



## The Challenge of Regulating Objectively

*Jonathan H. Adler*

Economists know the price of everything, but the value of nothing. This cliché captures the standard progressive critique of using cost-benefit analysis (CBA) to guide government policy, environmental regulation in particular. The core argument is that cost-benefit calculations are incapable of capturing the full range of ethical, aesthetic, and other concerns that should motivate regulatory decision-making, and that CBA has a tendency to undervalue precautionary measures—particularly measures that guard against catastrophic risks, defend vulnerable populations, and ensure equitable distribution of resources. While some progressive thinkers, such as New York University’s Richard Revesz and Obama administration regulatory czar Cass Sunstein, believe CBA can be reformed into a useful tool for progressive policymaking, others believe CBA is fundamentally flawed and should be exorcised from the federal regulator’s toolkit.

Douglas A. Kysar’s *Regulating from Nowhere* is among the latest and most ambitious additions to that anti-cost-

benefit canon. Previous authors have focused on the imprecision of economic valuations, the difficulty of adequately estimating ecological and aesthetic values, and the failure of CBA to account for distributional concerns. But Kysar extends the criticism, presenting an insightful, wide-ranging interdisciplinary critique of CBA as practiced by policymakers and of the hegemony of calculation. Where Kysar falters is in articulating a viable (or even desirable) alternative course for environmental policy.

Too often, Kysar argues, CBA is applied in a formulaic manner to complex policy questions. The resulting push to quantify and monetize environmental, health, and other costs and benefits of potential policy options can obscure more than it clarifies. He rejects any regulatory process that “requires regulators

to place monetary values on human life, endangered species, old-growth forests, and other protected subjects of environmental, health, and safety law.” Boiling regulatory assessments down to numerical point estimates can understate uncertainty and obscure

*Regulating from Nowhere:  
Environmental Law and the  
Search for Objectivity*

By Douglas A. Kysar

Yale ~ 2010 ~ 336 pp.

\$45 (paper)

the way we make valuations, crowding out a more nuanced and thoughtful evaluation of policy options. As he explains, “the choice of value metric is an emphatically ethical and political exercise, one that should remain open to contestation and that should, at least occasionally, take a backseat to more direct discussion of matters of justice.”

Cost-benefit analysis may be in Kysar’s cross-hairs, but he has a more ambitious aim. He seeks to depose the maximization of net social welfare as an end of government policy, and to substitute in its place a broad principle of precaution and environmental aspiration. He readily embraces the need for collective decision-making in many contexts, but wants policy choices to be grounded in normative principles, not a utilitarian calculus. Welfare-maximization of the sort embodied in CBA treats people as cogs, not individual moral agents; in this way, “the utilitarian normative standard seems to transform the individual into simply a part of the furniture of consequential optimization.” This is not merely “philosophically problematic,” but “psychologically untenable” as well, he warns. “Our subjectivity always reasserts itself,” and so we delude ourselves in thinking we can attain some true, objective “view from nowhere.”

**T**he critique of cost-benefit analysis leveled in *Regulating from Nowhere* is sound. Yet many of the

concerns Kysar identifies are more problems with how CBA is used than with the practice itself. He is correct to note that “any effort to actually define, construct, and implement a social welfare function...entails extraordinarily difficult normative judgments”—that regulatory policy decisions implicate subjective value preferences that cannot be completely resolved through application of any mathematical formula. But the principle that the expected costs of government action should be weighed against the expected benefits does not require that everything on either side of the ledger be reduced to dollars and cents. And jettisoning CBA does not eliminate the reality of tradeoffs. Virtually any collective policy choice embodies an implicit social welfare function; some advocates of CBA merely seek to make this explicit.

To illustrate the follies of CBA, Kysar points to the failure of the U.S. Army Corps of Engineers to adequately protect New Orleans from hurricanes. When developing standards for levee construction, the Army Corps developed a risk-assessment model based upon the “standard project hurricane” (SPH) and its likely effects. This was supposed to help the Corps design standards for hurricane protection projects. But the Corps made several errors, particularly in failing to account for insufficient and unreliable hurricane data, or even to properly consider all of the data it had.

Kysar blames the failure of the Corps' levees on "the welfare-maximization-policy construct, with its twin tools of risk assessment and cost-benefit analysis." But Kysar does not make clear why this is a cautionary tale against the reliance upon cost-benefit analysis, as opposed to a poignant example of cost-benefit done wrong, or the risks of hubristic government decision-making and the state's pretense of knowledge. There is no inherent reason why efforts to weigh costs and benefits cannot incorporate residual uncertainty. If there was incomplete or inadequate data on hurricane trends, this should have been taken into account. How else should the Corps have decided how much to invest in safeguarding human development placed in harm's way?

But this is how Kysar builds his case that we should rely on a more "precautionary" approach to regulatory policymaking. He seeks to "illuminat[e] the forgotten wisdom of our traditional, but now much-derided, precautionary approach to environmental governance." He wants to "emphasize the limits of human knowledge and the frequency of unpleasant surprises from technology and industrial development." If CBA is unworkable and untenable, he offers to replace it with "an *ex ante* governmental stance of precaution whenever a proposed activity meets some threshold possibility of causing severe harm to human health or the environment."

Yet insofar as Kysar's objection is that the Corps was insufficiently precautionary—that, in effect, it should have placed greater weight on the possibility of more severe storms and the non-economic consequences—it is still not clear why CBA itself is to blame. The *decision to use CBA* in policymaking is separate from *the way valuations are made* in the calculus. More broadly, the failure of the Army Corps to make sensible investments may illustrate the failings of political risk management, as well as the particular vulnerability of less powerful groups when political institutions make collective judgments ostensibly on their behalf—but these points actually undermine rather than support the broader solution that Kysar then proposes.

In Kysar's view, "proponents of cost-benefit analysis can in fact be seen as closet collectivists who seek to bind citizens together into a welfare-maximization compact." This is a fair critique, but it is apparently only the welfare maximization Kysar objects to, not the closet collectivism. Subsuming individual preferences is not the problem, as he explicitly advocates a "self-consciously collective or organicist conception of governance" grounded in "collective responsibility," and is fully comfortable with approaches to policy that are "premised on implicit or explicit assumptions about the nature of the life well lived." Indeed, in his

view, taking sides—regulating from somewhere—is unavoidable, as any set of regulatory policies will necessarily entail “deliberate government endorsement or condemnation of particular technologies, preferences, and values.”

The logical conclusion, then, would seem to be that government ought to embrace a particular set of values—and Kysar has one particular set in mind. The precautionary principle that he endorses is only part of a larger effort to instigate a sea change in environmental policy-making. As he explains:

On the precautionary account, environmental, health, and safety regulation is not merely an opportunity to maximize an existing set of individual preferences or interests, but rather a moment to consider the regulating body’s obligations to its present and future members, to other political communities, and to other species.

Whereas cost-benefit analysis aspires to provide a neutral and objective basis for selecting among policy options—to “regulate from nowhere”—Kysar argues for the deliberate embrace of a specific ethical vision, which encourages regulation that may not appear cost-justified because it fulfills a broader ethical mandate to seek continuous environmental improvement. Moreover, environmental regulation should not simply concern itself with existing

members of the political community, but should extend itself to encompass the interests of people overseas, of future generations, and even of other species. Only through such an approach, Kysar believes, can we overcome the “epistemological, ethical, and political” roots of the “global environmental crisis.”

While many of Kysar’s critiques of cost-benefit analysis are sound, the alternative he presents is not particularly workable, let alone desirable. He argues it is insufficient “to address uncertainty, irreversibility, and catastrophe through mechanical adjustments such as option values, risk aversion premiums,” and the like. In his view, “these devices often reflect the professional predilections of policy analysts more than they do considered normative judgment.” But what is the alternative, and why should we expect it to produce more desirable results, whatever the measure?

His answer is that policymakers should not seek “to locate and pursue an ‘optimal’ outcome,” but instead should

present for collective consideration an unalloyed depiction of what is, and is not, known about the possible consequences of human action, so that the political community can consider directly whether it wants to entertain catastrophic or irreversible environmental harm as part of its unique legacy.

This is all well and good—and, incidentally, consistent with assessing the relative costs and benefits of government intervention—but is not much of a guide for actual policy. Uncertainty, irreversibility, and catastrophe cannot serve as trump cards, sweeping aside all other concerns. Tradeoffs remain, whatever decision-making process is used. And if the ultimate judgment is political, why does Kysar think the residents of New Orleans would be any better off?

Even given a blank check, there is plenty of reason to doubt that the Army Corps would have made better flood-control investments. Here, as elsewhere, Kysar fails to engage concerns about the political economy of collective action, as if merely asserting a need for precaution and collective responsibility washes them away. It is also rather odd to read an environmental advocate suggest that the Army Corps did not do enough to alter the landscape for the benefit of human development. Elsewhere in *Regulating from Nowhere*, Kysar calls for elevating (if not constitutionalizing) the needs of other life forms within policymaking. But had the Corps not underestimated the likelihood of a Katrina-like event, it would have done even more to alter the coastal landscape. And while he acknowledges that the health, safety, and other costs of environmental regulation and stasis need to be taken into account, this undermines

the claim for moral absolutism, and suggests that a weak form of cost-benefit balancing may be sneaking in the back door.

Central to Kysar's argument is the claim that "precautionary approaches to environmental, health, and safety regulation display greater sensitivity to the inevitable situatedness of collective decision-making than do optimization models such as welfare maximization." Left unanswered is why all such matters need to be collective decisions at all. Not every private choice with environmental consequences must be "political," particularly if there are sufficiently robust liability rules to resolve conflicts and to sanction the imposition of health risks without consent. There are already institutional arrangements capable of communicating moral choices and incorporating normative values without collectivizing everything. Kysar may object to welfare maximization's devaluation of the individual, but subsuming all private consequential choices to the collective poses a similar risk, particularly if the state has an "obligation" to make choices for the rest of us, inevitably privileging some at the expense of others.

If, as Kysar suggests, the precautionary principle supports a pre-interventionist status quo, it ignores the ever-changing, non-static nature of the world around us. Change continues apace whether we embrace collective action or not. Demand for

food continues to climb whether or not we allow the use of genetically modified crops or chemically assisted agriculture. The tradeoffs Kysar meekly acknowledges remain—so there is no clear “precautionary” approach unless precaution is seen as a euphemism for reactionary stasis.

Kysar is correct that regulatory economists rarely have sufficient information and insight to accurately assign values to environmental and other non-market goods. Welfare maximization through calculation is an impossible dream because of the ultimate inability of welfare maximizers to calculate comprehensively. Yet the information problems confronting would-be welfare maximizers are no less intractable for advocates of a more precautionary approach. All systems of centralized, collective decision-making face F. A. Hayek’s “knowledge problem”: the greatest difficulty is collecting and centralizing the necessary information, not processing it through some cost-benefit calculus.

Demanding that decision-makers account for an ever greater array of variables, such as the interests of future generations, only makes this problem worse. But Kysar nonetheless calls for an “engaged effort to anticipate and consider the details of [future generations’] plight and to provide the specific institutions and resources they will need in order to endure it.” And you thought cost-benefit analysis was tough! Setting

aside the express goal of welfare maximization does not make the knowledge problem go away; nor does asserting that cost-benefit calculation will be replaced with a preference for precautionary intervention. Given the inherent subjectivity of many environmental preferences, the likelihood of a centralized system reaching the wrong result is that much greater—unless someone (Kysar?) is prepared to play philosopher-king and show us the way.

Part of the basis of Kysar’s critique is challenging the idea that “getting the prices right”—determining the correct valuations for seemingly intangible costs and benefits, like the environmental cost of a pound of carbon emission—can ensure sustainability without some “collective determination regarding resource use and conservation policies.” But this would seem to be an empirical question, and the record of “collective” (that is, political) institutions in this regard is not so great.

To take one example he offers in the book—fishery management—we actually know quite a bit about what sorts of institutional arrangements make fisheries more sustainable, and centralized, collective decision-making is not it. By contrast, property-based institutions, such as individual transferable quotas or “catch-shares,” which have proven tremendously successful in recent years, don’t require some CBA-wielding economist to

calculate a discount rate or identify some ideal yield for the fishery, since the underlying institutional arrangement already creates a framework in which these things can be discovered by the actors involved. The truly humble approach is one that recognizes the roles of institutions in coordinating human activity for broader purposes, and does not presume that any authority, democratically anointed or otherwise, can direct the system to some predetermined goal (assuming that there is even consensus about the goal in the first place).

Throughout *Regulating from Nowhere*, Kysar presents an idealized, if a bit naïve, view of collective decision-making. His ideal is a “reflective and responsible” political community, “imbued with an identity, a history, and a legacy still in formation,” that is “capable of reasoning through its obligations not only to its own citizens but also to those who reside within other communities.” Fittingly, his narrative of early environmental regulation emphasizes the public-spirited motivations of environmentalist advocates and the broad aspirational language embodied in early federal environmental statutes. But he leaves out the rough underbelly of environmental policymaking—the crass political compromises that often blunted regulatory protections or used environmental controls for economic advantage. The history of environmental law

is replete with corporate rent-seeking and unintended anti-environmental consequences—but not in Kysar’s account. The reader learns of “salient, culture-altering events,” such as the “pollution-induced burning of the Cuyahoga River,” that motivated environmental reform, but never learns that local communities and even private interests had made substantial environmental progress prior to federal reforms. In fact, river fires were once common—as they were on industrial waterways throughout the nation—but it was local communities that first identified the problem and came together to create solutions, not the federal government. Nor did the aspirational, absolutist federal environmental laws he celebrates play a significant role.

Kysar also hails the decision to phase out ozone-depleting chemicals as “a classic example of precautionary regulation in the face of incomplete information regarding potentially disastrous environmental harms.” But he ignores the special-interest deals that made it possible. The United States did not lead the global effort because of a commitment to precautionary action. Rather, U.S. policy embraced a phase-out of chlorofluorocarbons only after the economic interests of their manufacturers were accommodated—and even then some would question whether the United States led at all. Kysar’s Pollyannaish view of political decision-making fits

with his assumption that the political process is more effective than the marketplace at reflecting the values and interests of the people.

Despite his critique of the pretense of objectivity in welfare economics, Kysar is not above asserting his own purportedly objective standards of measurement, such as the “unmistakable” needs of life. But recognition of ecological realities shows that the needs of life are not so unmistakable and that tradeoffs are unavoidable.

Consider a relatively simple example in the context of ecosystem management. For years, environmentalists championed the need to reintroduce wolves into the Yellowstone ecosystem. Though often portrayed as an effort to restore some pre-existing ecosystem “balance,” it actually reflected a set of aesthetic preferences, and produced tradeoffs. In simple terms, more wolves means fewer elk and other species. Is this good or bad? It depends on what one wants. Relative species populations have fluctuated in the region for centuries, and there is no objective ideal ecological ratio of wolf and elk populations that serves the needs of “life” more generally. Kysar is correct that such policy debates should openly engage ethical, aesthetic, and other criteria; but it is naïve to suggest such debates fare better uninformed by knowledge of relevant tradeoffs, and it cannot seriously be maintained

that one ecological position is somehow supported by the “unmistakable” needs of life.

Despite his prior discussion of subjective value preferences and the limitations of perspective, Kysar writes of a need “to give nations faces, just as we must seek to better recognize and respect non-human life forms.” Yet we will always to a great extent hear what we want to hear from non-human life forms. Anointing yourself the Lorax does not guarantee you truly speak for the trees. It is easy to claim you are speaking for the interests of others if you do not actually have to hear their voices.

Kysar closes the book with “a simple, but hopefully catalytic legislative proposal”: an “Environmental Possibilities Act” that would limit the use of CBA in all environmental programs going forward. His proposed legislation would eliminate the “conceptual straitjacket” imposed by excessive reliance on CBA, and would require greater consideration of those outside the U.S. political process, including other countries, other species, and future generations.

He wants environmental law to “accept the need to constantly find ways of doing better by those who depend on us.” But this is a curious case to make for the technology-based regulatory standards he favors, as such standards have done more to lock in favored technological fixes than to induce innovation. There is far more pressure to innovate and



improve in the competitive marketplace than in the administrative state. Early environmental statutes may well have spurred significant environmental progress through the imposition of broad mandates, but this hardly suggests we can achieve similar results with more of the same. Those first environmental gains were the easiest to make, and the marginal returns from additional measures diminish rapidly. Renewed environmental progress—if we can even agree upon what that means—is more likely to come from decentralized, innovation-friendly institutional arrangements than a stronger, centralized regulatory ratchet. Yet the latter is where Kysar’s road leads.

Kysar appeals to the “romantic and transcendentalist traditions” of environmental law, as if this justifies the broad expansion of collective responsibility and choice. Yet an aspirational pursuit of transcendent ends need not require centralized political decision-making about deep moral questions—nor need it require trumping traditional liberal institutions, including private property, with collective judgment. In America, our churches are “property” under the law, fully incorporated into liberal market institutions, yet this does not

tarnish their sanctity, obstruct their transcendent aspirations, or hamper their growth. To the contrary, America is among the most devout nations on Earth. The fundamental nature of our religious institutions lies beyond the legal framework in which they are situated—yet that legal framework is what allows them to thrive as organic, self-directing institutions in a broader pluralistic society. They are healthier and more vibrant through being incorporated into a system of private institutions.

If Kysar’s ultimate concern is for a greater recognition of and reaching toward the environmental values he holds dear, his complaint should be less with CBA and utilitarian calculus than with the centralized regulatory structure in which they are used to impose one-size-fits-all policies. In selecting the wrong target, Kysar embarks on a journey to the wrong destination. Were we to take Kysar’s advice, we would no longer “regulate from nowhere,” but we would still regulate from nowhere good.

*Jonathan H. Adler is Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law.*