RULEMAKING VS. DEMOCRACY: JUDGING AND NUDGING PUBLIC PARTICIPATION THAT COUNTS

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This Article considers how open government "magical thinking" around technology has infused efforts to increase public participation in rulemaking. We propose a framework for assessing the value of technology-enabled rulemaking participation and offer specific principles of participation-system design, which are based on conceptual work and practical experience in the Regulation Room project at Cornell University.

An underlying assumption of open government enthusiasts is that more public participation will lead to better government policymaking: If we use technology to give people easier opportunities to participate in public policymaking, they will use these opportunities to participate effectively. However, experience thus far with technology-enabled rulemaking (e-rulemaking) has not confirmed these assumptions. To the extent that new participants have engaged with the process, their engagement predominantly takes the form of mass comment campaigns orchestrated by advocacy groups. The conventional response to this new participation—by agencies and academics alike—has been to regard mass commenting as worse than useless. Recently, though, Professor Nina Mendelson argued for rethinking this response. Exploring the relationship between rulemaking and democratic government, she proposes that agencies should take account of the value preferences expressed in such comments when rulemaking involves value judgments.

Engaging this important argument, we suggest that not all citizens' preferences about policy outcomes are created equal. We present a typology that captures important differences in information quality and deliberativeness of preference formation. Unlike electoral democracy (in which participation based

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on any type of preference is valued), the legitimacy of rulemaking derives from a formally transparent process of reasoned deliberation. The types of preferences expressed in mass comments may be good enough for electoral democracy, but they are not good enough for rulemaking, even when rulemaking is heavily laden with value choices.

This position challenges both the Web 2.0 ethos and the common open-government belief that more public participation, of any kind, is a good thing. At least with respect to rulemaking and similar complex policymaking processes, more public participation is good only if it is the kind of participation that has value in the process. From our experiences on Regulation Room, we argue that design of successful "Rulemaking 2.0" civic engagement systems must involve a purposeful and continuous effort to balance "more" and "better" participation. We offer several specific design principles for striking this balance, perhaps the most important of which is that a democratic government should not actively facilitate public participation that it does not value.

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INTRODUCTION

Open government enthusiasts (among which we certainly count ourselves) seem prone to magical thinking: the building of if-then causal links that are not objectively justifiable.[1] Open government magical thinking includes several strands: If we give people the opportunity to participate, they will participate. If we alert people that government is making decisions important to them, they will engage with that decisionmaking process. If we make relevant information available, they will use that in-

1. The essence of magical thinking is non-scientific causal reasoning, and can be associated with a number of cognitive biases (i.e., mistakes human beings make in reasoning, evaluating, remembering, or other cognitive processes); these include the attentional bias, the availability heuristic, the representativeness heuristic, and the confirmation bias. *See* BEHAVIORAL LAW AND ECONOMICS 1–10 (Cass Sunstein ed., Cambridge University Press 2000), for a good introduction to cognitive biases. For more on magical thinking, see Matthew Hutson, *Magical Thinking*, PSYCHOL. TODAY, Mar. 1, 2008, at 89.

formation to engage meaningfully. If we build it, they will come. If they come, we will get better government policymaking.

This Article considers how open government magical thinking around technology has infused efforts to increase public participation in rulemaking. The observations and suggestions made here flow directly from conceptual work and practical experience in the Regulation Room project. Regulation Room is an ongoing research effort by the Cornell eRulemaking Initiative (CeRI), a multidisciplinary group of researchers from communications, computing, conflict resolution, information science, and law who work in active partnership with the U.S. Department of Transportation (DOT) and other federal agencies.[2] The project's core is an experimental online public participation platform that offers selected "live" agency rulemakings.[3] The project goal is discovering how information and communication technologies (ICTs) can be used most effectively to engender broader, better participation in rulemaking and similar types of complex public policymaking.[4]

This Article begins by explaining how the belief that new ICTs would result in broadscale popular participation in rulemaking eclipsed the question "*why* is more public participation in rulemaking a good thing?" Perhaps democracies inevitably come to conflate more citizen participation with better government. However, treating the value of more rulemaking participation as self-evident has left us without guidance on how to value the kinds of new participation that technology brings, and on how to deploy technology to get the kinds of new participation we really want. Part II offers a framework for thinking about the differences between how participation is valued in electoral democracy and in rulemaking. Part III discusses some implications of these differences for designing rulemaking participation systems.

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2. *See* CORNELL ERULEMAKING INITIATIVE (CERI), http://www.lawschool.cornell.edu/ceri/ (last visited Aug. 3, 2012).

3. REG. ROOM, http://www.regulationroom.org (last visited July 28, 2012).

4. *See* Cynthia R. Farina et al., *Rulemaking 2.0*, 65 MIAMI L. REV. 395 (2011) [hereinafter *Rulemaking 2.0*]; Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011) [hereinafter *Rulemaking in 140 Characters*]. As this Article is being written, the project is developing Planning Room (planningroom.org), which will apply the technology and techniques developed to support public participation in rulemaking in a different complex policy environment: updating an agency's strategic plan.

I. THE DRIVE FOR E-PARTICIPATION

Over the last two decades, federal agencies have been told, through increasingly mandatory injunctions, that they should use emerging ICTs to increase public participation in rulemaking.

In 1993, the Clinton Administration's National Performance Review urged agencies to "[u]se information technology and other techniques to increase opportunities for early, frequent and interactive public participation during the rulemaking process . . . ."[5] Underscoring how quickly ICTs have evolved in under twenty years, the Review suggested "teleconferencing" as a way to gather public input and "computer bulletin boards" as a way to "circulate [agency] requests for information."[6] Over the course of the next decade, the Federal Register was made available on the World Wide Web in searchable format, followed shortly by the Unified Agenda and the Code of Federal Regulations.[7] Individual agencies, including DOT, the Occupational Safety and Health Administration, and the Environmental Protection Agency, began offering rulemaking information and even comment submission tools on their own, newly created websites.[8] Most rulemaking agencies began to allow the public to submit comments via then-new ICTs—fax and e-mail—in addition to traditional paper submission.[9]

In 2002, the G. W. Bush administration published the E-Government Strategy, which included creation of an "online rulemaking management" system as one of twenty-four government-wide initiatives; these initiatives were selected on the basis of predicted "value to citizens" and "improvement in agency efficiency."[10] The building of a central, government-wide e-rulemaking portal, Regulations.gov, was the result. Although informed

5. AL GORE, NAT'L PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, app. C at 168 (1993).

6. *See* AL GORE, NAT'L PERFORMANCE REVIEW, IMPROVING REGULATORY SYSTEMS, REG04: Enhance Public Awareness and Participation (1993), *available at* http://govinfo.library.unt.edu/npr/library/reports/reg04.html.

7. The Notices of Proposed Rulemaking that commence the public comment period are published in the Federal Register; the Unified Agenda gives notice of agencies' current and predicted rulemaking activity; the Code of Federal Regulations is the official codification of final rules. For a more detailed discussion of this history, see CYNTHIA R. FARINA, COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 21–24 (2008) [hereinafter ACHIEVING THE POTENTIAL].

8. *Id*. at 21.

9. *Id*.

10. OFFICE OF MGMT. & BUDGET, E-GOVERNMENT STRATEGY 9, 27 (Feb. 27, 2002).

observers continued to call for improvements in that system,[11] Regulations.gov enabled the public to view rulemaking documents online, and it added government-wide online comment submission (via typing into an online form, or attaching a document file) to the electronic commenting options of fax and e-mail.

This "first generation" of technology-enabled rulemaking did not significantly change the breadth and nature of public participation[12]—with one important exception. Advocacy groups became adept at using the Internet to mount massive membership "calls to action" for high profile rulemakings, variously called "mass e-mail," "e-postcard," or "astroturf"[13] campaigns. Examples include the nearly 500,000 comments submitted during the EPA's rulemaking setting standards for airborne mercury;[14] the 520,000 comments in the Fish and Wildlife Service's rulemaking to remove some species of the gray wolf from the endangered list[15] and approximately 670,000 comments in its proposed rulemaking to list the polar bear as endangered;[16] the 2.1 million comments that public interest groups reportedly sent to the EPA in support of the agency's greenhouse gas rule for new power plants;[17] the roughly 1 million comments on the Federal Communications Commission's proposed rule to allow more consolidated media ownership;[18] and the more than 1.2 million comments on the U.S. Forest

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11. *E.g.*, ACHIEVING THE POTENTIAL, *supra* note 7; Cary Coglianese et al., *Unifying Rulemaking Information: Recommendations on the New Federal Docket Management System*, 57 ADMIN. L. REV. 621 (2005).

12. *E.g.*, Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REG. & GOVERNANCE 46 (2007); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J., 943 (2006); John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969 (2006).

13. "Astroturf" conveys the idea of an organized, manipulative campaign masquerading as a genuine grassroots movement.

14. *See* Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T 41 (2007).

15. *See* Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15,123, 15,154 (Apr. 2, 2009) (to be codified at 50 C.F.R. pt. 17).

16. *See* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range; Final Rule, 73 Fed. Reg. 28,212, 28,235 (May 15, 2008) (to be codified at 50 C.F.R pt. 17).

17. *See* Rachel Arenstein, *2.1 Million Comments to Cut Carbon Pollution*, NAT'L WILDLIFE FED'N (June 28, 2012), http://blog.nwf.org/2012/06/2-1-million-comments-to-cut-carbon-pollution/; Susannah Marshall, *EPA's Carbon Pollution Rule Gets Largest Number of Public Comments for Any Federal Rule*, THINK PROGRESS (July 2, 2012, 3:37 PM), http://thinkprogress.org/climate/2012/07/02/509856/epas-carbon-pollution-rule-gets-largest-number-of-public-comments-for-any-federal-rule/?mobile=nc.

18. *See* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 908 (2006).

Service's "roadless area" conservation rule.[19] This technology-enabled "new participation" is examined in the next Section.

Most recently, the Obama administration's December 2009 Open Government Directive required agencies to use Web 2.0 ICTs to increase rulemaking participation, and gave agencies four months to come up with a multi-faceted Open Government Plan.[20] Web 2.0 technologies differ from first-generation online efforts in functionality and, more significantly, in philosophy. Web 2.0 design aims at website content that is dynamic and broadly interactive, rather than static and hierarchically controlled by the site owner. Examples include blogs and discussion fora in which content is created through initial and reactive postings; wikis and collaboration tools such as Google Docs that make it possible for multiple users to author a single text, simultaneously if they wish; and social networking services such as Facebook and Twitter that permit users to share information in the form of text and images and react to the information provided by others. The ethos of Web 2.0 is radically inclusive. The idea is not simply that users *make* rather than just retrieve Web content, but that, as Wikipedia (a Web 2.0 icon) explains, "Web 2.0 offers *all* users the *same* freedom to contribute."[21] Thus, proponents speak of the "Web-as-participation-platform" and describe Web 2.0 sites as having an "architecture of participation."[22]

At this point, technology and participation are no longer linked, but fused: technology instantiates participation. And with this fusion, technology becomes political. Web 2.0 is democracy on steroids: universal egalitarian participation (intentionally enabled and continuously validated by interactional technology) that users come to expect as a matter of right. At the global level, social networking systems are credited with fomenting political movements that bring down authoritarian governments.[23] Repres-

19. *See* Stephen Zavestoski et al., *Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking*, 31 SCI. TECH. & HUMAN VALUES 383, 387 (2006).

20. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, on the Open Government Directive, to the Heads of Exec. Dep'ts & Agencies 4 (Dec. 8, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf. The Directive implemented the President's Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, issued the day after his inauguration. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,685 (Jan. 21, 2009) [hereinafter Transparency and Open Government Memorandum].

21. *Web 2.0: Characteristics*, WIKIPEDIA, http://en.wikipedia.org/wiki/Web_2.0#Characteristics (last modified Aug. 6, 2012 at 5:55 AM) (emphasis added).

22. *See id.*; Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY (Sept. 30, 2005), http://oreilly.com/pub/a/web2/archive/what-is-web-20.html?page=3.

23. For example, the role of social networks during the "Arab Spring" revolutionary political movements has been extensively discussed. *See, e.g.*, Philip N. Howard & Muzam-

sive regimes that try to control Internet access and content are roundly condemned.[24] On the national level, the President uses Facebook, Twitter and YouTube town halls to discuss ideas for job creation with us all, while agency brainstorming "ideation platforms" ask the public to identify and rate ideas about toxic waste, foreign policy, nuclear power regulation, and space exploration.[25]

In this techno-political environment, participation is axiomatically good, and more participation is necessarily better. On the day after his inauguration, President Obama voiced the idea that has become the mantra of the Obama administration's e-government policy: "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."[26] Accordingly, the administration has focused on how to get into place, as quickly and widely as possible, the technology that would enable the people to reveal their knowledge.[27]

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mil M. Hussain, *The Role of Digital Media*, J. OF DEMOCRACY, July 2011, at 35; Essam Mansour, *The Role of Social Networking Sites (SNSs) in the January 25th Revolution in Egypt*, 61 LIBR. REV. 128 (2012).

24. *See* Howard & Hussain, *supra* note 23, at 44.

25. Respectively, U.S. Envtl. Prot. Agency, *Share Your Ideas*, OPENEPA, http://openepa.ideascale.com (last visited Aug. 8, 2012); U.S. Dep't of State, *Share Your Ideas*, OPENSTATE, http://openstate.ideascale.com (last visited Aug. 8, 2012); U.S. Dep't of State, *Opinion Space: A Universe of Viewpoints and Ideas*, http://www.state.gov/opinionspace (last visited Aug. 8, 2012); U.S. Nuclear Regulatory Comm'n, *Share Your Ideas*, OPENNRC, http://opennrc.ideascale.com (last visited Aug. 8, 2012); Nat'l Aeronautics and Space Admin., *About*, OPEN.NASA, http://open.nasa.gov/about (last visited Aug. 8, 2012); *Citizen Engagement Analysis: Crowd-Sourcing Ideas for NASA's Future*, NASA, http://www.nasa.gov/open/plan/citizen-engagement.html (last updated Aug. 9, 2012).

26. Transparency and Open Government Memorandum, *supra* note 20, at 4685; *see also* Michael Fitzpatrick, U.S. Office of Mgmt. & Budget, *Promoting Greater Transparency in the U.S. Open Government Initiative,* in 6TH CONFERENCE ON GOOD REGULATORY PRACTICE (APEC 2011), *available at* http://aimp.apec.org/Documents/2011/SCSC/CON1/11_scsc_con1_016.pdf; *Open Government*, PERFORMANCE.GOV (last visited Aug. 9. 2012) http://opengov.performance.gov; OPEN GOV'T P'SHIP, NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (Sept. 20, 2011), *available at* http://www.opengovpartnership.org/sites/www.opengovpartnership.org/files/country_action_plans/US_National_Action_Plan_Final_2.pdf.

27. For example, the General Services Administration rapidly negotiated government-wide terms-of-service agreements with social media providers to help agencies meet the short deadlines of the E-Government Directive. *See* Press Release, *GSA Further Opens Government, Launches Online Public Dialog Tool for Agencies*, U.S. GEN. SERVICES ADMIN. (Jan. 19, 2010), http://www.gsa.gov/portal/content/104037; U.S. GEN. SERVS. ADMIN., OPEN GOVERNMENT PLAN 37–39 (2010), *available at* http://www.gsa.gov/graphics/admin/GSAOpenGov20100407.pdf; *Social Media Directory*, U.S. GEN. SERVICES ADMIN, http://www.gsa.gov/portal/content/171365 (last visited July 31, 2012). The Office of Man-

II. WHAT KIND OF PARTICIPATION SHOULD WE VALUE?

Federal e-government leaders' overarching conviction that Web 2.0 would enable government to tap dispersed citizen knowledge subsumed any more particularized assessment of how, in the complex and demanding policy environment of rulemaking, more public participation would add value. Front-line agency rulewriters, by contrast, have confronted the reality of technology-enabled commenting. They have thus been forced to make judgments about the value of emerging forms of broad public engagement in rulemaking. The most dramatic example is the phenomenon of mass e-mail comments.

Launched by established advocacy organizations, these calls-to-action can generate tens, even hundreds, of thousands of duplicate or slightly personalized comments.[28] Typically, the initiators are organizations representing regulatory beneficiary interests—that is, the large indefinite groups (or, the public as a whole) who benefit from clean air and water, diverse media ownership, preserving endangered species, protecting pristine natural environments, etc. However, such campaigns also have been used by those who would be directly or indirectly harmed by regulation. For example, both the Forest Service's roadless area rulemaking and the National Park Service rulemaking about restricting snowmobiles in national parks produced barrages of comments not only from members of environmental groups, but also from groups mobilizing off-road enthusiasts, snowmobilers, and members of communities that depend on logging and recreational tourism—the kind of dynamic that leads knowledgeable observers to fear the dawn of a "rulemaking arms race."[29] The incidence of mass commenting is low relative to the roughly 4,000 new rules federal agencies propose each

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agement and Budget issued memoranda allaying agencies' fears about legal impediments to using the new ICTs. *See, e.g.*, Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, on Guidance for Agency Use of Third-Party Websites and Applications, to the Heads of Exec. Dep'ts & Agencies (June 25, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-23.pdf; Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Reg. Affairs, on Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act, to the Heads of Exec. Dep'ts and Agencies & Indep. Reg. Agencies (Apr. 7, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

28. *See* Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23, 34 fig. 4, 35 (2009) [hereinafter *The Case Against Mass E-mails*] (showing a bar chart of the organizations and numbers of e-mails in the polar bear rulemaking; one organization alone—National Resources Defense Council—generated over 300,000 comments).

29. Fred Emory & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, 31 ADMIN. & REG. L. NEWS no. 1, 2005 at 1, 8–9.

year,[30] but when a rulemaking does prompt mass commenting, the impact on the agency can be immense.[31] Moreover, technologies like Facebook and Twitter are making it even easier to spread the word and generate massive numbers of supporting or opposing comments.[32]

In a recent article, Professor Nina Mendelson looked at several rulemakings that prompted mass e-mail campaigns, in order to see how these comments fared in the lengthy preambles to final rules that explain the agency's response to comments received.[33] Mendelson found that in almost all instances the preambles acknowledged receipt of the comments but did not pay further attention to them: "agency officials appear to be discounting these value-laden comments, even when they are numerous."[34] In other words, the most notable form of technology-enabled "new public participation" is apparently being judged by agency rulewriters as having low, or no, value.

The standard administrative law response to these observations is applause. Rulemaking is not supposed to be a plebiscite.[35] Mass comment campaigns produce little more than an accumulation of regulatory "votes."[36] It would be deeply troubling if the agency *were* making decisions based on the numerical weight of outcome preferences.[37]

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30. OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 12 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/ 2011_cb/2011_cba_report.pdf.

31. *See, e.g.*, de Figueiredo, *supra* note 12, at 988–99; *The Case Against Mass E-mails*, *supra* note 28, at 46.

32. As political scientist Stuart Shulman, perhaps the leading expert on mass commenting, puts it: "[T]he logic of collective action many scholars my age and older grew up with is dead. The Internet killed it." *The Case Against Mass E-mails*, *supra* note 28, at 25.

33. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV 1343 (2011) (both presenting original research and collecting literature).

34. *Id*. at 1346. This is consistent with Shulman's research. *See The Case Against Mass E-Mails*, *supra* note 28, at 29–30.

35. *See Rulemaking in 140 Characters*, *supra* note 4, at 436–37 (describing the origin and elements of the "regulatory rationality" requirements for rulemaking). For more discussion, see *infra* text accompanying note 51.

36. *See* Benjamin, *supra* note 18.

37. Several scholars have expressed concern about e-rulemaking precisely because the kind of participation it evokes might push agencies towards plebiscitary decisionmaking. *See, e.g.*, David Schlosberg & John S. Dryzek, *Digital Democracy: Virtual or Real?* 115 ORGAN. & ENV'T 332 (2002); Bill Funk, *The Public Needs a Voice in Policy, But is Involving the Public in Rulemaking a Workable Idea?*, CPRBLOG, CTR. FOR PROGRESSIVE REFORM (Apr. 13, 2010), http://progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED1507624B63809E. *Cf.* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) (examining the problem in administrative contexts beyond rulemaking).

Mendelson takes on this conventional view with a challenging set of questions:[38] Increasingly, we recognize that regulatory decisions are heavily value-laden, even when they also require deployment of scientific or other specialized knowledge.[39] If this is so, why shouldn't the agency take account of citizens' value preferences? Rulemaking may not be simply a plebiscite, but it does occur within a democratic form of government. When choices among competing values must be made, government should be attending to citizens' value preferences at least until those preferences impinge on other values protected from majoritarian override as fundamental rights. Even if agencies ought not give *decisive* weight to numbers of mass comments, why shouldn't such participation count as evidence of the values citizens want government to favor in regulatory decisionmaking?[40]

This is an enormously important argument because it challenges us to think more deeply about the relationship of rulemaking to democratic government and, more specifically, about how the value of citizen participation in each is related. The balance of this Section explores these issues.

A. All Preferences Are Not Created Equal

To begin, consider that citizens' preferences about public policy outcomes—whether these outcomes involve candidates for electoral office, opinion surveys or referendum questions, or proposals for new regulations—may be grounded in very different amounts and kinds of information. We developed the following typology which, although obviously oversimplified, is a heuristic that captures important differences in the information quality and deliberativeness of preference formation:

> *1. Spontaneous Preferences*: These are the preferences a citizen expresses when she has neither focused her attention on information specific to the issue, nor been targeted by efforts to persuade her about the issue. Sometimes described as "top-of-the-head"[41] or "re-

38. Mendelson, *supra* note 33, at 1371–79.

39. *See, e.g.*, Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review of Agency Science*, 109 MICH. L. REV. 733, 735–36 (2011); Stephen Zavestoski, Stuart Shulman & David Schlosberg, *Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking*, 31 SCI., TECH, & HUM. VALUES 383 (2006); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 461–68 (2005).

40. Mendelson, *supra* note 33, at 1371–79.

41. *E.g.*, James Fishkin & Robert Luskin, *Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284, 287 (2005); John Zaller & Stanley Feldman, *A Simple Theory of the Survey Response: Answering Questions versus Revealing Preferences*, 36 AM. J. POL. SCI. 579 (1992).

active,"[42] *spontaneous preferences* are rapid, low-thought extrapolations from the individual's general knowledge, underlying value system, and worldview. For example, in the 2011 Health Confidence Survey conducted by the Employee Benefits Research Institute, 81% of respondents said they were "not at all" or "not too" familiar with the health exchanges that are a key part of the Patient Protection & Affordable Care Act.[43] Nonetheless, 57-58% also reported that they were "not at all" or "not too" confident in the ability of the federal or state governments to run health exchanges.[44]

2. Group-Framed Preferences: We know that groups, such as the Tea Party, Moveon.org, the Teamsters Union, the National Rifle Association, and the Environmental Defense Fund, can play a powerful role in the formation of citizens' public policy preferences. They become important components of an individual's civic identity and serve the valuable function of signaling when an issue "deserves" attention by those who share the group's values.[45] *Group-framed preferences* are based on information on an issue provided by a group with which the individual feels affiliation. These preferences are most likely to be formed when the issue is seen as closely related to in-group values,[46] when the communication includes the group's specific position on the issue,[47] and when the individual has little information about the issue from other sources.[48] Mass communication campaigns—alerting group members to an issue and urging them to send a message of support or opposition to legislators, the White House, or a federal agency—rely on group-framed preferences.

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42. "Reactive" is in contrast to "reflective." *E.g.*, Julie S. Weber et al., *Multi-Format Notifications for Multi-Tasking*, in HUMAN-COMPUTER INTERACTION—INTERACT 2009, at 247 (2009).

43. Paul Fronstin, *Public Opinion on the Future of Employment-Based Health Benefits: Findings from the 2011 Health Confidence Survey*, 32 EBRI NOTES, no. 11, at 8 fig. 7, *available at* http://www.ebri.org/publications/notes/index.cfm?fa=notesDisp&content_id=4936.

44. *Id*. at 7, 8 fig. 9.

45. *E.g.*, Michael A. Hogg & Scott A. Reid, *Social Identity, Self-Categorization, and the Communication of Group Norms*, 16 COMM. THEORY 7, 7–8, 18–21 (2006).

46. *See* Diane M. MacKie et al., *Knowledge of the Advocated Position and the Processing of In-Group and Out-Group Persuasive Messages*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 145, 146 (1992); Daan van Knippenberg et al., *In-Group Prototypicality and Persuasion: Determinants of Heuristic and Systematic Message Processing*, 33 BRIT. J. SOC. PSYCHOL. 289 (1994).

47. MacKie et al., *supra* note 46, at 149.

48. *See* Franklin J. Boster & Michael G. Cruz, *Persuading in the Small Group Context*, *in* THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 477, 485–86 (2002).

3. Informed Preferences: These are preferences based on exposure to, and consideration of, reasonably full and accurate factual information about the issue, as well as fairly representative policy or other arguments. The level of "informedness" may vary among citizens, depending on ability and motivation; the standard is not the impossible one of perfect information or deliberation. The essential quality of *informed preferences* is that the individual has attended, to some significant degree, to correct and balanced information about the relevant facts and to arguments for both sides. Deliberative polling and deliberative juries (or citizen panels) are examples of processes purposefully designed to produce informed preferences.[49]

4. Adaptive Preferences:[50] These are informed preferences modified by an assessment of the larger socio-political environment, legal and organizational constraints, and the claims of competing preferences. As used here, *adaptive preferences* are the choice of what is workable over what is ideal. They may be considered a compromise, the "lesser of two evils," or "something I can live with." For example, a 2012 Republican primary voter may have believed Newt Gingrich was the best candidate but voted for Mitt Romney as more able to beat Barack Obama in the general election. Voluntary conflict resolution processes, such as mediation or negotiated rulemaking, often build consensus through emergence of adaptive preferences.

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49. *See* David Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. (forthcoming 2013); Ned Crosby & Doug Nethercut, *Citizen Juries: Creating a Trustworthy Voice of the People* 111, 111–119 in THE DELIBERATIVE DEMOCRACY HANDBOOK (John Gastil & Peter Levine eds., 2005); James Fishkin & Cynthia Farrar, *Deliberative Polling: From Experiment to Community Resource* 68, 68–79 *in* THE DELIBERATIVE DEMOCRACY HANDBOOK (John Gastil & Peter Levine eds., 2005).

50. We use this term despite the Sen/Nussbaum critique of "adaptive preferences" as distorted because coerced by power imbalances and reflecting an internalization of low expectations and discrimination. *See* MARTHA NUSSBAUM, WOMAN AND HUMAN DEVELOPMENT 112–66 (2000); Amartya Sen, *Women, Technology and Sexual Division*, 6 TRADE AND DEV. 195 (1985). The focus of our typology is primarily descriptive. Preferences in any category may be more or less conducive to the individual's well-being. Particularly given our commitment to interest-based conflict resolution, we share the view of scholars who observe that adaptation can be a positive, as well as a negative, phenomenon. *E.g.*, Miriam Teschl & Flavio Comim, *Adaptive Preferences and Capabilities: Some Preliminary Conceptual Explorations*, 63 REV. SOC. ECON. 229 (2005) (arguing that the adaptive preference critique has a particular, narrow view on adaptation).

B. Preference Valuing in Democracy vs. Rulemaking

In electoral democracy, participation based on *any* of these types of preferences is valued. Voters are asked for outcomes, not reasons. Even if exit polls reveal widespread ignorance, misinformation, or mistake, the outcome is legitimate so long as ballots were freely cast by eligible voters. By contrast, decades of judicial elaboration have constructed rulemaking as a process in which outcome legitimacy turns on a formally transparent process of reasoned deliberation.[51] Agencies are expected to produce data-driven cost and risk analyses, to identify the facts they consider relevant and entertain claims that these facts are wrong or incomplete, to assess alternative approaches, to respond to questions and criticism, and to explain why their proposed solutions are the best choices within the bounds of what their statutory authority says they can, must, or may not consider.

In other words, a part of what we really mean by saying "rulemaking is not a plebiscite" is that the expression of outcome preferences, per se, has little value in this process: Participation that counts requires reason-giving, and this will inevitably privilege some types of preferences over others.

The electoral democracy participatory model and the rulemaking participatory model each have benefits and costs. Electoral democracy is highly inclusive, because the burdens of effective participation are relatively low: citizens need only cast a ballot in the designated manner at the designated time and place. Inclusiveness is costly, however. Spontaneous preferences are, by definition, low information/low thought. Group-framed preferences (as explained in more detail below) are often developed from calls-to-action in which information is incomplete and highly selective, if not actually distorted and misleading. Yet spontaneous and group-framed preferences are valued equally with informed and adaptive preferences.

In other words, the participatory model of electoral democracy contains fewer incentives for citizens to make the cognitive investment needed to form higher information or higher thought preferences. The result, as voting research repeatedly shows, is that many voters are unaware of, or mistaken about, the record and positions of candidates for major office *even on policy issues that they identify as important*.[52] As measured by their own

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51. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 376–85 (2006). *See generally* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 2–7, 39–43 (3rd ed. 2003) (describing breadth, impact, and legal structure of rulemaking).

52. *See* MICHAEL X. DELLICARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 263–64 (1996); MARTIN P. WATTENBERG, THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980S, at 123–26 (1991); Kate Kenski & Kathleen Hall Jamieson, *Issue Knowledge and Perceptions of Agreement in the 2004 Presidential General Election*, 36 PRESIDENTIAL STUD. Q. 243 (2006).

professed preferences, they cast the "wrong" ballot.[53] Enough of this happens to change outcomes in some elections.[54]

In rulemaking, the formal legal requirements of data-driven analysis, reason-giving, and consideration of alternatives reduce the risk of outcomes that are "wrong" because of low-information, low-thought decisionmaking. But this very emphasis on knowledge-based action is costly. Those holding informed and adaptive preferences are able to participate meaningfully in the form of decisionmaking the agency must use: They have at least some legal, factual, and/or policy bases for their preferred outcomes that can be articulated; they are at least to some degree aware of arguments on the other side and can respond with more than cursory dismissal. The agency may or may not find these assertions and arguments accurate, persuasive, or consistent with how it understands its statutory mission, but there is no question that such comments have value: they provide the currency in which rulewriters know they are legally expected to deal—of course the agency will attend to them. By contrast, those holding spontaneous and group-framed preferences can say little to explain and justify their outcome preferences beyond exhortations to action (or non-action), absolutist assertions of worldview and values, and conclusory references to facts that are either generally known or highly contestable.[55]

For this reason, the participatory model of rulemaking does incentivize citizens to invest the time and cognitive resources required to form the higher information/higher thought preferences that enable their engagement in reasoned decisionmaking. But, because the information produced in rulemaking tends to be voluminous and legally, technically, and linguistically complex,[56] the required investment is great. Hence, informed participation comes at the cost of inclusiveness: Individuals, small businesses, public interest groups, NGOs, and state, local, and tribal government entities tend to be disadvantaged vis-à-vis national corporations, trade and

53. *See, e.g.*, Richard Rau et al., *An Exploration of Correct Voting in Recent Presidential Elections*, 52 AM. J. POL. SCI. 395, 396–97 (2008) (analyzing data from 1972–2004 presidential elections, and defining a vote as "correct" if it was cast for the candidate whose expressed issue positions most closely matched the voter's collection of expressed, weighted preferences); *cf.* Larry M. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3 PERSP. ON POL. 15 (2005) (examining disconnect between voters' knowledge of and expressed views about the increasing gap between rich and poor and their support for regressive Bush administration cuts in income and estate taxes).

54. Rau et al. found that the proportion of "incorrect" votes averaged 25% of all voters and reached a highpoint of 49% in the 1980 election of Ronald Reagan; in several presidential elections, they concluded, the incidence and direction of incorrect voting may have affected the outcome. Rau et al., *supra* note 53, at 401–07.

55. *See, e.g.*, *infra* Appendix A (NRDC-proposed text in wolf rulemaking); Appendix E (proposed comment text in mercury rulemaking); Appendix G (Earthjustice-proposed text in polar bear rulemaking).

56. For specific examples, see *Rulemaking 2.0*, *supra* note 4, at 434–39.

professional associations, and other large, well-resourced private-sector entities.[57]

C. Are Value Preferences Different?

Still, all this does not directly address the question posed by Mendelson. Even if mass public comments have little weight in much of what the agency must decide in a rulemaking, why shouldn't these "value-focused comments"[58] count at the point when rulemaking decisions come down to value choices? The answer, we believe, is that the types of preferences expressed in these comments may be good enough for electoral democracy, but they are not good enough for rulemaking, even when rulemaking is heavily laden with value choices.

Initially, it's important to recognize that the contrast between the electoral democracy model of participation and the rulemaking model can be drawn even *within* the administrative process. "The agency" is not a monolith. At the front lines are the rulewriters, typically a group comprising some or all of the following: people experienced in the substantive program, people with relevant scientific or technical expertise, lawyers connected with the unit initiating the rule or some other individual with responsibility for the process, and economists who prepare the regulatory impact and other required analyses.[59] These predominantly career officials draft the Notice of Proposed Rulemaking ("NPRM"), read and summarize the comments, and draft the preamble and text of the final rule. Their work is reviewed—and often returned for changes—at several levels that include

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57. *See* JOHN E. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY 251 (1983) (participation in energy policy comprises almost exclusively "technically competent groups"—i.e., industry); KERWIN, *supra* note 51, at 183; *cf.* Wendy Wagner et al., *Rulemaking in the Shade, An Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99 (2011) (documenting systematic imbalance of participation and influence by regulated industry throughout the rulemaking process).

Studies before and after the advent of e-rulemaking confirm that individual commenters and public interest advocacy groups participate less consistently in rulemaking than business commenters. *See, e.g.*, Coglianese, *supra* note 12, at 951; Maureen Cropper et al., *The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making*, 100 J. POL. ECON 175, 178, 187 (1992); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?* 8 J. PUB. ADMIN. RES. & THEORY 245 (1998). A 1977 Senate Report found that the imbalance in expenditures was even greater than the imbalance in participation. S. COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 3 STUDY ON FEDERAL REGULATION: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. DOC. NO. 95-71, at 17–22 (1st Sess. 1977) ("[R]egulated industries spend from ten to one hundred times as much as public interest groups in rulemaking . . . .").

58. Mendelson, *supra* note 33, at 1362.

59. These analyses may be prepared by outside consultants; in our experience, the consultants work closely with the rulemaking team, including reading some, if not all, of the comments.

at least the General Counsel's office and the office of the Secretary, Administrator, Director, or Commissioner with ultimate decisional authority, whose signature is required to issue the NPRM and the final rule. Moreover, in the case of significant rules of executive agencies, both the NPRM and the final rule must be cleared by the Office of Information and Regulatory Affairs (OIRA), whose job includes ensuring that the rule is consistent with the President's priorities.[60] Notably, each of these levels is headed by presidential appointees who, unlike the rulewriters, continuously function in an atmosphere of susceptibility to political oversight and media scrutiny. A draft preamble that merely describes the receipt of mass public comments is enough, without more, to put these politically attuned actors on notice that the rulemaking has generated the level of advocacy/interest group support or opposition likely to draw the attention of White House staff, members of Congress, and the media.

Determining the extent to which review by these politically attuned actors shapes the rule that finally emerges from "the agency" is notoriously difficult.[61] Still, regardless of whether the preamble formally ascribes weight to mass public comments, it is implausible that they have been ignored by the agency's political leadership and OIRA.[62] Indeed, in many of the mass-comment rulemakings (e.g., the roadless access rule, the mercury rule, the gray wolf rule, and the snowmobile in national parks rule) the problem has not been that the agency is making under-the-radar value-laden judgments beyond the purview of electoral democratic accountability. Rather, as the calls-to-action and/or comments themselves often emphasized,[63] the administration was pursuing a particular and recognizably characteristic set of value preferences in these rulemakings; the value preferences expressed by most of the mass commenters were simply at odds with those of the sitting President.

At the level of the agency's political leadership, it seems completely appropriate for mass public comments to receive whatever weight they will bear—more specifically, whatever political pressure they can generate in Congress, the media, or competing power centers within the administra-

60. Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 at §§ 3(f), 6(b). The independent regulatory commissions are not required to submit their rules to OIRA. *See id*. at § 3(b).

61. *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1149–54 (2010).

62. *Cf.* William F. West, *Administrative Rulemaking: An Old and Emerging Literature*, 65 PUB. ADMIN. REV. 655, 662 (2005) (describing public comments as "a fire alarm that alerts politicians to agency actions"); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness In Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV, 66 (2004) (concluding, from examination of forty-two rulemakings, that the principal role public comments played was to inform political overseers of constituent views).

63. *E.g.*, *infra*, Appendices A, D, F, L, M.

tion. Electoral democracy takes citizens' preferences as it finds them, without asking about the quality of the information and thought they reflect.

But what about at the level of the rulewriters, where the real work of reasoned decisionmaking is supposed to happen? Professor Peter Strauss has written compellingly of the importance of the culture of administrative legality, whose norms impel those who write the rules (and ultimately those who defend them in court) to justify regulatory outcomes on more than bare political preference.[64] This is the other part of what we really mean by saying that "rulemaking isn't a plebiscite." To the extent rulemaking is a "democratic" process, we expect it to be a process of *deliberative*, rather than electoral, democracy.[65] Reasoned decisionmaking requires technocratic rationality (i.e., gathering and analyzing relevant data, considering costs and benefits, articulating supportable chains of causation, bringing expertise to bear) but is not satisfied by it. Agencies are also expected fairly to acknowledge conflicting interests and values, thoughtfully to consider solutions that might avoid or lessen the conflict and, if such cannot be found, clearly to explain why, within the bounds of the statutory goals and purposes, some interests and values ought to have priority over others. Agencies are, in other words, expected to make choices among interests and values deliberatively, considering "what can be justified to people who reasonably disagree with them."[66]

To be sure, this account of reasoned decisionmaking is the ideal, doubtless attained in practice far less often than we hope. Rulewriters may not be good deliberative decisionmakers because they lack information, time or ability,[67] or because they have "tunnel vision"[68] or perhaps even harbor bias

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64. Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

65. By using the adjective "deliberative," we do not mean to engage the debate over the precise meaning of and conditions for "deliberative democracy." *See, e.g.*, JOHN D. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS (2000); Joshua Cohen, *Deliberative Democracy*, *in* DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN?, at 219 (Shawn W. Rosenberg, ed. 2007). Rather the term is meant only to signify a group of characteristics that are hoped for, but neither required of nor typically found in, electoral democratic civic action: reflection rather than reaction; reasonably full information about facts and positions; and genuine engagement with the interests and values of all stakeholders in seeking solutions that serve the public interest. This has also been expressed as civic republicanism, classically described in Mark Seidenfeld, *A Civic Republic Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

66. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 2 (1996).

67. Scholars have long worried about "information capture," i.e., agencies needing information about risks, benefits, costs, and implementation factors that only industry has the resources to supply. *See, e.g.*, Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010); *cf.* Andrea Bear Field & Kathy E.B. Robb,

towards some kinds of regulatory stakeholders.[69] And there is always the possibility that well-reasoned outcomes reached by appropriately deliberative rulewriters are overborne by direction from their electorally democratic overseers.[70] Still, the value of participatory inputs must be gauged by the

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*EPA Rulemakings: Views from Inside and Outsid*e, 5 NAT. RESOURCES & ENV'T 9, 10 (1990) (finding from interviews, industry counsel agree that "[t]he arguments that stand the greatest chance of being listened to by the Agency are those that address technical aspects of a proposed rule rather than the legal basis of that rule"). Increased statutory demands for rulemaking, agency budgets that do not even keep pace with inflation, and loss of internal expertise from retirements exacerbate the degree to which agencies must depend on information provided by those being regulated.

68. *See* Jeffrey J. Rachlinski & Cynthia F. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 581, 596–97 (2002).

69. Teasing out bias is extremely difficult because of the information capture problem described in note 67. Information capture is, in turn, only one aspect of the generic problem of controlling for "participation literacy"—i.e., the degree to which comments are tailored to a decisionmaking process that values supporting factual detail, scientific or technical data, reason-giving, and policy arguments framed with reference to the agency's statutory mandates and other legal responsibilities.

Among studies on the effect of comments on rulemaking outcomes, Jason & Susan Webb Yackee's review of comments in 40 rules by four different agencies is unusual in trying to control for what they call the "information quality" of comments. They concluded that pro-business bias did exist, after examining five variables as proxies for information quality: whether the commenter identified him/herself as an expert; whether the comment was more than a page long; whether additional documents (e.g., scientific study) were attached; whether the commenter suggested more than one change in the agency proposal; and whether the comment came from a Washington DC "insider." Jason Webb Yackee & Susan Webb Yackee, *A Bias towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135–36 (2006). As the authors recognize, these are "imperfect proxies" for comment quality. *Id*. at 136.

By contrast, Mariano-Florentine Cuéllar's study of comments in three regulations by different agencies coded directly for content "sophistication," using several measures of "rhetorical, cognitive, and technical complexity." He concluded that sophistication, rather than commenter identity, predicts whether the agency adopted suggestions in the comment. Cuéllar, *supra* note 39, at 430.

70. *See* Mendelson, *supra* note 61, at 1149–51 (documenting high rates of change in significant rules submitted to centralized review during the Clinton, Bush and Obama Administrations).

This was the "bending" science problem perceived with some Bush administration rules. *See, e.g.*, Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1603–20 (2008); Michele Estrin Gilman, *The President as Scientist-in-Chief*, 45 WILLAMETTE L. REV. 565, 566 (2009). To be sure, normative line-drawing here becomes difficult. When the Obama administration's Secretary of Health and Human Services took the highly unusual step of blocking the Food & Drug Administration's new rule that would have provided young women easier access to the "morning after" pill, was this political expediency overbearing sound, science-based risk assessment or electoral democratic accountability resolving contested value preferences? *See, e.g.*, Ed Silverman, *Was HHS Correct to Overrule the FDA on Plan B?*, PHARMALOT (Dec. 8, 2011), http://www.pharmalot.com/2011/12/was-hhs-correct-to-overrule-the-fda-on-plan-b/.

kind of decisional process we *expect* the agency to engage in. By that measure, mass public comments will rarely deserve to be given value.

As noted earlier, high-volume public commenting almost always stems from action campaigns by one or more advocacy groups. Agencies can tell this from the content of the comments, which will contain more-or-less similar phrasing. Groups now encourage members to personalize their comments—even telling them that this will make the comments more effective[71]—but patterns of documentable duplication remain. Political scientist Stuart Shulman, who has extensively studied the mass e-mail phenomenon, has persuasively shown how such calls-to-action are part of a concerted strategy by these groups.[72] Often devised and executed with the help of professional online-marketing consultants, the strategy is typically implemented through web pages that include prominent "Donate Now" and "Tell a Friend" functionality to increase contribution and membership.[73] Being able to mobilize and deliver thousands of e-mails or e-comments evidences organizational clout to politicians and prospective major funders.

This does not mean that the groups conducting these campaigns are not genuinely concerned about the issue. It does mean that the primary purpose of the campaigns is persuasive, rather than educational. In reaching out to current and potential members, groups use the techniques that rhetoricians and marketers have long used to motivate people to take a desired action: appeals to emotion and exploitation of fears and insecurities;[74] hyperbolic, sometimes inflammatory, language and imagery;[75] selective deployment of facts and strategic, sometimes misleading, juxtapositions or omissions of information.[76] Even when the campaign offers "more information" to recipients, this material typically further explains and supports the group's position, rather than providing an objective presentation of the facts and arguments offered by the full range of regulatory stakeholders.[77]

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71. *E.g.*, *infra* Appendices C, E, G, K; *see The Case Against Mass E-mails*, *supra* note 28, at 29–30.

72. *See, e.g.*, *The Case Against Mass E-mails*, *supra* note 28.

73. *See id.* at 27–30; Stuart W. Shulman, Univ. of Mass. Amherst, Tools for Rules, Presentation at EPA Environmental Information Symposium: Transforming Information into Solutions, at slides 17–23 (Dec. 10, 2008), *available at* http://www.epa.gov/oei/symposium/2008/shulman.pdf.

74. *See, e.g.*, *infra* Appendices A, C, D, G, I.

75. *See, e.g.*, *infra* Appendices A, B, J, M.

76. *See, e.g.*, *infra* Appendices F, L.

77. For example, the "Extreme Data" offered in the animated "Extreme Auto Makeover" campaign by the Union of Concerned Scientists explains only how the information in the animation itself was derived. Union of Concerned Scientists, *Extreme Auto Makeover: Extreme Data*, SUV SOLUTIONS (last visited Aug. 12, 2012), http://www.suvsolutions.org/Extreme_Data.html; *cf.* Shulman, *supra* note 14, at 56 ("When a user of a Web advocacy form is constructing their unique additions to a form letter . . . the response is not to the

And, in the tried-and-true persuasive technique of reductionism, the choices regulators face are typically described in starkly us-or-them, all-or-nothing terms.[78]

This does not mean that the preferences expressed in the comments such campaigns produce are not genuinely held by those submitting them, or are not relevant in a broad sense to the rulemaking. However, given the nature of the rulemaking process, neither genuineness nor broad relevance is sufficient in most cases[79] to create value. In the first place, a reasonable agency could not assume these comments are fairly representative of citizens' preferences in general. There are many recognized methods of sampling (i.e., selecting a subset of individuals) to estimate characteristics of the whole population. Persuasive solicitation of members by a limited range of advocacy groups does not satisfy any of them.[80] Indeed, such campaigns are not necessarily accurate gauges of even individual citizen supsupport. Analyzing the incidence of unique e-mail addresses, Prof. Shulman discovered that more than half the e-mail comments in the mercury and polar bear rulemakings, and more than a quarter in the gray wolf rulemaking, were accounted for by individuals following the Chicago model of civic participation: "Vote early and often." These individuals, denominated "plebers" by Prof. Shulman, submitted between two and over 300 form comments in the rulemaking.[81]

The problem with mass comments runs even deeper than their unreliability as a gauge of citizen value preferences. Given the nature of the campaigns that produce them, a reasonable agency would assume that the preferences they express: (i) are based on incomplete, perhaps even erroneous, information about the facts germane to the regulatory problem; (ii) have not taken account of competing arguments, interests, and policy con-

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actual proposed rule published in the *Federal Register* nor the reasoned claims of the other side. Rather, it is almost exclusively to the appeals and imagery of the advocacy campaign organizers") (study of mercury rule comments).

78. *E.g.*, *The Case Against Mass E-Mails*, *supra* note 28, at 29 ("The member education delivered by mass e-mail campaigns . . . is generally superficial, often pushing citizens headlong toward adversarial thinking"); *see, e.g.*, *infra* Appendices A–J.

79. For discussion of certain circumstances in which these qualities are enough to convey valuable information to rulewriters, see *infra* Section III.B, Design Principle 1.B.

80. For review of methods used by designers of deliberative civic engagement projects to achieve representativeness, see THE DELIBERATIVE DEMOCRACY HANDBOOK, *supra* note 49, at 35–138. *Cf.* Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 INFO. SOC'Y J.L. & POL'Y 1, 43 (describing agency use of random-sample public contingent valuation studies to help in monetizing non-market values).

81. *The Case Against Mass E-Mails*, *supra* note 28, at 35–36. Prof. Shulman observes that allowing multiple submissions is a deliberate technology design choice by some advocacy groups. "Plebing" is certainly encouraged by another ubiquitous design element: a "progress meter" showing the number of comments the group hopes to generate, and the progress so far. *See, e.g.*, *infra* Appendices A, I, K.

siderations; and (iii) have not considered the workability or acceptability of regulatory outcomes more nuanced than absolute acceptance or rejection of the values asserted. If, in the case of individual mass commenters, these assumptions are inaccurate—if, that is, a particular commenter really does hold informed or adaptive preferences—there is no way for the agency to know it from the standard brief, conclusory mass-comment text.[82]

A reasonable agency, in short, would assume that mass comments suffer from the kinds of fundamental defects in information quality and deliberative judgment that would (justifiably) prompt judicial reversal were such flaws found in its own decisionmaking. Why would we want government decisionmakers to attend to such flawed preferences?[83]

Would mass public commenters maintain the same preferences were they to have more complete information about the facts, the variety of competing interests and values, and the range of regulatory outcomes the agency might adopt short of either banning the activity completely or leaving it entirely unregulated? The reasonable agency simply could not know. Research repeatedly shows that citizens are often ignorant of, or flatly wrong about, the workings and outcomes of regulatory programs.[84] More important, we know that providing reasonably full and balanced information about complex policy questions can change citizens' policy preferences, sometimes quite dramatically. James Fishkin found that providing accurate information about the percentage of the U.S. budget attributable to foreign aid in the context of a deliberative poll shifted the majority position from decreasing, to increasing, such aid.[85] Jason Barabas found that deliberation after exposure to a panel of experts who explained

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82. Prof. Shulman describes an automated tool "DURIAN" that has been developed separately to identify unique text added to form comments. *See The Case against Mass-Emails*, *supra* note 28, at 38–45. This important advance in technology-supported rulemaking makes it easier for the agency to discover the unusual form comment in which personalized text does convey more informed and thoughtful preferences.

83. *Cf.* David Hudson & Jennifer VanHeerde-Hudson, *"A Mile Wide and an Inch Deep": Surveys of Public Attitudes Towards Development Aid*, 4 INT'L J. OF DEV. EDUC. & GLOBAL LEARNING 5 (2012) (arguing that survey instruments to gauge public attitudes towards global poverty are not reliable because they fail to control for knowledge-levels and perceptions of aid effectiveness, both of which affect attitudes).

84. *See, e.g.*, James H. Kuklinski et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 796–97 (2000) (documenting widespread misinformation about welfare program); Michael E. S. Hoffman, *The Political Economy of TARP: A Public Opinion Approach* (Jan. 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998384 (controlling for partisan effects, citizen views on TARP's effectiveness are distorted by lack of knowledge in politically significant magnitudes).

85. JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 35 (2009); *cf.* John Gastil, POLITICAL COMMUNICATION AND DELIBERATION (2008); Robert C. Luskin et al., *Considered Opinions: Deliberative Polling in Britain*, 32 BRIT. J. POL. SCI. 455 (2002).

Social Security program operation and various options for increasing solvency was associated with a shift of participants' opinion towards raising payroll taxes, as compared with those who discussed options without this information.[86] James Kuklinski et al., found a significant shift in expressed preference about welfare spending when participants received accurate information about the proportion of the federal budget accounted for by welfare.[87] Peter Muhlberger and Lori Weber found that participants' opinions on three of five educational policy issues shifted after they learned more about the problems facing Pittsburg schools.[88] Robert Luskin et al. found that British participants' opinions about crime policy shifted significantly after more information was provided by panels of experts and political leaders.[89]

To be sure, preference shifts do not invariably occur in such settings.[90] Much work remains to be done to understand the circumstances and mechanisms by which information, the opportunity to reflect on it, and/or the opportunity to discuss it with others of different viewpoints effects change in preexisting beliefs.[91] Moreover, conflict resolution and group facilitation practitioners recognize that disagreements involving fundamental values pose considerable challenges for shifting participants' attitudes towards agreement.[92] Still, techniques do exist for overcoming these challenges.[93] In

86. Jason Barabas, *How Deliberation Affects Policy Opinions*, 98 AM. POL. SCI. REV. 687, 690–96 (2004).

87. Kuklinski et al., *supra* note 84, at 805–09. This effect was observed when the information was presented in a particular way that, in the author's words, "hit [participants] between the eyes." *Id.* at 806.

88. Peter Muhlberger & Lori M. Weber, *Lessons from the Virtual Agora Project: The Effects of Agency, Identity, Information & Deliberation on Political Knowledge*, 2 J. PUB. DELIBERATION, no. 1, 2006.

89. Luskin et al., *supra* note 85, at 484–87.

90. *See, e.g.*, David Denver et al., *Fishkin and the Deliberative Opinion Poll: Lessons from a Study of the* Granada 5000 *Television Program*, 12 POL. COMM. 147 (1995); James Gastil & James P. Dillard, *Increasing Political Sophistication Through Public Deliberation*, 16 POL. COMM. 3 (1996).

91. *See, e.g.*, Barabas, *supra* note 86 (finding significant differences based on discussion vs. deliberation, and opinion strength); Dan M. Kahan et al., *Cultural Cognition of the Risks and Benefits of Nanotechnology*, 4 NATURE NANOTECHNOLOGY 87 (2009) (studying the effect of information in shifting attitudes dependent on individual's worldview); Kuklinski et al., *supra* note 84, at 792 (finding that misinformation, leading to holding a false belief, presents a different problem than lack of information); Mathieu Turgeon, *"Just Thinking": Attitude Development, Public Opinion, and Political Representation*, 31 POL. BEHAVIOR 353 (2009) (evaluating the impact of giving people time to think on sophistication of opinion expressed).

92. *See, e.g.*, CHESTER A. CROCKER ET AL., TAMING INTRACTABLE CONFLICTS: MEDIATION IN THE HARDEST CASES (2004); Roy J Lewicki et al., ESSENTIALS OF NEGOTIATION, 193–208, (5th ed. 2010); ROGER M. SCHWARZ, THE SKILLED FACILITATOR: PRACTICAL WISDOM FOR DEVELOPING EFFECTIVE GROUPS (1994).

93. In addition to the sources cited in note 92, see, for example, CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 65–144 (6th ed. 2009); ROGER

particular, opportunities for preference-shifting are created when participants move from absolutist argument over values in the abstract (e.g., government must preserve national parks and wilderness areas in their natural state vs. government management of natural resources must favor recreational uses and job-creation) to focusing on particular regulatory strategies that might accommodate interests of the range of stakeholders (e.g., allowing carefully defined use with limits as to amount, location, time, and manner).

III. DESIGNING FOR PUBLIC PARTICIPATION THAT COUNTS

Unpacking the statement "Rulemaking is not a plebiscite" in this way helps us answer the question identified at the outset: "Why is more public participation a good thing in rulemaking?" *More* public participation in rulemaking is not a good thing. Rather, the goal of a Rulemaking 2.0 system[94] should be more participation that satisfies three conditions:

1. Participation by stakeholders and interested members of the public who have traditionally been under-voiced in the rulemaking process (*Who*)
2. Participation that takes the form of germane "situated knowledge" and informed or adaptive preferences (*What*)
3. Participation in rulemakings in which the existence of the first two conditions can reasonably be predicted to exist, and the value is reasonably likely to outweigh the costs of getting the desired participation (*When*)

In this section, we explain these conditions and offer specific design principles that follow from them.

One important caveat: Here we are focusing exclusively on participation by "the public." As we have explained elsewhere,[95] there are at least two other possible targets for Rulemaking 2.0 systems: (1) bringing into the discussion experts not affiliated with any of the stakeholders; and (2) engaging sophisticated stakeholders in a genuine interchange, in contrast to the current practice of isolated, parallel commenting at the very end of the comment period. These are important targets, but involve different design strategies than the ones required for engaging non-expert newcomers to rulemaking.

FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991).

94. That is, a second-generation e-rulemaking system that employs Web 2.0 information and communication technologies.

95. *Rulemaking in 140 Characters*, *supra* note 4, at 423–25.

A. Recognizing the Knowledge in the People

At a design meeting early in the Regulation Room project, one team member vigorously argued that our objectives should be, *first*, getting as many people as possible to the website and, *second*, making it as easy as possible for them to add some sort of comment. Echoing President Obama's vision of more participation as the key to tapping distributed knowledge, he explained: "More has to be better. If 100 public comments contain one useful idea, then 100,000 comments should contain 100 useful ideas." We silently contemplated the prospect of a small group of trained and supervised students moderating and summarizing 100,000 comments over a period of a few weeks during which they (and their supervisors) maintained a normal academic schedule. In that moment, we abandoned orthodox federal Participation 2.0 thinking.

The logic of crowdsourcing[96] may be compelling, but we believe it cannot be the guide for designing a Rulemaking 2.0 system. The President of the United States can muster the resources to analyze nearly 400,000 ideas, comments, and votes in an online brainstorming session[97] to get 16 topics worth further discussion,[98] or to cull almost 170,000 tweets to get 18 "good" questions for an online town hall.[99] A rulemaking agency (or a collaborating

96. "Crowdsourcing" is simply a method of distributed problem solving: issuing a call to a group (the crowd) for solutions. It differs from the more familiar method of "outsourcing" in that the group is the undefined public rather than a specified entity. Although the term has become associated with Web 2.0, a signal example is compilation of source material for the Oxford English Dictionary begun in the 1860s. It is not irrelevant that this undertaking—without doubt, a masterwork—took seventy years to complete.

97. *See* Nat'l Acad. of Pub. Admin. (NAPA), OPEN GOV'T DIALOGUE, http://opengov.ideascale.com/ (last visited July 29, 2012) (noting the Dialogue's "usage statistics"). The full Open Government Dialogue data set used to be accessible from the White House Office of Science and Technology Policy's (OSTP) blog located at http://www.whitehouse.gov/blog/Data-from-Public-Consultation-on-Open-Government. Unfortunately, this website no longer links to the original data, but they can be found using the "Way Back Machine" (an Internet archive retrieval program that allows access to previous versions of websites) at the following prior version of the OSTP's website: http://web.archive.org/web/20100113230710/http://www.whitehouse.gov/blog/Data-from-Public-Consultation-on-Open-Government. The totals provided by the White House do not match the raw data, apparently because the White House totals exclude duplicative or off-topic submissions.

98. *See* Michael Baldwin, *Data from Public Consultation on Open Government*, OPEN GOV BLOG (Aug. 7, 2009, 5:55 PM), http://www.whitehouse.gov/blog/Data-from-Public-Consultation-on-Open-Government (discussing how sixteen topics from the brainstorming phase were presented for discussion in the discussion phase.)

99. *See* Linda M. Gallant & Gloria M. Boone, *Communicative Informatics: An Active and Creative Audience Framework of Social Media*, 9 TRIPLEC (COGNITION, COMMUNICATION, CO-OPERATION): OPEN ACCESS JOURNAL FOR A GLOBAL SUSTAINABLE INFORMATION SOCIETY 231, 238 (2011) (describing how Twitter staff selected the 18 asked tweets partly using a computer algorithm that measured which of the proposed tweets were most popular).

academic research project) cannot routinely plan to read 100,000 comments to find 100 that offer some value to the rulemaking. At least until advances in natural language processing research yield nuanced and reliable methods of automated topic categorization, summarization, and content analysis of comments,[100] "more" per se cannot sensibly be the goal of participation system designers.

Instead, we would frame the goal as *more public participation of value in rulemakings that need what historically silent voices can add to the process*. In other words, the President's vision—"Knowledge is widely dispersed in society and public officials benefit from having access to that dispersed knowledge"—is the beginning, not the end, of understanding how to create the "increased opportunities to participate in policymaking" that will benefit government.

Initially, we make a claim for which we offer experiential, rather than empirical, support: Many (perhaps most) rulemakings do not need more public participation—or don't need it enough to justify the expenditure of resources required to get participation of value. The topics are too specialized, technical, or narrow to generate public interest or the affected stakeholder groups are already participating in the conventional process.[101] Still, there is a non-trivial number of rulemakings in which it is possible confidently to predict the existence of identifiable groups of individuals or entities who will be directly affected (either because their conduct is being regulated or because they are intended beneficiaries of regulation) but who have not historically participated effectively in the conventional process.

These are the rulemakings we target for Regulation Room. So far, they have included: two proposed new regulations on commercial motor vehicle (CMV) operators, an industry in which 99% of companies are owner-operators or other small businesses[102] (the "texting" rule[103] and the electronic on-board recorder ("EOBR") rule[104]); new consumer protections for air

100. What enables the DURIAN software described in note 82 to work is the highly duplicative nature of mass e-mail comments. Instances of unique text can be isolated, tabulated, and presented to rulemakers in a form that substantially reduces reading time. When the content of public comments does not start with a group-provided script, then automated content analysis is far more difficult and less reliable. *See, e.g.*, Claire Cardie, Cynthia Farina, Thomas Bruce & Erica Wagner, *Using Natural Language Processing to Improve e-Rulemaking*, PROC. OF THE 2006 INT'L CONF. ON DIGITAL GOV'T RES. 177 (2006).

101. Our experiential base is discussion over two years with DOT and other agencies that was aimed at identifying suitable rules for Regulation Room.

102. Electronic On-Board Recorders and Hours of Service Supporting Documents, 76 Fed. Reg. 5,537, 5,549 (proposed Feb. 1, 2011).

103. Limiting the Use of Wireless Communication Devices, 75 Fed. Reg. 16,391 (proposed Apr. 1, 2010), final rule published at Limiting the Use of Wireless Communication Devices, 75 Fed. Reg. 59,118 (Sept. 27, 2010).

104. Electronic On-Board Recorders and Hours of Service Supporting Documents, 76 Fed. Reg. 5,537 (proposed Feb. 1, 2011).

travelers (the airline passenger rights ("APR") rule[105]); and proposed requirements that air travel websites and airport check-in kiosks be accessible to travelers with disabilities (the air travel accessibility ("ATA") rule[106]).

In these kinds of rulemakings, our experience reveals that such historically "undervoiced" stakeholders can bring a particular kind of knowledge—"situated knowledge"—that the agency itself may not possess, and that organizations purporting to represent these stakeholders may not reveal in sufficient detail or persuasiveness. By situated knowledge, we mean *information about impacts, problems, enforceability, contributory causes, unintended consequences, etc. that is known by the commenter because of lived experience in the complex reality into which the proposed regulation would be introduced.*[107] We discuss situated knowledge in more detail elsewhere,[108] but here are illustrations from two Regulation Room rulemakings. (All comments, as well as the detailed final summary of discussion submitted to the agency, remain available on regulationroom.org):

> *1. Situated knowledge can reveal and explore tensions and complexities within what may otherwise appear a unitary set of interests.* In the APR rule, air travelers debated whether a rule requiring aircraft to return to the gate and deplane during long tarmac delays would actually help travelers, if wandering passengers delayed final departure time or missed the flight entirely. At the same time, they raised special problems that lengthy time in a cramped seat pose for travelers with certain health conditions, pregnant women, elderly travelers, and parents with young children. They discussed solutions ranging from "hall pass" type schemes, through restricted area deplaning or distribution of restaurant-type "beepers," to special remote holding terminals with limited size and basic services.
>
> *2. Sometimes, situated knowledge identifies contributory causes that may not be within the agency's regulatory authority but could affect the impact of new regulatory measures.* A commercial pilot commenting in the

105. Enhancing Airline Passenger Protections, 75 Fed. Reg. 32,318 (proposed June 8, 2010).

106. Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, 76 Fed. Reg. 59,307 (proposed Sept. 26, 2011).

107. "Situated knowledge" is a term used in multiple disciplines, including organizational behavior, anthropology and sociology, education, information technology and computational design, and feminist theory. Variations in meaning therefore exist, but the common core is context-specific knowledge personal to the individual (or perhaps to a group of which she is part).

108. *See* Cynthia R. Farina, Dima Epstein, Josiah Heidt & Mary J. Newhart, *Knowledge in the People: Rethinking the Value of Public Participation in Rulemaking*, 47 WAKE FOREST L. REV. No. 5 (forthcoming 2012) [hereinafter *Rethinking the Value of Public Participation*].

APR rule explained how some airlines' compensation systems create incentives for flight crews not to return to the gate. In the EOBR rule, drivers for companies already using electronic time management systems described instances when dispatchers used electronically transmitted information to pressure drivers to be on the road for the maximum possible number of hours, even though this increased fatigue by disrupting normal sleeping patterns.

3. Sometimes, situated knowledge reframes the regulatory issues. The EOBR discussion revealed that, for many drivers, concerns about counterproductive inflexibility were only part of the reason for strongly opposing the proposed rule. Equally important was the perception that DOT was treating them as irresponsible lawbreakers by requiring all drivers to use monitoring equipment that it had previously required only for flagrant violators—at a time when, according to its own data, CMV-related accidents were actually declining. In another part of the discussion, small company owners contested the agency's estimate of offsetting savings in administrative paperwork processing costs by pointing out that they had no support staff: drivers were expected to do their own paperwork on their own time.

Situated knowledge is often conveyed through stories. In the EOBR rule for example, several truckers described occasions when driving with a company-required electronic time management system had forced them to stop when close to home, or to pull over in an unsafe location, because unexpected traffic or weather conditions had spent all their legal driving time. Others recounted instances when irresponsible or unorganized third-party shippers, over whom they had no control, caused them to lose hours sitting at the loading dock waiting for cargo they were contractually obligated to transport.

To be sure, none of the examples discussed above involve knowledge likely radically to shift the agency's thinking, but each provides relevant contextual information that could help the agency understand more fully the impact its proposal is likely to have "on the ground."[109]

109. Because conventional rulemaking discourse takes the form of data, reasoned argumentation, and other "objective" information-communication, the often personalized, narrative form may interfere with the agency's ability to "hear" the knowledge being conveyed. *See id*.

B. Principles of Rulemaking 2.0 Design

Several principles of participation system design flow from this conception of when more public participation might benefit the rulemaking process. Throughout, keep in mind that the idea is not to have a Rulemaking 2.0 participation platform *displace* first generation e-rulemaking systems. Regulations.gov—with its electronic rulemaking dockets that give online access to the NPRM and other rulemaking documents as well as to the public comments, and its online comment submission functionality—will continue to provide information on, and commenting capability for, rulemakings government-wide. Rather, the focus is on when and how *additional* Web 2.0 technologies, both of outreach and of content creation, should be deployed.

Principle 1. No Bread and Circuses[110]

A democratic government should not actively facilitate public participation that it does not value. Agencies cannot refuse to docket and review the submissions produced by mass e-mail campaigns; given the strong organizational interests such campaigns serve for advocacy groups irrespective of the actual impact in rulemaking, mass public commenting is likely to be an enduring phenomenon. But the government's responsibility for the nature of the rulemaking participation systems it employs is not defined by the behavior of private groups. Agency officials understand, as people new to rulemaking almost invariably do not, both the kinds of participation that matter to the process in general, and the amount of effort needed to participate effectively in a particular rulemaking. For government to solicit new participants without providing the support they require to participate meaningfully, or to hold out methods of participation that are easy but have little value, is political showmanship and not open government.

To be sure, the value of individual and group participation in public policymaking processes comprises more than utility to the government decisionmaker. In Regulation Room, for example, participants have reported acquiring more knowledge both about what the agency is trying to accomplish and about the arguments and concerns of those with different views.[111] Still, there is an important line between valuing the experience of civic engagement apart from its effect on outcomes, and facilitating mere "feel-good" participation. Even if engaging in participatory acts of low

110. "Bread and circuses" is traced to the Roman satirist Juvenal and refers to the political strategy of Roman officials currying favor with citizens by giving out free food and entertainment, thus debasing democracy by encouraging citizens to abandon the difficult work of meaningful political involvement.

111. *Rulemaking 2.0*, *supra* note 4, at 443.

value to government decisionmakers were to continue to give citizens a warm feeling of civic satisfaction over time—which we doubt—a participation system that encourages such acts is peddling democratic snake oil.

This is a concededly fierce normative conception of the responsibility of those who design and operate Rulemaking 2.0 participation systems. But the degree of purposeful participation design called for by the "No Bread and Circuses" principle is, we believe, a necessary counterweight to the "all-participation-has-value" philosophy instantiated in Web 2.0 technology and methods. This first principle calls for intentionality in the selection both of participation *opportunities* and participation *methods*:

> *1.A. Rulemakings for expanded public participation efforts should be selected with care, to identify those in which dispersed, situated knowledge is both likely to exist and practicable to obtain.*

As long as Regulations.gov provides the opportunity for everyone to submit comments on all rules, there is no legal reason why the agency cannot be selective in the rules that it also offers through a Rulemaking 2.0 system. That said, the actual selection of good candidates for expanded public participation can resemble Ulysses threading his way through Scylla and Charybdis: Agency rulewriters tend to be over-quick to dismiss the need for more participation, while e-government leaders seem over-quick to insist that more public involvement could always help.

The truth, we believe, is that the people know more than rulemakers think and less than e-government leaders believe. The following questions can help identify rulemakings where the enhanced participation opportunities of a Rulemaking 2.0 system are likely to add value:

> 1. *Are there identifiable types of stakeholders that either do not customarily participate (or participate effectively) in the rulemaking process or whose only participation is via representative organizations?* Examples from rules done on Regulation Room include airline flight crews and gate agents, as well as air travelers, in a rulemaking on new airline passenger rights; and individual drivers whose operating licenses will be at risk, as well as state and local police on whom will fall the frontline enforcement burdens, in new commercial motor vehicle driver regulations.
>
> *2. Are these types of stakeholders likely to have* useful *situated knowledge of some sort?* For example, women of childbearing age arguably represent a distinct group of stakeholders in mercury pollution rulemakings because of mercury's demonstrated impacts on fetal development. But if these new rulemaking participants are actively recruited, what could they add in the way of situated knowledge

germane to setting specific emission or effluent limits? By contrast, current or former park rangers and foresters might be able meaningfully to contribute to rulemakings on restricting vehicle access to undeveloped areas by particularizing benefits and harms, and improving workability of possible use restrictions.[112]

3. *Is it reasonably possible to convey the information these types of stakeholders (or interested members of the public) would need in order to form informed or adaptive preferences—i.e., preferences that ought be given weight in deliberative decisionmaking?* As discussed earlier, rulemaking is often value-laden, but not all types of preferences have value. (Recall that what makes a preference "count" is not its substance—even with reasonably full and balanced information, a woman planning to become pregnant might continue to prefer an extremely stringent mercury standard—but rather its basis in the kind of reasonably informed and thoughtful consideration that can support deliberative explanation and interchange.) Our second proposed design principle, below, focuses on the extent to which a Rulemaking 2.0 participation system must be knowledge-imparting, but the practicability of that task must factor into the agency's initial selection decision. The NPRM, draft Regulatory Impact Assessment, and other rulemaking documents provide a great deal of information, but their audience is lawyers, sophisticated regulated entities, and reviewing courts. Consider what it would take to provide reasonably complete and balanced factual and policy information about adjusting mercury pollution limits in a form that lay people could and would learn from. Possible? Perhaps. Difficult? Extremely. Compare the far simpler analogous task in the airline passenger rights rulemaking, or even in the snowmobile park access rule.[113]

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112. Exploring the legal and policy implications of public or private sector employees commenting based on knowledge and views at least partially acquired during the course of their employment is beyond our scope. We simply note that employees can avoid individual attribution of comments that may not align with their employer's position through pseudonymous commenting (i.e., using a distinctive "username" that need not be one's real name). Neither Regulation Room nor Regulations.gov attempts independently to verify identifying information provided by commenters. Indeed, many agencies, including agencies in DOT, accept anonymous comments.

113. For a notable example, see Jen Millner, *Snowmobiles in Yellowstone National Park: An American Right, or Wrong?*, SCI. EDUC. RES. CTR., http://serc.carleton.edu/research_education/yellowstone/snowmobiles.html (last visited Aug. 16, 2012), a digital resource for teachers created as part of a project, funded by the National Science Foundation, to bring research into classroom education. The site works through the controversy.

It may seem oxymoronic to insist that the agency predict when it will get dispersed knowledge that, by hypothesis, it does not know exists. Still, based on our experience with DOT and Regulation Room, good guidance comes from the exercise of *first*, trying to identify stakeholders who do not generally participate on their own behalf in the rulemaking; *then* trying to imagine what kind of germane experiential knowledge they may have; and, *finally*, considering what sort of information they would need to participate meaningfully in the particular rulemaking, through the revelation of situated knowledge or the expression of informed or adaptive preferences. Even if the selection process is imperfect, the alternative (i.e., acting as if all rules could and would benefit from expanded public participation) is worse, for it heightens the risk that Rulemaking 2.0 merely fobs citizens off with the shadow of engagement, rather than making it possible for them to do the hard work of participating in self-government.

1.B. Only methods of participation likely to lead to participatory outputs of value to the rulemaking should be included in a Rulemaking 2.0 system.

Web 2.0 facilitates crowdsourcing by prominently encouraging users to vote, rate, and rank content. Many of us benefit regularly from such technology-enabled participation: RottenTomatoes.com informs our movie choices by aggregating the ratings of critics and of ordinary movie goers;[114] Yelp.com provides a one-stop travel guide that collects ratings of everything from hotels and restaurants to local music spots and grocery stores;[115] Amazon.com gives us not only ratings from individual consumers, but also other would-be purchasers' ratings of the usefulness of those ratings.[116]

As methods of participation, voting, rating and ranking are both low-effort (and therefore popular with users[117]) and highly scalable[118] (and therefore popular with designers). Unsurprisingly, then, they are frequently part of the Web 2.0 participation platforms now being offered to agencies.[119] When new agencies inquire about partnering with Regulation Room for

114. *See* ROTTEN TOMATOES, http://www.rottentomatoes.com (last visited Aug. 18, 2012).

115. *See* YELP, http://www.yelp.com (last visited Aug. 18, 2012).

116. *See* AMAZON, http://www.amazon.com (last visited Aug. 18, 2012).

117. *See, e.g.*, Dan Cosley, Dan Frankowski, Sara Kiesler, Loren Terveen, & John Riedl, *How Oversight Improves Member-Maintained Communities*, 2005 Proc. of the SIGCHI Conf. on Hum. Factors in Computing Sys. 11, *available at* http://portal.acm.org/citation.cfm?id=1054972.1054975; Rosta Farzan, Joan M. DiMarco, & Beth Brownholtz, *Spreading the Honey: A System for Maintaining an Online Community*, PROC. OF THE ACM 2009 INT'L CONF. ON SUPPORTING GROUP WORK 31, *available at* http://dl.acm.org/citation.cfm?id=1531680&bnc=1.

118. I.e., many users can be accommodated with little additional effort.

119. Both IdeaScale, the ideation platform originally used in phase 1 of the Open Government Dialogue (and widely used by agencies as their public dialogue tool) and MixedInk, the collaborative drafting platform used in the final phase of the Dialogue, rely on voting to prioritize contributions.

their rulemakings, they often ask whether they can have some sort of voting or rating functionality. This is a point at which it becomes crucial to deconstruct the Web 2.0 fusion of technology and participation. Rulemaking is not like reviewing movies or rating consumer products. If newcomers to rulemaking don't understand what makes a comment valuable to the process, why allow them to judge the content others submit? If quality, not quantity, counts in rulemaking, why allow commenters to vote? If rulemaking's model of participation rejects the leveling universalism of the Web 2.0 model, why let citizens think that agency decisionmakers care about their votes, ratings or rankings?

In the early stages of designing Regulation Room, these questions led us to a presumption that participant voting, rating and ranking has no place in a Rulemaking 2.0 system. With the wisdom of experience, we advocate a more nuanced version: *Use of such participation methods must be affirmatively justified by the designer.* Here are situations in which such justification could be found:

> *1. Effectiveness of consumer information proposals.* Although low-thought spontaneous preferences generally have no value in rulemaking, there are some exceptions. For example, Congress required DOT to provide consumers with information on how choice of tires could affect the energy efficiency of their automobiles. After focus group testing narrowed the range of possible approaches, a rulemaking sought comment on which of four label designs (if any) most effectively informed consumers on durability, safety, and energy efficiency of the particular model.[120] Here, properly framed voting or ranking seems not only defensible but desirable. Ideally, the functionality would be designed to encourage some explanation (e.g., the image on one design that was supposed to be a rain cloud looks more like a cowboy hat[121]) but even votes or ranking without comment have some value to the agency. This approach could be used for discrete aspects of a multi-issue rulemaking (which the DOT tire labeling rulemaking in fact was).
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> *2. To nudge more useful forms of participation.* Research has shown that inducing people to take initial steps in a task or process can create an investment in completing it.[122] Low-effort and familiar

120. Tire Fuel Efficiency Consumer Information Program, 74 Fed. Reg. 29,542 (proposed June 22, 2009) (to be codified at 49 C.F.R. 575).

121. This consumer observation actually emerged during the real rulemaking. *Id.* at 29,545.

122. *See* John W. Atkinson & David Birch, *The Dynamics of Achievement-Oriented Activity*, *in* MOTIVATION AND ACHIEVEMENT 271 (J. W. Atkinson & J. O. Raynor eds., 1974).

> acts like voting might be used to encourage the more effortful participation of informed commenting.[123] When Regulation Room offered DOT's airline passenger rights rule, site visitors were met with a poll in which major areas of the proposal—tarmac delays, baggage fees, bumping—were represented by colorful images. The poll asked "What matters to you?" On voting for a particular topic, the user was offered the opportunity to go directly to the post that described the agency's proposal on this topic. In this example, the voting opportunity was intentionally framed to avoid position-taking and so did not suggest that outcome preferences, per se, mattered in the rulemaking. Had the agency been interested in prioritizing its reform efforts, the poll might have provided directly useful information about how consumers perceived problems.

Regulation Room is currently experimenting with a participation functionality called "Endorse," which participants may use for the comments of others: "*Endorse comments that do a good job of making a good point.*" "Endorse" was devised based both on the literature of online communities[124] and on survey responses revealing that some Regulation Room users did not add a comment because others had already said what they would say. Everyone benefits from decisions not to duplicate existing comments, yet it is desirable to give these individuals some way to participate, both as a small step that might induce additional participation and because we have some evidence that those who participate (rather than simply read) are more likely to experience the increased knowledge effects described earlier.[125] Very preliminary data suggest that Endorse can serve these purposes. The functionality has been carefully designed not to have common attributes of Web 2.0 voting. For example, the number of endorsements is revealed to the author of the comment—a form of community appreciation that incentivizes further participation by the author[126]—but not to other users. Moreover, endorsements do not affect the ordering of the comments or otherwise give them privileged status. Still, Endorse is thinly disguised voting, and as such it is effectively on probation. Its use is being carefully monitored, and it will be retained only if the data show that the benefits

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123. *Cf.* B.J. FOGG, PERSUASIVE TECHNOLOGY: USING COMPUTERS TO CHANGE WHAT WE THINK AND DO 34–37 (2003) (describing "tunneling" design as a form of guided persuasion).

124. *E.g.*, Jenny Preece, Blair Nonnecke & Dorine Andrews, *The Top Five Reasons for Lurking: Improving Community Experiences for Everyone*, 20 COMPUTERS IN HUM. BEHAV. 201, 215–21 (2004).

125. *See Rulemaking in 140 Characters*, *supra* note 4, at 459.

126. *See* Cosley et al., *supra* note 117, at 14; Gilly Leshed, Jeffery Hancock, Dan Cosley, Poppy McLeod & Geri Gay, *Feedback for Guiding Reflection on Teamwork Practices*, *in* ACM GROUP CONF. PROC. 217–20 (2007) (finding that peer feedback facilitates good teamwork).

outweigh the risks of seeming to sanction the plebiscitary conception of rulemaking.

Principle 2: Abandon the Equal Treatment Norm

The equation of government fairness and neutrality with equal treatment is deeply engrained in our political culture. In the context of rulemaking participation, however, adopting a single model of outreach and information for all potential participants is the regulatory equivalent of forbidding rich and poor alike to sleep under bridges. Agencies are understandably risk-averse about any departure from conventional rulemaking practice that might open them to reversal on judicial review. Nonetheless, a Rulemaking 2.0 system will not significantly broaden meaningful public participation unless both outreach and information efforts are tailored to the needs of new potential participants.

2.A. They will not come just because you build it, or even just because you tell them about it.

Getting new participants into rulemaking poses two distinct challenges: first, novices to the process must be made aware that a rulemaking is going on and that they have a right to participate and second, they must be convinced of why they should bother.[127] Publication in the Federal Register (which fulfills the agency's legal duty of notice) adequately performs these alert-and-motivate functions for sophisticated stakeholders, who know that the Register is an important source of information and can determine which proposed rulemakings affect their interests.[128] Register publication serves neither function for traditionally undervoiced stakeholders—even if the NPRM prominently urges them to use a Rulemaking 2.0 site, as DOT's NPRMs do when the rule is being offered on Regulation Room. Getting newcomers to the participation site requires deliberately planned outreach that (i) is targeted to where such stakeholders or interested members of the public get their information, (ii) employs media that they are accustomed

127. Motivating civic participation is well-recognized as an important, and thorny, problem. In theory, it ought be easier to motivate public commenting than voting since in the former, a single individual's participation could indeed affect the outcome. Making this distinction requires an understanding of the rulemaking process few under-voiced stakeholders have. Other hurdles to motivating action—the contingent, future nature of the benefit or harm; the level of effort required to participate, etc.—remain. For description of how some of these factors led to lack of success in one e-rulemaking project, see Jennifer Stromer-Galley, Nick Webb & Peter Muhlberger, *Deliberative E-Rulemaking Project: Challenges to Enacting Real World Deliberation*, 9 J. INFO. TECH. & POL. 82 (2011).

128. Sophisticated advocacy groups also understand this, but the problems with relying on them to inform and motivate new participants to effective forms of engagement have already been discussed.

to use, and (iii) explains what is going on in terms that make clear why they should care about this more than the myriad other activities seeking their attention.

This kind of targeted "social marketing"[129] will not be easy for agencies steeped in the equal-treatment norm. In a recent DOT rulemaking proposing accessibility standards for air travel websites and airport check-in kiosks,[130] participation by travelers with disabilities or their friends and family members was low despite vigorous, multimedia outreach efforts by the Regulation Room communications team. Finally, as the close of the comment period loomed, the team decided to push on Twitter and Facebook the message, "The airlines will comment on DOT's proposal to make air travel websites accessible to travelers with disabilities; you should too." When we later mentioned this while discussing outreach methods with a group of agency rulemakers, one person in particular seemed outraged, saying that we could do that because we were a private group but as the agency she has an obligation to be "neutral" and "not to favor any commenter." There is, to be sure, a fine line between targeted motivational outreach, and taking sides, and this message may have come close to that line. Still, the predictive portion ("The airlines will comment on the proposed rule") was well-grounded in experience, and proved accurate in the particular rulemaking. Is it really inappropriate to imply to the beneficiaries of proposed regulation that their interests are likely to be different than those of the regulated entities, and to urge them to speak up for themselves in the public comment process?

We cannot guarantee that some reviewing court, also steeped in the equal-treatment norm, would not consider such targeted informational and motivational outreach to be reversible error—although it would seem both difficult for sophisticated commenters to demonstrate actual harm and perverse to fault an agency, charged with regulating airlines for the purpose of ensuring the safe and nondiscriminatory carriage of passengers, for special solicitude towards getting affected travelers to participate.[131] We do insist that if the agency really is committed to expanding public involvement in a particular rulemaking, it must be willing to take some risks to motivate participation among those uninitiated to the process and its importance.

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129. *See* Matthew Wood, *Marketing Social Marketing*, 2 J. SOC. MARKETING 94 (2012).

130. *Air Travel Accessibility*, REG. ROOM, http://regulationroom.org/air-travel-accessibility (last visited Sept. 9, 2012).

131. It is quite difficult to prove "bias" in rulemaking. *See* PETER L. STRAUSS, TODD D. RAKOFF, CYNTHIA R. FARINA & GILLIAN E. METZGER, GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 252–58 (11th ed. 2011).

2.B. Information must be tailored to different participant needs.

As the previous discussion shows, reasonably balanced information—about the problem the agency is trying to address, any limits on the nature or scope of the solutions it may adopt, and the factual and policy arguments on both (or more) sides—is probably the single most important condition for participation that counts. Yet the very kinds of individuals and entities that we most want to bring into the process are the least likely to obtain such information from current rulemaking materials. The conventions of the Notice of Proposed Rulemaking have been shaped by the analytic demands of statute and Executive Order, risk-aversion in the face of judicial reversal, and the nature and capacity of the sophisticated stakeholders with whom the agency typically interacts. These materials simultaneously assume a great deal of knowledge and overwhelm the intelligent lay reader with information.

Regulation Room uses a number of information re-packaging strategies to create a series of "issue posts" that present the important aspects of the proposed rule in relatively manageable segments and fairly plain language. Participants with a taste for more detail can readily get to the original, more complex text, while those who want more help can get it through a glossary of unfamiliar terms and acronyms and separate pages that explain the regulatory background. Web 2.0 hyperlinking capacity makes this sort of "information layering" easy. The more fundamental problem for agencies is the idea of creating a second text, parallel to the NPRM, that is shorter, simpler in language, and set up to facilitate discussion by laypeople. Would any variance in content between the formal version and "the people's version" create grounds for challenge? One possibility for managing this risk is to include a "people's version" in the NPRM itself, following the formal version. Any variance should then be treated no differently than if any other two parts of the NPRM seemed ambiguous or inconsistent: commenters have the chance to ask and the agency has the chance to clarify.

2.C. To enable meaningful new participation, there may be no substitute for human assistance.

Effective participation in rulemaking is hard. In *any* context, the norms of deliberative discourse—giving reasons, providing support for claims, and otherwise doing more than asserting preferences by fiat—do not come naturally to people.[132] In the context of rulemaking, the volume of material and complexity of problems tax the capacity of most newcomers to form and articulate informed or adaptive preferences, *even with* tailored information design. With respect to situated knowledge, participants need

132. *See Rethinking the Value of Public Participation*, *supra* note 108.

enough understanding of the context and issues to recognize which aspects of their experience are applicable, and they may require help in communicating those aspects so that relevance and value is apparent.

The crucial role of a facilitator is widely recognized in offline civic engagement settings.[133] A skilled moderator can help foster the norms of deliberative discourse, aid those with less participatory facility in contributing to the discussion and, if necessary, manage conflict in constructive ways. Regulation Room uses law students, trained and supervised by conflict-resolution experts, as facilitative moderators. An evolving Moderator Protocol identifies several kinds of moderator "interventions" aimed variously at ensuring that participants have the substantive and site-use information required to participate effectively; at gently nudging commenters be clear in articulating their interests, experiences and concerns; at encouraging problem-solving interchange among participants; and generally at fostering commenting that has value in the process.[134]

At least when the focus of the participation effort is engaging undervoiced stakeholders and interested members of the public, our experience convinces us that human moderation is essential, even with a system that meets all the other design principles. At present, the level of citizen familiarity with rulemaking and understanding of the norms of effective participation is far too low simply to provide well-designed information and participation functionality, and then expect newcomers to produce useful participatory output. This recommendation aligns with Arthur Edwards' proposed conception of the moderator as "democratic intermediary."[135]

Moderation of this kind is undoubtedly costly. An important part of the Regulation Room research is attempting to develop automated aids, and perhaps even real-time "comment-support interfaces," that reduce the human effort required. But this is the moderation of the future, not the present. For now, the answer does not lie in technological miracles but in traditional methods of committing trained personnel for a significant period of time. The resource-intensiveness of this strategy is one reason we emphasize careful selection of rules, i.e., determining when the value to be

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133. *See, e.g.*, Hiro N. Aragaki, *Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons*, 24 OHIO ST. J. ON DISP. RESOL., 406, 438–78 (2009); Lawrence Susskind, *Deliberative Democracy and Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL., 395, 395–96 (2009).

134. *See* Joonsuk Park, Claire Cardie, Cynthia Farina, Sally Klingel, Mary Newhart & Joan-Joseph Valbe, *Facilitative Moderation for Online Participation in E-Rulemaking*, 13TH ANN. INT'L CONF. ON DIGITAL GOV'T RES. (2010), *available at* http://www.lawschool.cornell.edu/ceri/upload/dgo2012_submission_25.pdf.

135. *See* Arthur R. Edwards, *The Moderator as an Emerging Democratic Intermediary: The Role of the Moderator in Internet Discussions about Public Issues*, 7 INFO. POL'Y 1 (2002).

anticipated from new participants is reasonably likely to outweigh the costs of getting the desired participation.

Moreover, studies of online civic discussion projects in European countries (which tend to be ahead of the United States in recognizing that technology alone cannot achieve broader meaningful public engagement) confirm that it is difficult for government officials themselves to provide the kind of active moderation required to keep discussions on track and nudge participants past conclusory assertions of spontaneous or group-formed preferences.[136] Participants' global lack of trust in government leads quickly to accusations that an agency moderator is engaging in censorship, lacks genuine commitment to robust debate, and becomes defensive in the face of criticism. Whether or not such accusations are well-founded, the real problem is that debates about moderator objectivity distract attention and undermine efforts to mentor effective commenting. For this reason, we join researchers who have recommended the use of trained facilitators from outside the responsible agency.[137] That said, we are not convinced there is no role for agency personnel in the moderator process. New Regulation Room projects over the next 12–18 months will, we hope, allow experimentation with forms of collaborative moderation in which the agency's superior substantive expertise in the regulatory area can help our moderators mentor effective commenting.

Principle 3. Means Should Change; Ends Should Not

A defining moment in Regulation Room came when we received this communication from a site visitor during an early rulemaking:

> I am interested in this regulation but do not want to spend a lot of time reading or submitting comments. How can I just "voice my opinion" in an easy way? I could not figure out how to do this. My suggestion is to state the section of the proposed regulation. Then, ask for votes, using for example 5 choices from strongly agree to strongly disagree, with the option of adding comments to any question. What you already have is useful but too time consuming for me.

Our first reaction was to dismiss this as a quintessential example of American civic laziness. Next came self-doubt: Were we improperly imposing our own narrow, legally framed perception of valuable participation?

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136. *See, e.g.*, *id.* at 5; Scott Wright, *Government-Run Online Discussion Fora: Moderation, Censorship and the Shadow of Control*, 8 BRIT. J. POL. & INT'L REL., 550, 556 (2006).

137. *E.g.*, Wright, *supra* note 136. A very apt analogy from existing regulatory processes is the procedure for negotiated rulemaking, which contemplates a neutral facilitator from outside the agency.

Shouldn't we structure participation methods to allow users to choose their level of engagement, just as we layer information to allow users to choose their level of knowledge acquisition? Finally, came the understanding that design of Rulemaking 2.0 systems is a continuing effort to strike the balance, well-recognized by offline democratic deliberation theorists and practitioners, between "more" and "better"—that is, between inclusiveness and what Robert Dahl called "enlightened understanding."[138] Now, we accept that site design and operating protocols are a process, in which we are continually challenged to reimagine how to get "more" without sacrificing "better." The third design principle aims at mindfulness of this ongoing balancing act.

3.A. Do not try to make participation easy; try to make opportunities for meaningful participation available to everyone.

Participation system designers must resist being bullied, by both impatient users and idealistic e-government thought leaders, into lowest-common-denominator participation system design. They must also struggle against being virtuously complaisant that practicing purposeful participation design endows them with wisdom unattainable by anyone who has not struggled through the process. We say this from personal experience. The design of online deliberative participation systems is still in its infancy.[139] There are almost certainly ways to make any system better. The challenge is being open to revision and experimentation without losing sight of what the system is trying to accomplish.

The purpose of a Rulemaking 2.0 system is not to make participation easy. This defies conventional thinking about e-participation design but is a necessary entailment of the first "No Bread and Circuses" principle. Low-effort participation tends to be worth about as much as it cost. Rather, the purpose is making it possible for the broadest range of citizens to engage effectively in public policy decisions that affect them.

The focus on increasing *opportunity* to participate, rather than *participation*, reminds system designers of the agency of individual citizens. The designer's responsibility is to create the best possible environment for users of different ages, education levels, and socio-economic circumstances to recognize, understand, and effectively use their right to participate in rulemaking. The citizen's responsibility is to decide whether participation is important enough to do what is needed. The designer should continue to search for effective ways to alert, inform, educate, motivate, and support

138. Robert Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, 109 POL. SCI. Q. 23, 30 (1994); *see also* FISHKIN, *supra* note 85, at 32–64.

139. *See* Stephen Coleman & Giles Moss, *Under Construction: The Field of Online Deliberation Research*, 9 J. INFO. TECH. & POL. 1, 11 (2012).

new participants—and, as part of that search, should reflect with an open mind on criticisms and suggestions of those outside the design process. But, ultimately, the citizen must choose whether to accept the terms on which participation is available, and many will choose "no." (This, after all, is a nation with one of the lowest levels of voter turnout among industrialized democracies.) The line between finding unconventional ways of increasing access to meaningful participation opportunities and "dumbing down" civic participation can be elusive, but it is a line designers must respect.

3.B. Measures of success should align with what the system is trying to achieve.

Quantitative metrics—how many "hits," visitors, page views, comments, etc.—are seductive. They are easy to gather through online analytics tools, easy to present in attractive charts and tables, and easy to compare over time and across versions. Without doubt, such metrics can give designers useful information, and we regularly use them, and report them, in Regulation Room. But if more is not the same as better, then success can't be defined by numbers.

The problem—to which we immediately confess no satisfactory solution—is what metrics should be used instead. A measure suggested to us by White House officials is whether commenters have come up with a new idea or new information that leads to a more effective or less costly regulation. Few would question that this, when it happens, is "success." It is, however, a very underinclusive measure. Put somewhat differently, much of the participation of sophisticated commenters could not satisfy this metric.[140]

What seemingly is required is some measure of comment quality that can be applied to compare comments obtained using different participation methods, moderator interventions, etc. The Regulation Room team has been attempting to develop a method of quality coding, but a system that sufficiently discriminates among comments and yet is reliably reproducible across human coders has eluded us so far.[141] This experience led us to ques-

140. This statement is based on our reading of industry comments submitted to Regulations.gov in the rulemakings done on Regulation Room and our conversations with agency rulewriters. *Cf.* Webb Yackee & Webb Yackee, *supra* note 69, at 137 (concluding from rulemaking study that greater observed agency responsiveness to business comments could not be explained by greater information content in those comments).

141. Prof. Cuéllar's study coded comment "sophistication" using five factors: Did the commenter (1) "distinguish the regulation from the statutory requirements?" (2) "include at least a paragraph of text providing a particular interpretation of, and indicating an understanding of, the statutory requirement?" (3) "propose an explicit change in the regulation provided in the notice of proposed rulemaking (NPRM)?" (4) "provide at least one example or discrete logical argument for why the commenter's concern should be addressed?" (5) "provide any legal, policy, or empirical background information to place the suggestions

tion, more fundamentally, how to conceptualize the value that inexperienced stakeholders and interested members of the public can be expected to bring to the process. Our early efforts to define and measure "situated knowledge" are described elsewhere.[142] At this point, our principal contribution is a warning: Just as system designers should not encourage forms of participation that have no value, so success should not be judged by metrics that do not in fact measure the value Rulemaking 2.0 systems seek to add.

CONCLUSION

> *"[D]emocracy cannot be justified merely as a system for translating the raw, uninformed will of a popular majority into public policy . . . ."*
>
> *—Robert Dahl*[143]

> *"There is no such thing as a 'neutral' design."*
>
> *—Richard Thaler & Cass Sunstein*[144]

Here we have challenged builders of civic engagement systems to reject the assumption, common in both Web 2.0 design and open-government thinking, that more participation is better. Instead, we have argued, responsible e-participation design begins with the hard question of what types of public participation are (and should be) valued in the particular policymaking context.

The question is hard because the answer will often be kinds of participation that are more informed and thoughtful, *and hence more effortful and rare*, than the participation that we accept in electoral democracy and that is enabled by popular Web 2.0 mechanisms. For this reason, those who build and those who choose to use Rulemaking 2.0 platforms must be prepared to resist the pressure, from both would-be users and some open-government advocates, to facilitate cheap and easy participation.

The paradigm of participation expressed through system design and operating mechanisms shapes user behavior in both practical and normative ways. Design that supports and nudges citizens toward reasonably informed participation in complex public policymaking is undeniably difficult and resource-intensive. But the alternative is deceptive and irresponsible. There is no such thing as neutral design.

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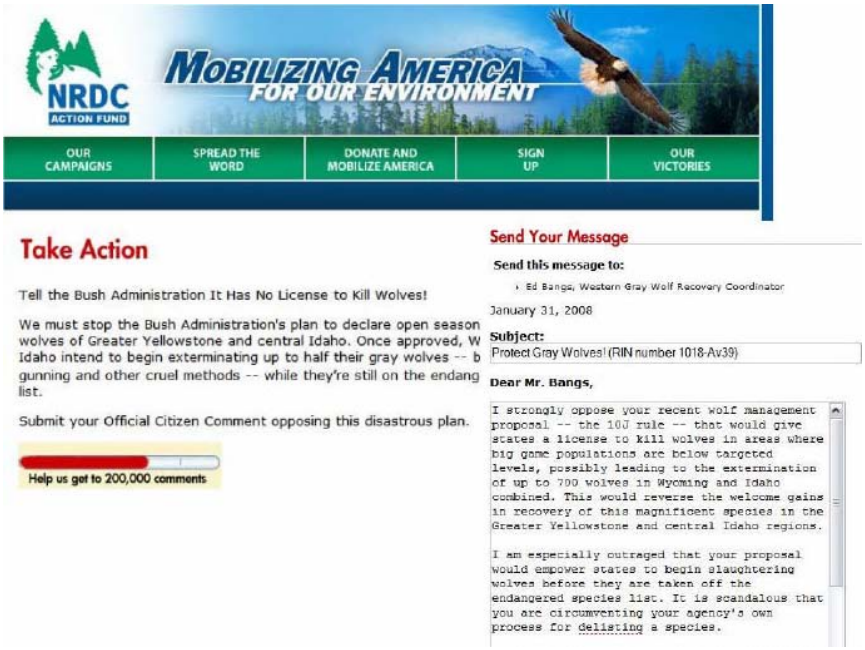
in context?" Cuéllar, *supra* note 39, at 430–31. These seem excellent measures of sophistication, but are insufficiently discriminating when applied to the concededly unsophisticated newcomer comments made in Regulation Room.

142. *Rethinking the Value of Public Participation*, *supra* note 108.

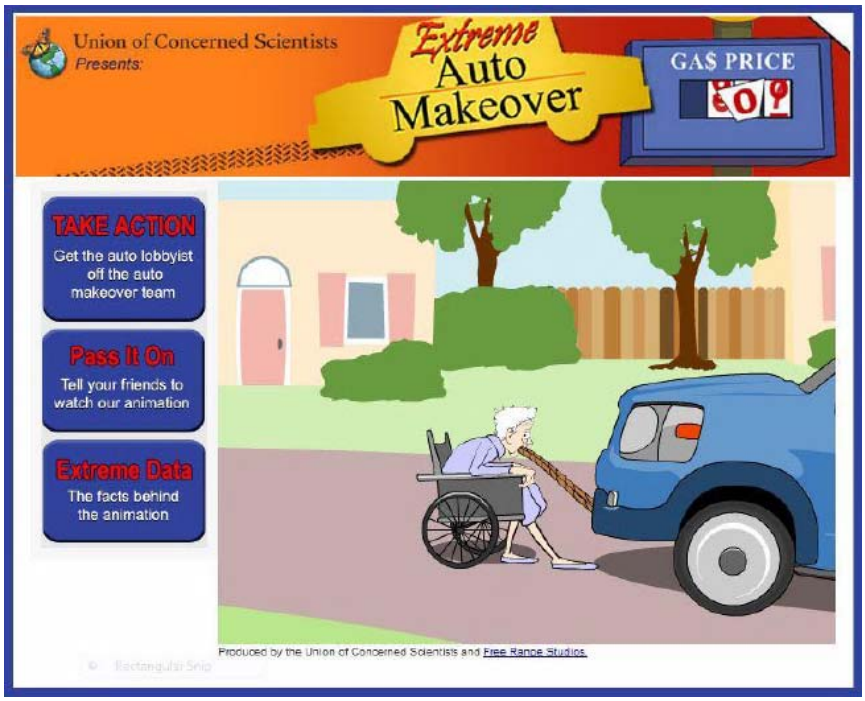
143. Dahl, *supra* note 138, at 30.

144. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 3 (2008).

APPENDIX A

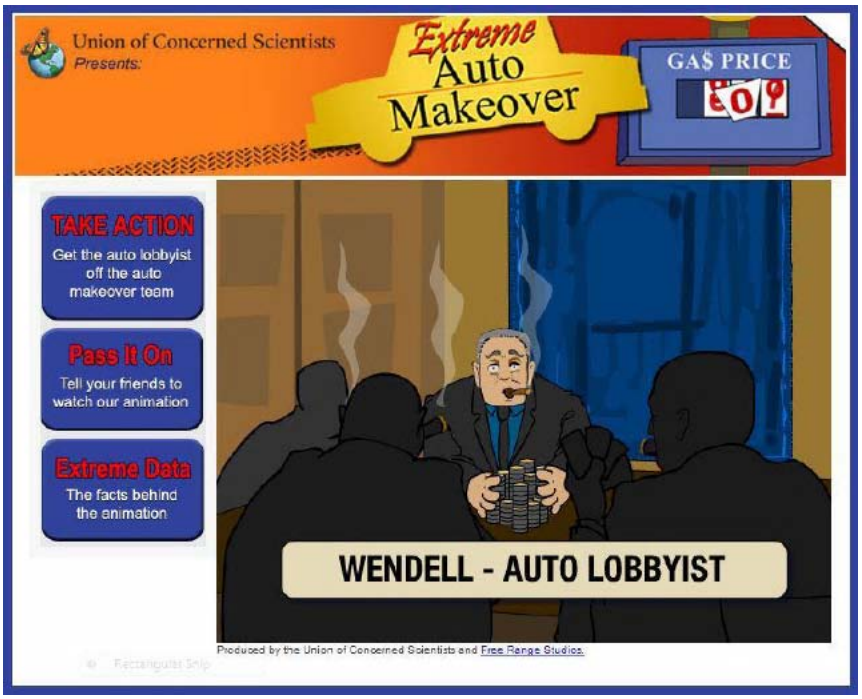


APPENDIX B




Union of Concerned Scientists
Presents:
Extreme Auto Makeover
GA$ PRICE
TAKE ACTION
Get the auto lobbyist off the auto makeover team
Pass It On
Tell your friends to watch our animation
Extreme Data
The facts behind the animation
NO FIRST BORN-
CASH ONLY!
Produced by the Union of Concerned Scientists and Free Range Studios


Union of Concerned Scientists
Presents:
Extreme Auto Makeover
GA$ PRICE
TAKE ACTION
Get the auto lobbyist off the auto makeover team
Pass It On
Tell your friends to watch our animation
Extreme Data
The facts behind the animation
Produced by the Union of Concerned Scientists and Free Range Studios



APPENDIX C

Get Automaker Lobbyists off the Extreme Auto Makeover Team!

Just two weeks before gas prices hit $3.00 per gallon, the National Highway Traffic Safety Administration (NHTSA) proposed revised fuel economy standards. Unfortunately, the plan will not help, and could actually undermine U.S. energy security. NHTSA has opened the proposal for public comment. **This is your chance to tell the government that you want standards that bring us better vehicle choices, not more gas-guzzling automaker loopholes. So take action today and then tell your friends.** Our goal is to submit 50,000 comments to tell the government that Americans can't wait any longer for better fuel economy—so spread the word!

Watch the Extreme Auto Makeover now

Please personalize your letter by adding in your own thoughts and concerns. Customized letters have the greatest impact!

Take Action on this Issue

Send this message to:

- NHTSA Acting Administrator Ms. Jacqueline Glassman
- cc: Your Congressperson
- cc: Your Senators

Send This Message

Complete the following to send this message and sign-up to receive periodic updates. If you have participated before, just type in your email address and submit the form.

Email: *

Prefix: *
–Select–

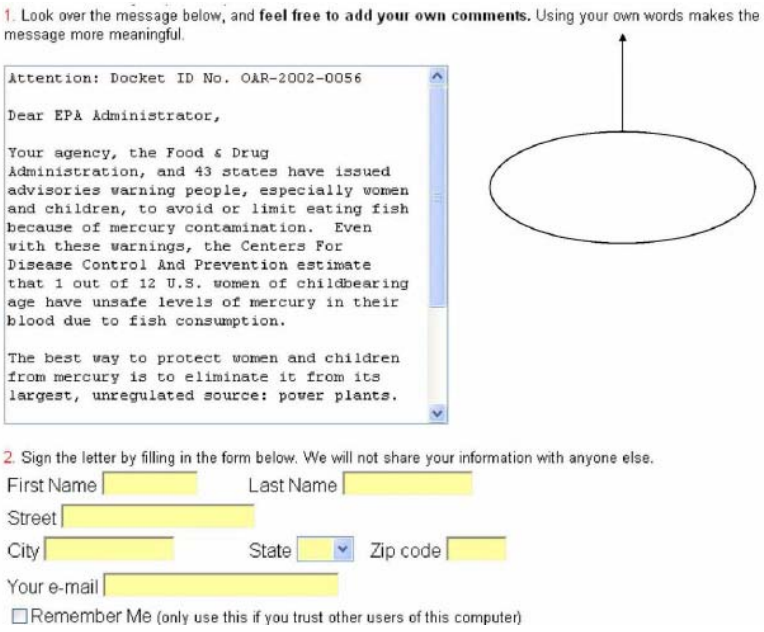
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APPENDIX D



APPENDIX E



APPENDIX F



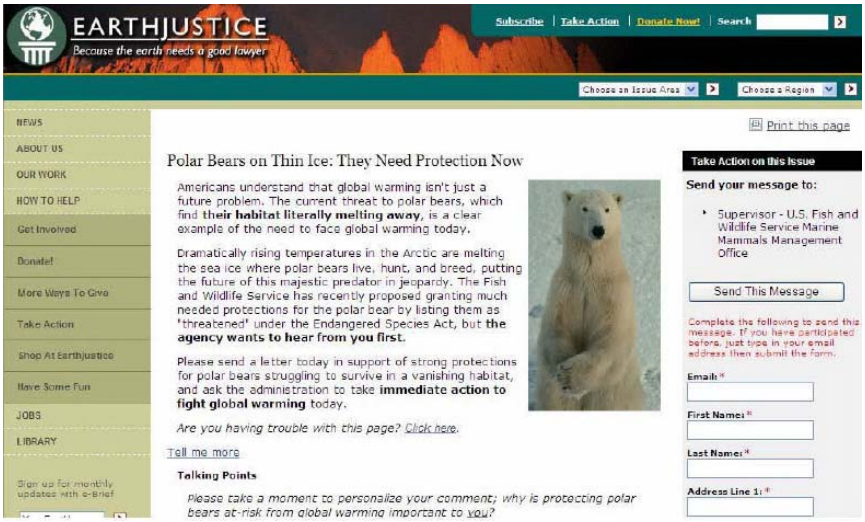
Tomorrow marks the last day for the public to comment on the highest-profile battle in years between the Bush administration and advocates of public health. The administration is under court order to finalize the first-ever federal regulations to reduce poisonous emissions of mercury from power plants--the largest uncontrolled source of mercury pollution in the U.S.

MoveOn.ORG
Democracy in Action.

The battle is marked by an unprecedented public protest against a Bush administration Environmental Protection Agency (EPA) proposal that would allow power plants to emit six to seven times more mercury into America's air--and for at least a decade longer--than would be the case if the current Clean Air Act were simply implemented in good faith.

Properly implemented, the Clean Air Act would bring about a 90 percent reduction of mercury emissions over three years. But the Bush administration has stubbornly defended its plan to reduce mercury emissions by only 70 percent--and over a period of 13 years. As a result, over 600,000 citizens have submitted comments opposing the Bush plan. This is more than twice the highest number of comments EPA has ever received on a rulemaking--greater even than the outcry when the administration tried (unsuccessfully) to fend off stronger controls over arsenic in drinking water.

APPENDIX G



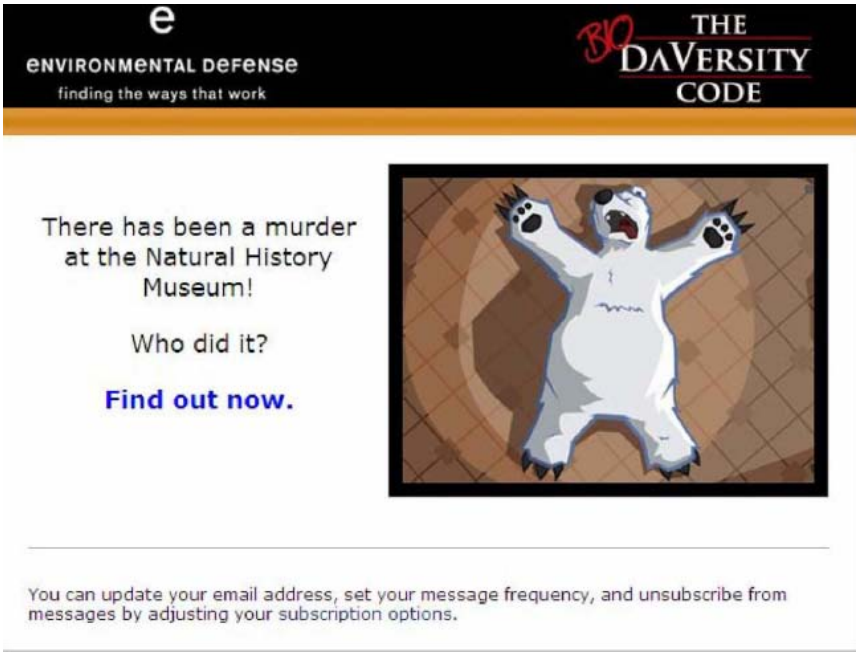
APPENDIX H



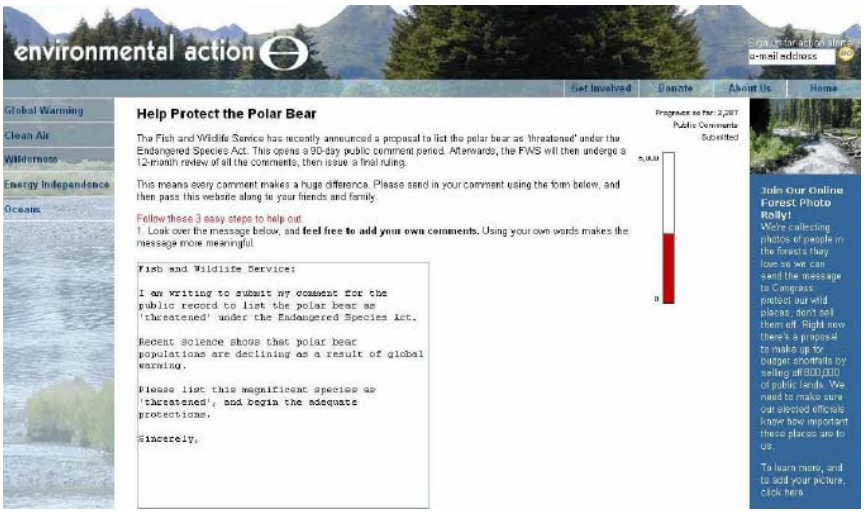
APPENDIX I



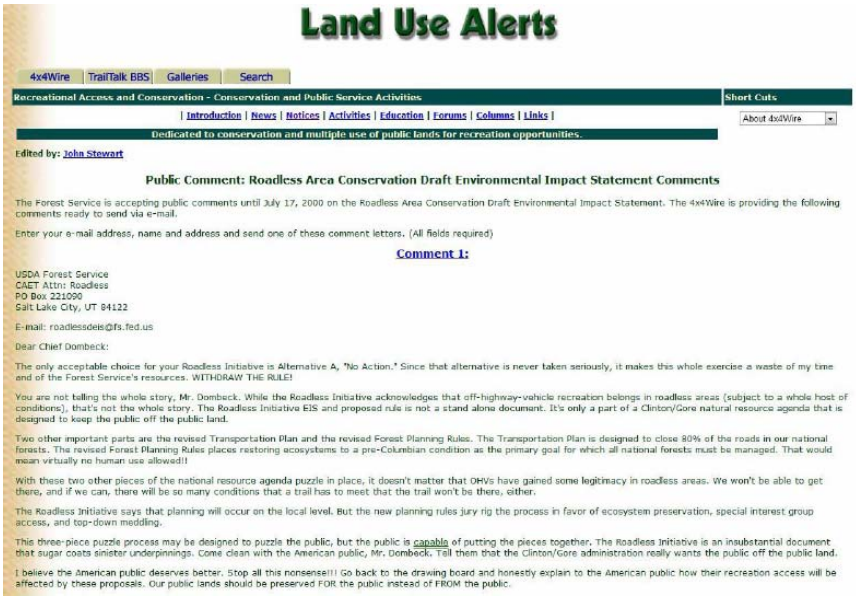
APPENDIX J



APPENDIX K



APPENDIX L



Land Use Alerts

4x4Wire | TrailTalk BBS | Galleries | Search

Recreational Access and Conservation - Conservation and Public Service Activities

Short Cuts: About 4x4Wire

| Introduction | News | Notices | Activities | Education | Forums | Columns | Links |

Dedicated to conservation and multiple use of public lands for recreation opportunities.

Edited by: John Stewart

Public Comment: Roadless Area Conservation Draft Environmental Impact Statement Comments

The Forest Service is accepting public comments until July 17, 2000 on the Roadless Area Conservation Draft Environmental Impact Statement. The 4x4Wire is providing the following comments ready to send via e-mail.

Enter your e-mail address, name and address and send one of these comment letters. (All fields required)

Comment 1:

USDA Forest Service
CAET Attn: Roadless
PO Box 221090
Salt Lake City, UT 84122

E-mail: roadlessdeis@fs.fed.us

Dear Chief Dombeck:

The only acceptable choice for your Roadless Initiative is Alternative A, "No Action." Since that alternative is never taken seriously, it makes this whole exercise a waste of my time and of the Forest Service's resources. WITHDRAW THE RULE!

You are not telling the whole story, Mr. Dombeck. While the Roadless Initiative acknowledges that off-highway-vehicle recreation belongs in roadless areas (subject to a whole host of conditions), that's not the whole story. The Roadless Initiative EIS and proposed rule is not a stand alone document. It's only a part of a Clinton/Gore natural resource agenda that is designed to keep the public off the public land.

Two other important parts are the revised Transportation Plan and the revised Forest Planning Rules. The Transportation Plan is designed to close 80% of the roads in our national forests. The revised Forest Planning Rules places restoring ecosystems to a pre-Columbian condition as the primary goal for which all national forests must be managed. That would mean virtually no human use allowed!!

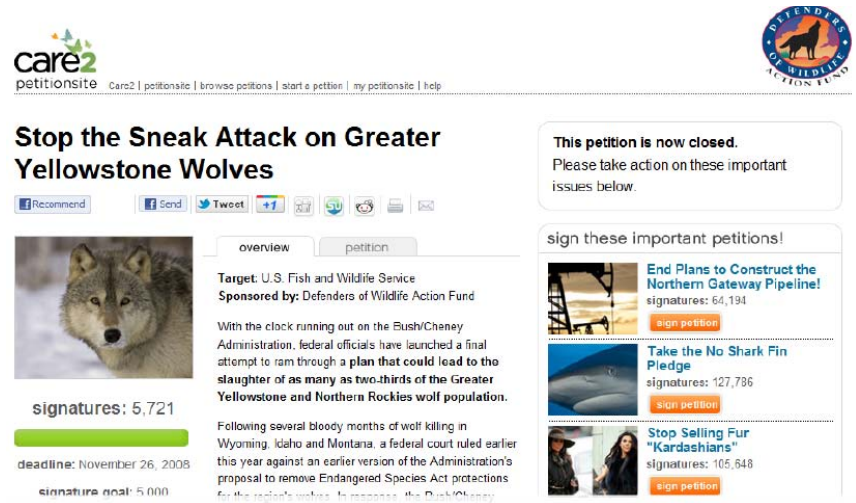
With these two other pieces of the national resource agenda puzzle in place, it doesn't matter that OHVs have gained some legitimacy in roadless areas. We won't be able to get there, and if we can, there will be so many conditions that a trail has to meet that the trail won't be there, either.

The Roadless Initiative says that planning will occur on the local level. But the new planning rules jury rig the process in favor of ecosystem preservation, special interest group access, and top-down meddling.

This three-piece puzzle process may be designed to puzzle the public, but the public is capable of putting the pieces together. The Roadless Initiative is an insubstantial document that sugar coats sinister underpinnings. Come clean with the American public, Mr. Dombeck. Tell them that the Clinton/Gore administration really wants the public off the public land.

I believe the American public deserves better. Stop all this nonsense!!! Go back to the drawing board and honestly explain to the American public how their recreation access will be affected by these proposals. Our public lands should be preserved FOR the public instead of FROM the public.

APPENDIX M



care2 petitionsite — Care2 | petitionsite | browse petitions | start a petition | my petitionsite | help

DEFENDERS OF WILDLIFE ACTION FUND

Stop the Sneak Attack on Greater Yellowstone Wolves

Recommend | Send | Tweet | +1

signatures: 5,721

deadline: November 26, 2008

signature goal: 5,000

overview | petition

Target: U.S. Fish and Wildlife Service
Sponsored by: Defenders of Wildlife Action Fund

With the clock running out on the Bush/Cheney Administration, federal officials have launched a final attempt to ram through a **plan that could lead to the slaughter of as many as two-thirds of the Greater Yellowstone and Northern Rockies wolf population.**

Following several bloody months of wolf killing in Wyoming, Idaho and Montana, a federal court ruled earlier this year against an earlier version of the Administration's proposal to remove Endangered Species Act protections

This petition is now closed.
Please take action on these important issues below.

sign these important petitions!

End Plans to Construct the Northern Gateway Pipeline!
signatures: 64,194
sign petition

Take the No Shark Fin Pledge
signatures: 127,786
sign petition

Stop Selling Fur "Kardashians"
signatures: 105,648
sign petition