate their own actions in order to secure esteem or avoid disesteem. (In addition, the norms that induce these effects might themselves have been introduced, more or less consciously, as regulations, that is as a means

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<sup>17</sup> This study plays a minor role in Brennan and Pettit (2004). See Munger and Harris (1989).

of changing peoples' behaviors. That seems clearly to be behind public announcements and other efforts to get people to wear masks and wash their hands during the COVID-19 pandemic).

Consider next, and in contrast, the role that esteem plays in professional academic life. Most academics seek the approval of their academic peers. They want our work to be well-regarded and want to avoid the disesteem associated with being a 'non-performer' or perhaps worse, having done shoddy or ill-thought-out work. Academics want their research to be noticed; and they want it to be judged favorably. And though, under well-functioning institutions, there is some positive correlation between professional esteem and salary level<sup>18</sup>, it seems clear that most of academics care about their reputations for their own sake – for example, even into formal retirement! However, it seems clear that there is no single marker of academic quality.<sup>19</sup> Esteem for academic performance operates largely as an incentive throughout the range, whether one enjoys esteem or suffers disesteem. Esteem effects here operate in a manner analogous to taxes and subsidies, not restrictions or requirements: they provide incentives that apply across the entire range of performance levels.

## **VI. Government Policy vs. Esteem Modifications**

The object of the preceding section was to suggest that the distinction between policies that impose restrictions and those that set taxes or subsidies has its analog in the 'economy of esteem'. We called this difference one of 'policy technology'. It may seem that there is an important difference between the case where 'government' decides on the policy technology as a matter of explicit choice and the case where the policy technology emerges from the forces of popular opinion. However, we think the differences can easily be overstated. After all, government policy can operate via interventions in the 'economy of esteem' just as the forces of esteem are operative in determining what policy 'choices' governments make. And each individual plays a role – a small one to be sure – in shaping popular opinion simply by virtue of being one of those whose attitudes constitute potential sources of esteem. Indeed, in many arenas, prevailing public opinion may play a larger role in determining government policies than in the political processes that determine who governs and the official mechanisms through which those who govern establish, change, or withdraw policies. Why that is so we shall be at pains to indicate in the following section.

A fair amount of academic policy discussion involves people making recommendations as to what the best policy would be in particular cases. There is of course nothing wrong with trying

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<sup>18</sup> Actually, empirical work on the relation between academic salaries and number of publications and/or other markers of academic quality such as prizes or citation levels suggest that the correlations, though positive, are not strong. For example, that evidence suggests that the marginal salary return from publication levels beyond a rather small number is negligible. [Lovell (1973). See de Fraja et al (2016) for a more general discussion at the UK university level.]

<sup>19</sup> Some elements in professional esteem can of course have an on/off character: tenure decisions; promotion to full professor; winning of notable prizes and so on. But these are only elements in a much broader assessment in which most markers come in degrees.

to work out a satisfactory answer for oneself (and for others who one might influence). But, it seems to us, academics too often imagine that they have a distinctive position in the policy arena: arguing as if the best policy is the policy a benevolent dictator would simply impose and more or less assuming full compliance.

With this approach in mind, we would like to call attention to two things:

1. The difference between the considerations that are taken to bear on ‘policy-makers’ as distinct from those that bear on ‘policy-takers’ (the agents who inhabit the models of behavior with which academic policy advisors routinely work);
2. The normative tension between widespread commitments to democratic processes that dignify the opinions of all the electorate, on the one hand, and the substantive normative assessment of the policies to which democratic processes might give rise, on the other. Put another way, policy advisor ought to take account of the constraints – political and otherwise -- that govern policy choice (both as a matter of fact and as a matter of the normative properties of those processes).

The first invites the observation that, in electoral processes, the voters serve as policy-makers, not policy-takers. This induces a difference between peoples’ roles in markets (and other arenas of private choice) and their role at the ballot box.<sup>20</sup> At the ballot box, each is asked the question – which candidate or policy would be best? This is quite a different question than which would increase my own personal well-being more? – even for those for whom their own well-being is a primary motivation in the market setting. Needless to say, plenty of people likely vote their pocketbooks, but certainly not all do, and for a variety of good reasons.<sup>21</sup>

To pursue the esteem analogy here, there seems to be nothing in itself wrong with asking whether the forces of social esteem might be applied to achieve what you think are the best outcomes, given the limited influence you individually exert on others’ opinions and attitudes. Your own attitudes of esteem and disesteem, if known, may well make a difference to how others behave, both towards you and in pursuit (or reaction against) the values you are thereby revealing.

Simply being a participant in the esteem ‘economy’ is not enough to make you a ‘regulator’ but attempts to make the esteem economy work ‘better’ (or perhaps even work to your own

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<sup>20</sup> A difference that has been explored in some detail in Brennan and Lomasky (1993) and, in its normative aspects, in Brennan and Hamlin (2000).

<sup>21</sup> One reason, which we flag, in “Voting and Causal Responsibility,” is that in political contexts, unlike market contexts, our decisions about how to vote (vs what to buy) are usually nowhere close to being decisive. So even for people largely concerned for themselves, the cost to them of voting for the policy that they genuinely think is best, even if the policy would be costly for them, is negligible. But there are plenty of others. Brennan and Sayre-McCord (2015).

advantage) do make you one.<sup>22</sup> And this includes, though of course is not exhausted by, attempts within the economy of esteem to influence the ‘policy technology’ – to alter what are currently ‘regulations’ in the narrower sense to something more like a tax/subsidy or vice versa.

We think it is clear that sometimes attention to social norms, rather than laws and regulations, has significant advantages. At the same time, depending on the structure and content of the norms in question, this approach inherits all the substantive evaluative and moral questions that face the three policies we examined in sections III and IV above.

## VI The Quasi-Federal Structure of the Esteem Economy

We remarked in the previous section that an individual may well be able to exercise greater influence in the esteem economy than she can in political processes – that her pretensions to benevolent ‘despotism’ are more effective in the esteem setting, at least in your (more or less narrow) circle.

Of course, it is one thing to have an attitude and another to express it. There may well be settings in which a particular attitude is entirely fitting in itself but where expressing it is neither fitting nor morally permissible. And yet there are presumably other settings where failing to express the fitting attitude might be morally wrong -- even though that expression may be costly in other ways.

The central point here, however, is that in contemporary society, characterized as it is by a highly refined division of labor, we all operate in rather specialized communities of esteem. In those communities, we are especially affected by the esteem and disesteem of our peers – especially of those ‘peers’ who are themselves highly esteemed.<sup>23</sup> And our peers are especially affected by our attitudes. The academic examples illustrate this fact nicely. We may be touched by the enthusiasm of a doting parent on our reaching doctoral status but we do not usually think of that as relevant to our *academic* standing.

What is true of academia is true of pretty well all professions – of the military, say, where medals and honor citations and rank (to say nothing of demotion or discharge) are all signs of esteem (or disesteem); or the golf club where one’s handicap is a measure of one’s standard of play and members strive to reduce theirs even though it makes winning competitions that much more of a challenge. Not every activity, of course, is so clearly partitioned. General properties of individual character are matters over which esteem applies – truthfulness, or trustworthiness, or benevolence are properties that all exhibit in some measure and that pretty well everyone values positively. Here, the attitudes of any observer count – and no-one is

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<sup>22</sup> Of course, you would be a *failed* regulator if your attempts had no effect; and a *bad* regulator if your efforts had a perverse effect.

<sup>23</sup> Though as the New York lavatory example suggests, we can desire to avoid the disesteem of people whose own standing is unknown to us.

especially disqualified as a relevant observer. But even here the set of observers is limited by geography and happenstance.

In the electoral setting by contrast, the influence one can hope to exercise is much more limited. You may have attitudes about what would be best and express those attitudes – not just by the way you cast your ballot, but by letters to the editor of your local newspapers and lobbying your local representative – and even, if you are well-connected, pressing those you know who have more influence than you do. But the numbers are large and the influence that any one person can exercise has to be limited – rather more limited in general than in the more refined circles in which the esteem you express counts. Of course, in those more refined circles your attempted ‘regulations’ also *affect* fewer people and a narrower range of outcomes. But those will be outcomes of importance to you because they occur not only settings where the esteem you bestow has an influence, but also in the setting in which the esteem in which you are held is most significant.

The reference in the title of this section to a quasi-federal system operating within the economy of esteem is we think descriptive. The domain of concern is ‘federalized’ not via geography or history but via the various domains in which individuals choose to operate: family; profession; sporting clubs; singing groups. In most of these settings there will be norms of behavior and criteria of better and worse ‘performance’ that will determine the esteem in which you are held and create incentives for you to work to increase that esteem (or reduce the disesteem). In those arenas, you will also have the possibility of changing the prevailing norms or influencing the underlying values on which evaluative attitudes depend. So will others of your peers. No-one exercises a monopoly on the capacity to ‘regulate’ in the broader sense. But no-one has that monopoly either in a democratic system of divided government: each Congressman and each Senator and each bureaucrat (however lowly in the pecking order) and each judge and each opinion leader and each lobbyist and each voter all have a say, however minor.

There is little conceptually that distinguishes the political process from the esteem process. And certainly, in both cases, it should be emphasized that each is indeed a *process* in which the established policies and norms are subject to continuous possible modification and where entry into the business of ‘reregulation’ is more or less open. Nothing in either system would lead us to believe that the outcomes of the various processes involved would be incapable of improvement. Indeed, it would be very surprising if, in the esteem case, the prevailing content and structure of norms were either static or ideal.

## **VII Explicit Policy Design**

For policy specialists, it would amount to a confession of professional incompetence to concede that emergent social norms are the best that can be done, practically and morally, when it comes to society’s organization. Certainly, there seem to be few who really believe that: so whatever else, such an option is not one that has much chance of success in a democratic society.

Yet as soon as we engage, self-consciously, in implementing policies (whether they involve restrictions (and minimums) or taxes (and incentives) for the sake of influencing peoples' attitudes or behavior, we are trying to regulate people. That feature of our efforts, whatever the mechanism we use, should not be backgrounded by a verbal distinction between regulation and other policy tools.

On the other hand, one can easily underestimate the role that decentralized emergent social norms themselves play in the determination not just of behavior but, specifically, of policy. After all, as Hume insisted, it is "on opinion only that government is founded"<sup>24</sup>; and popular opinion is in significant measure a reflection of prevailing norms.

### **VIII A 'Constitutional' Aspect of the Regulation vs. Budgetary Instrument Issue**

Since we have made so much of the 'policy technology' question in the preceding discussion it is perhaps fitting that we should close with a discussion of what might be at stake in the choice of technologies – along more institutional than substantive lines. We should make it clear at the outset that when we refer to 'regulation' here, we have in mind 'regulation' in the narrow sense relevant for the policy technology comparison and not in the broader sense of regulation with which we began our discussion and concerning which we think all the same moral questions can be raised.

The aphorism "Expenditures good: taxes bad" is probably a cliché among those involved in day-to-day politics. Maximizing political support for a policy involves emphasizing the benefits of the policy and downplaying the costs – and indeed it is usually only one's political opponents who pay public attention at all to the costs.<sup>25</sup> The idea that somehow it is possible to secure benefits from government that no-one has to pay for is a myth that those in office typically have a strong incentive to promote. This desire to background costs explains lots of features of prevailing political practice: the maintenance of tax instruments such as excise taxes, whose credentials in terms of standard norms of taxation are poor; the increasing and widespread use of debt as a revenue instrument; and more specifically, the tendency to substitute regulatory for budgetary instruments in any case where the costs of the regulation are complicated and obscure (and so less politically risky).

Imagine for example that you are on the staff of a Senator. This Senator has a taste for power and the kind of enlarged ego that is characteristic of that species. She wants to "make her mark" – partly for ego-related reasons, partly for social esteem, and partly out of the convictions that induced her to go into politics in the first place. You are, perhaps, not entirely exempt from these motivations yourself. When you get together with your peers you speak in

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<sup>24</sup> Hume "Of the First Principles of Government" in Miller (ed.) (1985).

<sup>25</sup> In certain cases, where there is enmity towards a particular group, it may pay to play up the fact that that group loses from a policy. In such cases, publicizing costs may be politically profitable. But we do not think such cases are common.



lowered voice and reverential tones of “having an influence” – of “making a difference” – and in any case you want to do a good job for your Senator. A glowing reference from her is likely to be to your professional advantage. But in addition, you have a natural desire for “success” in any job you undertake and success here involves helping your Senator achieve her ends and gaining her approval.

Your Senator has a “pet scheme” – a particular policy that is a kind of flagship enterprise for her. Unfortunately, it costs a lot of money. And if it is to have a chance it will need the support of a good number of the Senator’s colleagues. The problem is that those colleagues have pet projects of their own, many of which also come with a hefty price tag. Accordingly, either there will have to be a serious blow-out in total taxes to fund all these ventures, or there will have to be a considerable curtailment of ambitions. Probably a bit of both, because any significant increase in taxes (beyond say that associated with bracket creep under the income tax) is likely to be electoral suicide. So, in any plausible setting, your Senator’s pet project will be competing with those of other Senators and they all know that. If *your* Senator’s project is to succeed, theirs is rather less likely to. So, they are naturally cast in the role of adversaries: they will scrutinize your (Senator’s) project for flaws and be inclined to push against it. That is a necessary part of the budget determination exercise.

No such natural competition, however, operates in the context of restrictive regulations. There may be some broad limits on the amount of legislation that can be got through in a session – perhaps because of the time required for debate or limits on the capacities of the drafting facilities, or the burdens of getting people to sign on. But your Senator’s pet project, if pursued via restrictive regulations rather than taxes or subsidies, is much less of a threat to others’ than it would be in the budgetary setting. Accordingly, during discussions around with colleagues, your Senator has reason to avoid a tax-and-spend technology in support of her project, if pursuing it through via regulation is possible.

Now, as every good public policy expert knows, it is not that the regulation involves less aggregate cost than the budgetary alternative: a regulation is in the relevant respects concerning costs roughly equivalent in its effects to a tax/expenditure operation. What is different is that in the budgetary case the cost is explicit – and has to be aggregated to form a claim on tax resources that are scarce. And that fact creates explicit conflict with other budgetary claims. Regulation (rather like public debt) imposes its costs less visibly.

It is perhaps worth noting that it is not just taxpayer-citizens who are the subject of differential sensitivity in this domain. Often when commentators are doing international comparisons of the “size of government” they simply attend to the total tax-take or total budgetary expenditure. They tend not to include the very considerable activity governments pursue in regulatory mode – something that may differ very considerably between the countries being compared. Of course, estimating the ‘revenue equivalents’ of regulations is a major exercise – which is partly why commentators don’t undertake it. But if the putative experts find it difficult to work out what the cost of regulation is, then it is hardly surprising that citizen-taxpayers are

only dimly aware of what is at stake. Or at least more dimly aware than they are of their total tax burden – which is all that the argument here requires.

In this sense, the line on regulation is similar to the anxieties that public choice scholars (and most notably James Buchanan) have traditionally expressed about public debt. Although Buchanan’s earliest work on debt was focused on questions of debt incidence, it seems clear that part of his concern was that debt financing led to an over-expanded public sector – at least against a benchmark in which the benefits and costs of public projects were made equally salient to taxpayer-voters.<sup>26</sup>

That same theme reappears as an important proviso to the argument for restrictions on “the power to tax” developed by one of us (Brennan) with Buchanan in a book with that title (1980). The thought is that total tax take is relatively easy to regulate; but to the extent that a limit on taxes simply encourages the substitution of regulation, one may be encouraging reliance on an inferior policy technology and shifting the balance towards more obscure forms of policy delivery.<sup>27</sup>

The bottom line here is that there may be good *constitutional* reasons for giving a positive weight to budgetary over regulatory means of policy delivery at the intra-constitutional level of policy-making. Just how this might be achieved as a matter of constitutional design is an open question: here as elsewhere, one might have to rely on social norms among policy-designers to establish and support the relevant presumptions. But it is worth noting that there may be some incentives within the bureaucratic class to favor budgetary mechanisms – since such mechanisms tend to deliver greater resources to policy-implementers and hence greater bureaucratic discretion over larger budgets.<sup>28</sup>

Arguably, somewhat the same considerations may favor a general presumption of democratic process over social norms. After all, democratic processes operate through explicit confrontation and often with alternative options on the table. The outcomes are open to explicit contestation through more or less well-defined institutions. Someone is or purports to be “responsible” for the outcomes that emerge and that someone can be held to account. Social norms do not operate in this way. Precisely because they operate as ‘emergent’ phenomena without any clear or explicit processes for their evaluation and possible change, they tend to operate less ‘visibly’. They present more as social facts than as things that are amenable to change. This may make them less prone to examination. Perhaps this is something that tips the balance in favor of democratic processes. We say this in a decidedly speculative spirit. And, certainly, we see this as a matter of weights in a weighing process: any attempt to

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<sup>26</sup> This is a concern that appeared center-stage in his book with Richard Wagner (1977)

<sup>27</sup> See Brennan and Kliemt (2018) and Brennan (2018) for a fuller exploration of these ideas. At the symposium, Lisa Heinzerling mentioned that she discovered, when she was at the EPA, was that policy makers assumed 100% compliance for the cost-benefit analysis of various proposed rules (which of course lowers the relative cost estimate of the rule)..

<sup>28</sup> The idea that bureaucrats prefer larger budgets is a major theme in the ‘public choice’ work on bureaucracy. See for example Niskanen’s classic treatment (1971)

replace social norms by explicitly political ones comes with huge downside risks with, likely, very little prospect of substantial success.

## VII Summary and Conclusions

In this paper we began by drawing the concept of regulation broadly. We consider any system of structured organization to be a regulated system; and any attempt to change that system in pursuit of some end or hoped for outcome as regulation. We have advanced that broad account for two reasons.

First, we think the ethical and practical concerns about regulation, narrowly construed, are characteristic of all attempts to exercise control in the pursuit of one's ends (that is, of all regulation, as we characterize it). Appreciating this fact, we think, should help to dislodge the idea that the problem with "regulation" (narrowly construed) is that it involves government using its power to change our behavior. That is true of most of the policies government puts in place, including laws against theft and murder, not just restrictions of which drugs are legal. The real objections come on the scene only when we begin asking about how the government is using the power, for what ends, and at the risk of violating whose rights, to what.

Second, we think that the broader conception of regulation sets the stage for thinking clearly about the different kinds of policies that are available, using laws and social norms, for influencing peoples' behavior. With that in mind, we drew three distinctions:

- a) between constitutional regulation that deals with the properties of the 'basic institutions of society', on the one hand, and intra-constitutional regulation, which deals with regulation more narrowly as an instrument of 'policy' operating within the constitutional system, on the other;
- b) between regulation imposed by or involving government and regulation as imposed by social norms and the forces of social esteem; and
- c) within the category of governmental policy (in the first instance) between a policy-type that imposes restrictions or requirements on the one hand and a policy-type that shapes incentives with taxes or subsidies. We illustrate that distinction by appeal to an example involving alternative greenhouse-gas emission policies. And then, towards the end, we discuss the ways in which political considerations are likely to push policy decisions towards restrictions and requirements (regulations, narrowly construed) and away from taxes and subsidies.

We consider distinctions b) and c) to be independent, in the sense that the distinction restrictions (or requirements) and taxes (or subsidies) applies no less to the structure and operation of social norms than to the structure and operation of government policies.

We explore one dimension of the difference between government action and the social esteem/norm case by reference to a comparison between the scope of politics (and the influence that the individual might be able to exercise in the political domain) and the scope of esteem effects in typical cases. We suggest that esteem tends to operate in an effectively ‘federalized’ structure, with separate restricted domains associated with the refined division of labor and the specializations that people tend to develop in their non-professional activities.

Finally, and yet more narrowly drawn, we suggest one reason why the policy technology issue might be normatively significant for reasons that are structural – that bear on the way political processes work and in particular the way in which costs of public undertakings are hidden by policies that implement restrictions and made more salient by policies that rely on taxes. This observation, if true suggests an advantage for budgetary instruments – unless one believes that democracy works best when certain things are obscured from the electorate. Yet, as our discussion of non-standard public goods brings out, this advantage might easily be outweighed if the policies concern weakest link or best shot public goods.

All of this, we think, tells in favor of not focusing specifically on “regulation” narrowly construed, in thinking about the justification, moral and otherwise, of government policies.

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