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## Democratic Accountability in Stressful Times: When Decisions Must Be Made Quickly

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**DEMOCRATIC ACCOUNTABILITY IN  
STRESSFUL TIMES: WHEN DECISIONS  
MUST BE MADE QUICKLY**

*Letizia Gianni*\*

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INTRODUCTION

The advent of the administrative state and the never-ending rise of its powers and functions have led the academy to engage in a robust debate on which procedural guarantees better safeguard the legitimacy of executive decisions.<sup>1</sup> For policymaking, executive actors should seek to achieve the objectives within the statutory boundaries set by the legislature, and whenever possible use procedures that permit interested citizens to evaluate the executive’s action.<sup>2</sup> Nowadays, administrative bureaucrats are expected to support critical policy choices with sound analysis and well-argued justifications, and, most significantly, to publicly disclose the technical information at the basis of the analysis. This transparency requires bureaucrats to fully explain the reasons underpinning alternative available options and then to submit those explanations for public consultation with interested parties to engage in a meaningful, open discussion with all stakeholders.

Rational reason-giving becomes even more important when administrators must make hard choices to reconcile divergent policy objectives. Power generation and climate change offer just one example where government must strike an appropriate balance between policy goals that may conflict with one another. Energy is both the cause of global warming and the key to solving it. Fossil-fueled electricity production generates two-thirds of global

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<sup>1</sup> See generally J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & POL. 239 (2017) (assessing the benefits and drawbacks of the administrative state); see generally Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605 (2016); see generally John Ferejohn, *Instituting Deliberative Democracy*, 42 NOMOS: AM. SOC’Y POL. LEGAL PHIL. 75 (2000) (analysis of deliberative democracy in a pluralist society).

<sup>2</sup> Susan Rose-Ackerman, *Triangulating the Administrative State*, 78 CALIF. L. REV. 1415, 1423 (1990).

greenhouse gas emissions and thereby heavily contributes to climate change.<sup>3</sup> Energy generation is also directly impacted by climate change. With warmer average temperatures, for instance, energy demand for cooling increases in the summer. Also, the water cycle changes and thus impacts the level of hydropower produced.<sup>4</sup> That is why using renewable energy sources or nuclear energy rather than fossil fuels to generate electricity may help reduce CO<sub>2</sub> emissions: to alleviate climate change and increase the resilience of the energy sector. Nonetheless, other factors may limit energy policy as geopolitics and security issues drive political choices and have major effects on the global energy market. The recent war in Ukraine has certainly disrupted regional stability in the area, bringing energy security top of mind for many European states, which have tried to act rapidly to gain energy independence from Russia.

In such cases, when some decisions must be made quickly, the role of procedural guarantees to decision-making may be cast into doubt by those who must make the decision. During times of stress, one could ask whether the use of scientific expertise and accountable procedures could be overridden under extraordinary circumstances. The urgency of the decision may not leave space for the delays that open rulemaking can cause. Or the decision to be adopted may just aim to update a previous resolution in light of some new adverse, changed circumstances. Is there a reason to believe that citizens should accept their lack of access to complete information and to a transparent rulemaking process? Citizens have to obtain complete information about the decision-making process so that they can participate meaningfully in the rituals of deliberative democracy and play an active role in rulemaking. Bypassing this right constitutes a breach that, in my view, could be justified only in limited, exceptional circumstances, given how detrimental that breach is to how deliberative democracy is supposed to work.

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<sup>3</sup> Molly Walton, *If the Energy Sector Is to Tackle Climate Change, It Must Also Think About Water*, INT'L ENERGY AGENCY (Mar. 23, 2020), <https://tinyurl.com/2tjr6s8j>.

<sup>4</sup> See *Energy and Climate Change*, EUR. ENV'T AGENCY (May 11, 2021), <https://www.eea.europa.eu/signals/signals-2017/articles/energy-and-climate-change>.

This Essay examines the risks that arise when regulators, under stressful political circumstances, may decide not to deploy the main assessment techniques of deliberative democracy, in particular, the evaluation of costs and benefits and public consultation. Section I outlines the functions and limitations of the analytical tools that measure costs and benefits, specifically in the field of environmental policymaking. Section II offers an overview of the main challenges of engaging the public in decision-making. I reach the preliminary conclusion that, while public participation mostly enhances the legitimacy of public authorities and compliance with the law, cost-benefit analysis may be easily rigged if its data are not further scrutinized and debated during public consultation or judicial review. However, both public consultation and judicial review demand significant time and staff resources, which may be lacking in exceptional circumstances of stress. In Section III, I discuss Germany's recent decision to delay the phase-out of coal plants as a case study of an executive decision to deliberate unconstrained by the procedural guarantees of democratic accountability. In Section IV, I propose a tentative three-prong test to assess the boundaries of an acceptable trade-off between participatory democracy and rapid executive decision-making under stressful conditions.

#### I. THE PROSPECTS AND LIMITATIONS OF THE PROCEDURAL GUARANTEES OF ACCOUNTABLE DECISION-MAKING

While decision makers grapple with perennial and novel challenges, many of which are related to the environment, a chief question concerns how to balance between demand for expertise and public participation. In an increasingly complex world, we need scientific insights to adequately weigh the risks against the advantages of important decisions. Further, we need those decisions to be justified and subject to public scrutiny to keep authorities accountable to their citizenry.<sup>5</sup> Some pit these two needs against one another as

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<sup>5</sup> See generally Jennifer Nou, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, 26 YALE L. & POL'Y REV. 601 (2008).

adversaries,<sup>6</sup> but I argue that expertise and public consultation are complementary to each other considering their roles and limitations.

#### A. Cost-Benefit Analysis and Its Problematic Normative Assumptions

In part, the legitimacy of executive decision-making depends on whether the exercise of power is based on knowledge.<sup>7</sup> Decision makers express this knowledge by considering the advantages and disadvantages of the available policy options. This consideration helps rationalize the decision-making process. In a letter advising a friend on how to make a good decision, Benjamin Franklin suggests that “all the reasons pro and con” shall be brought “present to the mind at the same time” in the attempt “to estimate their respective weights.”<sup>8</sup> This exercise may manifest through the simple numeric terms of conventional cost-benefit analysis (CBA). In the U.S., CBA has come through different political seasons unscathed.<sup>9</sup>

CBA attempts to provide a quantitative measurement of the costs and benefits of public policies, so that scarce resources can be efficiently allocated to further public goals. Among other methodologies, CBA is useful in balancing specific tradeoffs between

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<sup>6</sup> See, e.g., Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 J. LEGAL STUD. 971 (2000); see also GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 9 (1987); see generally Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003).

<sup>7</sup> Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 23 (2001) (citing Max Weber, 3 *Economy and Society* 956-1003 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968)).

<sup>8</sup> Benjamin Franklin, *Letter to Joseph Priestley*, in BENJAMIN FRANKLIN: REPRESENTATIVE SELECTIONS, WITH INTRODUCTION, BIBLIOGRAPHY AND NOTES 348-49 (Chester Jorgenson & Frank Mott eds., 1936).

<sup>9</sup> Cass R. Sunstein, *The Cost-Benefit State 2* (Coase-Sandor Institute for Law & Economics Working Paper No. 39, 1996) (Both Republican and Democratic Administrations have confirmed the goodness of this approach multiple times. It has been twenty-five years since the U.S. government and its regulatory action were first described as a “Cost-Benefit State”).

short-term and medium-term market failures.<sup>10</sup> The simplicity of its rationale has contributed to its popularity. Under a CBA approach, actions are worth doing if the resulting benefits outweigh the costs. However, monetization is material to CBA, since converting all values into money ensures that trade-offs among different elements are countable, visible, and kept under control.

CBA is rooted in conventional welfare economics, which assumes that individuals are rational agents, and they have preferences over different states.<sup>11</sup> An individual's welfare or utility increases when her preferences are satisfied.<sup>12</sup> Preferences depend on how people rank different states of the world, so that they are individual-centered. The worth a person attaches to something is given by the price the person is willing to pay for it.<sup>13</sup> However, welfare economics recognizes that if two people place the same dollar value on one thing, it does not imply that their individual welfare has increased by the same amount. This is the reason the utility or welfare

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<sup>10</sup> SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE 122 (2021).

<sup>11</sup> MATTHEW ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 159 (2012).

<sup>12</sup> *Id.*; see also Richard J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFF. 158, 194 (1990); Robert E. Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75-101 (J. Elster & A. Hylland eds., 1985).

<sup>13</sup> Ezra J. Mishan, COST-BENEFIT ANALYSIS 24 (1976); see also VILFREDO PARETO, 2 COURS D'ECONOMIE POLITIQUE (G.H. Bousquet & G. Busino eds., 1896) (The modern form of CBA, developed by Nicholas Kaldor, was built on the concept of "welfare optimum" provided by Vilfredo Pareto. The Pareto optimum indicates a state of affairs in which no one can be made better off without making someone else worse off.); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 551 (1939) (Kaldor used Pareto's work to define the Potential Pareto test (PCT). While he acknowledged that economists cannot scientifically make interpersonal utility comparisons, Kaldor suggested this was irrelevant in the PCT as "[o]nly if the increase in the total income is sufficient to compensate for such losses, and still leave something left over to the rest of the community, can the project be said to be 'justified' without resort to interpersonal comparisons of utility.").

curves of different individuals cannot really be compared.<sup>14</sup> However, under the Kaldor-Hicks test, the question of the comparability of individual satisfactions has become irrelevant, as desirable policies are those leading to an increase in aggregate real income and to a point where total gains exceed total losses.<sup>15</sup>

Nonetheless, this way of developing a substantive account of well-being and the assumptions this implies are heavily criticized.<sup>16</sup> A major critique is that individuals do not have the same income, thus individual curves describing a willingness to pay cannot just be added up.<sup>17</sup> The acknowledged impossibility of interpersonal utility comparisons has been addressed by considering the aggregate measures of gains and losses. This means that if a proposal generates total monetary gains exceeding its total costs, that proposal is desirable as long as it could potentially compensate those who could be losing in the specific case. However, CBA disregards whether actual compensation among individuals takes place, as it does not measure distributional effects across the population.<sup>18</sup> This normally raises two counterclaims. First, the CBA methodology may use

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<sup>14</sup> Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *ECON. J.* 635, 640 (1938).

<sup>15</sup> See Kaldor, *supra* note 13, at 550.

<sup>16</sup> See e.g., Ryan Bubb & Richard Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 *HARV. L. REV.* 1593 (2014); see also Joshua Wright & Douglas Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 *NW. U. L. REV.* 1033, 1063 (2012); Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *STAN. L. REV.* 1551 (1998); see also Zachary D. Liscow & Daniel Markovits, *Democratic Law and Economics*, 39 *YALE J. REG.* (forthcoming 2022) (contends that economists' recommendations based on welfare economic assumptions are misleading because economists make normative claims relying on the assumption that lay people act rationally, which behavioral economics has already proved to be wrong).

<sup>17</sup> ROSE-ACKERMAN, *supra* note 10, at 126; see also Martha Nussbaum, *The Cost of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 *J. OF LEGAL STUD.* 1005, 1036 (2000); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 149-51 (2004); Thomas O. McGarity, *A Cost-Benefit State*, 50 *ADMIN. L. REV.* 72, 73 (1998); Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 *IOWA L. REV.* 1405, 1453 (2005).

<sup>18</sup> ROSE-ACKERMAN, *supra* note 10, at 126.



distributive weights to counteract the changeable marginal utility of money.<sup>19</sup> Second, redistribution of income runs afoul of CBA's goal of welfare maximization, and the former should be the separate goal of other policies (e.g., taxation and subsidization policies).<sup>20</sup> In other words, regulators should push the system toward the maximum welfare frontier, coping with income distribution once the maximum income possible has been secured. Diminishing the net benefits to pursue distributional goals means that society goes down on the welfare scale.<sup>21</sup> In a world of growing inequality, the question remains open about whether equity should be integrated in any analysis or would be better pursued in other ways. This cautions us to manage CBA findings carefully as they might disregard important distribution problems in our society.

### 1. The Limits of CBA to Measure Environmental Risks

CBA has emerged as a valuable tool to quantify the potentially irreversible damage to the environment caused by carbon emissions. However, CBA, is not suited for this field in its traditional use. This is because CBA relies on assumptions that are not entirely appropriate in the environmental domain.

To begin with, CBA shows all its weaknesses when, for example, in the context of environmental decision-making, CBA

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<sup>19</sup> See MATTHEW ADLER & ERIC POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 157 (2006) (stresses that CBA might incorporate distributive weights to counterbalance the variable marginal utility of money, but these weighing factors would simply function to help CBA measure overall welfare more precisely, without any relation to purely egalitarian principles or norms).

<sup>20</sup> See Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. OF LEGAL STUD. 667 (1994); see also Aanund Hylland and Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCANDINAVIAN J. OF ECON. 264 (1979). But see Chris W. Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001).

<sup>21</sup> TEVFIK F. NAS, *COST-BENEFIT ANALYSIS: THEORY & APPLICATION* 148 (2nd ed. 2016); see also Arnold C. Harberger, *Three Basic Postulates for Applied Welfare Economics: An Interpretative Essay*, 9 J. ECON. LITERATURE 785, 797 (1971); RICHARD W. TRESCH, *PUBLIC FINANCE: A NORMATIVE THEORY* 543-45 (1981).

attempts to price goods that are normally “priceless.”<sup>22</sup> This is the “incommensurability” objection to CBA. For instance, what is the cost of human life? Human life often plays a crucial role in calculating benefits of health and environment regulation.<sup>23</sup> However, CBA is not the only place where this problem arises. Insurance companies commonly use a Human Life Value Approach to monetize physical damages in the case of accidents.<sup>24</sup> But in other instances, monetization may get more complex. We can think of social environmental costs and benefits, many of which are intangible and difficult to measure. Environmental policy often involves non-welfare values such as the integrity of the environment, the protection of endangered species, or the importance of natural ecosystems threatened by the negative consequences of future human actions. Valuing these elements makes monetization immensely difficult.

Likewise, evaluating the risks and uncertainties implicated in climate change puts CBA far outside its comfort zone. The effects of climate change transcend national boundaries. These effects, Professor Susan Rose-Ackerman of Yale Law School notes, extend into the distant future, generating consequences that are large, uncertain, and unequally distributed across generations.<sup>25</sup> Hence, distributional and inter-generational inequalities do not square well with the assumptions underlying cost-benefit analysis, due to its disregard for many long-term social costs and benefits. The discount rate used to express future net benefits imply that those that occur far in the future have little weight in the analysis. Furthermore, the paucity of data available and large cost uncertainties generate widely

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<sup>22</sup> FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 149-51 (2004).

<sup>23</sup> *Id.* at 62.

<sup>24</sup> See generally Alfred Hofflander, *The Human Life Value: A Theoretical Model*, 33 J. RISK & INS. 529 (1966) (explaining the theory behind the Human Life Value model).

<sup>25</sup> ROSE-ACKERMAN, *supra* note 10, at 122.

divergent and mutually inconsistent practices when CBA is used in this domain.<sup>26</sup>

However, the recent application of CBA to climate change has contributed to the questioning of its orthodox assumptions and to important innovations. Some examples are the use of equity weights to account for impacts on different income groups, or new discounting approaches emphasizing the distinction between inter- and intra-generational time preferences.<sup>27</sup> Another commonly used variable for understanding the impacts on the environment is the social cost of carbon. The social cost of carbon is the cost of the damages created by one extra ton of carbon dioxide emissions released in the atmosphere.<sup>28</sup> These costs derive from changes in the climate (e.g., warming, sea level rise) and the way these transformations affect human conditions and activities like human health, land use, labor productivity, and agriculture. At present, the social cost of carbon has been set by the Biden administration at around \$51 per ton of carbon emitted, but it is expected to rise during the next revision.<sup>29</sup> The social cost of carbon serves to quantify the costs associated with carbon emissions which are not directly reflected in market prices, and it has been widely used in CBA as applied to specific environmental policies.<sup>30</sup>

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<sup>26</sup> J.C. JANSEN ET AL., REVISITING EU POLICY OPTIONS FOR TACKLING CLIMATE CHANGE - A SOCIAL COST-BENEFIT ANALYSIS OF GHG EMISSIONS REDUCTION STRATEGIES 12 (Centre for European Policy Studies, 2006).

<sup>27</sup> See Francis Dennig, *Climate Change and The Re-evaluation of Cost-Benefit Analysis*, 151 CLIMATIC CHANGE 43, 54 (2018).

<sup>28</sup> Renee Cho, *Social Cost Of Carbon: What Is It, And Why Do We Need To Calculate It?*, COLUM. CLIMATE SCH. (Apr. 1, 2021), <https://news.climate.columbia.edu/2021/04/01/social-cost-of-carbon/> (“The social cost of carbon is used to help policy makers determine whether the costs and benefits of a proposed policy to curb climate change are justified.”).

<sup>29</sup> Clark Mindock, *Biden ‘Social Cost of Carbon’ Climate Risk Measure Upheld by U.S. Appeals Court*, REUTERS (Oct. 22, 2022, 2:00 PM), <https://tinyurl.com/yptcre75>.

<sup>30</sup> Geoffrey Giller, *The Social Cost of Carbon is Still the Best Way to Evaluate Climate Policy*, YALE SCH. ENV'T (Aug. 23, 2021), <https://environment.yale.edu/news/article/social-cost-of-carbon-still-best-way-to-evaluate-climate-policy>.

Many scholars warn against how flaws in the specification of arbitrary inputs (e.g., discount rate) may have huge effects on the social cost of carbon and CBA results.<sup>31</sup> Nevertheless, some argue that the social cost of carbon is still the best way to assess climate damages.<sup>32</sup> This is because the proposed alternative, the target-consistent approach (a cost-effectiveness analysis), starts with an arbitrary goal, which may be set based on politics, and then builds the analysis needed to achieve that result. Target-consistent pricing, Professor Matthew J. Kotchen observes, may be subject to drastic changes depending on who is in charge politically, rather than providing a non-partisan path with objective consistency. However, both approaches—the social cost of carbon and target-consistent pricing—have arbitrary elements as the social cost of carbon is also set politically by the executive.

## 2. The Limited Value of CBA

Technocratic techniques like CBA run the risk of relying on flawed normative assumptions and lead to skewed results. Nevertheless, CBA remains very popular and widely used. In part, this is because alternative techniques face, and similarly fail to resolve, most of the same difficult issues as CBA.<sup>33</sup> Sometimes, these alternative instruments, like multi-criteria analysis,<sup>34</sup> seem to do a worse job of measuring the welfare costs of regulations. But, once we

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<sup>31</sup> Robert S. Pindyck, *Climate Change Policy: What Do the Models Tell Us?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 19244, 2013); see also Andrew Taylor, *Why the Social Cost of Carbon Is a Red Herring*, 31 TUL. ENV'T L.J. 345 (2018); Amy Sinden, *Cost-Benefit to the Rescue?; Maybe Not*, YALE J. ON REGUL. (Oct. 12, 2021), <https://www.yalejreg.com/nc/symposium-reviving-rationality-part-08/>.

<sup>32</sup> Matthew J. Kotchen et al., *Keep Climate Policy Focused on the Social Cost of Carbon*, 373 SCIENCE 850, 852 (2021).

<sup>33</sup> MATTHEW ADLER & ERIC POSNER, NEW FOUNDATIONAL BASIS FOR CBA (2006) (classifies these available methods as non-welfare-focused, narrow welfare-focused, and wide welfare-focused, the latter category being further articulated in quantitative (CBA) and qualitative (intuitive balancing), and (d) hybrids of the previous models).

<sup>34</sup> Niek Mouter et al., *Comparing Cost-benefit Analysis and Multi-criteria Analysis*, in STANDARD TRANSPORT APPRAISAL METHODS 225 (Advances in Transport Policy and Planning series, Nov. 2020).

are aware of the pitfalls of the CBA approach, how should we look at its evaluations? Why should we retain CBA in assessing a policy?

A backup argument is that CBA can be an informative instrument, which offers an easily understandable overview of the issues involved in a policy problem. Professor Cass R. Sunstein notes that CBA is a tremendous instrument able to synthesize a great deal of information.<sup>35</sup> This might be true, but such an approach leads to the concern, well-known to most vocal scholars against CBA, that this summary information does not protect against misleading descriptive findings. If impact assessment (IA) techniques are removed from any judicial, parliamentary or public scrutiny, the IA's underlying assumptions are not immune to the risk of political manipulation. The informational approach therefore requires an additional layer of justification. CBA can summarize the effects of a considerable number of countervailing factors so that this information may lay the foundation of an open discussion on the data summarized. One could then argue that CBA, as other methodological tools, contributes with numerical analysis to enhanced transparency in executive decision-making because it provides results to criticize. And numbers may offer a shorter, more immediate language to confront different views.

However, it is critical that CBA and other IA documents be subject to debate through some form of public scrutiny. The two tools, numerical analysis and public consultation, should go hand in hand. Professor Karen Bradshaw notes that while stakeholder consultation works well in several contexts when numerical analysis fails, the two are not necessarily irreconcilable.<sup>36</sup> Interested groups and individuals affected by a decision may provide insightful perspectives on how they would better rank the available options. If the number of interested individuals is high, seriously discussing how the costs and benefits have been quantified may reduce the risk of

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<sup>35</sup> Cass Sunstein, *Cognition and Cost-Benefit Analysis*, in COST-BENEFIT ANALYSIS 252 (Matthew D. Adler & Eric Posner eds., 2001).

<sup>36</sup> Karen Bradshaw, *Stakeholder Collaboration as an Alternative to Cost-Benefit Analysis*, BYU L. REV. 655 (2019).

conflict and litigation afterwards, while also promoting a more rapid adaptation to the new rules.<sup>37</sup>

On the last note, CBA easily allows for iterative thinking. This means that this analysis can be replicated, if needed, to monitor or reshape—*ex post*—a regulation that has been already adopted. Such an approach would also enable decision makers to update the assumptions underpinning the *ex-ante* assessment whenever circumstances demand adjustments in the rules. CBA is not unchangeable or monolithic. No weighted values need to be taken as given.

#### B. Public engagement with executive decision-making

What public consultation means may vary depending on the specific features of the many citizen participation mechanisms that today exist in domestic and global governance.<sup>38</sup> This is because the appropriate level and means of public participation remain unresolved questions. Different levels of citizen participation in administrative deliberation may diversely affect the costs and benefits of such participation for the deliberative administrative process and for the same ideal of democratic governance.<sup>39</sup> Yet there is a general consensus that more opportunities for citizens to participate in the executive decision-making process and shape policy outcomes are beneficial to healthy democracies.<sup>40</sup> More opportunities enhance the

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<sup>37</sup> See Liscow & Markovits, *supra* note 16 (Authors call this approach “democratic law and economics” based on behavioral economists informing representative samples of ordinary people about the evidence and let them decide for themselves. Those decisions, rather than experts’ opinions alone, would then inform policymakers.).

<sup>38</sup> Benedict Kingsbury, *Global Administrative Law in the Institutional Practice of Global Regulatory Governance*, 3 *WORLD BANK LEGAL REV.* 3, 10 (2012) (on the dynamic procedures requested by the global administrative space).

<sup>39</sup> See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-making*, 92 *NW. UNIV. L. REV.* 174, 241 (1997).

<sup>40</sup> *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave* 36 OECD (2020), <https://tinyurl.com/7ekusjxm>; see also Saki Kumagai & Federica Iorio, *Building Trust in Government through Citizen Engagement* 1-2

legitimacy of governments and strengthen government performance.<sup>41</sup>

As administrators enjoy limited legitimacy, they can limit the democratic deficit by involving individual citizens and organized groups in discussions on legislative and regulatory texts. Therefore, as the chain of legitimacy between the administrative state and the citizens is broken, inclusive participatory processes for the public to feed into executive decisions may help make those decisions democratically acceptable.<sup>42</sup>

Further, public engagement with rulemaking can improve the output quality and effectiveness of agencies' policymaking. Although

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WORLD BANK (2020), <https://openknowledge.worldbank.org/handle/10986/33346>.

<sup>41</sup> See 1 C.F.R. § 305.71-6 (“persons whose interests or views are relevant and are not otherwise represented should be allowed to participate in agency proceedings whether or not they have a direct economic or personal interest”); see also ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 7 (1972) (stating that “mass participation may be one of the major innovative forces in developing new issues and refining old issues that have remained on the formal agenda for some time”); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972) (maintaining that the lack of public participation is a major factor in agencies' failure to develop regulatory policy responses to public needs); Frank Fischer, *Citizen Participation and the Democratization of Policy Expertise: From Theoretical Inquiry to Practical Cases*, 26 POL'Y SCI. 165, 181-82 (1993); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361-62 (1972); STUART LANGTON, CITIZEN PARTICIPATION IN AMERICA: ESSAYS ON THE STATE OF THE ART 7 (1978); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 105-11 (1970) (noting that political unawareness and lack of interest in problems are indicative of deficiencies in institutions, rather than of limitations of citizens); CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 31 (4th ed. 2010) (“Rulemaking adds opportunities for and dimensions to public participation that are rarely present in the deliberations of Congress or other legislatures.”); RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 368 (4th ed. 2002) (noting rulemaking's democratic character); David Markell, *“Slack” in the Administrative State and Its Implications for Governance: The Issue of Accountability*, 84 OR. L. REV. 1, at 10 (2005).

<sup>42</sup> See ROSE-ACKERMAN, *supra* note 10, at 154.

administrators may have substantial expertise, their knowledge may be incomplete in certain fields. They need to gather the additional information they need from stakeholders (regulated industries, regulatory beneficiaries, experts, citizens) to get a full understanding of the regulatory issues and evaluate the available ways forward.<sup>43</sup> The best decisions are made when the decision makers have as much information as possible at their disposal. In most instances, public input into decision-making is not only helpful, as people may have something relevant to say, but it is vital to give agencies the full picture of the problem they plan to regulate. As the Austrian economist Friedrich A. Hayek noted, information is decentralized, being unevenly dispersed among different members of society. What falls within the knowledge of one actor, even the most powerful one such as the state or government, could be just a particle of the whole of knowledge belonging to all members of the society.

For example, the interested groups of the proposed regulation may have a better knowledge about the costs of the implementation of the proposal and other possible unforeseen collateral effects. Therefore, the agency must not ignore any information coming from the groups being regulated, whose engagement in rulemaking guarantees that decisions are correctly informed and increases the likelihood of achieving compliance.<sup>44</sup> However, prospective regulatory beneficiaries may also have direct knowledge about the questions decision-makers plan to regulate, and the likely positive and negative effects of the proposed solutions.<sup>45</sup> Citizens and other interested groups may signal complexities of the question administrators have not noticed. Citizens may identify side effects of the proposed solution that the agency has not considered

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<sup>43</sup> Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 795, 802 (2021).

<sup>44</sup> See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1346 (2010); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713-14 (1975).

<sup>45</sup> See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202-03 (1982) (describing regulatory beneficiaries); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 452 (2007) (also describing regulatory beneficiaries).



and point toward alternative actions to take.<sup>46</sup> Public input may also highlight terminology inaccuracies that, unless corrected, would create confusion and weaken the effectiveness of the regulatory effort undertaken by the agency.

Some critics have raised concerns about the opportunity to increase the occasions for public participation in rulemaking. Professor Jerry L. Mashaw, among others, responds to the enthusiastic claim for greater citizens' participation by stressing its costs alongside its benefits.<sup>47</sup> Skeptics focus on two main drawbacks. First, although mass participation may be positive for democracy, the increase in public participation risks adversely affecting the "quality of bureaucratic decision-making."<sup>48</sup> This includes the claim that citizens' engagement procedures may lead to excessive delays and cause other inefficiencies in the decision-making process, a phenomenon known as "rulemaking ossification."<sup>49</sup> Second, critics note that participatory procedures normally empower the already empowered, while they do little to enhance democratic legitimacy of broadly-based decision-making.<sup>50</sup> Notice-and-comment rulemaking designed by the Administrative Procedure Act (APA) does not give any special status to cause-based groups and considers all intervenors (business organizations, not-for-profit groups, citizens) formally equal.<sup>51</sup> Nor does the APA provide for outreach or funding to

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<sup>46</sup> See Kaldor, *supra* note 13, at 550.

<sup>47</sup> JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE*, at 23-29 (1985).

<sup>48</sup> Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-making*, 92 NW. U. L. REV. 173, 177 (1997).

<sup>49</sup> See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387-96 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60-62 (1995).

<sup>50</sup> MASHAW, *supra* note 47, at 24 ("Interests that are substantially affected might, because of lack of resources or organization, fail to participate effectively in administrative forums. . . . Certain interests, because of their intensity, resources, and organization, will come to dominate even an open decision-making process.") For other concerns raised on NGOs, their participation in governance and their accountability (or lack thereof), see Markell, *supra* note 41.

<sup>51</sup> 5 U.S.C. § 553(c).

participants to ensure a broader public input.<sup>52</sup> On the other hand, the debate has been mostly silent respecting what participatory procedures citizens may prefer to express their views and provide their input in public consultation.<sup>53</sup>

Although there may be credence to some of these claims, in the last decades most democracies have moved toward a greater role for public input into executive or agency decision-making, notably in Europe, where public participation is less established than in the U.S.<sup>54</sup> Further, in recent years widespread support for citizen engagement has led to newly created hybrid approaches to boost public participation.<sup>55</sup> Both the U.S. Congress and federal agencies

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<sup>52</sup> See ROSE-ACKERMAN, *supra* note 10, at 178.

<sup>53</sup> A sociological account is offered by procedural justice theory, which shows that citizens' confidence in certain procedures may increase their willingness to defer to them and comply with their outcomes. See generally Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513 (2003); Tom R. Tyler, *Why People Cooperate with Organizations: An Identity-based Perspective*, 21 RES. IN ORG. BEHAV. 201, 247 (1999); Tom R. Tyler & David L. Markell, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 KAN. L. REV. 1, 4 (2008); see also TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 45-74 (1997) (People may trust more some consultation techniques in the context of which they perceive themselves to be treated with fairness and respect. While procedural justice focuses on the fairness or appropriateness of a procedural process, "distributive justice" concentrates on the perceived fairness of the outcome of a procedure).

<sup>54</sup> See Tyler & Markell, *supra* note 53, at 2.

<sup>55</sup> In the U.S., Congress has encouraged negotiated rulemaking and promoted e-rulemaking. See A. Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L. J. 943, 943-47 (2006); C. Coglianese, *Internet and Citizen Participation in Rule-making*, 1 J. L. & POL'Y FOR THE INFO. SOC'Y 33, 44-47 (2005). U.S. federal and state reform proposals have consistently provided for enhanced opportunities for broad-based participation. See, e.g., Small Business Regulatory Enforcement Fairness Act of 1996, 5 USC § 801 et seq., P.L. 104-121 (1996) (adopting reforms designed "to make agencies more responsive to small business"); Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. § 625 (1995) (proposing additional public participation in regulatory analysis by allowing persons subject to major rules to petition the relevant agency or President for cost-benefit analysis and subjecting denial of such petitions to renewed judicial review). At the state level, Florida adopted a major Administrative Procedure Act

have been receptive and have adopted several policies purported to increase the role of citizens in governance.<sup>56</sup> These developments must be favored and supported. There are enormous benefits when the public can meaningfully participate in rulemaking, and final rules are consistent with public views about what is desirable and correct. Even in the U.S., part of those benefits are untapped so there is a lot of room to improve the participatory mechanisms already available.

## II. ESCAPING IMPACT ASSESSMENT UNDER STRESSFUL CONDITIONS: THE CASE OF GERMAN NUCLEAR POLICY

During the regulatory process, mechanisms to facilitate public participation and to ensure that the benefits of regulations outweigh their costs are burdensome, costly, and time-consuming for all parties involved. To adopt a major piece of regulation at the U.S. Environmental Protection Agency (EPA), for instance, takes an average of three years and requires many work hours for administrators, experts, and interested groups.<sup>57</sup> U.S. rules may be

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reform bill in 1996 aimed at facilitating increased participation in agency decision-making, including negotiated rulemaking and more opportunities for the public to challenge rules before they are final. *See* 1996 Fla. Laws ch. 96-159 codified at Fla. Stat. § 120 (1997), [http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&URL=0100-0199/0120/0120.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0100-0199/0120/0120.html). In 1995, North Carolina also adopted many participatory reforms, including a Rules Review Commission made of eight citizens which have veto power over proposed agency rules. *See* N.C. Gen. Stat. § 150B-21.12(d) (1995).

<sup>56</sup> *See, e.g.*, U.S. Office of Pol’y, Econ Env’t & Inno. Prot. Agency, *Public Involvement Policy of the U.S. Environmental Protection Agency* 2 (May 2003), <https://archive.epa.gov/publicinvolvement/web/pdf/policy2003.pdf> (last visited Sept. 23, 2022) (detailing public involvement in the specific field of environmental regulation).

<sup>57</sup> *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L. J. 1255, 1349 (1997); STEVEN J. BALLA AND JOHN R. WRIGHT, *Consensual Rule Making and the Time it Takes to Develop Rules*, in POLITICS, POLICY, AND ORGANIZATIONS at 187 (2009); *see also* ROSE-ACKERMAN, *supra* note 10, at 169 (reporting that the Occupational Safety and Health Administration (OSHA) proposed a rule limiting the use of beryllium in 1975, but the agency issued the final rule only in 2016 at the outcome of a compromise between unions and employers).

challenged in court before they even enter into force, causing additional delay. One could ask whether, if some exceptional circumstances could occur in a political context under stressful conditions (i.e., adverse material changes that are rapid and unexpected) where overriding this lengthy process is justified.

I explore this question by analyzing a case study that concerns the recent determination of the German government to definitively shut down its three remaining nuclear power plants at the end of 2022. The German case illustrates a situation where administrators, under stressful conditions, made a hard choice to reconcile divergent policy objectives—energy security and climate action—without engaging in any assessment procedure or public consultation. The case reveals that political actors may offer the time and trouble of measuring environmental impacts as justifications not to engage in the procedures of accountable decision-making and to escape any public involvement. I propose a three-prong test whose conditions, if all satisfied, may justify a government’s decision without procedural guarantees, temporarily departing from the ordinary track of democratic deliberation. I conclude that the German government’s choice fails to satisfy this test.

#### A. Background: Climate Change and the Rush to Fossil Fuels Due to the War in Ukraine

In recent years, coal was definitively on its way out in much of the world.<sup>58</sup> The U.S. and Europe were gradually cutting back.<sup>59</sup> Some banks said they would stop financing new mines.<sup>60</sup> In 2020,

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<sup>58</sup> See *World Energy Outlook 2021*, INT’L ENERGY AGENCY 57-59 (Oct. 12, 2021), <https://iea.blob.core.windows.net/assets/88dec0c7-3a11-4d3b-99dc-8323ebfb388b/WorldEnergyOutlook2021.pdf>.

<sup>59</sup> See *Coal Demand Has Seen Its Biggest Drop Since World War II. But It’s Not All Good News*, WORLD ECON. F. (Jan. 6, 2021), <https://www.weforum.org/agenda/2021/01/coal-demand-asia-decarbonize-emissions/>.

<sup>60</sup> See *Bank of China to Stop Financing New Coal Mining, Power Projects Overseas from Q4*, REUTERS (Sept. 24, 2021, 9:10 AM), <https://tinyurl.com/yfsk2skt>; see also James Thornhill, *Banks Don’t Want to Lend to Australia’s Coal Miners Any More*, BLOOMBERG NEWS, (Oct. 28, 2020, 10:18 AM), <https://www.mining.com/web/banks-dont-want-to-lend-to-australias-coal-miners-any-more/>; Pilita Clark, *Jpmorgan*

coal demand plummeted across the board as economies shrank during the COVID-19 pandemic. In 2021, at the COP26 climate summit, countries, including the biggest consumers China and India, agreed to “phase-down” their use of the world’s dirtiest fuel.<sup>61</sup> Coal was “consigned to history,” the United Nations said.

However, in 2021 the world generated more electricity from coal than ever before.<sup>62</sup> And 2022 is set to record another surge. The war in Ukraine is prolonging the rally. Coal, oil, and gas prices have reached their highest levels in nearly a decade as countries scramble to replace Russian sources. Since Russia invaded Ukraine on February 24, 2022, a number of governments around the globe have announced strategies to deal with rising energy prices and potential shortages due to the sanctions imposed against Russia. Those strategies have frequently involved implementing price caps or tax cuts to alleviate the financial burden on households and companies. Many of these strategies have also included doubling down on coal, the cheapest (and dirtiest) fossil fuel.

According to some observers, the Russia-Ukraine war and the shock to energy prices may accelerate parts of the global energy transition, notably in Europe, considering that Russia’s oil and natural gas have been fueling the European economy for decades.<sup>63</sup> But short-term policies in the U.S. and Europe to subsidize fossil fuel consumption may undermine the international response to climate change. The disruptions caused by the war and the need for

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*to Stop Direct Financing Of New Coal Mines*, FINANCIAL TIMES (Mar. 7, 2016), <https://archive.ph/vgoV0>.

<sup>61</sup> *COP26 The Glasgow Climate Pact*, UN CLIMATE CHANCE CONFERENCE UK 2021 (Nov. 15, 2021), <https://ukcop26.org/wp-content/uploads/2021/11/COP26-Presidency-Outcomes-The-Climate-Pact.pdf>.

<sup>62</sup> See Amy Gunia, *The World Generated More Power from Coal in 2021 Than Ever Before*, TIME (Dec. 18, 2021, 2:25 AM), <https://time.com/6129192/international-energy-agency-coal-2021-report/> (noting that in 2021 greenhouse-gas emissions from fuel reached a record of 15.3bn tons, representing more than 40% of the global total).

<sup>63</sup> See Somini Sengupta & Lisa Friedman, *War Abroad and Politics at Home Push U.S. Climate Action Aside*, N.Y. TIMES (Mar. 2, 2022), <https://www.nytimes.com/2022/03/02/climate/state-of-the-union-biden-ukraine-climate.html>.

independence from Russia's resources seem to have temporarily displaced climate change from the political agendas of many. U.N. Secretary-General Guterres highlighted that "keeping [the goal to limit future warming to 1.5 degree Celsius] alive requires a 45 percent reduction in global emissions by 2030 and carbon neutrality by mid-century." But this objective is now on "life support" due to the mad rush to fossil fuels. These short-term measures might conclusively "close the window" on the Paris climate goals.<sup>64</sup>

#### B. Germany's Reliance on Russian Energy and Subsequent Remedial Measures

Until the war in Ukraine began, among its European peers, Germany was relying more heavily on Russian energy, particularly on its natural gas. Russia has been Germany's top energy supplier, providing more than half of its natural gas and coal supplies and a third of its crude oil.

In the last decade, Germany's energy policy has been based on three pillars, all of which presupposed that Germany would import most of its gas from Russia. The first pillar is the decision to exit from nuclear power, which was decided in 2011 after the Fukushima nuclear disaster. The second pillar is the progressive phaseout of coal-fired power plants by 2038, a target that the newly elected government (the so-called "traffic-light coalition")<sup>65</sup> hopes to reach by 2030. The third pillar is a rapid transition toward cleaner renewable energy sources and electric vehicles. The ineliminable condition that could make the entire plan possible was the operation of Nord Stream 2, the hotly contested \$11 billion gas pipeline linking Russia to Germany under the Baltic Sea. The project would have allowed additional Russian gas to flow directly to Germany, supporting the transitional phase where Germany would have been

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<sup>64</sup> *UN Chief Warns Against 'Sleepwalking to Climate Catastrophe'*, U.N. NEWS (Mar. 21, 2022), <https://news.un.org/en/story/2022/03/1114322>.

<sup>65</sup> The "traffic light coalition" is the label commonly used to indicate the new center-left government including the Social Democrats, the liberal Free Democrats, and the Greens.

switching from coal to green energy, “a bridge into the clean energy future.”<sup>66</sup>

The outbreak of the war in Ukraine has led a shocked federal government to immediately revise part of its energy plan in an attempt to stop importing oil from Russia by the end of 2022 and wean itself off Russian natural gas as soon as possible. Germany has halted the Nord Stream 2 project.<sup>67</sup> The government has also ramped up support for renewables, aiming for Germany to get 80% of its electricity from renewable energy by 2030 (up from the previous goal of 65% and nearly double the 42% share it supplied in 2021).

In the long term, the crisis has reinforced Germany’s determination to raise its green ambitions and accelerated *Energiewende*, the clean-energy transition it began at the end of the ‘80s.<sup>68</sup> However, in the short term, that means finding alternative suppliers for fossil fuels. To the extent that these plans were in place before the war in Ukraine began, they depended on Russian natural gas, which would have allowed the country to close emissions-heavy, coal-fired power plants while it built up its renewable sector. That concept has now become outdated.

The course of the events has also caused opinion swings in the public. According to a recent poll, 80% of German citizens

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<sup>66</sup> See Andrew Curry, *How the Ukraine War Is Accelerating Germany’s Renewable Energy Transition*, NAT. GEO. (May 6, 2022), <https://tinyurl.com/2wvr7vfp> (reporting statements by Matthias Buck, Europe Director at Agora Energiewende, a think tank that focuses on the energy transition).

<sup>67</sup> See Sarah March & Madeline Chambers, *Germany Freezes Nord Stream 2 Gas Project as Ukraine Crisis Deepens*, REUTERS (Feb. 22, 2022, 11:55 AM), <https://www.reuters.com/business/energy/germanys-scholz-halts-nord-stream-2-certification-2022-02-22/>.

<sup>68</sup> See Craig Morris & Martin Pehnt, *The German Energiewende Book*, HEINRICH BÖLL FOUND. 88 (2016), <https://lifeaftercoal.org.za/wp-content/uploads/2017/07/Morris-et-al-German-Energy-Transition.pdf> (reporting that in 1987, Chancellor Helmut Kohl spoke of the “threat of grave climate change from the greenhouse effect” in the German Parliament, and in 1991 his coalition adopted the Feed-in Act, which provided the first feed-in tariffs for renewable energy and stipulated that green power had priority over conventional power).

support the accelerated green transition, but support for nuclear and coal power is rising in view of soaring energy prices.<sup>69</sup> Now, 54% of the population believes that nuclear power is needed.<sup>70</sup> And 42% of German citizens are in favor of keeping coal plants open past the 2030 target. While the federal government has decided to postpone the shutdown of its coal-fired power plants and is even planning new drillings to extract gas and oil in the North Sea,<sup>71</sup> a return to nuclear power remained off the table too.

### C. The German Green Paradox

After the 2011 Fukushima accident, Germany began phasing out its 9.5 GW nuclear capacity by shutting down fourteen plants in the last ten years. Three other plants are still operating and are expected to be phased out at the end of 2022.<sup>72</sup> That decision came

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<sup>69</sup> 40 Prozent der Deutschen wollen vorerst an Atom- und Kohlekraft festhalten, VERIVOX (Mar. 15, 2022, 9:33 AM), <https://www.verivox.de/presse/40-prozent-der-deutschen-wollen-vorerst-an-atom-und-kohlekraft-festhalten-1119260/>.

<sup>70</sup> Fabian Kluge, *Deutsche Mehrheit der Deutschen will länger an Atomkraft festhalten*, AUGSBURGER ALLGEMEINE (Mar. 11, 2022), <https://tinyurl.com/2czutu87> (reporting that the Civey Research Institute found that 70% of German residents said the nuclear phaseout should be postponed in light of the country's dependence on Russia). These data show a remarkable shift compared to what was recorded before Russia invaded Ukraine. Specifically, more than 81% of German residents were in favor of the nuclear phase-out in a 2015 survey. See Jan Goebel et al., *How Natural Disasters Can Affect Environmental Concerns, Risk Aversion, and Even Politics: Evidence from Fukushima and Three European Countries*, 28 J. POPULATION ECON. 1137, 1180 (2015).

<sup>71</sup> Julia Horowitz, *'Drill, Baby, Drill' Is Back in Europe as Gas Crisis Looms*, CNN BUSINESS (Aug. 1, 2022, 6:15 AM), <https://edition.cnn.com/2022/08/01/energy/gas-fields-europe-energy-crisis-russia/index.html>; Sofia Stuart Leeson, *The Netherlands, Germany Announce Joint North Sea Drilling Operation*, EURACTIV (Jun. 2, 2022), <https://tinyurl.com/mr3fmzbf>.

<sup>72</sup> On October 17, 2022, German Chancellor Olaf Scholz ordered that the lifespan of the last three nuclear power plants should be extended until April 15 next year "at the longest." See Hans von der Burchard & Tristan Fiedler, *Germany Extends Lifespan of All Three Nuclear Power Plants*, POLITICO (Oct. 17, 2022, 7:28 PM), <https://www.politico.eu/article/germany-olaf-scholz-extends-lifespan-of-all-three-nuclear-power-plants/>. The decision came amid growing criticism, within and outside the governing coalition, in the debate over the future of Germany's nuclear power industry.



under scrutiny once the war in Ukraine started. EON SE and EnBW Energie Baden-Wuerttemberg AG, two of Germany's largest energy companies, immediately said they were open to delaying the nuclear phaseout.<sup>73</sup> In the same vein, on March 8, 2022, when launching its Communication on a European Action for more affordable, secure and sustainable energy, the European Commission invited the E.U. Member States to use “[o]ther forms of fossil-free hydrogen, notably nuclear-based, also play a role in substituting natural gas.”<sup>74</sup> This is because nuclear energy is recognized as one of the cleanest sources of energy, which many see as a necessary backbone of a low-carbon electricity economy.<sup>75</sup> For instance, Belgium heard the Commission's call and delayed by a decade its plan to scrap nuclear energy in 2025.<sup>76</sup>

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<sup>73</sup> Will Mathis & Rachel Morison, *Delaying Germany's Nuclear Phaseout Is Easier Said Than Done*, BLOOMBERG (Feb. 28, 2022, 8:07 PM), <https://www.bnnbloomberg.ca/delaying-germany-s-nuclear-phase-out-is-easier-said-than-done-1.1730193>.

<sup>74</sup> *Communication from the Commission to the European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of the Regions*, at 7, COM (2022) 108 final (Mar. 8, 2022), [https://eur-lex.europa.eu/resource.html?uri=cellar:71767319-9f0a-11ec-83e1-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:71767319-9f0a-11ec-83e1-01aa75ed71a1.0001.02/DOC_1&format=PDF).

<sup>75</sup> See Richard Rhodes, *Why Nuclear Power Must Be Part of the Energy Solution*, YALE ENV'T 360 (Jul. 19, 2018), <https://e360.yale.edu/features/why-nuclear-power-must-be-part-of-the-energy-solution-environmentalists-climate>; see also *Nuclear Power in a Clean Energy System*, INT'L ENERGY AGENCY (May 2019), [https://iea.blob.core.windows.net/assets/ad5a93ce-3a7f-461d-a441-8a05b7601887/Nuclear\\_Power\\_in\\_a\\_Clean\\_Energy\\_System.pdf](https://iea.blob.core.windows.net/assets/ad5a93ce-3a7f-461d-a441-8a05b7601887/Nuclear_Power_in_a_Clean_Energy_System.pdf) (considering nuclear energy an “essential foundation” of the energy transition). Last year, the United Nations Economic Commission for Europe labeled nuclear phaseouts a “setback” for efforts to fight climate change. See *Global Climate Objectives Fall Short Without Nuclear Power in the Mix*: UNECE, UN NEWS (Aug. 11, 2021), <https://news.un.org/en/story/2021/08/1097572>. The U.S. Department of Energy defines nuclear as a zero-emission clean energy source. See, e.g., *3 Reasons Why Nuclear Is Clean and Sustainable*, ENERGY.GOV (Mar. 31, 2021), <https://www.energy.gov/nc/articles/3-reasons-why-nuclear-clean-and-sustainable>.

<sup>76</sup> See *Belgium Delays Nuclear Energy Exit 10 Years Due to Ukraine War*, FRANCE24 (Mar. 18, 2022, 11:44 PM), <https://www.france24.com/en/live-news/20220318-belgium-delays-nuclear-energy-exit-10-years-due-to-ukraine-war>.

The promise of a gradual phase-out of nuclear power has been enshrined in Belgian law since 2003 and the decision to again delay the moratorium was fiercely resisted by the Greens party. The Greens had made an exit from nuclear power in 2025 a

But Germany insisted on sticking with its plan. This choice baffles many outside the country. However, whether the German choice is right or wrong is not relevant to the discussion here. What is relevant is how the German government reached and justified its decision.

On March 8, 2022, a government inquiry concluded that keeping the country's remaining nuclear power fleet online was "not recommended" at this stage and that it was too late to reactivate the plants that had already been shut down.<sup>77</sup> That conclusion was based on the assessment of the Ministry for Economic Affairs (BMWK) and the Ministry for the Environment (BMUV) (collectively the "Green Ministries"), both led by the Green Party. The Ministries jointly released a document on their website to explain their reasoning.<sup>78</sup> Germany's negative assessment of nuclear power articulates five main reasons as the basis for the decision.

First, the government considers legal hurdles. To reopen the plants already closed, the plants would need to obtain new authorizations at the end of the mandated procedures, and they would need major investments to pass the safety tests. On the other hand, to permit the three nuclear plants to keep operating beyond 2022, Germany should amend its Atomic Energy Act via parliamentary procedure. The extension of the operations of currently approved establishments, under the case law of the European Court of Justice, would also require an environmental impact assessment.<sup>79</sup> Second, extending the runtime of the three running plants would also require a safety assessment, which was last

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condition to join a politically fragile seven-party coalition that was painfully cobbled together in 2020, more than a year after inconclusive elections.

<sup>77</sup> Nikolaus J. Kurmayer, *Germany Rules Out Prolonging Its Nuclear Power Plants*, EURACTIV (Mar. 8, 2022), <https://www.euractiv.com/section/energy/news/germany-rules-out-prolonging-its-nuclear-power-plants/>.

<sup>78</sup> Prüfung des Weiterbetriebs von Atomkraftwerken aufgrund des Ukraine-Kriegs, BUNDESMINISTERIUM FÜR UMWELT, NATURSCHUTZ, NUKLEARE SICHERHEIT UND VERBRAUCHERSCHUTZ (BMUV) (Mar. 7, 2022), [https://www.bmu.de/fileadmin/Daten\\_BMU/Download\\_PDF/Nukleare\\_Sicherheit/laufzeitverlaengerung\\_akw\\_bf.pdf](https://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Nukleare_Sicherheit/laufzeitverlaengerung_akw_bf.pdf).

<sup>79</sup> *Id.* at 1 (noting "Germany has also so far defended this view internationally and would hardly be able to avoid it").

performed in 2009. Significant retrofitting would be needed to restart them and ensure they meet “state-of-the-art” safety requirements for a longer period. Third, if the nuclear plants were reactivated, the effect would not be felt in time for the 2022 winter season. Furthermore, the three plants that are currently still running would not have sufficient fuel available after December 31, 2022, which would result in “no additional electricity generation” for the coming winter. They expect that getting new fuel would take twelve to fifteen months, so it would arrive in the fall of 2023.<sup>80</sup> Fourth, some spare parts will be lacking because there is no longer a market in Germany for them. Further, specialized personnel have been retiring, and it would be hard to find newly trained people to hire. The costs associated with getting personnel back on board would require a runtime extension of three to five years.<sup>81</sup> Fifth, the BMWK and BMUV maintain that from autumn 2023 onwards, the nuclear plants would supply additional electricity volumes accounting for around 5% of Germany’s electricity production, but that would hardly contribute to increasing German independence from Russian gas imports in the gas crisis. The ministries also assume that other options will be available until 2028 to ensure sufficient electricity supply despite gas shortages.<sup>82</sup>

The executive statement contains one concerning element that, together with what is not in the document, gives rise to what I call the German “Green Paradox.” Let’s start from what of relevance is not included in the text.

First, the document does not contemplate the costs and benefits for the environment, which is awkward if one considers that the Green Party runs these ministries. While the German government was initially planning to phase out coal by 2030 in a best-case scenario, it has now committed to keeping coal power plants in operation and at the ready for now.<sup>83</sup> The updated plan clearly

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<sup>80</sup> *Id.* at 3.

<sup>81</sup> *Id.* at 3.

<sup>82</sup> *Id.* at 5.

<sup>83</sup> Melissa Eddy, *Germany Plans to Keep Coal-Fired Plants Ready in Case Russian Gas Is Cut*, N.Y. TIMES (May 25, 2022), <https://tinyurl.com/54n6fdjx>; *see also*

envisions that any upcoming shortage will be made up with more electricity coming from coal. Replacing gas-fired electricity with far dirtier coal power inevitably produces more emissions. However, the analysis does not offer any quantitative evaluation (via CBA or other tools) to measure the social costs and benefits of replacing natural gas with coal. Environmental cost and benefits are simply overlooked in a decision affecting the country's energy policy over the next ten years.

Second, the Green Ministries make clear in their statement that they sought to avoid re-opening parliamentary or public discussions on the country's nuclear policy.<sup>84</sup> Any correction of the *status quo* would have required both a parliamentary ballot and an environmental impact assessment. Under Directive 2011/92/EU (known as "Environmental Impact Assessment" – EIA Directive), environmental assessment is defined as the procedure that ensures that the environmental implications of decisions are considered before the decisions are made.<sup>85</sup> In Europe, environmental assessments are conducted for individual projects (under the EIA Directive) or for public programs (under Directive 2001/42/EC, the 'Strategic Environmental Assessment' – SEA Directive). Both Directives aim to make sure that any significant impacts on the environment stemming from a project are duly assessed before the project gets approved or authorized. In this assessment, decision makers must include any data useful to identify and weigh the effects of the project on the environment. They must also outline the main alternatives studied to avoid or reduce any significant adverse effects and explain the reason for the final choice. Consultation with the public is also a key feature of the procedure.

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Loveday Morris & Vanessa Guinan-Bank, *Germany Is Firing Up Old Coal Plants, Sparking Fears Climate Goals Will Go Up in Smoke* (Aug. 1, 2022, 10:24 AM), <https://www.washingtonpost.com/world/2022/08/01/germany-coal-energy-climate/>.

<sup>84</sup> See BMUV, *supra* note 78, at 1.

<sup>85</sup> See Council Directive 2011/92, art. 3, 2012 O.J. (L 26), 1-21 (EC), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0092&from=EN>.

However, by leaving the statutory situation unchanged, the German Ministries chose a path where they were not obliged to conduct the environmental assessment. In this way, they did not have to gather sufficient data to weigh the environmental impacts of their choice and make them public. They also used the time and trouble of measuring environmental impacts as a reason not to engage in the assessment procedure in first place, thereby escaping any public involvement. As far as measurement tasks can be resource intensive, however, that should never provide the government with an alibi to circumvent its duty to environmental protection and to the public. If it is true that such assessment procedures “have a price” as they slow down administrative action that is because they promote the regulatory stability necessary to achieve long-term policy goals.<sup>86</sup> By adopting sticky regulations, agencies can regulate into the future, supported by a sound analysis conducted in conversation with interested members of the public.<sup>87</sup>

#### D. Toward a Stress Conditions Test

Public policy commonly raises issues that concern both decision makers, experts, and the public at-large. The optimal level of interplay among these actors may depend on both the technical nature of the matter and the timing of the decision-making process. However, a certain degree of interplay shall undoubtedly exist among the three to produce better policy outcomes and more democratic results.

Members of the Green Party have played a key role in shaping policy and public opinion on this point. However, others recall historical reasons to explain why in Germany “nuclear energy has always been associated with war,” creating a large anti-nuclear movement well before the 1986 Chernobyl accident happened and the Green Party was founded.<sup>88</sup> Still, polls suggest that Germans

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<sup>86</sup> See Aaron Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90 (2018).

<sup>87</sup> *Id.* at 91.

<sup>88</sup> Zia Weise, *Why Germany Won't Give Up on Giving Up Nuclear*, POLITICO (Apr. 28, 2022, 3:27 PM), <https://www.politico.eu/article/politics-behind-germany-refusal-reconsider-nuclear-phaseout/> (reporting the statement of Miranda

might be more easily adaptable and open to change than their politicians when some adverse material changes occur. German residents could have had a say on the government's choice, had the executive gone for a fully-fledged impact assessment under ordinary legislative procedure.

I therefore revisit the German case to clarify whether, under certain exceptional conditions, the use of impact assessment tools could be avoided justifiably. To this end, I chart the path to a test to apply in these critical situations. The proposed test assesses three dimensions relating to: (a) how politically strong the government is; (b) how consistent is the envisioned choice with the electoral campaign of the government; and (c) how urgent is the decision to be adopted. The conditions of this three-prong test are not exhaustive. If all three conditions are satisfied, the executive power might be justified to temporarily overcome the legal hurdles of deliberative democracy. This approach stands against the use of technocratic analysis regardless of public input, while it fosters those attempts to combine the use of CBA with greater participation of the public.<sup>89</sup>

1. Political Strength of the Executive Power in terms of Legitimacy

When a new government has been formed at the outcome of democratic elections, there is a shared belief that the new government best represents what people voted for. Legitimacy is conferred by voting. Sometimes elections may be overshadowed by controversies around voting irregularities, such as the U.S. presidential election in 2020. Some electoral procedures may be better than others. However, a freshly established government, as

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Schreurs, Professor of Climate and Energy Politics, Technical University of Munich, who explains that the association of nuclear energy with the atomic bombs in Hiroshima and Nagasaki, or Germany's own search for nuclear capacities during World War II, and also because of the Cold War situation in Germany, created a groundswell of opposition long before Chernobyl and the Greens' foundation).

<sup>89</sup> See Daniel Paez, et al., *DISCUSS: A Methodology to Support Public Participation in Cost-Benefit Analysis*, CTR. FOR PUB. POLY UNIV. OF MELBOURNE (2004), <http://hdl.handle.net/11343/33856>.

that in our case study, might appear stronger than a government at the end of the mandate, as it has been recently blessed by people's expression of will. However, is this instance of a strong chain-of-legitimacy enough to justify eliminating other sources of legitimacy as those involved in the deliberative democracy model specifically, impact assessment tools? In modern Western states, we typically accept a government as legitimate because of the procedures and the mechanisms through which it governs to keep it accountable for its choices through greater transparency. Procedures and institutions that privilege deliberation through reason-responsiveness must be preferred over the absence of such guarantees against misruling and inconsistencies.<sup>90</sup> Therefore, the fact that the German government has been recently elected cannot justify—on its own—the decision not to follow a more democratic deliberative procedure of decision-making, especially because of the unanticipated changes caused by the Russian war on Ukraine.

## 2. Consistency with Electoral Campaign Promises

Whether winning parties keep their campaign promises or not is not just wishful thinking. To fulfill campaign promises lies at the core of how democratic accountability works. Congruence between executive policies and campaign promises is relevant to various democratic theories.<sup>91</sup> Nor is it a purely theoretical concern whether the ruling party takes an action totally at odds with what had been promised. In this instance, additional sources of parliamentary and input legitimacy become even more crucial to assess the new deal. If

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<sup>90</sup> ARTHUR I. APPLBAUM, LEGITIMACY: THE RIGHT TO RULE IN A WANTON WORLD 156 (2019).

<sup>91</sup> On the mandate theory of democracy and the responsible party model see ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-41 (1957); BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 161-92 (1997); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 528 (2003). Other authors argue that party platforms bear little relationship to what a government will do eventually, therefore electoral promises are not significant to the democratic debate. See ELMER E. SCHATTSCHEIDER, PARTY GOVERNMENTS 53-64 (1942); RICHARD ROSE, DO PARTIES MAKE A DIFFERENCE? 9-18 (1984); Michael A. Davis & Michael Ferrantino, *Towards a Positive Theory of Political Rhetorics: Why Do Politicians Lie?* 88 PUB. CHOICE 1, 10-13 (1996).

the executive deliberation corresponds to the action plan as outlined during the electoral campaign, the government's choice would seem more legitimate compared with doing the opposite of what the candidates had committed to before the elections. In Germany, the "traffic light" government had announced that it would have phased out coal-fired plants by 2030, while it has now committed to maintain them in operation without notice of further deadlines. This executive decision runs counter to the government's recent campaign promises and would have deserved a broader engagement of the Parliament and the citizenry during adoption in order to gain greater legitimacy.

### 3. Urgency to Adopt the Decision

Speaking of urgency takes this discourse on slippery ground. If there is little time to decide, the government can easily argue that time constraints mandate a swifter course without the delays caused by parliamentary discussions, impact analysis, and public consultations. Urgency is a big challenge for all legislators, as it inevitably leads to issues with accountability, transparency and participation. When the action must be timely, urgency is commonly accepted as an overriding factor enabling a temporary suspension of democratic guarantees. But first, the wound to democracy should be healed as soon as possible, for example by subsequent parliamentary voting. Second, the fallout generated by the Ukrainian war is tragic and demands rapid choices, but time pressure in Germany is not so high as to preclude any ordinary procedures. In addition, the effects of the energy policy decisions under discussion are expected to last for decades to come. Finally, if completing a CBA or another numerical analysis requires too much time, public commenting on online platforms can be organized very quickly. Although that may be cause for concern on other fronts, such as whether the comments received are representative or how much agencies value them.<sup>92</sup>

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<sup>92</sup> An investigation report released by the New York Attorney General in 2021 revealed that in the context of the notice-and-comment process on the 2017 Net Neutrality proposal, one college student alone generated 7.7 million comments (i.e., around a third of the total) by using a computer algorithm. Moreover, several broadband companies hired so-called lead generators who collectively submitted in



## CONCLUSION

It is true that the procedural instruments of accountable decision-making are highly resource intensive in terms of time, staff, and money. However, this can never be a reason for the executive to get rid of them. The legislature should allocate sufficient resources so that the executive can perform the full assessment procedure—impact assessment and public engagement—whenever necessary. Nonetheless, the government should not be unconstrained while it decides that the situation does not require the procedural guarantees which keep the same government accountable. Not even when some adverse material changes subvert unexpectedly, and in a short time, the political circumstances. In this essay, I have proposed a three-prong test whose conditions, if all fulfilled, may justify a decision by exceptionally departing from the ordinary track of accountable deliberation.

First, the government must be politically strong in terms of legitimacy, like when it has been newly established after democratic elections. Second, the decision must be consistent with what the executive representatives have promised during their electoral campaign. Third, the decision must be made quickly. Nowadays, digital platforms would allow governments to issue a notice of consultation and gather public views in a timeframe as brief as the one needed to adopt a “rapid” decision at the government level. That is why the urgency condition should be assessed very strictly. I have also observed that, whenever time allows for it (*i.e.*, the proposed test is not met), public engagement debate should be preserved and encouraged to marginalize policy approaches that are rooted in political ideology rather than in scientific data. Yes, people may

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excess of 8 million comments (*i.e.*, another third of the total), often by misappropriating living or deceased individuals’ identities and submitting computer-generated comments on their behalf. See *Fake Comments: How U.S. Companies & Partisans Hack Democracy to Undermine Your Voice*, N.Y. STATE OFF. OF THE ATT’Y GEN. (May. 6, 2021), <https://ag.ny.gov/sites/default/files/oag-fakecommentsreport.pdf>. On the challenges posed by managing mass computer generated and falsely attributed comments; see also Nina A. Mendelson, *Should Mass Comments Count*, 2 MICH. J. ENV’T. & ADMIN. L. 173, 175-79 (2012).

change their views or preferences on a given topic over time, but if public debate is properly conducted, this does not raise major concerns. In contrast, governing parties, may decide to avoid the procedural guarantees of accountable decision-making and engage in informal written reason-giving in order to defuse political opposition. This kind of executive's behavior is worrying, although one must consider that all impact assessment techniques may be prone to political manipulation if these techniques are removed from all kinds of scrutiny, such as parliamentary discussion, public consultation, and judicial review. For this reason, CBA cannot have full informational value on its own, but the impact analysis therein may be essential to lay the groundwork for a subsequent focused discussion among stakeholders. Among the tools of accountable decision-making, public consultation plays a key role in determining the conditions of transparency necessary to an open and informed debate. Only a frank dialogue among all interested parties can expose potential flaws and manipulations in the impact assessment documents and correct them. Also, public consultation is unique compared with other assessment tools, such as CBA, where people's preferences are exogenously given as the comment process instantaneously reflects what people think at the time of consultation. Although the questions on when and how to effectively consult people during the decision-making process remain open.