



THE PUBLIC'S ROLE IN ADMINISTRATIVE LAW

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Thank you for the honor of speaking at this annual dinner, and I would like to commend Professor Cary Coglianese, and all who are involved in running the Penn Program on Regulation, for making the Program and events like this available to students here at the University of Pennsylvania Law School.

The topic that brings us together this evening—administrative law—might seem obscure and dry to some, but its subject is democracy. The questions it asks are some of the most important we consider as citizens: Who makes the law? To whom are they accountable? What role should the public have in all of this?

Consider these legal questions: Is a particular agency action a *rule* that requires proceeding by notice and comment? Is a final rule the *logical outgrowth* of the rule that was proposed? Did the agency adopt a rule without giving consideration to a significant comment in the rulemaking record?

Some people might think, “how tedious, how obscure!” But you and I know differently. Each of those questions goes to the role the American people will play in the development of law. The questions can be restated as follows: Will there be advance notice to the public of the law’s requirements, as required for a new regulation? Did the public have a chance to speak and be heard, as required by the notice-and-comment process? And, was the public *listened* to—and if it is ignored, will the public have the chance to go to court and force the agency to listen and respond to its evidence and point of view?

Or take the questions of *Chevron* and *Seminole Rock* deference.¹ (For personal reasons, I prefer to call it *Seminole Rock*—not *Auer*—deference.²) To most lawyers, these are obscure matters, though many appreciate that *Chevron* has to do with the authority of regulatory agencies. But those in

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¹ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

² *Auer v. Robbins*, 519 U.S. 452 (1997).

this room know that questions of deference go to fundamental issues in our constitutional democracy: What ability should the executive branch have to make law? What role do our courts have in pronouncing what the law is? To what extent should we permit Congress to absent itself from some of the most important legislative decisions that are made for our society?

Administrative law is the law that governs the government, and at bottom, its subject is questions like these—some of the great questions about government and democracy.

I. THE VALUE OF PUBLIC PARTICIPATION IN RULEMAKING

I have had the opportunity to serve in the federal government three times, twice as a lawyer. But I would like to discuss here the role that outsiders play in our system of administrative law—companies, unions, environmental groups, and others, including lawyers. Because as I have been suggesting, administrative law is in part about participatory government. And especially as the administrative state expands and Congress punts more—and more difficult—policy questions to agencies, it is often by appearing before those agencies that the public has its most valuable opportunity to participate in the development of the law. Appearing before agencies—and occasionally, appearing opposite those agencies in court—gives the public an opportunity to have a genuine impact on the law. And to improve the law.

Because that is the other value of notice and comment: Not merely giving the public a voice, but also bettering the rules that govern us. In the words of the D.C. Circuit, notice and comment improve the law by making sure “the agency will have before it the facts and information relevant to a particular . . . problem.”³ “Public participation in the rulemaking process,” that court has said, “is essential in order to permit administrative agencies to inform themselves.”⁴ We value public participation in rulemakings in part because it is an opportunity to bring valuable evidence to the agency’s attention, to explain effects of a proposed rule that the agency may not have appreciated, and simply to bring a perspective that the agency itself otherwise would not have.

In this way, the public’s participation in the administrative process can make the law better—better informed, and better calibrated to the impacts a regulatory action will have.

The converse is also true, by the way. When the public does not participate in a thoughtful way, the rulemaking process can suffer. Government decision-making is weakened when the public’s contribution falls short. We call this garbage in, garbage out.

I have observed this shortcoming in government decision-making in my own law practice. In recent years I have brought court challenges to a number of actions by financial regulatory agencies—the U.S. Securities and Exchange

³ Nat’l Elec. Mfrs. Assoc. v. Env’t Tech. Council, Inc., (D.C. Cir. 1996).

⁴ U.S. Chamber of Commerce v. Occupational Safety & Health Admin., 636 F.2d 464 (D.C. Cir. 1980).

Commission (SEC), U.S. Commodity Futures Trading Commission, and the Financial Stability Oversight Council.⁵ I still recall my apprehension—bordering on trepidation—when I got involved in my first SEC rulemaking.⁶ By training I am a litigator and, originally, a labor and employment lawyer. By the time I got involved in this rulemaking, I felt I had a pretty good handle on the requirements of the anti-discrimination laws, minimum wage and overtime requirements, and the like. But regulating the financial markets—that's another thing, I thought: Heavy, sophisticated stuff.

And so I was stunned when I dug into the file at the SEC in this rulemaking and saw the comments that had been submitted by the public, and how the agency dealt with them. The comments generally were brief and conclusory, and merely asserted a view: “We believe you should do the following.” Or, “we believe you should *not do* the following.” If it was a matter the commenters felt especially strongly about, they would say so—that is, “we *strongly believe* you should do the following.” The animating principle appeared to be that if a lot of important people spoke firmly, the agency would heed that and act accordingly.

Many people who participate in rulemakings seem to view rulemaking's closest analogue as an election. In notice and comment, they seem to think, whichever side gets the most votes wins. I view it more like a trial: If it is a contentious rulemaking, you want to get all your evidence and argument before the agency in the hope of persuading it. But if you cannot persuade the agency, you have made the record you need for an effective appeal—that is, for a court challenge to the rule. Because just like at trial, in a rulemaking if you do not put your evidence and argument before the agency, it often is not going to be admissible later in court.

II. COST-BENEFIT ANALYSIS AND REASONED AGENCY DECISION-MAKING

When I looked at the record compiled by the agency in the first rulemaking by the U.S. Securities and Exchange Commission I was involved in, I was struck by the almost complete absence of economic analysis.⁷ As an employment lawyer I had seen cost-benefit analyses by the Occupational Safety and Health Administration and the Wage and Hour Division of the Labor Department; I was familiar with the lively debate over the role of cost-benefit analysis in environmental regulation.⁸ The SEC was regulating the financial markets—direct economic regulation. I therefore

⁵ See *U.S. Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); *Am. Equity Inv. Life Ins. Co. et. al. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Bus. Roundtable et. al. v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Inv. Co. Inst. v. U.S. Commodity Futures Trading Comm'n*, 891 F. Supp. 2d 162 (D.D.C. 2013); *Am. Petroleum Inst., et. al. v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013); *Metlife Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661 (D.C. Cir. 2017).

⁶ *U.S. Chamber of Commerce v. SEC*, 412 F.3d at 133.

⁷ *Id.*

⁸ See, e.g., *A Debate Over the Use of Cost-Benefit Analysis*, REGUL. REV. (Sept. 26, 2016), <https://www.theregreview.org/2016/09/26/debate-cost-benefit-analysis>.

expected the Commission to be particularly attentive to economic impacts, and particularly adept at assessing them.

Far from it. This particular SEC rulemaking concerned the extent to which directors of mutual funds should be required to be independent of the advisory firm that manages the fund.⁹ It was a hotly disputed rule, yet there had been just one economic study submitted for the rulemaking record.¹⁰

But even that was too much for the Republican-appointed Chairman of the SEC. The SEC holds public meetings when it adopts rules, and in the meeting to adopt the new mutual fund governance rule, the SEC Chairman said he was not going to await further economic analysis before adopting the rule, because, he explained, “there are no empirical studies that are worth much. You can do anything you want with numbers.”¹¹ This was seconded by another of the commissioners, who—in voting for the rule—said the Commission should not await economic studies because “methodologies will always be flawed or at least subject to question.”¹²

Now this would be extraordinary for virtually any agency. But this was a financial regulatory agency, whose business is economic impacts—not protecting health or safety, but regulating economic relationships. When you regulate the economy, you ought to find some room for economic analysis in your analysis of regulations’ effects. Moreover, the SEC in this rulemaking had a duty, under the governing statute, to consider the effects of its new rule on “efficiency, competition, and capital formation.”¹³

I ended up challenging this particular SEC rule on behalf of the U.S. Chamber of Commerce, and since then have handled a series of cases challenging SEC regulations. In a number of these cases, my clients challenged the rule based in part on deficiencies in the agency’s cost-benefit analysis.

A small academic literature has grown up around these D.C. Circuit cases; much of it has been very critical of the court’s rulings.¹⁴ A number of academics have concluded that the D.C. Circuit has demanded too much of financial regulatory agencies, and some have suggested that requiring cost-benefit analysis of financial rules is too tall an order.¹⁵ (There are also respected academics who disagree.)¹⁶

⁹ Investment Company Governance, 69 Fed. Reg. 46378 (Aug. 2, 2004).

¹⁰ *Id.*

¹¹ U.S. Chamber of Commerce v. SEC, 412 F.3d at 133.

¹² *Id.*

¹³ 15 U.S.C. § 80a–2 (2010).

¹⁴ See Bruce R. Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. REGUL. 2 (2012).

¹⁵ See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015); Donna M. Nagy, *The Costs of Mandatory Cost-Benefit Analysis in SEC Rulemaking*, 57 ARIZ. L. REV. 129, (2015); John C. Coates, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. (2015).

¹⁶ See Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 936 (2017).

I do not agree with the critics of these decisions, in part because I am very familiar with the evidence that was before the agency in the cases, and with what the agency did and did not do with the evidence before it. The SEC mutual fund governance rule is a case in point. The court's analysis in that case has been criticized as too demanding.¹⁷ But recall what the Chairman of the SEC said: "There are no empirical studies that are worth much. You can do anything you want with numbers."¹⁸ And recall his colleague's assertion that the Commission should not wait for economic evidence because "methodologies will always be flawed or at least subject to question."¹⁹ While there certainly are limits to the economic analysis that can be performed on a rule, the SEC 10 years ago was not pushing those limits—it was not trying to engage in a genuine analysis of the economic effects of its rules at all.

Another decision that has come in for a lot of criticism is the D.C. Circuit's invalidation of the SEC's so-called proxy access rule.²⁰ This rule permitted certain large shareholders to use the company's proxy to put forward their own alternative candidates for the board of directors. The idea was that by enabling dissident shareholders to put forward alternative director candidates without the expense of a full-blown proxy contest, the rule would make it easier to field candidates for director positions; this, in turn, would broaden the pool of candidates and make directors more vulnerable to challenge and more responsive to shareholders, thereby improving the caliber and performance of directors and ultimately the company as a whole.

As in the mutual fund case, the D.C. Circuit invalidated the rule as arbitrary and capricious and for falling short of the SEC's duty to consider economic effects.²¹ The decision has been criticized for setting too high a bar for the SEC.²²

In truth, the SEC made a number of elementary mistakes in this rulemaking. In partial response to some of this academic commentary, I will mention two.

First, the SEC never had a coherent theory of how prevalent the new proxy access mechanism in the rule would become—how frequently it would be used. The basic concept was that contesting director elections would be much easier and therefore more frequent, with the end result that there would be more candidates to choose from, and directors would be better and more responsive. How often this mechanism would be used was therefore directly related to how effective it would be—but at the same time,

¹⁷ See James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811 (2012).

¹⁸ U.S. Chamber of Commerce v. SEC, 412 F.3d at 133.

¹⁹ *Id.*

²⁰ Organization; Conduct and Ethics; and Information and Requests, 17 C.F.R. § 200 (2010).

²¹ *Bus. Roundtable*, 647 F.3d at 1144.

²² See Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695 (2013).

the frequency with which it was used was closely tied to the direct costs it would impose.

In estimating these costs in the preamble to the final rule, the SEC lowballed how frequently the access mechanism would be used.²³ The mechanism would be deployed in 51 corporate board elections a year, the Commission projected.²⁴ This meant it would be used less frequently than traditional proxy contests, even though the premise was that proxy access would be *easier*—more accessible—than traditional proxy contests.

But later in the preamble, when estimating the rule's benefits, the SEC said that the new mechanism would save about \$18,000 each election compared to the cost of a traditional proxy contest, and added this: Although \$18,000 in cost savings may not seem like a lot, the rulemaking comments “regarding the likely increase in the number of election contests resulting from the new rules . . . strongly indicate that the benefits” would far exceed that \$18,000 figure.²⁵ The Commission then cited rulemaking comments to support these claimed benefits—and the comments it relied on projected a far more frequent use of the access mechanism than the 51 contests the SEC had predicted when estimating the rule's costs. As the D.C. Circuit concluded, the SEC had acted “opportunistically” in assessing costs and benefits: “The Commission anticipated frequent use of [the rule] when estimating benefits, but assumed infrequent use when estimating costs.”²⁶ This was bad cost-benefit analysis, and it was arbitrary and capricious.

One lapse by the SEC in this rulemaking, then, was not having a coherent view of how frequently this new mechanism would be used. A second lapse lay in not considering *who* would use it. Under the SEC's rule, only certain of a company's largest shareholders would be eligible to use the proxy access mechanism: those that held at least three percent of the shares outstanding for three years or more. A significant number of these shareholders would be union pension funds established in collective bargaining with employers, and the pension funds of states and locales, such as the CalPERS fund.²⁷

These pension funds were among the most vocal proponents of the access mechanism in the rulemaking, yet their interests can be quite different than a typical shareholder's. Commenters cited evidence that labor unions use pension funds' investments in public companies as a means of pressuring companies to make certain business decisions, such as recognizing a labor union as the bargaining representative of workers at a particular facility. Similarly, some commenters argued that government

²³ Organization; Conduct and Ethics; and Information and Requests, 17 C.F.R. § 200 (2010).

²⁴ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56667 (Nov. 15, 2010).

²⁵ *Id.* at 56668, 56757.

²⁶ *Bus. Roundtable*, 647 F.3d at 1144.

²⁷ U.S. Sec. & Exchange Comm'n, Comment Letter from Jonathan D. Urick on Proposed Rule Facilitating Shareholder Director Nominations (Jan. 14, 2010), <https://www.sec.gov/comments/s7-10-09/s71009-592.pdf>.

pension funds sometimes are motivated by political objectives that bear little relationship to maximizing the value of their investment in a company.²⁸

Commenters argued that these specialized interests undermined a central premise of the rule—that the large, long-term shareholders using the access mechanism would act in a manner that was likely to reflect the interests of shareholders as a whole.

In the rulemaking, the SEC ignored this criticism of its proxy access proposal. It did not even use the word “union” in its lengthy release adopting the rule (except when citing comments by the many labor unions that supported the rule). This became a key argument for the challengers in the court of appeals: Significant evidence had been presented that the rule would be used differently than the SEC intended, yet the SEC had ignored that evidence. This failure of the SEC to respond to record evidence was a garden-variety failure under the Administrative Procedure Act, and it was a serious deficiency in the Commission’s assessment of the rule’s benefits.²⁹ The court was right to invalidate the rule in part on this ground, and it was right to vacate the rule as a whole: When an agency does not have a clear view of who will use its rule, for what purpose, and how often, there has been a serious lapse in reasoned decision-making.

III. CONCLUDING THOUGHTS ON COST-BENEFIT ANALYSIS AND THE PUBLIC’S IMPACT IN RULEMAKING

In this lecture, I have been discussing the D.C. Circuit’s treatment of cost-benefit analysis in recent decisions involving financial regulatory agencies. But the most important recent cost-benefit decision is a 2015 ruling by the Supreme Court, *Michigan v. EPA*, a case that also illustrates something important about public participation in rulemakings.³⁰

Michigan v. EPA concerned a new rule of the U.S. Environmental Protection Agency that the agency had determined would impose about \$10 billion in annual costs on power plants.³¹ EPA was required by statute to consider whether the rule it was adopting was “appropriate and necessary.”³² The agency declined to consider the rule’s costs as part of that inquiry.

The Supreme Court held that this was arbitrary and capricious. Justice Scalia explained in the opinion of the Court that “one would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for few dollars in health or environmental benefits.”³³ Rather, he said, “agencies have long treated cost as a centrally

²⁸ U.S. Sec. & Exchange Comm’n, Comment Letter from Alexander M. Cutler on Proposed Rule Facilitating Shareholder Director Nominations (Aug. 17, 2009), <https://www.sec.gov/comments/s7-10-09/s71009-267.pdf>.

²⁹ 5 U.S.C. § 500 (1999).

³⁰ *Michigan v. EPA*, 576 U.S. 743 (2015).

³¹ National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. 9304 (Feb. 16, 2012).

³² 42 U.S.C. § 7412 (1999).

³³ *Michigan v. EPA*, 576 U.S. at 752.

relevant factor in deciding when to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”³⁴ “Cost,” he added, “includes more than the expense of complying with regulations; any disadvantage could be termed a cost.”³⁵

Justice Kagan, in dissent, disagreed that EPA had disregarded costs, but agreed with the five-justice majority that cost needed to be considered.³⁶ “Cost,” she wrote, “is almost always a relevant—and usually, a highly important—factor in regulation.”³⁷

The upshot of *Michigan v. EPA* is that some form of cost-benefit analysis is appropriate in almost every rulemaking, except under statutes with an exclusive list of permitted considerations that does not include cost. And note that the Court’s conclusion did not turn simply on the statutory phrase, “appropriate and necessary.” The majority and dissent spoke more broadly. As Justice Scalia explained and Justice Kagan seemed to agree, the rulemaking process is about assessing pros and cons—reasons *for* doing something and reasons *against* it, or reasons for doing it *some other way*. If I can show an agency a less costly, less disruptive way of achieving its goals, it is likely arbitrary and capricious for the agency to take the more costly approach. Moreover, if I can show that a proposed agency action would have extremely costly effects that the agency has not yet considered, the agency has an obligation to consider those effects and explain why the rule it proposed nonetheless remains the best approach.

There is currently debate over whether Congress should enact more laws requiring cost-benefit analysis.³⁸ (There is also debate about whether Congress should *repeal* existing laws that *do* require cost-benefit analysis.) But what *Michigan v. EPA* tells us is that cost-benefit analysis—that is, evaluating pros and cons—already is properly part of the rulemaking process.

Michigan v. EPA also reflects something larger about the rulemaking process that, for public participants in rulemakings, is empowering. There is a common perception that arbitrary-and-capricious review under the Administrative Procedure Act (APA) is impossibly deferential—almost insuperable—and that there is little that comments submitted for the rulemaking can do to shape the outcome.³⁹ That is incorrect. Agencies have at least three central obligations in a rulemaking: (1) To consider significant comments that they receive, (2) to consider alternatives that are offered to their regulatory proposal, and (3) to alter the rule in light of these comments

³⁴ *Id.* at 752-53.

³⁵ *Id.* at 752.

³⁶ *Id.* at 764.

³⁷ *Id.* at 769.

³⁸ See *Assessing the Regulatory Accountability Act*, REGUL REV. (May 30, 2017), <https://www.theregreview.org/2017/05/30/assessing-regulatory-accountability-act>; *Comparison of Legislation in the 115th Congress Affecting the Rulemaking Process*, DAVIS POLK (Jan. 26, 2017), https://www.davispolk.com/sites/default/files/2017-01-26_comparison_legislation_affecting_rulemaking.pdf.

³⁹ See 5 U.S.C. § 706 (1966); 5 U.S.C. § 500 (1999).

and alternatives, or—if they choose not to—to provide a sound reason for declining to do so.

What this means for the public is that if you have a better idea than the government and present it cogently in a comment, the government had better take note: It needs to give that comment consideration and either adopt your idea or give a sensible explanation for not doing so.

So rather than seeing informal APA rulemaking as a sort of lawless, open plain where the agency to a large extent can go wherever it wants, another way to view it is as a forum where—in some respects—public commenters help shape the agency's obligations: You, the public, supply the evidence; you supply the argument; and the agency has a duty to meet you on those terms. If you convincingly show there is a better way to achieve the agency's goals, or that the proposed rule would have a seriously adverse effect that would not occur under another effective alternative approach, then in a sense you have helped set the terms of debate. The prospect of judicial review, and the APA's requirement of reasoned decision-making, have empowered the public to force the agency to come to terms not only with its own proposal, but also with the public's conception of alternative, superior ways to tackle the problem.

In this way, the public can inject substantive content into an agency's decision-making that is not expressed on the face of the statute itself. Consider *Michigan v. EPA* as an example: The Clean Air Act did not explicitly require consideration of costs and benefits.⁴⁰ But if commenters put in evidence of the proposed rule's high costs, and of what they perceive as its limited benefits, the agency in most cases will have a statutory duty to consider those costs and benefits. The notice-and-comment process has forced the agency to consider substantive factors not required on the face of the statute.

This empowers the public, if it engages effectively in notice and comment. And let me be clear, for those who do not care for quantitative cost-benefit analysis, that the concept is not limited to cost-benefit analysis in a strict, quantitative sense; indeed it is not limited to cost-benefit analysis at all. The Court made clear in *Michigan v. EPA* that “cost” is broadly defined: “Consideration of cost . . . requires paying attention to the advantages *and* disadvantages of agency decisions.”⁴¹ Moreover, “‘cost’ includes more than the expense of complying with regulations; any disadvantage could be termed a cost.”⁴² Any significant relevant matter that you, as a commenter, inject into the rulemaking discussion, and that reflects an important advantage or disadvantage to a given regulatory approach, can become a matter that the government must take into account as it writes new federal rules.

⁴⁰ 42 U.S.C. § 7412 (1999).

⁴¹ 576 U.S. at 753.

⁴² *Id.* at 752.