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2023

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### Recommended Citation

Daniel E. Walters, *The Environmental Democracy That Was, Then Wasn't, but Could Be Again*, 8 U. Pa. J.L. & Pub. Aff. 25 (2023).

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# UNIVERSITY *of* PENNSYLVANIA

## JOURNAL *of* LAW & PUBLIC AFFAIRS

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Vol. 8

No. 1

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### THE ENVIRONMENTAL DEMOCRACY THAT WAS, THEN WASN'T, BUT COULD BE AGAIN

*Daniel E. Walters\**

Looking at the state of public participation in environmental regulatory policymaking today, one might be tempted to paraphrase Charles Dickens and observe that it is the best of times, and it is the worst of times.<sup>1</sup>

Over the fifty years since William D. Ruckelshaus wrote the essay that is the subject of this symposium, we have seen a remarkable flourishing of citizen participation, both in the environmental field and beyond. Ruckelshaus had no way of imagining the myriad ways that technology would allow citizens to learn about and engage with regulatory decision-making. As ambitious as the vision that he laid out is, had someone told Ruckelshaus in 1972 that in 2017 there would be federal agency rulemakings with 22 million public comments,<sup>2</sup> or that the Environmental Protection Agency he helped give birth to would, by 2022, have a social media account with 635,200 followers who can tune in daily for news from the agency,<sup>3</sup> he likely would have been flabbergasted.

At the same time, Ruckelshaus's optimism about citizen participation in environmental matters—that it would go hand-in-hand with greater regard for the environment,<sup>4</sup> and that it would gravitate toward consensus<sup>5</sup>—now

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<sup>1</sup> CHARLES DICKENS, *A TALE OF TWO CITIES* 38 (1859).

<sup>2</sup> Steven J. Balla, Reeve Bull, Bridget C.E. Dooling, Emily Hammond, Michael Herz, Michael Livermore & Beth Simone Noveck, *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 97 (2022).

<sup>3</sup> U.S. Environmental Protection Agency, <https://twitter.com/EPA> [<https://perma.cc/HX6X-AACH>].

<sup>4</sup> William D. Ruckelshaus, *The Citizen and the Environmental Regulatory Process*, 47 IND. L.J. 636, 642 (1972).

<sup>5</sup> *Id.* at 644.

seems almost quaint. Participatory innovations in environmental and administrative law, many of which Ruckelshaus celebrates in his essay, are now being reconsidered even by environmental allies, who often see participatory procedures as being easily co-opted to delay or obstruct important public projects in the fight to address climate change.<sup>6</sup> Far from leading to widespread “understanding, trust and cooperation,”<sup>7</sup> participatory opportunities often systematically favor entrenched interests and effectively marginalize historically underrepresented constituencies, leading to greater skepticism and cynicism.<sup>8</sup> Fifty years out, the nascent citizen environmental movement that Ruckelshaus observed in the “citizenry” has fractured, and environmental protection has devolved into one of the most polarizing issues in an historically polarized era.<sup>9</sup>

Yet, in this essay, I do not want to take a side on whether the glass is half empty or half full. Instead, I want to highlight what Ruckelshaus was right about and, just as importantly, where his vision of environmental participatory governance might need some updating. Looking back at the dawn of environmental democracy in the regulatory process and comparing it to the present situation, we can learn both how the need for incorporating public preferences in regulatory decision-making endures and how delicate that task can be without public consensus over the best policy course.

Ruckelshaus was, and still is, correct that “[i]t is absolutely essential to realize that the public has a vested interest in environmental matters.” It is unimaginable that members of the public who are so directly affected both by environmental degradation and by efforts to ameliorate it would not have

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<sup>6</sup> See J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 697 (2020) (noting that “even if the Green New Deal can overcome political opposition, technological feasibility, and funding constraints, it has one very big obstacle ahead of it—the Old Green Laws”). This is part of a broader debate playing out right now among the liberal intelligentsia about legal and procedural obstacles to state capacity. See, e.g., Ezra Klein, *What America Needs is a Liberalism That Builds*, N.Y. TIMES (May 29, 2022), <https://www.nytimes.com/2022/05/29/opinion/biden-liberalism-infrastructure-building.html> [<https://perma.cc/6TEC-TW48>] (arguing that the liberal vision must change because it has constrained America’s ability to efficiently deliver infrastructure due to regulatory and procedural obstacles).

<sup>7</sup> Ruckelshaus, *supra* note 4, at 641.

<sup>8</sup> Daniel P. Carpenter, Angelo Dagonel, Devin Judge-Lord, Christopher T. Kenny, Brian Libgober, Steven Rashin, Jacob Waggoner & Susan Webb Yackee, *Inequality in American Democracy: Methods and Evidence from Financial Rulemaking* 3 (Aug. 1, 2022) (unpublished manuscript), <https://judgelord.github.io/finreg/participatory-inequality.pdf> [<https://perma.cc/K2DL-RDCE>].

<sup>9</sup> Riley E. Dunlap, *Partisan Polarization on the Environment Grows Under Trump*, GALLUP (Apr. 5, 2019), <https://news.gallup.com/opinion/gallup/248294/partisan-polarization-environment-grows-trump.aspx> [<https://perma.cc/9A6B-65KY>].

any voice in how decisions are made. Ruckelshaus could see even in 1972 that environmental policymaking inevitably involves the “balancing of environmental values against other economic and social values,” and that it is therefore imperative that decision-making be in some way *public* decision-making.<sup>10</sup> If anything, that has only become truer today. Once we clear away some of the low-hanging fruit—e.g., lead in gasoline, protection of famous national parks and forests, cleaning up flaming rivers—we are left with much more difficult challenges that require significant tradeoffs and distributional choices that often divide even environmentalists.<sup>11</sup> These vexing challenges include deciding where to site the high-voltage transmission lines and wind and solar farms that will power a decarbonized energy future,<sup>12</sup> how to decide how much abatement of a non-threshold pollutant is “necessary to protect the public health . . . with an adequate margin of safety,”<sup>13</sup> and how to remedy decades of environmental injustices against vulnerable populations while ensuring that it does not happen again, whether by accident or intention.<sup>14</sup> Just as in 1972, few would say these questions should be “solely within the purview of scientists.”<sup>15</sup>

But beyond this core observation, which thankfully comes close to a truism, the more complex issues that arise in modern environmental policymaking raise questions about precisely what the role of the citizen in the environmental regulatory process should be today, and how the process can be designed to facilitate public influence on environmental decision-making without undermining sound policymaking.

Part of what needs to be updated in Ruckelshaus’s vision is the simple causal theory at the heart of his account, which nearly always counsels instituting more and more opportunities for participation in order to increase “sociological legitimacy” of government decisions.<sup>16</sup> For Ruckelshaus, the working theory behind the push for greater opportunities for participation in

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<sup>10</sup> Ruckelshaus, *supra* note 4, at 643.

<sup>11</sup> To be clear, virtually any environmental regulatory challenge involves difficult value tradeoffs that require more than expert or scientific judgments, *see, e.g.*, Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255, 1257-58 (2004), but some are more difficult than others.

<sup>12</sup> Ruhl & Salzman, *supra* note 6, at 712-14 (noting the need for “new commercial-scale renewable power generation and transmission infrastructure,” but acknowledging the project has “faced stiff opposition in many instances” from local NIMBYs and even “environmental protection interests”).

<sup>13</sup> Coglianese & Marchant, *supra* note 11, at 1283 (discussing EPA’s task under the NAAQS program of the Clean Air Act).

<sup>14</sup> Alice Kaswan, *Environmental Justice and Environmental Law*, 24 FORDHAM ENVTL. L. REV. 149, 150-53 (2012) (describing the origins of the “environmental justice” movement).

<sup>15</sup> Ruckelshaus, *supra* note 4, at 638.

<sup>16</sup> Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 387 (2019).

the environmental regulatory process was that more participation would help to close “credibility gaps” that can emerge when regulators make consequential decisions.<sup>17</sup> By participating, “the citizen is given a valuable insight into the practicalities” of making environmental decisions, and, according to Ruckelshaus, this usually leads to “[a] realization that most solutions require pragmatic compromises or balancing of interests” that “rids the citizen of any nagging suspicion that an agency knuckled under to private interests.”<sup>18</sup> In Ruckelshaus’s thinking, participatory process is a cure for a disease—the disease of cynicism that had begun to wash over the country in the middle of the 20<sup>th</sup> century.<sup>19</sup>

Yet it is not clear that Ruckelshaus has the causal story entirely right. Whether participatory processes do provide “certitude” that environmental decision-makers are rendering “wise and well-founded” decisions is an empirical question,<sup>20</sup> and experience may even suggest that participation is actually generative of cynicism. After all, the steady accretion of participatory processes in regulatory decision-making over the last 50 years corresponds with a concomitant rise in distrust of government.<sup>21</sup> It is not far-fetched to hypothesize that the more the public sees of the “sausage making” of regulatory government, the more frustrated it will become. At times, even Ruckelshaus seems to appreciate that this may be the case. In a telling line, Ruckelshaus notes that it was once the case that the “public, largely indifferent to regulatory activities, accepted agency actions as being for the ‘public convenience and necessity.’”<sup>22</sup> Historically, there is a case to be made that the less the public knows, the more accepting it will be of government actions.

This points the way to another feature of Ruckelshaus’s vision that needs revisiting: its overall goal. There is a happy coincidence, in Ruckelshaus’s account, between an emerging environmental movement that he tightly associates with the “public” as a whole, on the one hand, and increasing participatory processes, on the other. Lacking the ability to foresee

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<sup>17</sup> Ruckelshaus, *supra* note 4, at 636-37.

<sup>18</sup> Ruckelshaus, *supra* note 4, at 637.

<sup>19</sup> Ruckelshaus, *supra* note 4, at 636-37 (“Today, credibility gaps and cynicism make it essential not only that decisions be wise and well-founded, but also that the public know this to be true. Certitude, not faith, is *de rigueur*.”). For a more general historiography of this cynical turn and its impacts on regulatory policymaking, see generally Paul Sabin, *Public Citizens: The Attack on Big Government and the Remaking of American Liberalism* (2021).

<sup>20</sup> Ruckelshaus, *supra* note 4, at 636-37.

<sup>21</sup> *Public Trust in Government: 1958-2022*, Pew Research Center (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> [<https://perma.cc/Y7VB-RVNQ>].

<sup>22</sup> Ruckelshaus, *supra* note 4, at 636.

the future, it was easy for Ruckelshaus to posit that we are “moving slowly—seemingly grudgingly at times—but inexorably into an age when social, spiritual and aesthetic values will be prized more than production and consumption.”<sup>23</sup> It is somewhat difficult to parse out what Ruckelshaus would think if his understanding of public preferences turned out to be wrong, or if it crumbled over time and the public’s preferences on environmental protection were more polarized. But that is the question we face today. There is no longer the social consensus that allowed Ruckelshaus to assume that the public interest coincides with environmental protection.<sup>24</sup> It becomes much more difficult to think about the *telos* of environmental democracy if the public’s views about environmental protection are more internally conflicted. What, then, should give way: environmental protection or democracy?

We do not have to make this difficult choice if we are willing to think of democracy itself differently than Ruckelshaus does. Rather than thinking of democracy as driven by consensus, we can think of democracy as agonistic—i.e., as a process of contestation that has some degree of intrinsic value.<sup>25</sup> There is much more room for a continued commitment to participatory process on this account. It does not matter if there is consensus on environmental matters anymore; participatory processes play the indispensable role of providing an opportunity for the voicing of environmental values in a contestatory public dialogue.

To be sure, Ruckelshaus seems almost to anticipate this different conception of public participation in the ultimate paragraph in his essay, where he writes that “[t]he real significance of the environmental debate lies not in the specifics or disposition of particular cases but in the fact that the debate itself occurred.”<sup>26</sup> But the last 50 years’ worth of experience with environmental democracy only strengthens the need to refocus environmental democracy on processes that facilitate that debate. As Ruckelshaus implies, there will be a future for environmental protection as long as that debate is allowed to play out.

In the end, maybe these are the best of times, full stop. Many of the supposed dysfunctions of public participatory processes in environmental decision-making are linked to an unrealistic assumption that these processes will help the public discover a latent consensus over environmental matters

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<sup>23</sup> *Id.* at 636.

<sup>24</sup> Dunlap, *supra* note 9 (“Support for efforts to protect environmental quality, once viewed as a ‘uniting issue’ when such efforts became prominent in the 1970s, is now characterized by strong divisions along party lines . . .”).

<sup>25</sup> For further exploration of the theory of democratic agonism, see Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 *YALE L.J.* 1, 1 (2022).

<sup>26</sup> Ruckelshaus, *supra* note 4, at 644.

that will make for frictionless environmental protection. What we have instead is an energized public that is actively debating the future of the environmental movement and making policy more responsive to the diverse opinions of the public. While this often prevents total victory for any one constituency, it does make it certain that the environmental movement will be here to stay, keeping regulators' eyes trained on the importance of environmental values in governmental decision-making.