



**Beyond Best-in-Class:
The Secret to Regulatory Excellence**

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Given three magical wishes, someone longing for a “best ever” regulatory agency could imagine using the first wish to build one out of the best component parts available. Basketball aficionados sometimes engage in this kind of daydreaming, imagining the result if one could take, say, Larry Bird’s eyes, Julius Erving’s hands, Allen Iverson’s heart, Wilt Chamberlain’s strength, and assemble a “best of” chimera (see, e.g., http://enquirer.com/editions/2003/02/08/spt_wwwspthoopsnbaperf8.html). Perhaps an agency starting from scratch, or able to undergo a wholesale rebuild, would try to emulate the best priority-setting system it could find, the best set of processes for encouraging broad and deep public comment found in some other setting, the most successful method for targeting scarce enforcement resources, etc. Unfortunately, such a hybrid would be undesirable as well as unrealistic, because an agency with finite resources cannot be outstanding in every conceivable way simultaneously. But even if this kind of assemblage was possible, why assume that we should settle for any of the components to only be as good as today’s best examples? Raising the level of any attribute to “best in class” status is certainly laudable, but inherently precludes a step change to a higher and hitherto-unrealized level of performance. The “best in class” typewriter is still inferior to even an average personal computer.

My thesis is that we should judge regulatory excellence more in absolute than in relative terms. In this chapter, I offer three general themes for how to pursue absolute regulatory excellence. First, I believe that a best-in-class agency must reliably and thoughtfully navigate between each of a *multiplicity* of conflicting demand-pairs (see Table 1). The first part of this chapter will describe many of these pairs and suggest how the agency should think about the balancing function.

But excellence requires more than meeting individual challenges as they come – it starts with “engraved inner criteria to guide action” (David Brooks), so that the workforce, the legislative and executive branch overseers¹, and the public know how the agency approaches problems and solutions in general. The key word here is “engraved,” befitting my belief that many actions by a regulatory agency that might strike some or all stakeholders as capricious would be seen as “disadvantageous to me, but acceptable” if the agency grounded the action in a *pre-articulated* statement of philosophy and predilection. Agencies need, in general, to get better at explaining (which is not the same as rationalizing...) their decisions with reference to these general statements, which can certainly change over time.² Together, these engraved criteria have to guide each of the three vertices of the triangle consisting of characteristics, actions, and

¹ I’m not sure how to easily describe this in terms that would apply to Parliamentary systems of government, monarchies, etc...

² For example, an agency might issue an update to its current five-year strategic plan in light of an unexpected economic recession, stating that for the time being, it would be more risk-averse with respect to rulemaking and enforcement actions that could tend to cause significant net job losses (and more likely to favor actions that would tend to create significant net new jobs).

desired outcomes (see Figure 1). The second part of the chapter will discuss how an inner-directed agency can surpass one that is “merely” best-in-class, using the metaphor of avoiding obstacles (the latter) versus staking out a course in advance (the former).

Where I hope to be particularly ambitious in this chapter is to explore the question of where the desirable course comes from in the first place. So, the third part of the chapter will discuss how I think an excellent agency can develop and improve its core mission—how it can discern and communicate its mission, analyze the latitude it has to refine the mission, and how it can seek additional discretion to improve it. Ultimately, I will argue that the single most powerful impediment to excellence is the tendency of agencies to speak and act in service of things other than a “noble mission.” Incisive self-evaluation may reveal that all too often, what appears to be, or is rationalized to be, action in service of the mission turns out instead to be in service of the leadership of the agency, the executive overseeing the government, one favored constituency alone, or the preservation of the institution rather than the principles for which it was established. I will try to describe what makes for a noble mission, and how agencies routinely fail to adhere to it.

Outline of Part I:

- An overarching facet of excellence is the ability to navigate thoughtfully between conflicting demands. I will refer to Table 1 below, and explain each pair of demands in more detail.
- Simple strategies (pick the middle; try to make the extreme factions equally unhappy; lurch between placating one extreme and the other; over-correct for past mistakes (that is, lurch from one extreme to the other), or perhaps most rudimentary, keep favoring one side over the other regardless of the merits) are signs of an agency that has not reached BiC. I will invoke some specific examples here to underscore the folly of pursuing these simple strategies; for example, the OSHA ergonomics rule actually had two incarnations, the first providing the very specific guidance businesses said they wanted, and the second (ten years later) providing the wide flexibility businesses said they wanted—each draft was vehemently attacked for being the opposite of what these very stakeholders desired. Similarly, David Kessler’s failed attempt to have the FDA regulate tobacco may have suffered from the fundamental attempt to compromise—the Supreme Court objected to the simultaneous finding of “risk with no benefit” and the response of an age-based set of restrictions rather than an outright ban. Instead of any of these “split the baby” strategies, somewhere on each spectrum in Table 1 there should be a “golden mean” policy or action that balances—not necessarily anywhere close to the midpoint—the demands in some proportion to their relative merit.
- Over a portfolio of policies/actions, there may be merit in choosing mixed strategies, or even ones that add in a random component (“keep ‘em guessing” in game-theoretic terms)—as long as that orientation is revealed in advance as part of an “engraved criterion.”
- The qualitative leap from BiC to truly excellent MAY depend on the agency creatively seeking game-changing responses to various demands so as to recast them as win/win opportunities. For example, the tension between performance standards (opposed by stakeholders who call for guidance and decry the “arrogance” of issuing vague requirements) and design standards (opposed by those who decry the “micro-managing”

by bureaucrats) can sometimes be sidestepped by issuing regulations that combine the two regimes (rules containing a “safe harbor” design but that allow anyone to innovate away from it as long as equivalent or better performance emerges). Part of this section will describe 4-8 other cases where there may be a clever way to avoid satisficing.

Outline of Part 2:

- Characteristics, actions, and outcomes are indeed (reference Cary’s chapter and/or the convenor’s report) the three pillars by which regulatory excellence can be judged, but the relationships among them are as important as their individual quality (see Figure 1).
- Hence, the truly excellent agency must perennially examine (looking for reactions from to its staff, its overseers, its various publics, and perhaps neutral experts convened for the purpose) the three sets of questions inherent in Figure 1: (1) are the characteristics we embody leading to purposive actions consistent with those attributes?; (2) are those actions begetting outcomes in causal, direct, and efficient ways?; and (3) do the outcomes represent changes in the world (or the maintenance of desirable states of nature) that we should be proud of, given our stated characteristics?

Outline of Part 3:

- The essential responsibility of an evidence-based public agency is to understand, and to act on that understanding—seeing clearly is not enough, nor is acting boldly. As Nobelist Sherwood Rowland put it, “What’s the use of having developed a science well enough to make predictions if, in the end, all we’re willing to do is stand around and wait for them to come true?”
- The fundamental failure of regulatory agencies, in my view, can be traced to serving masters other than the mission itself. To make this point, I first need to give examples of how agencies and their personnel fall short, and end up serving other masters, including short-term institutional gain, reflexive defense of “turf,” personal career advancement, and other expediencies. Through forthright probing into the founding purpose of the agency, its staff and leadership can try to understand when they are being tempted to do “what’s good for the team,” instead of what’s good for the country—and this understanding will be greatly facilitated in an agency that has a culture that balances loyalty and dissent better than most U.S. agencies do.
- Ultimately, though, I hope to argue that serving a narrow, self-contradictory, or deflating mission—even serving it well—is a disappointment. Here are some potential differences between a BiC mission statement and a truly excellent one:
 - ◆ Does it seek to maximize along only one dimension (e.g., “protect the environment” without regard to cost, or promote industry without regard to externalities)? Arguably, these sorts of missions do not avoid tradeoffs, but rather leave society with tradeoffs that are managed in ad hoc, opaque, and capricious ways;
 - ◆ Does it regard “small” changes in the macroeconomy as “rounding error” or as objects for special scrutiny to promote justice (e.g., are “few net jobs are created or lost” the end of the story or the beginning)?
 - ◆ Does it regard the “porting” of problems so they fall outside of the agency’s narrow jurisdiction as a victory, or as an unacceptable short-cut?

- ◆ Does it require the agency to live up to the principles it holds up for the rest of society (that is, for the environmental agency to reduce its own footprint; for the worker-safety agency to have a low internal injury/illness rate)?
- ◆ Does it refuse to be satisfied with reducing risks singly, but insists on looking at opportunities to solve multiple problems?
- ◆ Does it look at the capacity of the entire government to address the problems its mission contributes to, and seek to work routinely with other agencies to maximize net benefit? If it determines that an important problem will “fall between the cracks” of a government divided into silos, does step up to the plate and seek to secure for itself new responsibilities?
- ◆ Does it seek to dispel myths about the mission, or about its own performance, even if they are popularized by important agency stakeholders?

In this discussion, I intend to be sympathetic to the difficulties of developing such a mission statement caused by problems and deficiencies in the statutes that give agencies their authority. A Clean Air Act that explicitly allowed EPA to consider costs, rather than forcing it, in effect, to consider costs *sub rosa*, would make an “optimizing” (as opposed to a one-dimensional “maximizing”) mission statement much easier to articulate and support.

What is the ultimate risk courted by an agency who seeks to remain true to its core mission? The individual who heads the agency could be fired; while that might end the experiment (and make that person’s successors loath to try again), it would not necessarily make the agency any worse off than had it not pushed the envelope at all—so taking the risk has a positive expected value (p times the net gain plus $(1-p)$ times no net loss). The more severe consequence would be an agency that was dissolved for having lost its legislative support (again, in a tripartite system like ours in the US). While there are cases (MMS) of agencies losing their social license to operate in the wake of a catastrophic failure, I’m not sure there are any examples of this happening in the wake of an attempt to succeed beyond prior expectations (I will research this question). But even this would not be the end of the mission, but the transformation of the agency.

In contrast, the ultimate success of an agency that seeks to go beyond BiC would be the widespread (even if grudging, from one quarter or another) admiration of all of its stakeholders—and, of course, whatever economic, environmental, and other benefits arising from the success itself. Regulatory excellence, therefore, is a risk worth taking, and it is more than its own reward.

TABLE 1
THE REGULATORY ATTRIBUTES THAT CALL FOR A “GOLDEN MEAN”

Many characteristics of a regulatory agency naturally fall on a worst-best spectrum. It’s hard (but not impossible!) to imagine “honesty” as other than uni-directional—the less an agency obfuscates or lies, the better. But many, perhaps most, attributes are unwise at BOTH extremes but ideal somewhere in between—which suggests that a possible primary organizing principle of regulatory excellence is *the conscious choice of a balancing point for each attribute, in general or as modified by the instant situation.*

For example, consider the attribute “confidence.” At one extreme, an agency could be so arrogant as to only endure public comment grudgingly, and never accede to an alternate view. At the other extreme, the agency could be so timid (and/or self-loathing) that it will blow wherever the strongest wind takes it (I was recently quoted criticizing OSHA for putting out yet another Request for Information on chemical exposure limits—100 pages of “questions” and no hint that the agency has a discriminatory sense, let alone a position—I said “the best way to start the ‘dialogue’ you claim to value is to say something”).

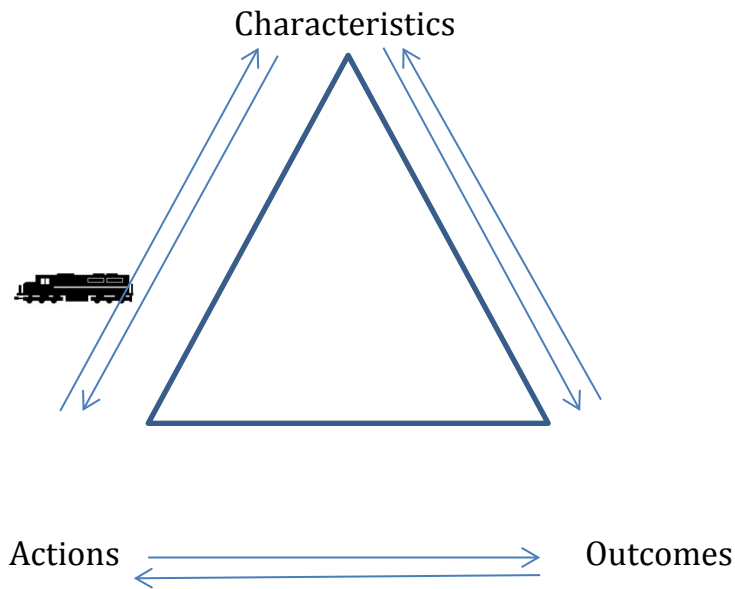
It seems to me that somewhere in between these endpoints lies a quality of “empathetic leadership”—I (the agency) have listened to your POV, and to yours over there too, but I was not put here as a tabula rasa-- I have views of my own, and **in light of those prior views and how they have been informed by your views**, I come out here on this decision, **for these reasons.**”

Here is the beginning of a list of such “U-shaped” attributes, with some clue as to how the fulcrum might be described (a fulcrum being perhaps a good metaphor because it doesn’t need to be in the geographic middle—a seesaw will balance an adult and a child if the fulcrum is closer to the former person).

- ArroganceEmpathetic Leadership.....Groveling
- Focus on activities....constantly looking both “out the windshield” and “in the rear-view mirror”.....focus on outcomes
- Deciding from the “gut” “Head and heart” thinking.....Cold automaton
- One-size-fits-all regs.....Engraved process for granting exceptions.....More exceptions than rules
- Only look at net benefit.....Nonlinear functions for estimating C,B.....Only look at the tails
- Blind precaution to avert harm.....Balanced Approach.....Blind precaution to avoid **costs**
- Micro-managing specifications.....Hybrid Approach.....Pure management-based regs
- Crushing internal dissent.....Engraved process for WB protection.....”Free-for-all” of internal sabotage
- Cares only about new rules.....Data-driven allocation between.....Cares only about sunseting and “burden reduction”
- Creates an inbred workforce.....balanced approach.....Too much churn

Fetishizes “worst things first”solution-focused priority-setting.....Obeys loudest stakeholders only
Seeks to expand agency budget/turf per se.....balance.....Seeks to “economize” and divest per se
Views regulated entities who are in compliance as irrelevant.....views them as allies to help leverage better
performance by their suppliers and customers.... Views them as “photo ops” to celebrate excellence

FIGURE 1



What if in each of the six cases, there is a “bridge out” in the diagram, and the train can’t get from one place to the other?

Characteristics without actions are *hypocrisies* (we aren’t who we say we are);

Characteristics without outcomes are *platitudes* (we *are* what we say we are, but it doesn’t do any good)

Actions without characteristics are *signs of capture* (we “go along to get along”)

Actions without outcomes are *drudgery* (we are very busy, but maybe we are just moving sand from one pile to another)

Outcomes without characteristics are *capricious*, easily undone or reversed (we are effecting change for change’s sake)

Outcomes without actions are *signs of inertia* (and easily become raw material for a smug agency, as NASA was the first 23 times the Space Shuttle flew without incident—it wasn’t taking the safe actions, but coasting along on the (temporarily) good outcomes)