

8-2014

Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts

Cynthia R. Farina

Cornell Law School, crf7@cornell.edu

Mary J. Newhart

Cornell Law School, Cornell eRulemaking Initiative, mjn3@cornell.edu

Josiah Heidt

E-Government Fellow, Cornell eRulemaking Initiative

Follow this and additional works at: <http://scholarship.law.cornell.edu/ceri>

 Part of the [Administrative Law Commons](#)

Recommended Citation

Farina, Cynthia R.; Newhart, Mary J.; and Heidt, Josiah, "Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts" (2014). *Cornell e-Rulemaking Initiative Publications*. Paper 17.

<http://scholarship.law.cornell.edu/ceri/17>

This Published Papers is brought to you for free and open access by the Centers and Programs at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell e-Rulemaking Initiative Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

A R T I C L E

Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts

by Cynthia R. Farina, Mary Newhart, and Josiah Heidt

Cynthia R. Farina is the William G. McRoberts Research Professor in Administration of the Law, Cornell University. Mary Newhart is the Executive Director and Senior Researcher, Cornell eRulemaking Initiative. Josiah Heidt is the 2011-2012 E-Government Fellow, Cornell eRulemaking Initiative.

An underlying assumption of many open government enthusiasts is that more public participation will necessarily 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. Yet, experience thus far with technology-enabled rulemaking (e-rulemaking) has not confirmed this “if-then” causal link. Such causal assumptions¹ include 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. If we make relevant information available, they will use that information meaningfully. If we build it, they will come. If they come, we will get better government policy.

This Article considers how this flawed causal reasoning around technology has permeated efforts to increase public participation in rulemaking. The observations and suggestions made here flow 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 who partner with the U.S. Department of Transportation (DOT) and other federal agencies.² At the

core is an experimental online public participation platform that offers selected “live” agency rulemakings.³ The 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 policymaking.⁴

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

I. The Drive for E-Participation

Federal agencies have used emerging ICTs to increase public participation in rulemaking. Regulations.gov has enabled the public to view rulemaking documents online and added governmentwide online comment submission to the previous options of fax and e-mail, although observers have called for system improvements.⁵ The motivating

The full version of this Article was originally published as: Cynthia R. Farina, Mary Newhart & Josiah Heidt, Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2013). It has been excerpted and updated with permission of Michigan Journal of Environmental and Administrative Law, Cynthia R. Farina, Mary Newhart, and Josiah Heidt. Please see the full article for complete footnotes and sources.

1. Fallacies of this kind (sometimes referred to as “magical thinking”) refer to nonscientific 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) and include attentional bias and confirmation bias. See BEHAVIORAL LAW AND ECONOMICS 1-10 (Cass Sunstein ed., Cambridge University Press 2000), for an introduction to cognitive biases.
2. See CORNELL eRULEMAKING INITIATIVE (CeRI), <http://www.lawschool.cornell.edu/cei/> (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 in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011) [hereinafter *Rulemaking in 140 Characters*]. The Planning Room (planningroom.org) 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.
5. E.g., CYNTHIA R. FARINA, COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* (2008); Cary Coglianese et al., *Unifying Rulemaking Information: Recommendations on the New Federal Docket Management System*, 57 ADMIN. L. REV. 621 (2005).

Web 2.0 idea is not simply that users *make* rather than retrieve content, but that “Web 2.0 offers *all* users the *same* freedom to contribute.”⁶ Advocacy groups have used the Internet to mount membership “calls to action” for high profile rulemakings. Technology and participation are no longer linked, but fused, and technology becomes political. In this techno-political environment, participation is axiomatically good, and more participation is necessarily better.

II. What Kind of Participation Should We Value?

Federal e-government leaders’ 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. Without such reflective assessment, technology-enabled commenting often leads to increased participation that only expresses opinions or preferences without elaboration or deliberation. For example, calls to action launched by established advocacy organizations have resulted in mass e-mail comments that are numerous and duplicative.⁷ While the incidence of mass commenting is low relative to the number of new rules proposed each year, when a rulemaking does prompt mass commenting the impact on the agency can be immense.⁸

Examining such mass e-mail campaigns, Professor Nina Mendelson found that “agency officials appear to be discounting these [preference]-laden comments, even when they are numerous.”⁹ Rulemaking is not supposed to be a plebiscite.¹⁰ It would be troubling if the agency *were* making decisions based on the numerical weight of outcome preferences.¹¹ Mendelson takes on this conventional view with a challenging set of questions.¹² Increasingly, we rec-

ognize that regulatory decisions are heavily preference- or value-laden, even when they also require use of scientific or other specialized knowledge.¹³ If this is so, why shouldn’t the agency take account of citizens’ value preferences? When choices among competing values must be made, government should be attending to citizens’ value preferences at least until they impinge on other values protected from majoritarian override. Even if agencies ought not give *decisive* weight to numbers of mass comments, why shouldn’t such participation count as evidence of values citizens want favored in regulatory decisionmaking?¹⁴ This argument challenges us to think more deeply about the relationship of rulemaking to democratic government and how the value of participation in each is related.

A. All Preferences Are Not Created Equal

Citizens’ preferences about public policy outcomes may be grounded in very different amounts and kinds of information. The following typology, while oversimplified, captures differences in the information quality and deliberativeness of heuristic preference formation:

1. *Spontaneous Preferences*: The preferences a citizen expresses when she has neither focused on the issue, nor been targeted by efforts to persuade her about the issue. Sometimes described as “top-of-the-head”¹⁵ or “re-active”¹⁶—generally derived from the individual’s general knowledge, underlying value system, and worldview.
2. *Group-Framed Preferences*: Groups (like the Environmental Defense Fund or National Rifle Association) 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.¹⁷ Mass communication campaigns rely on group-framed preferences.

6. *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).

7. See Stuart W. Shulman, *The Case Against Mass E-Mails: Perverse Incentives and Low Quality Public Participation in the U.S. Federal Rulemaking*, 1 POL’Y & INTERNET 23, 34 fig. 4, 35 (2009) [hereinafter *Case Against Mass E-Mails*].

8. John M. Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 988-99 (2006); *The Case Against Mass E-Mails*, *supra* note 7, at 46.

9. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

10. See *Rulemaking in 140 Characters*, *supra* note 4, at 436-37 (describing “regulatory rationality” rulemaking requirements).

11. Some have expressed concern about e-rulemaking because it might push agencies toward 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-ED1507624B638 09E>.

12. Mendelson, *supra* note 9, at 1371-79.

13. 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 et al., *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).

14. Mendelson, *supra* note 9, at 1371-79.

15. 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).

16. “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).

17. 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).

3. *Informed Preferences*: These are preferences based on exposure to, and consideration of, reasonably full and accurate factual information and fairly representative arguments for both sides of the issue.
4. *Adaptive Preferences*:¹⁸ These are informed preferences modified by an assessment of the larger socio-political environment, legal and organizational constraints, and the claims of competing preferences. These are choices of the workable over the ideal. Voluntary conflict resolution processes often build consensus through adaptive preferences.

B. Preference Valuing in Democracy vs. Rulemaking

In electoral democracy, participation based on *any* of these preferences is valued. Voters are asked for outcomes, not reasons. 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*.¹⁹ In contrast, rulemaking is a process in which outcome legitimacy turns on a formally transparent process of reasoned deliberation. 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. Participation that counts in rulemaking requires reasoning, and this privileges some types of preferences. Citizens must invest the time and cognitive resources required to form preferences that enable their engagement in reasoned decisionmaking. But informed participation comes at the cost of inclusiveness; not every interested member of the public will have resources to process the voluminous and legally, technically and linguistically complex information produced by a rulemaking.

C. Are Value Preferences Different?

Mendelson posed the question, even if mass public comments have little weight generally, why shouldn't these "value-focused comments"²⁰ count when rulemaking decisions depend on value choices? We believe the answer is that the preferences expressed in such mass

comments may suffice for electoral democracy, but not for rulemaking, even when a rulemaking is heavily laden with value choices.

Importantly, the contrast between the electoral democracy and rulemaking models of participation can be drawn even *within* the administrative process. Agency rulewriters, often career officials with substantive, scientific, technical, legal or economic expertise, typically draft rulemaking proposals, read and summarize comments, and prepare final rules. Their work is reviewed at various levels, within and outside of the agency, that are headed by presidential appointees who are susceptible to political oversight and media scrutiny. Additionally, significant rules 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. A draft preamble that merely describes the receipt of mass public comments is enough to put politically attuned actors on notice that the rulemaking might draw the attention of White House staff, members of Congress, and the media.

Determining the extent to which review by these actors shapes the rule that emerges from "the agency" is notoriously difficult.²¹ It is implausible that mass public comments are ignored by the agency's political leadership and OIRA.²² Rather, the administration may simply be pursuing a set of value preferences at odds with preferences expressed by most of the mass commenters. For agency political leadership, it seems appropriate for mass public comments to simply generate whatever pressure they can on Congress, the media, or competing power centers within the administration.

But what about at the rulewriter's level, where reasoned decisionmaking is supposed to happen? Professor Peter Strauss has written of the culture of administrative legality, whose norms impel rulewriters to justify regulatory outcomes on more than political preference.²³ To the extent rulemaking is "democratic," we expect it to be a *deliberative* process, rather than an electoral one.²⁴ Agencies are expected to acknowledge conflicting interests and values, thoughtfully consider solutions, and clearly explain why some interests and values ought to have priority over others. This account of reasoned decisionmaking is an ideal rather than a reality. Still, the value of participatory inputs must be gauged by the process we *expect* the agency to engage in. By that measure, mass public comments will rarely deserve much value. Though the individuals submit-

18. We use this term despite the Sen/Nussbaum critique of "adaptive preferences." See MARTHA NUSSBAUM, WOMAN AND HUMAN DEVELOPMENT 112-66 (2000); Amartya Sen, *Women, Technology and Sexual Division*, 6 TRADE & DEV. 195 (1985). 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).

19. See MICHAEL X. DELLI-CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 2663-64 (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).

20. Mendelson, *supra* note 9, at 1362.

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

22. *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 that public comments inform political overseers of constituent views).

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

24. "Deliberative" here signifies characteristics such as reflection, reasonably full information, and genuine engagement with interests and values of all stakeholders.

ting comments through mass calls to action may genuinely hold the expressed preferences, and though those preferences may be relevant to the rulemaking, neither genuineness nor broad relevance is sufficient to create comments of value to the agency.

First, an agency could not assume these comments are fairly representative of citizens' preferences in general. Also, given the standard brief, conclusory mass-comment text these campaigns usually produce, the agency would not be able to tell if an individual commenter holds informed or adaptive preferences. Instead, the agency must assume that the preferences: (i) are based on incomplete, perhaps erroneous, information; (ii) have not taken account of competing arguments, interests, and policy considerations; and (iii) have not considered the workability or acceptability of regulatory outcomes more nuanced than absolute acceptance or rejection of the values asserted.

Thus, a reasonable agency would assume that mass comments suffer from the kinds of fundamental defects in information and judgment that would (justifiably) prompt judicial reversal were such flaws found in the agency's own decisionmaking. Why would we want government decisionmakers to attend to such flawed preferences?²⁵ Moreover, would mass public commenters maintain the same preferences were they to have more complete information? The reasonable agency simply could not know.

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 system²⁶ 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. Importantly, here we focus exclusively on participation by "the public." Different design strategies would attend Rulemaking 2.0 systems targeting other groups such as non-affiliated experts.

A. Recognizing the Knowledge in the People

The logic of crowdsourcing²⁷ may be compelling, but we believe it cannot be the guide for a Rulemaking 2.0 system. A goal to get more participation may result in many additional comments, but there is no guarantee these comments will contain valuable information for the agency. Instead, we would frame the goal as getting more informed participation, particularly in the kinds of rulemakings that need what historically silent voices can add.

Many rulemakings do not need more public participation. The topics are too specialized, technical, or narrow to generate public interest or the affected stakeholder groups are already participating in the conventional process.²⁸ Still, there are rulemakings in which it is possible to identify groups of individuals or entities who will be directly affected by the regulation but who have not historically participated in the conventional process.

Our experience on Regulation Room reveals that in these types of rulemakings, historically "silent" stakeholders can bring "situated knowledge" that the agency itself may not possess. Additionally, organizations purporting to represent these stakeholders may not sufficiently convey the full complexity of individuals' situated knowledge. 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.* We discuss situated knowledge in more detail elsewhere,²⁹ but here are conclusions drawn from two Regulation Room rulemakings:

1. *Situated knowledge can reveal and explore tensions and complexities within what may otherwise appear a unitary set of interests.*
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.*
3. *Sometimes, situated knowledge reframes the regulatory issues.*

Situated knowledge is often conveyed through stories. Stories played a central role in a Regulation Room discus-

25. Cf. David Hudson & Jennifer VanHeerde-Hudson, "A Mile Wide and an Inch Deep": *Surveys of Public Attitudes Towards Development Aid*, 4 INT'L J. DEV. EDUC. & GLOBAL LEARNING 5 (2012) (arguing that surveys regarding global poverty are unreliable because they fail to control for knowledge-levels and perceptions of aid effectiveness).

26. Rulemaking 2.0 is a second-generation e-rulemaking system that employs Web 2.0 information and communication technologies.

27. "Crowdsourcing" is simply a method of distributed problem solving: issuing a call to a group for solutions.

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

29. See Cynthia R. Farina et al., *Knowledge in the People: Rethinking the Value of Public Participation in Rulemaking*, 47 WAKE FOREST L. REV. 1185 (2012).

sion of a proposed DOT regulation on requirements for the use of electronic time management systems by commercial motor vehicle (CMV) operators. There, drivers shared stories revealing that their opposition to the proposed rule was rooted in concerns about the counterproductive inflexibility of such systems. Several truckers described occasions when driving with these systems 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. While stories of this kind may not often radically shift agency thinking, they can provide relevant contextual information that could help the agency understand more fully the impact its proposal is likely to have “on the ground.”³⁰

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. The idea is not to have a Rulemaking 2.0 participation platform *displace* first generation e-rulemaking systems; rather, the focus is on when and how *additional* Web 2.0 outreach and content creation technologies should be deployed.

Principle I. No Bread and Circuses³¹

A democratic government should not actively facilitate public participation that it does not value. Agencies cannot simply ignore mass comments; given the strong organizational interests such campaigns serve irrespective of any rulemaking impact, mass public commenting will likely continue. Agencies understand, however, both the participation that matters 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 adequate support, or to hold out participation methods that are easy but have little value, is political showmanship, not open government.

The degree of purposeful participation design called for by the “No Bread and Circuses” principle is a counterweight to the “all-participation-has-value” philosophy instantiated in Web 2.0. This principle requires intentionality when selecting participation *opportunities* and *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 comment 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 be problematic: 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 participation could always help. Asking 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 do not customarily or effectively participate in the rulemaking process or whose only participation is via representative organizations?* Examples of such stakeholders from a Regulation Room rule on airline passenger rights included airline flight crews, gate agents, and individual air travelers.
2. *Are these types of stakeholders likely to have useful situated knowledge?* For example, women of childbearing age arguably represent a distinct stakeholder group in mercury pollution rulemakings because of mercury’s impacts on fetal development. But what could such stakeholders add by way of situated knowledge germane to setting emission limits? By contrast, park rangers might be able to contribute to rulemakings on restricting vehicle access to underdeveloped areas by particularizing benefits and harms, and improving workability of possible restrictions.
3. *Is it reasonably possible to convey the information these stakeholders need to form informed or adaptive preferences that ought to be given weight in deliberative decisionmaking?* The NPRM, draft Regulatory Impact Assessment, and other documents provide information, but their audience is lawyers, sophisticated entities, and courts. Consider the difficulty of providing reasonably complete and balanced information about adjusting mercury pollution limits in a form useful to laypeople; compare this to the far simpler analogous task in the airline passenger rights rulemaking.

Even if the selection process is imperfect, the alternative (i.e., acting as if all rules 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 meaningfully participate in self-government.

30. Because conventional rulemaking discourse takes a more objective form, the personalized and narrative forms may interfere with the agency’s ability to “hear” the knowledge conveyed. *See id.*

31. “Bread and circuses,” traced to Roman satirist Juvenal, refers to the strategy of Roman officials currying favor through free food and entertainment, thus debasing democracy by discouraging the difficult work of meaningful political involvement.

1.B. Only participation methods likely to lead to valuable participatory outputs should be included in a Rulemaking 2.0 system.

Web 2.0 facilitates crowdsourcing by prominently encouraging users to vote, rate, and rank content. Voting, rating, and ranking are frequently part of Web 2.0 participation platforms now offered to agencies because they are low-effort and highly scalable. Rulemaking, however, is not like rating consumer products. Participant voting, rating, and ranking has no place in a Rulemaking 2.0 system unless *use of such participation methods is affirmatively justified by the designer*. Here are situations in which justification could be found:

1. *Effectiveness of consumer information proposals.* Although low-thought spontaneous preferences generally have no rulemaking value, there are exceptions. For example, Congress required DOT to provide consumers information on how tire choice could affect automobile energy efficiency. A rulemaking sought comment on which label designs most effectively informed consumers.³² Here, voting or ranking seems desirable.
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 investment in completing it.³³ Low-effort and familiar acts like voting might be used to encourage the more effortful participation of informed commenting.³⁴

Principle 2. Abandon the Equal Treatment Norm

The equation of government fairness and neutrality with equal treatment is engrained in our political culture. However, adopting a single model of outreach and information for all 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 judicial reversal. 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 requires informing novices that rulemaking is happening, they have a right

32. Tire Fuel Efficiency Consumer Information Program, 74 Fed. Reg. 29542 (proposed June 22, 2009) (to be codified at 49 C.F.R. §575).
33. 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).
34. 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).

to participate, and they should exercise that right. Publication in the Federal Register performs these functions for sophisticated stakeholders, but not for traditionally under-voiced stakeholders. Getting newcomers to participate requires deliberate outreach that (i) is targeted to where such stakeholders or interested persons get information, (ii) employs media that they are accustomed to, and (iii) explains what is going on in terms that make clear why they should care.

This kind of targeted “social marketing”³⁵ will not be easy for agencies steeped in the equal-treatment norm. Admittedly, there is a fine line between targeted motivational outreach and taking sides; but it is hardly clear that it is inappropriate to imply to the beneficiaries of proposed regulation that their interests are likely different from those of regulated entities, and urge them to speak up for themselves in the public comment process. We cannot be sure that a reviewing court, also steeped in the equal-treatment norm, would not consider targeted outreach reversible error. It would appear difficult, however, for sophisticated commenters to demonstrate actual harm. Moreover, it seems perverse to fault an agency charged with regulating for the public good for soliciting participation from those likely to benefit from its rulemaking.

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

Reasonably balanced information about the problem the agency is addressing, limits on its authority, and the relevant factual and policy arguments involved is probably the most important condition for valuable participation. Yet the potential participants 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 NPRM 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 sophisticated stakeholders. These materials simultaneously assume a great deal of knowledge and overwhelm the intelligent lay reader with information.

Regulation Room uses a number of information repackaging 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. We “layer” information so participants who seek more detail can readily access the original text, while those who want more help can get it through a glossary of unfamiliar terms and separate pages explaining the regulatory background. 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 pos-

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

sibility 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. The volume and complexity of materials, *even with* tailored information, makes it difficult for newcomers to articulate informed or adaptive preferences. For situated knowledge, participants need enough understanding of the context and issues to recognize which aspects of their experience are applicable, and they may require help communicating so that relevance and value are apparent.

In parallel to the role of facilitators in offline civic engagement settings, using a skilled moderator online can help foster norms of deliberative discourse, aid those with less participatory experience in contributing to the discussion, and constructively manage conflicts. Regulation Room uses trained and supervised law students as facilitative moderators; our experiences have shown that human moderation is essential in engaging undervoiced stakeholders and interested citizens. Currently, the level of citizen familiarity with effective participation is too low to expect newcomers to participate usefully without additional help. Because committing moderators for significant time is costly, we emphasize careful selection of rules, *i.e.*, determining when the anticipated value from new participants is reasonably likely to outweigh the costs. Further, we also recommend using facilitators from outside the responsible agency to avoid perception of the moderator as censoring, lacking genuine commitment, or becoming defensive in the face of criticism.³⁶

Principle 3. Means Should Change; Ends Should Not

The design of Rulemaking 2.0 systems should be a continuing, mindful 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.”³⁷

36. *E.g.*, Scott Wright, *Government-Run Online Discussion Fora: Moderation, Censorship and the Shadow of Control*, 8 BRIT. J. POL. & INT’L REL., 550, 556 (2006). A very apt analogy from existing regulatory processes is the procedure for negotiated rulemaking.

37. Robert Dahl, *A Democratic Dilemma: System Effectiveness Versus Citizen Participation*, 109 POL. SCI. Q. 23, 30 (1994); *see also* JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 32-64 (2009).

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

Low-effort participation tends to be worth about as much as it costs. Rather, the purpose of Rulemaking 2.0 systems should be on making it possible for the broadest range of citizens to engage meaningfully in policy decisions that affect them. The focus on increasing *opportunity*, rather than *participation*, reminds designers of the agency of citizens. The designer’s responsibility is to create the best environment for users of different ages, education levels, and socio-economic circumstances to recognize, understand, and effectively participate in rulemaking. The designer should search for effective ways to alert, inform, educate, motivate, and support new participants, and should reflect on criticisms and suggestions of outsiders.

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 can give designers useful information, and we regularly use 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 confess no satisfactory solution—is what metrics should be used instead. What seemingly is required is some measure of comment quality that can compare comments from different participation methods, moderator interventions, etc. Difficulty in developing a solution led us to question more fundamentally how to conceptualize the value that inexperienced stakeholders and interested citizens can be expected to bring to the process. 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.

IV. Conclusion

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 to facilitate cheap and easy participation.

Design that supports and nudges citizens toward reasonably informed participation in complex public policy-making is undeniably difficult and resource-intensive. But

the alternative is deceptive and irresponsible. There is no such thing as neutral design.