E-RULEMAKING'S DEMOCRATIC TRANSFORMATION: ANTICIPATED, ACTUAL, AND POTENTIAL

by **Michael HERZ,** Arthur Kaplan Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University (United States).

Notice-and-comment rulemaking is often held out as the purest example of participatory democracy in actual American governance. K.C. Davis called notice-and-comment rulemaking the "most democratic of procedures" because all may participate.[1] Regulators are required to accept comments from any interested person and consider and respond to them before making a final decision. Direct public engagement has been seen as an antidote to the democracy deficit that plagues policymaking by unelected bureaucrats.[2] Central to this conception is a belief that the comment process will involve a meaningful exchange of views. In the words of the DC Circuit, notice and comment involves "an exchange of views, information, and criticism between interested persons and the agency."[3] Indeed, it is this broad participation and exchange that is seen as legitimating the resulting regulations.[4]

Of course, the reality has always fallen far short of these ideals. Many anticipated that electronic rulemaking would enable more democratic rulemaking, finally allowing effective and broad public participation. This has not in fact happened. This paper reviews the course of e-rulemaking in the United States and offers some suggestions for how it might be restructured in a more limited, but more meaningful, democratic way.

---

[1] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 66 (1969). Or, as Professor Davis also wrote:

> "Affected parties who know facts that the agency may not know or who have ideas or understanding that the agency may not share have opportunity by quick and easy means to transmit the *facts, ideas, or understanding* to the agency at the crucial time when the agency's positions are still fluid. The procedure is both democratic and efficient."

KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1972).

[2] *See*, e.g., Cass R. Sunstein, *Democratizing Regulation, Digitally*, 34 DEMOCRACY: A JOURNAL OF IDEAS (Fall 2014) ("During the New Deal and since, some observers have expressed concern that regulators are not directly accountable to the people, and have contended that they may suffer from some kind of 'democracy deficit.' For such critics, notice-and-comment rulemaking is an important way to legitimate the administrative process, by increasing accountability and responsiveness. Democratic participation is built into the very idea of notice-and-comment rule-making.").

[3] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977), quoted in *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011).

[4] *See, e.g.,* Barack Obama, *Exec. Order* 13,563, § 1(a), 76 FED. REG. 3821, 3821 (2011) ("Our regulatory system […] must allow for public participation and an open exchange of ideas."); Regulations.gov, *Public Comments Make a Difference*, http://www.regulations.gov/docs/FactSheet_Public_Comments_Make_a_Difference.pdf (assuring visitors to federal government rulemaking portal that "public comments make a difference" and "lend democratic legitimacy" to agency regulations).

§ 1 – High Hopes

However, the traditional paper-based process, with notice via a hard-copy *Federal Register* and comments stored in a docket room in Washington, DC, always and necessarily fell far short of the ideal. Barriers to participation reduced the likelihood of "diverse public comment," limited the opportunity for participation by *all* affected parties, and meant that some useful information was not reaching the agencies.[5] This is emphatically true with regard to laypersons. Historically, individuals have generally simply not participated in notice-and-comment rulemaking. When they have, prompted by something in a newspaper or a nudge from a stakeholder, their comments have been ineffective and easily ignored.[6] Perhaps more important, the basic structure – a one-shot opportunity to submit comments – prevented the "*exchange* […] between interested persons and the agency" anticipated by the D.C. Circuit.[7] And note what the D.C. Circuit does not even mention, *viz.* the possibility of an exchange *among* interested persons.

Beginning in the 1990s, federal agencies started to experiment with electronic rulemaking, moving what had always been a paper process online.[8] The Department of Transportation was in the vanguard, establishing an electronic docket system for rulemakings in 1998. EPA was not too far behind. The second Bush Administration developed an e-Government Strategy consisting of 25 initiatives; these were very much focused on delivery of services, but did include expansion of electronic rulemaking as one of its projects. Additional impetus, and funding, comes from the December 2002 passage of the E-Government Act.[9] The Act's goals and rhetoric are lofty, though for the most part they are aimed at governmental operations other than rulemaking. The rulemaking provision, Section 206, is fairly modest. It provides that "to the extent practicable, as determined by the agency in consultation with the Director [of OMB], agencies shall accept submissions under section 553(c) […] by electronic means."[10] Also "to the extent practicable," agencies "shall ensure that a publicly accessible

---

[5] *See, e.g.,* Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. Pub. Admin. Res. & Theory 245, 245-67 (1998); Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 Wis. L. Rev. 671, 681-89 (detailing costs of participation in administrative processes).

[6] As Richard Stewart wrote in 1975:

> "I recall a visit to the offices of a major federal agency to inspect comments submitted in a major rulemaking proceeding. The bound presentations of regulated firms and a few well-heeled public interest litigants were in frequent use; a large heap of other comments, generally ill-informed, from the citizenry at large had been dumped in a corner and ignored."

Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1775 n.503 (1975).

[7] *See* text at *supra* note 3.

[8] The developments are usefully summarized in Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 Admin. L. Rev. 353, 363-66 (2004).

[9] E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified in scattered sections of 44 U.S.C.).

[10] 44 U.S.C. § 3501 Note.

Federal Government website contains electronic dockets for rulemakings under section 553."[11] These dockets shall, again to the extent practicable, "make publicly available online […] all submissions under section 553(c) […] and other materials that by agency rule or practice are included in the rulemaking docket under section 553(c) […] whether or not submitted electronically."[12] In January 2003, regulations.gov, the federal government-wide rulemaking portal, went live. The next stage was to create a government-wide e-docket system. This proved challenging, and took longer than most had anticipated, but by the close of the Bush administration, the regulations.gov site had become the anticipated government-wide "federal docket management system," or FDMS.[13]

While agencies do still receive comments on pieces of paper, and while they must still publish proposed and final rules in the *Federal Register*, some few copies of which are still printed in hard copy, notice-and-comment rulemaking has now moved on line. It is an electronic process.

Ten and twenty years ago, it was widely anticipated that the change from a paper to an electronic process would be (or even had been) transformative.[14] The word "revolution" was tossed around rather freely.[15] The expectation was that it would produce two basic changes in the way agencies write regulations and, by extension, the substance of the regulations ultimately adopted. First, the Internet massively reduces barriers to public participation in rulemaking. E-rulemaking was thus expected to open to all what had been a largely invisible insiders' game limited to sophisticated players blessed with access, funds, a Washington, DC presence, and good lawyers. Second, e-rulemaking promised to make the process more *dialogic*. Instead of a spoked wheel, with the agency at the hub and numerous isolated commenters sending their comments in to the center, all independent of one another, the online process seemed to invite reply periods,[16] comments on comments, exchanges through different media, collaborative drafting – in short, a conversation, with genuine give and take.[17]

---

[11] *Id.*

[12] *Id.*

[13] *See* generally Curtis Copeland, Congressional Research Service, *Electronic Rulemaking in the Federal Government* (Oct. 16, 2007) (detailing the funding, technological, coordination, and political obstacles that slowed creation of a central FDMS).

[14] Michael Tonsing, *Two Arms! Two Arms! E-Government Is Coming!,* FED. LAW., July 2004, at 19 ("The Electronic Rulemaking Initiative […] has dramatically transformed the federal rulemaking process by enhancing the public's ability to participate in regulatory agency decision-making.").

[15] Beth S. Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433 (2004); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 ADMIN. L. REV. 277 (1998).

[16] *See, e.g.*, Neil Eisner, "Policy Direction & Management" (Center for the Study of Rulemaking, Mar. 16, 2005), available at http://www.american.edu/rulemaking/panel3_05.pdf (Department of Transportation official endorsing reply periods and anticipating that they "will be tremendously increased as more agencies have electronic, Internet-accessible dockets").

[17] Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1429-30, 1462-71 (2002); David Schlosberg et al., *Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation*, 4 J. INFO. TECH. & POL. 37, 49–51 (2007).

The expectation was that these two changes would in turn have three significant benefits. First, and most prosaically, it would be more efficient. Agencies would have less paper to manage, and centralizing the process would bring economies of scale.

Second, and most grandly, by bringing in a wider range of participants, the process would be more "democratic."[18] This assertion is often offered as self-evident; the more people participating in a process, the more democratic it is. But this claim requires some unpacking. Broad participation is not actually an end in itself, although agency staffers and commentators often treat it as one. Rather, the democratic value would seem to consist in (at least) three subsidiary values. (a) To the extent that agency rules reflect judgments about values or preferences rather than technical problems with right and wrong answers, they are arguably more legitimate if they reflect popular input. An agency decision that reflects what the public as a whole would do (or, perhaps, what the public as a whole would do if it were fully informed and thought about the problem conscientiously) is "democratic,"[19] and fuller participation is necessary, if not sufficient, for the agency to know what that is. (b) Broader popular participation will produce a more informed citizenry, which in turn will be able to hold political actors accountable through mechanisms *other than* participation in rulemaking. (c) Broader participation will produce greater buy-in regarding the resulting regulations, which in turn will lead to fuller and less costly compliance.

The third anticipated value of broader and more dialogic participation was that it would, simply, produce better rules. This might happen for several reasons. For one thing, rulemakers would have access to more and better information. As Cary Coglianese wrote: "[T]he local sanitation engineer for the City of Milwaukee […] will probably have useful insights about how new EPA drinking water standards should be implemented that might not be apparent to the American Water Works Association representatives in Washington, DC."[20] Here e-rulemaking optimists invoke, expressly or otherwise, a good deal of contemporary writing about "dispersed knowledge" and "the wisdom of crowds."[21] Second, e-rulemaking

---

[18] *See, e.g.,* Christine S. Meers, *The Department of Transportation's Docket Management System: A Tool for a Collaborative Democracy*, in BUILDING KNOWLEDGE MANAGEMENT ENVIRONMENTS FOR ELECTRONIC GOVERNMENT (Ramon C. Barquin ed. 2001).

[19] *See* John M. de Figueiredo & Edward D. Stiglitz, *Democratic Rulemaking*, in THE OXFORD HANDBOOK OF LAW AND ECONOMICS (forthcoming) (suggesting two possible benchmarks against which to measure how "democratic" rulemaking is: "legislative matching" (referring to how closely the rule matches what Congress would have done) and "electorate matching" (referring to how closely the rule matches what the median voter would have done)).

[20] Cary Coglianese, *Weak Democracy, Strong Information: The Role of Information Technology in the Rulemaking Process*, *in* GOVERNANCE AND INFORMATION TECHNOLOGY: FROM ELECTRONIC GOVERNMENT TO INFORMATION GOVERNMENT 101, 117 (Viktor Mayer-Schonberger & David Laze eds., 2007).

[21] As President Obama put it on his first day in office: "*Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking, and to provide their Government with the benefits of their collective expertise and information.*"
Memorandum on Transparency and Open Government, 74 FED. REG. 4685, 4685 (Jan. 21, 2009).

might produce better rules because the process would allow for a fuller vetting of public submissions. Having comments online and readily accessible could result in comments on comments, reply periods, or other exchanges that would test and refine public submissions in a way that does not occur when everyone submits directly, at the last minute, without the opportunity to see what others have submitted.[22]

§ 2 – MODEST IMPROVEMENTS

E-Rulemaking is indisputably an improvement over the paper-based process it replaced. First, it is easier to submit a comment. This is a plus; it is hardly a transformation. Printing out and mailing a document is not that hard either.

Much more important is the ready availability of materials contained in the rulemaking docket. Having that material available online improves the ability of commenters to review and respond to it more effectively, and this can only be a good thing. The point is not just that the new regime is more efficient, though it is that.[23] It also makes for higher quality comments. No one has *proved* this, but it is supported by a survey of agency staff by Jeffrey Lubbers[24] and informal conversations, and it is what one would expect.

Widely available rulemaking dockets are of use to others besides commenters. Rulemaking dockets contain a lot of good stuff. One of the things that regulations.gov has made steady and impressive progress on over the years is making it easier to find material on its site. One major breakthrough was full-text searching. In 2012 the site introduced a set of Application Programming Interfaces (APIs) to enable third parties to search and retrieve material on the regulations.gov site. The enhanced availability of rulemaking materials is not an aspect of notice-and-comment rulemaking per se, and for present purposes it suffices just to note the expansive

[22] Other enumerations of expected benefits of more open and inclusive policymaking are possible. Consider this overlapping but slightly different list:
– *Greater trust in government.*
– *Better outcomes at less cost.*
– *Higher compliance.*
– *Ensuring equity of access to public policy making and services.*
– *Leveraging knowledge and resources.*
– *Production of more innovative solutions.*
OECD, DIRECTORATE FOR PUBLIC GOVERNANCE AND TERRITORIAL DEVELOPMENT, FOCUS ON CITIZENS: PUBLIC ENGAGEMENT FOR BETTER POLICY AND SERVICES 23-24 (2009).

[23] The Federal Docket Management System reportedly saved the government $30 million over five years when compared to paper-based docketing. Office of Mgmt. & Budget, Exec. Office of the President, *Report to Congress on the Benefits of the E-Government Initiatives* 10 (2010), *available at*:
http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/FY10_E-Gov_Benefits_Report.pdf.

[24] *See* Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451 (2010). Lubbers asked agency staff about sixteen activities that e-Rulemaking might have made easier or harder a compared to a paper-based process. Strikingly, respondents reported that *each* of the sixteen tasks had become easier. The second highest of the sixteen was: "disseminate information relevant to the agency's proposed rulemaking (for example, studies, economic analyses, legal analyses), so as to generate more informed commenters." *Id.* at 461.

literature on the utility of making government-held information widely available.[25]

In addition, an online docket makes it easier for the agency staff to do *its* job. No one has to worry that something has been checked out, more than one person can use a document at a time, people stay out of each other's way.[26] And the docket is available to agency staff who do not work at headquarters.[27]

§ 3 – No Transformation

While the *mechanics* of notice-and-comment rulemaking have changed, and very much for the better, the *nature* of the rulemaking process remains essentially what it was before the move online. E-rulemaking's grander anticipated benefits have not yet come to pass.[28]

The traditional, sophisticated participants are doing what they have always done.[29] Their comments are lengthy, well-researched, often prepared by counsel, and generally submitted right at the close of the comment period. (The last-minute submission is generally seen as being in part just a function of human nature, but also the result of the desire to avoid subjecting one's comments to review and critique by other commenters.[30]) The fact that the comments are posted on-line or attached to an email is no real change at all.

In addition, e-rulemaking has not proven more dialogic or collaborative than the traditional paper process. The FCC makes use of reply or rebuttal comment periods as a matter of course.[31] But the FCC largely stands alone. Use of reply periods remains quite rare and, strikingly, has not significantly increased with the

[25] *See, e.g.,* Jerry Brito, *Hack, Mash, and Peer: Crowdsourcing Government Transparency*, 9 COLUM. SCI. TECH. L. REV. 119 (2008); David Robinson et al., *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160 (2009); Richard Thaler, *This Data Isn't Dull. It Improves Lives,* N.Y. TIMES, March 13, 2011, at B5.

[26] Indeed, the task that scored highest in the Lubbers survey – that is, the task for which there was the highest level of agreement that it had been made easier by the move on-line – was: "Coordinate the rulemaking internally by allowing many people to look at the same rulemaking docket without getting in each others' way." Lubbers, *supra* note 24, at 461.

[27] A Department of Transportation staffer reports that in the bad old days "one DOT organization found it necessary to fly a staff member from Boston to Washington, D.C., several days each week just to locate and review docketed material housed throughout the nine separate docket offices." Christine Meers, *Taking Government to the People* (unpublished manuscript), *quoted in* Thomas C. Bierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation* 14 (April 2003) (Resources for the Future Discussion Paper 03-22), *available at:* http://ageconsearch.umn.edu/bitstream/10681/1/dp030022.pdf.

[28] Useful overviews include Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENVTL. & ADMIN. L. 1 (2012); Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 417-19 (2011).

[29] *See*, e.g., Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53 (2013) (describing the gap between lay and professionally prepared comments in an individual rulemaking).

[30] Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current practices and Recommendations to the Administrative Conference of the United States* 30-33 (March 15, 2011), *available at* http://www.acus.gov/sites/default/files/COR-Balla-Report-Circulated.pdf.

[31] FCC Rules of Practice, 47 C.F.R. § 1.415(c) ("A reasonable time will be provided for filing comments in reply to the original comments, and the time provided will be specified in the notice of proposed rulemaking.").

move of rulemaking on-line.[32] Commenters still write their comments in isolation and most submit them right before the deadline; the agency still responds only in the preamble to the final rule. Instead of providing a shared venue for collaboration and discussion, electronic rulemaking, in Peter Shane's incisive description, "resembles a global suggestion box, appended to an electronic library."[33]

Most strikingly, and perhaps most disappointingly, with isolated exceptions there has not been a meaningful shift in effective lay participation. Lay participation has shown isolated increases in quantity. But that increase has been haphazard, manipulated, uninformed, and largely unhelpful to rulewriters. Most rulemakings remain below the radar; very few produce a huge outpouring of lay comments.[34] Moreover, though the matter is disputed, lay comments have by and large not been especially helpful or influential. Few people are aware of the opportunity; of those who are, few bother to participate; and few of those who participate manage to submit something useful or persuasive. Some simply assert a bottom line.[35] Some reflect engagement and sincerity, but do not actually say anything.[36] Some are informed and intelligent, but just do not tell the agency anything it does not already know.[37] Some urge the agency to take an alternative approach that is not within its authority.[38] And, of course, as one would predict based

---

[32] Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States* 9-10 (2011).

[33] Peter M. Shane, *Turning GOLD into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy*, in ONLINE DELIBERATION: DESIGN, RESEARCH, AND PRACTICE 149, 154 (Todd Davies and Seeta Peña Gangadharan eds. 2009).

[34] Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 952-58 (2006).

[35] For example, these two comments, reprinted here in their entirety (as are those in the following footnotes). "Please DO NOT allow smoking of electronic cigarettes on aircraft." DOT-OST-2011-0044-0335. "regulate". FSOC-2010-0002-1094 (regarding the Volcker rule) (capitalization and punctuation, or lack thereof, in the original).

[36] "I am very sure that the effects will pronounced more on both sides but i guess it is debatable. It will be interesting to see what others' view point is on the electronic reporting effects on the public and the government." http://www.regulations.gov/exchange/node/509 (regarding the effects on state and local governments of requiring mandatory electronic reporting as part of water pollution permits). "Technology is a dual edged sword and could work to our advantage or disadvantage depending on the level of responsibility that we have when we use it.", http://www.regulations.gov/exchange/node/65 (same, in response to a quite focused question about what specific technologies governments would need in order to received electronically reported information).

[37] "The rocky mountain wolf is still recovering across a broader range, I think delisting in distinct places (e.g., Wyoming) will limit if not derail this process." FWS-R6-ES-2011-0039-1316 (delisting wolf under Endangered Species Act). "I urge you to make the interim ban on texting by drivers of commercial trucks and buses permanent. It's bad enough that cell phone usage is allowed. Texting has to be outlawed permanently. Control of large vehicles cannot be maintained if the driver does not keep his/her eyes on the road all the time." FMCSA-2010-0029-0005 (regarding proposed ban on texting while driving a commercial vehicle).

[38] "Dear EPA, I support the proposed new rules that would increase national fuel economy standards to 54.5 miles per gallon by the year 2025 and I commend the Obama administration for continuing to pursue strong, clean vehicle standards that will reduce our dangerous dependence on oil and cut global warming pollution, while creating much-needed jobs and saving drivers money at the pump. Additionally, these landmark standards remind us of the valuable role that the federal government can play in

on reading other on-line comments sections, many are really, really angry and abusive.[39] What lay comments generally *fail* to do is provide agency staff what they most need: concrete examples, specific alternatives to the proposal, an awareness of statutory limitations, hard data or actual experience, and direct responses to specific questions the agency has asked.[40]

Finally, in those rulemakings that have generated extensive lay participation the comments have been dominated by duplicative submissions resulting from organized "astroturf" campaigns. NGOs urge their members to submit a comment, which really means just clicking a button, *not* because they have something valuable to say but because it is important to show support for or opposition to an agency proposal. The following email solicitation is typical:

> "When we asked you to stand up against oil & gas climate pollution, you delivered. You stood with 178,913 other EDF activists in supporting the EPA's efforts to put strict limits on oil & gas climate pollution from facilities to be built in the future.
>
> Now, we need you to lend your voice again – this time, to protecting America's most beautiful vistas from oil & gas pollution.
>
> Take action today, and support strong limits on oil & gas climate pollution on federal lands [...]

---

strengthening the economy and protecting the planet. We cannot afford to delay in confronting the threats of climate change and our dangerous oil dependence. I urge you to finalize the strongest possible standards free of harmful loopholes.

In addition, Mr. President, I ask you to take steps or measures to get the ball rolling on alternate sources of energy, such as solar power. The United States has always been a leader in research and development of new technologies, and there is no reason why our country should or even consider relinquishing that leadership. You have said that it will create new jobs, and I think that it makes all the sense in the world. The Chinese must not eat our breakfast, lunch, dinner, much less pie and coffee.

Thank you, Mr. President."

EPA-HQ-OAR-2010-0799-2422 (regarding automobile fuel economy standards)

[39] "Morons, morons – please pay attention – Killing 90% of the wolve population disrupts the eco system as we know it. just like fracking is causing earthquakes and global warming, so is killing natures predators. For all the morons in government – this is not the only solution – Get your heads out of your asses and come up with an intelligent solution. Stupid! Stupid! Stupid!!!! Virtually every one in government is plain stupid with no common sense to fix our nations' problems." FWS-R6-ES-2011-0039-2221.

[40] *See, e.g.,* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 443 (2005) (noting that "individual commenters came across as being angry and exasperated," "failed to understand the distinction between the regulation and the statute," and rarely offered "anything remotely resembling a concrete proposal"). Cuellar identified five criteria for what makes rulewriters take comments seriously:

> "(a) Did the commenter distinguish the regulation from the statutory requirements?; (b) Did the commenter include at least a paragraph of text providing a particular interpretation of, and indicating an understanding of, the statutory requirement?; (c) Did the commenter propose an explicit change in the regulation provided in the notice of proposed rulemaking (NPRM)?; (d) Did the commenter provide at least one example or discrete logical argument for why the commenter's concern should be addressed?; and (e) Did the commenter provide any legal, policy, or empirical background information to place the suggestions in context?"

Id. at 431. Not surprisingly, lay commenters generally compare poorly with ones with professional training on these criteria.

> It has been 30 years since the Department of Interior's Bureau of Land Management (BLM) has updated the methane rules protecting these precious public lands – and in the meantime, we have made staggering technological advancements. We can cost-effectively cut this problem *almost in half* with these new technologies.
>
> BLM has proposed a rule putting strict limits on this pollution – but *we're running out of time* to ensure these regulations are strengthened and finalized.
>
> We need our most dedicated climate activists, now more than ever. Please, stand with us again, and add your name in favor of protecting America's landscapes from oil & gas climate pollution!
>
> Thank you for standing with us,"

Clicking highlighted portions of the text takes the recipient to a comment page. A couple of clicks, and the deed is done.

The language of this appeal is striking. It is the standard rhetoric of the political campaign or any on-line vote gathering. It is not about facts, arguments, or legal requirements. It is about a show of support. What is it that the individual commenter offers? "Support." What is it that the individual commenter adds? "Your name." What gives these comments weight? Sheer numbers – the "178,913 activists" who "stood up."

Tens or hundreds of thousands of near-identical submissions are a testament to the costlessness of submitting a comment. But such "click-through democracy," in Stuart Shulman's phrase, may be a "harbinger of a slide into a technological arms race predicated on plebiscite-style governance."[41] Even e-rulemaking's greatest enthusiasts acknowledge that "the digitization of citizen participation practices has not worked well. […] Online participation is evolving from notice-and-comment into 'notice and spam.'"[42]

Indeed, there can be something upside-down about this process. Consider this comment, submitted in response to a Bureau of Land Management proposal to update rules regarding the flaring of natural gas on public lands:

> "Having attended two public meetings related to Methane flaring, I feel like I am now adequately informed. Thank you, BLM for staging the meetings.
>
> I, wholeheartedly, agree with the need to monitor methane dispersal into our atmosphere. As a homeowner using natural gas to heat my house in the cold New Mexico winters, I acknowledge that various Petroleum distillates are a resource that ought not be wasted. Therefore, I applaud the methane waste prevention measures.
>
> As a resident of San Juan County, New Mexico, I realize I live in an eggs-in-one-basket economy. I hope our

[41] Stuart W. Shulman, *Click-Through Democracy*, 20 USA SERVS. INTERGOVERNMENTAL NEWSLETTER 42, 42 (2007).

[42] Beth S. Noveck & David R. Johnson, A Complex(ity) Strategy for Breaking the Logjam, 17 N.Y.U. ENVTL. L.J. 170, 179 (2008).

> economic leaders will take measures to diversify our economy.
>
> Again, I support the Methane Rules. They are long overdue. Thank you."[43]

The traditional, and essentially correct, understanding of notice-and-comment is that commenters have information or insight that the agency does not. Here, instead, the agency informs members of the public, who then, duly informed, express "support" for what the agency proposes without telling the agency anything at all that it does not already know.

Not surprisingly, then, almost all observers have concluded that lay comments generally and mass comments in particular have not been influential. Agencies "occasionally acknowledge the number of lay comments and the sentiments they express [but] they very rarely appear to give them any significant weight."[44] Rulewriters may even resent such submissions.[45]

CONCLUSION: STEPS ON THE WAY FORWARD

What, then, can and should be done to achieve the appropriate democratic aspirations of notice-and-comment rulemaking? The fundamental challenge is to create a better match between the inputs rulewriters need, the information commenters have, and the technological means to move one to the other. In essence, two approaches have been attempted, and neither has been a triumph. One is to simply move the traditional paper notice-and-comment process on line. As discussed, that is an extremely valuable change, but one thing it does *not* do is enable effective participation by stakeholders or the general public. The barriers to such participation go far beyond simply not being aware of the rulemaking or not having access to materials in the docket or not being able to pay for postage.

The second approach is to ask for different kinds of input from lay commenters. In essence, to ask, implicitly or explicitly, for a vote. But no one actually thinks that notice-and-comment should be a referendum.

So, challenge is how can we get better participation from people with something to offer and less clutter. That means focusing on the quality of submissions more than their quantity and enabling historic outsiders with relevant knowledge to effectively participate. The tools of web 2.0 can be harnessed to this end, but only if appropriately targeted. Herewith some more modest suggestions.

---

[43] Comment on Bureau of Land Management, Waste Prevention, Production Subject to Royalties, and Resource Conservation, FR Doc # 2016-01865, ID BLM-2016-0001-0014, https://www.regulations.gov/document?D=BLM-2016-0001-0014.

[44] Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343, 1346, 1363-64 (2011).

[45] David Schlosberg et al., *Deliberation in E-Rulemaking? The Problem of Mass Participation*, in ONLINE DELIBERATION: DESIGN, RESEARCH, AND PRACTICE 133, 143 (Todd Davies & Seeta Peña Gangadharan eds., 2009); Mendelson, *supra* note 44, at 1363.

A) Outreach

Agencies should use social media to inform the public about agency activities, the rulemaking process in general, and specific rulemakings. Agencies should take an all-of-the-above approach to alerting potential participants to upcoming rulemakings, posting to its website and blog and sending notifications through multiple channels. Social media provide a more effective means to reach interested persons that have traditionally been under-represented in the rulemaking process.

B) Agenda-Setting

Agencies sometimes tweet general requests for the public to submit ideas. To pick a random example, on February 1, 2013, EPA tweeted:

> "It's time for #EPAtips again! What are some unexpected ways you've found to save energy this winter?"

Responses could be tweeted or posted on Facebook. The same day, it tried again:

> "Tell us some unexpected ways you've found to save energy this winter. Use hashtag #EPAtips. We'll retweet our favorites."

The next day:

> "Last chance to share your #EPAtips with us! What are some unexpected ways you've found to save energy this winter?"

And then two days later:

> "Thanks to everyone who shared their #EPAtips with us!"

The exuberant (or desperate) exclamation marks notwithstanding, it appears that not a single "unexpected way to save energy" was submitted. So, there is nothing magic about a social media platform. The "open call" is almost always doomed to failure – too imprecise, often insincere, and invisible to almost all those with something useful to contribute.[46]

Nonetheless, social media may be particularly useful with regard to agency agenda-setting. That is, its most important applications to rulemaking may lie *outside* the notice-and-comment process. Social media have much, perhaps most, to offer not during the actual comment period, but *prior* to issuance of the NPRM (and possibly *after* promulgation of the final rule). This is a period in which the agency's scope of inquiry is extremely broad, the questions more open-ended, and the interchange less formal.[47]

---

[46] BETH SIMONE NOVECK, SMART CITIZENS, SMARTER STATE: THE TECHNOLOGIES OF EXPERTISE AND THE FUTURE OF GOVERNING (2015) (Kindle Location 586) (noting that the few successful open calls "are random and serendipitous. For every open call that works, there are dozens that are never seen by those who could help.").

[47] Negotiated rulemaking ("reg neg") provides a ready analogy. Under the Negotiated Rulemaking Act, the entire reg neg process is a mechanism for developing a proposed rule. The proposed rule is then published in the *Federal Register* and the ordinary notice-and-comment process takes place. Use of social media differs from regulatory negotiation in important respects. There are, ideally, many more participants and the idea is not all to reach a mutually acceptable compromise. But the two share important elements. Both open up the traditional rulemaking process, create a more dialogic exchange, and have a

The point here is three-fold. First, as a generalization, it is probably fair to say that the lay public is better at identifying problems than at identifying solutions. Such input is especially relevant at the early stages of the rulemaking process, when the agency needs to understand the existing state of affairs, what's working and what isn't, where improvements must be made, and so on: in short, what's the problem?

Second, for *all* interested persons, lay and expert alike, a looser, more dialogic exchange may be especially useful in at an early, problem-identifying stage.

Third, time and again we have seen that members of the general public tend to set forth a bottom line, a belief or viewpoint rather than an argument or information. The APA anticipates that commenters will provide "data, views, or arguments."[48] Rulewriters tend to want to hear data and arguments more than views, and figuring out whether, when, and why "views" should matter is complex.[49] But one can at least say that "views" matter most with regard to agenda-setting. Figuring out the dose-response curve for a carcinogen requires data; figuring out whether a proposal is consistent with the relevant statute requires argument; but figuring out which problems to tackle should be influenced, at least in part, by what the public considers pressing. This is not the place to rehash longstanding debates regarding whether government should, for example, pursue the risks that concern people the most or those that experts say pose the greatest threat. But *if* one holds the former view, then it is appropriate to consider the bottom-line sort of input social media may produce at the agenda-setting stage even if it is unhelpful at the rule-formulation stage. (And, of course, if one holds the opposite view, then more exclusive reliance on experts is equally critical at both stages.)

C) Useful Information

The use of social media may not be appropriate and productive in all rulemakings. Rulemakings that primarily involve questions of statutory interpretation, technical knowledge, or scientific expertise are poorly suited to the kinds of responses, and responders, usually produced by social media. On the other hand, social media may be valuable when an agency seeks to ascertain the perceptions or reactions of regulated parties or, even more, the general public to a proposed rule.

For certain sorts of questions, likely a minority of rulemakings, the crowdsourcing model could be promising. There will be particular rulemakings where an agency might benefit, in a crowd-sourced

slightly awkward fit with the traditional process. Agencies resolved that awkwardness for reg neg by having the whole process take place before the NPRM, and Congress took the same tack. *See* Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969, *codified at* 5 U.S.C. §§ 561-70. Similarly, agencies would be unconstrained by rulemaking requirements when gathering input via social media prior to the NPRM.

[48] 5 U.S.C. § 553(c).

[49] *See generally* Michael Herz, *"Data, Views, or Arguments": A Rumination*, 22 WM. & MARY BILL OF RIGHTS J. 351 (2013).

sort of way, in getting a whole bunch of volunteers to *try* things. The CFPB's Know Before You Owe rulemaking[50] is an example. The agency sought to determine which of two disclosure forms was more helpful and comprehensible. It did the obvious thing: it had a bunch of people look at the forms and give their reactions. There are other settings where that sort of direct feedback would be helpful. One could imagine, for example, giving different groups different versions of a warning label, letting each look at it and then take a little test about what they noticed, retained, and understood. Agencies should not assume that all rulemakings will be enhanced by a crowdsourcing approach. However, where public or user response is precisely the question to be determined, direct submission to the public at large will provide useful information and should be pursued.

D) Situated Knowledge

While the dispersed knowledge/crowdsourcing idea is easily oversold, a narrower version is robust. Housed at the Cornell E-Rulemaking Initiative and led by Professor Cynthia Farina of the Cornell Law School, Regulation Room is a website that uses Web 2.0 approaches and tools to facilitate public discussion and feedback in connection with federal agency rulemakings.[51] The site is conceived and operated by researchers from computing and information science, communications, conflict resolution, law, and psychology. Its basic goals are to improve the amount and quality of public participation in rulemaking. An important conclusion is that the most useful lay comments will come not from members of the general public but from individuals who possess "situated knowledge." "This knowledge is based on their on-the-ground experiences with the kinds of problems, circumstances, or solutions involved in the proposed regulation."[52] Such knowledge might reveal levels of complexity of which the agency was unaware, hidden contributions to existing problems, possible unintended consequences of particular proposed solutions, or ways of thinking about a problem that just had not occurred to policymakers without day-to-day, on-the-ground experience.[53]

The lesson here is generalizable, and is evident in the work of one of the leading thinkers about technology and democracy, Beth Noveck. Professor Noveck's latest book, *Smart Citizens, Smarter State*,[54] is a clarion call to greater public participation in governance. But the essential premise is not that "the general public" always has

[50] *Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, 77 FED. REG. 51,116 (2012) (to be codified at 12 C.F.R. pts. 1024 & 1026).

[51] The project's useful self-description is available at http://regulationroom.org/about/. *See also* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011).

[52] Farina et al., *supra* note 28**Erreur ! Le signet n'est pas défini.**.

[53] *Id.*; Cynthia R. Farina & Mary J. Newhart, *Rulemaking 2.0: Understanding and Getting Better Public Participation* 16 (IBM Center for The Business of Government 2013).

[54] NOVECK, *supra* note 46.

useful things to contribute nor that all issues should be put to a vote. To the contrary, Noveck's point is that governing institutions make far too little use of the skills and experience of those inside and outside of government; "governing requires the ability to curate quickly credible, specific, and relevant information, to make hard decisions."[55]

The goal of e-rulemaking is to more fully capture such credible, specific, and relevant information, not to solicit the views of random, self-nominating members of the public.

[55] *Id.* at Kindle Locations 2006-07.