

The Administrative Conference and Empirical Research

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ABSTRACT

This article describes the ways in which ACUS has encouraged scholars to engage in empirical research and some of the results of those efforts. It then discusses the many important characteristics of the notice and comment rulemaking process and its effects that scholars have identified in empirical studies of the type that ACUS has sponsored or inspired.

TABLE OF CONTENTS

I. WAYS IN WHICH ACUS ENCOURAGES EMPIRICAL RESEARCH	1564
II. AN EXAMPLE OF THE VALUE OF EMPIRICAL RESEARCH: UNDERSTANDING THE RULEMAKING PROCESS	1566
III. SOURCES OF BIAS IN RULEMAKING	1569
A. <i>Collective Action Problems</i>	1570
B. <i>Judicial Decisions Defining Notice</i>	1571
C. <i>Judicial Decisions Defining Statement of Basis and Purpose</i>	1572
D. <i>Judicial Decisions on Standing</i>	1572
IV. WHAT SHOULD WE DO ABOUT BIAS IN RULEMAKING?	1573
I. WAYS IN WHICH ACUS ENCOURAGES EMPIRICAL RESEARCH	

One of the many important contributions of the Administrative Conference of the United States (“ACUS”) to the development and understanding of administrative law lies in its critical role in encouraging legal scholars to engage in empirical research. In this Article, I will describe the ways in which ACUS introduces young scholars to empirical research and helps them internalize its value. I will then present one example of the extraordinary value of ACUS-sponsored empirical research—studies uncovering a high degree of bias in favor

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of regulated firms in the notice and comment process that agencies use to issue rules.¹

From its inception to the present, ACUS has emphasized the importance of making decisions based on data and analysis.² Each of ACUS's hundreds of recommendations is the product of a decision-making process that begins with a report in which an ACUS consultant gathers and reports extensive data relevant to the subject of the recommendation to determine how agencies have performed various assigned tasks.³ The consultant then analyzes the data and uses it as the basis for proposed recommendations that are then debated and acted upon by ACUS.⁴

In most cases the ACUS consultant is a promising young law professor who later becomes a productive and well-respected scholar.⁵ The consultant's early experience with ACUS-sponsored empirical research forces the consultant to learn how to gather and analyze data and instills in the consultant respect for empiricism at an early point in her professional development. The many books and articles produced by the consultant over the course of a lengthy career as a scholar are enriched by that early experience as an ACUS consultant. The publication of the consultant's report in the legal literature also forces any other scholar who chooses to participate in the scholarly conversation initiated by the report to engage in empirical research.⁶ Effective participation in any scholarly conversation that begins with an ACUS report requires the participant rely on data and analysis. As a result, the standard ACUS method of decisionmaking makes empiricism one of the prices of admission to any conversation about any important topic in administrative law.

Two early ACUS consultant reports written by a young professor at the University of North Carolina illustrate the many ways in which ACUS contributes to empiricism in administrative law research.⁷ A 1974 report relied on meticulous study of the ways in which agencies make rulemaking decisions as the basis for proposed recommenda-

1 See *infra* Part II.

2 See Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 116–17 (1998).

3 See ACUS@RecommendationRoom, *How Are Recommendations Developed?*, REG ROOM.ORG, <http://acus.recommendationroom.org/learn/recommendation-process> (last visited June 7, 2015).

4 *Id.*

5 See Edles, *supra* note 2, at 116.

6 See *id.*

7 See *infra* notes 8–9.

tions of the record a court should use when it reviews an agency rule.⁸ A 1976 report relied on careful study of the procedures agencies use to adjudicate forty-two types of disputes as the basis for proposed recommendations of the procedures that agencies should use in all informal adjudications.⁹

The author of those reports went on to publish eight books and sixty-four articles on administrative law.¹⁰ Each book and article has contributed significantly to our understanding of administrative law in large part because it incorporated and relied upon data and analysis.¹¹ The 1974 and 1976 reports also began scholarly conversations that continue today and are necessarily based on the continuing empirical research that the reports triggered.¹² The author of those two reports, Paul Verkuil, went on to become the present Chairman of ACUS, where he continues to encourage empirical research in administrative law by retaining consultants to conduct data-driven studies that are then used as the basis for ACUS recommendations.¹³

II. AN EXAMPLE OF THE VALUE OF EMPIRICAL RESEARCH: UNDERSTANDING THE RULEMAKING PROCESS

Empirical research has increased our understanding of virtually all aspects of administrative law, including topics as diverse as how administrative law judges make evidentiary decisions¹⁴ to the factors that determine the extent of deference courts give to agency decisions.¹⁵ This Article illustrates the extraordinary value of empirical research by focusing on only one important context—how agencies make decisions in notice and comment rulemakings. Section 553 of the Administrative Procedure Act (“APA”)¹⁶ describes the notice and comment procedure and requires agencies to use that procedure to

⁸ See generally Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

⁹ See generally Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

¹⁰ Richard J. Pierce, Jr., *Paul Verkuil: An Outstanding Scholar in His Spare Time*, 32 CARDOZO L. REV. 2445, 2445 (2011).

¹¹ *Id.* at 2448.

¹² *Id.* at 2445.

¹³ *Id.* at 2445–47, 2457.

¹⁴ See Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987).

¹⁵ See Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515 (2011).

¹⁶ 5 U.S.C. § 553 (2012).

issue all legally binding rules.¹⁷ The agency must (1) issue a Notice of Proposed Rulemaking (“NPR”), (2) solicit and consider comments from all interested members of the public, and (3) issue a final rule that incorporates a “concise general statement of their basis and purpose.”¹⁸

Before scholars began to engage in serious empirical research about the notice and comment procedure, most believed that the process produced good results because it permitted and encouraged widespread public participation in the rulemaking process.¹⁹ In theory, the notice and comment decisionmaking process is even-handed because individuals and groups that would benefit from strict regulation of an activity have as much ability to influence the outcome of the process as do regulated firms that oppose strict regulation because of the costs it imposes on them.²⁰ Extensive empirical research about the notice and comment process, however, has produced robust findings that are inconsistent with the theory that underlies the process and with our prior naive beliefs about the even-handed effects of the process.²¹ Instead, numerous studies have found that the notice and comment process incorporates many features that bias it powerfully in favor of regulated firms.²²

The first robust finding is that the most important part of the rulemaking process occurs before the agency issues the NPR.²³ The pre-NPR stage accommodates the interests of regulated firms who have the manpower and resources to persuade agencies through private meetings at the earliest stages in the rulemaking process. This stage of the decisionmaking process takes about twice as long as the post-NPR part of the decisionmaking process.²⁴ The agency’s goal in the pre-NPR process is to render the post-NPR process of receiving and considering comments irrelevant by publishing a proposed rule

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 188–91 (1996).

²⁰ See *id.*

²¹ See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–61 (1995) (stating that several studies found inadequate opportunity for public participation in rulemaking process).

²² See *infra* note 23.

²³ See Kimberly D. Krawiec, *Don’t “Screw Joe the Plumber”: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 70–71 (2013); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110–13 (2011).

²⁴ Wagner et al., *supra* note 23, at 144 n.150.

that is virtually identical to the final rule.²⁵ As a result, the pre-NPR decisionmaking process consists substantially of a large number of private meetings with individuals and firms interested in the outcome of the proposed rule.²⁶ For instance, agency decisionmakers had 450 meetings with interested parties before publishing the NPR of the soon-to-be Volcker rule—arguably the most important rule issued to implement the Dodd-Frank Act.²⁷ Similarly, EPA decisionmakers had an average of 178 meetings with interested parties before EPA published the NPRs that led to the issuance of each of its ninety air toxic emission standards.²⁸

These pre-NPR meetings are dominated by regulated parties seeking more relaxed regulation and the law firms and trade associations who represent them, rather than by the potential beneficiaries of the proposed rule seeking more strict regulation, such as individuals and the consumer protection groups who support them. For instance, 93.1% of the pre-NPR meetings with decisionmakers in the Volcker rulemaking were with regulated financial institutions or their representatives, while parties with an interest in strict regulation of financial organizations accounted for only 6.9% of those meetings.²⁹ The disparity between regulated firms and potential beneficiaries of proposed rules was even greater in the ninety EPA rulemakings. In over half of the EPA rulemakings, only regulated firms and their representatives—not potential beneficiaries—met with decisionmakers before EPA issued its NPR.³⁰ On average, regulated firms had 170 times more meetings with agency decisionmakers than did representatives of the potential rule beneficiaries.³¹ Not surprisingly, the ACUS-sponsored studies produced a robust finding that regulated firms have far greater influence over the substance of a proposed rule than do potential beneficiaries of the rule.³²

²⁵ See *id.* at 110.

²⁶ *Id.* at 143.

²⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5481–5603 (2012)); see also Krawiec, *supra* note 23, at 79–80, 98. The Volcker Rule’s goal is to prevent banks from making certain speculative investments that played a part in precipitating the 2008 financial crisis. For example, the rule prohibits banks from “engag[ing] in proprietary trading; or acquir[ing] or retain[ing] any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund.” 12 U.S.C. § 1851(a) (2012).

²⁸ Wagner et al., *supra* note 23, at 124.

²⁹ Krawiec, *supra* note 23, at 80.

³⁰ *Id.* at 128.

³¹ Wagner et al., *supra* note 23, at 125.

³² Krawiec, *supra* note 23, at 82; Wagner et al., *supra* note 23, at 124–28.

The systemic bias in favor of regulated firms continues in the post-NPR period. In many rulemakings, individuals who prefer strict regulation submit the greatest number of comments.³³ Virtually all of those comments are worthless to decisionmakers, however, because they consist of little more than slogans that are more appropriate as bumper stickers rather than contributions to a decisionmaking process—e.g., “protect us from being poisoned by polluters” or “protect us from thieving bankers.”³⁴

By contrast, the comments submitted on behalf of regulated firms are long, well-crafted, and rich in data and analysis.³⁵ Regulated firms and their representatives submit the vast majority of the comments that have the potential to persuade decisionmakers.³⁶ For example, comments submitted by or on behalf of regulated firms accounted for an average of 81% of all of the detailed comments submitted in the ninety rulemakings in which EPA issued toxic emission standards.³⁷ On the other hand, parties who favored more strict air quality rules did not submit any comments in a majority of those rulemakings, and they accounted for an average of only 4% of all comments.³⁸ Not surprisingly, 83% of changes that EPA made in response to comments weakened the proposed rule by relaxing emissions standards, ultimately benefitting regulated firms.³⁹

III. SOURCES OF BIAS IN RULEMAKING

Once we have a clear picture of the nature and magnitude of the systemic bias in favor of regulated firms in the notice and comment rulemaking process, it is relatively easy to identify the major sources of the bias. They include: (1) collective action problems, (2) judicial decisions that define an adequate NPR, (3) judicial decisions that define an adequate statement of basis and purpose, and (4) judicial decisions that determine who has standing to obtain judicial review of rules.⁴⁰

³³ See, e.g., Krawiec, *supra* note 23, at 71–78.

³⁴ See *id.* at 74–78; Cynthia R. Farina, Mary Newhart & Josiah Heidt & CeRI, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 139–44 (2012).

³⁵ Krawiec, *supra* note 23, at 74; *cf.* Wagner et al., *supra* note 23, at 128–32 (concluding that comments from regulated firms are more numerous and effective).

³⁶ See Wagner et al., *supra* note 23, at 128–32.

³⁷ *Id.* at 128–29.

³⁸ *Id.*

³⁹ *Id.* at 130–31.

⁴⁰ See *infra* Parts III.A–D.

A. *Collective Action Problems*

Mancur Olson identified the most important source of bias in favor of regulated firms half a century ago—collective action problems.⁴¹ When a public policy debate pits a large number of people, each with a small amount at stake, against a small number of people, each with a large amount at stake, the small group of people has a major advantage in the decisionmaking process.⁴² Consider, for instance, an agency decision over whether to issue an air quality rule that would provide three billion dollars in benefits to a population of 300 million people and that would impose costs of one billion dollars on ten regulated firms. Any economically rational decisionmaker who has an accurate and complete understanding of the stakes would decide to issue the rule: the benefits outweigh the costs three to one. The decisionmaker is unlikely to obtain an accurate and complete understanding of the stakes, however, through the combination of meetings and comments that are disproportionately one-sided but nevertheless serve as their primary means of education during the rulemaking process.

In the above example, each of the 300 million potential beneficiaries of the rule has ten dollars at stake. It would make no sense for any member of that group to spend more than ten dollars to learn about the issues in the debate and to attempt to influence its outcome. The issues in most such debates are complicated; consequently, each of the 300 million potential beneficiaries is likely to remain rationally ignorant of the issues and therefore powerless as a potential source of influence on agency decisionmakers. Moreover, the transaction costs involved in any potential effort to form a group of likely individual beneficiaries that could cooperate in an attempt to understand the issues and influence the outcome of the debate are prohibitively high.⁴³

On the other hand, each of the ten regulated firms that would bear the costs of the rule has one hundred million dollars at stake. Each can rationally spend up to one hundred million dollars to learn about the issues in the debate and to influence its outcome. An expenditure of even 10% of that amount, or ten million dollars, is sufficient to hire the combination of talented lawyers and consultants required to effectively engage with decisionmakers and draft the kinds of detailed comments that are rich in data and analysis and more

41 MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

42 *Id.* at 54–55; Wagner et al., *supra* note 23, at 128.

43 *See* OLSON, *supra* note 41, at 53–55.

likely to persuade decisionmakers not to issue the rule.⁴⁴ Moreover, unlike the 300 million potential beneficiaries, the benefits to a regulated firm of engaging in a cooperative effort to persuade the agency not to issue the rule vastly exceed the transaction costs of organizing such an effort. Therefore, each firm is likely to participate effectively in the decisionmaking process either individually or collectively through a trade association.

B. Judicial Decisions Defining Notice

Courts have adopted two definitions of the “notice” an agency must issue as the first formal step in the rulemaking process. First, the notice must “adequately foreshadow” the final rule.⁴⁵ Any significant difference between the rule proposed in the NPR and the final rule increases the risk that a court will hold that the rule is invalid because the NPR was inadequate.⁴⁶ Second, the agency must identify in the NPR any source of data or analysis that it will rely upon in the statement of the basis and purpose the agency must incorporate into its final rule.⁴⁷

The first requirement gives agencies a powerful incentive to resolve all major issues in a rulemaking before issuing the NPR,⁴⁸ while the second requirement provides a powerful incentive to minimize the time between the issuance of the NPR and the issuance of the final rule.⁴⁹ Taken together, these requirements explain why studies of the rulemaking process find that the pre-NPR process is twice as long as the post-NPR process and why, in the words of one of the researchers, the rule “must be essentially in final form at the proposed rule stage” in order to survive judicial review.⁵⁰ Any significant change an agency makes between the proposed rule and the final rule creates a significant risk that a court will hold that the final rule was not adequately foreshadowed by the proposed rule.⁵¹ Moreover, the longer the time between the issuance of the proposed rule and the issuance of the final rule, the greater the risk that a new study or data source will

⁴⁴ See *supra* note 36 and accompanying text.

⁴⁵ 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.3 (5th ed. 2010); see also *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019–20 (3d Cir. 1972).

⁴⁶ See 1 PIERCE, *supra* note 45, § 7.3.

⁴⁷ See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 392–93 (D.C. Cir. 1973); see generally 1 PIERCE, *supra* note 45, § 7.3.

⁴⁸ *Wagner et al.*, *supra* note 23, at 110–11.

⁴⁹ See 1 PIERCE, *supra* note 45, § 7.3 at 583–84.

⁵⁰ *Wagner et al.*, *supra* note 23, at 110.

⁵¹ See 1 PIERCE, *supra* note 45, § 7.3 at 572–75.

become available that requires the agency to issue a supplemental NPR to avoid the high risk of judicial reversal for failing to disclose all important sources of data and analysis the agency relies on to support its final rule in a timely manner.⁵² Of course, those conclusions are consistent with the finding that the pre-NPR part of the decisionmaking process is more important than the post-NPR part of the decisionmaking process and that the bias in favor of regulated firms is particularly powerful in the pre-NPR part of the decisionmaking process.⁵³

C. *Judicial Decisions Defining Statement of Basis and Purpose*

Courts have held that the statement of basis and purpose, which must be incorporated into a final rule, must adequately respond to all well-supported comments that are critical of a proposed rule, in order to avoid judicial rejection of the rule as arbitrary and capricious.⁵⁴ That requirement gives regulated firms and their representatives a powerful incentive to submit detailed and persuasive data-driven comments rich in analysis.⁵⁵ It also provides a powerful incentive for agencies to make changes to proposed rules that are favored by regulated firms to avoid the risk of judicial rejection of the final rule for failure to adequately respond to well-supported comments.⁵⁶ It also provides a powerful incentive for agencies to avoid having to make such changes or to explain why they have not done so by proposing a rule in the NPR that already incorporates features that are favored by regulated firms.⁵⁷ In short, these judicial decisions go a long distance in explaining both why the pre- and post-NPR decisionmaking processes are biased in favor of regulated firms.⁵⁸

D. *Judicial Decisions on Standing*

Courts always hold that any *regulated firm* has standing to obtain review of a rule that imposes *costs* on the firm,⁵⁹ but they often hold that an *individual* who is likely to *benefit* from issuance of a rule does not have standing to obtain review of a decision not to issue that

⁵² See *id.* § 7.3 at 586–87.

⁵³ See Wagner et al., *supra* note 23, at 111–13.

⁵⁴ See, e.g., Nat'l Tire Dealers & Retreaders Ass'n v. Brinegar, 491 F.2d 31, 40–41 (D.C. Cir. 1974); see also 1 PIERCE, *supra* note 45, § 7.4 at 592–93.

⁵⁵ See *supra* note 35 and accompanying text.

⁵⁶ See Wagner et al., *supra* note 23, at 111.

⁵⁷ See *id.*

⁵⁸ See *id.* at 111–13.

⁵⁹ See 3 PIERCE, *supra* note 45, § 16.3.

rule.⁶⁰ This asymmetric access to judicial review gives agencies an incentive to consider the views expressed by regulated firms who can take them to court more seriously than the views of the individuals who would benefit from the rule but who often lack standing to take the agency to court.

IV. WHAT SHOULD WE DO ABOUT BIAS IN RULEMAKING?

The many empirical studies that find pervasive systemic bias in favor of regulated firms in the rulemaking process raise the obvious question—what should we do to eliminate or reduce that bias? One possible course of action is to improve the ability of potential beneficiaries of rules to participate effectively in the rulemaking process. One member of ACUS, Cynthia Farina, has expended a great deal of effort for several years in attempts to design and implement methods that will broaden the segments of the public that can participate effectively in rulemakings.⁶¹ She has concluded, however, that effective participation in rulemakings by parties other than regulated firms can be accomplished only in a small subset of rulemakings and only with the considerable assistance of an organization like the Cornell eRulemaking Initiative, run by Professor Farina.⁶²

Other potential methods of reducing bias in the rulemaking process are more radical. Courts could overturn the judicial opinions that contribute to this bias, or Congress could amend the APA in ways that would reduce some of the sources of the bias.⁶³ Scholars have argued in support of both of those types of changes in administrative law, with no apparent effect so far.⁶⁴

Like most of the scholars who participate in the process of empirical research designed to enhance our understanding of the rulemak-

⁶⁰ See generally 3 PIERCE, *supra* note 45, §§ 16.2–16.4 (discussing the extremely complicated law that governs standing to obtain review of agency rules). The Supreme Court has held that Article III of the Constitution requires a petitioner to prove that it has suffered injury-in-fact as a result of the agency decision to issue a rule. See *id.* § 16.3. Any regulated firm can satisfy that requirement easily by submitting an affidavit in which it describes the costs it must incur to comply with the rule. See *id.* § 16.4. The Court often holds that beneficiaries of a rule have not established injury-in-fact, however, either because the injury they suffer is not “individualized” or because it is a future injury that is not “certainly impending.” See *id.*

⁶¹ See, e.g., Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 396–99 (2011) (describing an experimental electronic “Regulation Room” platform designed to increase public participation in the rulemaking process).

⁶² Farina et al., *supra* note 34, at 144–45, 163; see also *Cornell eRulemaking Initiative*, CERI, <http://www.lawschool.cornell.edu/ceri/> (last visited June 20, 2015).

⁶³ See Pierce, *supra* note 21, at 64–66, 71.

⁶⁴ See *id.*

ing process, I have concluded that the rulemaking process is biased in favor of regulated firms. I have also indulged the assumption that the bias in favor of regulated firms is normatively bad. I must confess, however, that I have no empirical support for that assumption.

It is equally plausible that the bias in favor of regulated firms in the rulemaking process is socially beneficial as a means of offsetting *ex ante* bias in favor of strict regulation on the part of regulators. It is also plausible that the government decisionmakers who propose rules are well-intentioned but naive in important respects. They may have a lot of knowledge about the benefits of strict regulation, such as reductions in the adverse effects of air pollution on health, but they may have little knowledge of the costs of regulation. If that is the case, it may be that a decisionmaking process that is inherently biased in favor of regulated firms produces favorable results for society by educating the decisionmakers of the costs of regulation. Of course, that is only a plausible assumption that may or may not be true.

ACUS has performed a valuable service by sponsoring empirical research that documents the bias in favor of regulated firms in the notice and comment process. Now, perhaps ACUS can help us take the next logical step by sponsoring empirical research to determine whether that bias should be a source of concern or whether it compensates for, and offsets, the initial pro-regulatory bias of agency officials. Perhaps ACUS can retain a consultant who is clever enough to devise a method of testing the hypothesis that antiregulatory bias in the rulemaking process is socially beneficial because it counteracts the *ex ante*, pro-regulatory bias of agency decisionmakers. That is one of hundreds of empirical studies that ACUS can sponsor to enhance our understanding of the administrative decisionmaking process and to improve that process.