

IS IT LAWFUL TO USE REGULATION TO ACHIEVE EQUITY?

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Upon taking office in January, President Biden moved immediately to turn the executive branch of the federal government in a dramatically different direction. In his first few weeks in office, he issued 37 executive orders, more than any recent president has in that period of time. These orders rescinded a wide variety of orders issued by President Trump dealing with immigration, energy and the environment, critical race theory, and other significant matters. Other orders rescinded President Trump's signature orders on regulatory policy and procedures, including those dealing with cost-based regulatory budgeting and restrictions on the use of regulatory guidance.

In addition to these rescissions, President Biden took forward looking action relating to regulatory policy and procedures. On January 20, he issued a Memorandum on "Modernizing Regulatory Review" that directs the heads of executive departments and agencies each to produce a set of recommendations for "improving and modernizing" the regulatory review process. Improvement and modernization seem like rather unremarkable goals for a government initiative. In fact, the Memorandum represents one of President Biden's most significant regulatory actions.

Regulatory review, or regulatory impact analysis, is the process used by the federal government to evaluate the cost-effectiveness of proposed regulations. Regulation restricts the actions and impacts the property rights of the regulated entities. Regulation forcibly reallocates private resources. As a result, there is virtually universal agreement that the economic benefits produced for society by a regulation should justify the overall economic cost of its imposition.

Every president since Jimmy Carter has sought to effectuate this conceptual consensus by issuing executive orders and memoranda that direct regulatory agencies to consider the economic costs and benefits produced for society by proposed regulations. In 2003, the Office of Management and Budget issued Circular A-4 to provide detailed guidance to agencies regarding the methodological attributes of adequate regulatory impact analysis.

Progressive adherents to Critical Theory have complained that the benefit-cost analysis used in traditional regulatory review gives too much weight to quantifiable factors and fails to adequately credit qualitative benefits such as those that result from the advancement of social justice and racial equity. They have argued that regulatory review should not just evaluate the economic benefits and costs of a proposed regulation for society as a whole but should, instead, be conducted to advance regulations that favor historically disadvantaged racial groups by distributing benefits and costs in a way that will reduce and ultimately eliminate the

economic disparities that have been created by the structural racism they claim pervades the current regulatory system.

The Memorandum fully reflects this progressive point of view. It declares that America's "serious challenges" include "systemic racial inequality." It calls for changes to the regulatory review process to ensure that it "fully accounts for regulatory benefits that are difficult or impossible to quantify." It directs executive departments and agencies to produce a set of "concrete suggestions on how the regulatory review process can promote...racial justice...[and]...equity...[and]... ensure that regulatory review serves as a tool to affirmatively promote regulations that advance these values." The Memorandum further directs respondents to "propose procedures that take into account the distributional consequences of regulations...[and]...as part of any quantitative or qualitative analysis...ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."

The Memorandum raises serious constitutional issues. Equal treatment of every individual under the law is a bedrock principle of the American republic. It is based on centuries of legal and political evolution dating from the Magna Carta in 1215. It is a fundamental constitutional right that flows necessarily from the self-evident truth of individual equality affirmed in the opening paragraphs of our Declaration of Independence.

The equity sought by the Memorandum, i.e., the elimination of economic disparities through the distribution of regulatory benefits and burdens to favor some racial groups over others, is utterly antithetical to the principles and institutions of our constitutional system. Equality under the law requires that people be treated equally and judged impartially as individuals. Equity, as sought by the Memorandum, requires that people be treated differently and judged as members of a group to achieve equal outcomes. The Memorandum does not merely ask agencies to take into account the distributional consequences of regulation, it directs agencies to ensure that their regulations create race-based distributional consequences.

In addition to the Memorandum, the Biden administration has taken legislative action to promote racial equity. The litigation triggered by the legislation confirms the seriousness of the constitutional issues raised by the policy. The COVID-19 relief programs contained in the American Rescue Plan Act of 2021 ("ARPA") include one to forgive loans previously made by the Department of Agriculture and one to provide funding through the Small Business Administration to restaurants. Both programs were structured and administered to distribute their benefits giving preferential treatment to racial minorities. This was done, according to the administration, to address the systemic racial discrimination that disadvantaged minority communities have faced.

In *Parents Involved in Community Schools v. Seattle School District* (2007), the Supreme Court held that “when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” Following enactment of the ARPA, plaintiffs across the country filed suits challenging the loan forgiveness program and the restaurant funding program as clear violations of the Constitution’s requirement for equal protection under the law. In response to the suits, federal courts have found that both programs fail to pass constitutional muster when subjected to the appropriate strict scrutiny.

Federal regulatory agencies should pay close attention to the ARPA litigation as they consider how to respond to the directives contained in the Memorandum. They should also recall that the basic dictionary definitions of “equity” focus first on fairness, impartiality, and justice. The agencies, and everyone in government, should realize that the only fair way to secure justice for all the members of society, whatever their race, is to treat each and every individual equally and impartially under the law. That is clearly required by the Constitution. And it is the only equitable thing to do.

J. Kennerly Davis, Jr. has over forty years of experience in corporate management, public service, and the private practice of law. Most of his practice has involved some aspect of the federal regulatory system.