

C O M M E N T

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

by Michael Halpern

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For more than ten years, researchers have tried to evaluate the influence of electronic public participation on rulemaking. Some have expressed concern about the drive for more public participation; mass comments can slow down the rulemaking process, they suggest, and inappropriately influence the development of a rule. There is evidence that mass comments do influence their targets. For example, Andrei Kirilenko et al. developed an algorithm they call RegRank which found that a financial regulatory agency developed final rules that took into account “comments that reflect organized public efforts.”¹ Overall, this is a good thing, as effective rules will incorporate different types of knowledge.

The better question is, how do we enrich mass engagement? Farina et al. mostly concentrate on the value of mass comments to the agency rule writer, and seem resigned to the fact that mass comments will continue. They suggest an intriguing, multi-tiered system called Regulation Room that can help rule writers distinguish between comments that express preferences and comments that provide expertise. But that isn’t the whole story. In this response, I argue that public participation should both facilitate meaningful input into a rule and help shape public dialogue around the rule. Further, the benefits of more participation in public comment periods extend far beyond those afforded to the individual rule writer. Finally, while more sophisticated ways of processing public comments would be helpful, and Regulation Room could be one such system, the most comprehensive and responsive governing will require policymakers to embrace experimentation with participatory democracy, both online and offline, throughout the rulemaking process.

I. Mass Comments Are Not All Created Equal

Mass comments generated by all types of groups can selectively use or misrepresent evidence to support ideological posi-

tions. Some mass comments do include a significant amount of specificity, however, and do not simply profess ideological preferences. For example, members of the Science Network at the Union of Concerned Scientists (UCS), a nationwide network of 17,000 subject matter experts from a variety of scientific disciplines, use primary source material as well as UCS analysis and talking points to inform their comments.

While some busy scientists cut and paste talking points, many others use this material as a starting point and adapt the material to their own areas of expertise. In this vein, a distinction should be made between mass comments that are brief form letters and mass comments that are derived from a more complete body of research and resources and reflect unique perspectives and expertise.

II. Secondary Benefits of More Participation

Sometimes, secondary benefits to mass public comments are more important than generating additional input. Even a blunt instrument of public participation is critical to the rulemaking process. First, comment periods give an organization a concrete, finite opportunity to bring a proposed rule to the attention of its constituents and supporters and explain the rule’s import. Often, this is the only opportunity that the public has to weigh in.

Second, participating in a mass comment process can lead to more meaningful engagement. Running a mass comment campaign enables organizations to identify those who are willing to engage more substantively. If a citizen is willing to submit a form public comment, she may be more likely to participate in a public hearing or meet with a legislator, or provide more specialized expertise to agencies in the future. Further, experts who have unique experiences and perspectives assist organizations in explaining a rule’s (or a future related rule’s) potential impact.

Notably, better access to high-quality, expert participation does not guarantee better decisions. While *more* public participation in rulemaking might not help the rule writer, *more varied* public participation in rulemaking can bring perspectives from people with diverse knowledge *and* skills not only to the

1. See Andrei A. Kirilenko et al., *Do U.S. Regulators Listen to the Public?: Testing the Regulatory Process With the RegRank Algorithm* (Robert H. Smith Sch. of Bus. Research Paper Series, Jan. 12, 2014, last revised Mar. 28, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377826.

regulatory agency but also to others who read the comments. The authors' stated goal of improving rule writers' access to situated knowledge—provided by those affected by a rule—is an important one, as this knowledge can also identify additional impacts that rule writers may have not considered.

III. Bringing Attention to Political Interference

The rulemaking process is designed to value evidence and devalue preferences, sometimes leading to tortured decisions and definitions when the statute or science does not conform to administration priorities. Often, highly contentious rulemakings need public attention so that there is not undue special interest influence on the process.

It is clear, moreover, that arguments made during a public comment period can be helpful in influencing not only the rule writer but also agency leadership as well as the Office of Management and Budget (OMB) and other parts of the White House. On more controversial proposals, the OMB has a track record of changing both draft and final rules after they are submitted by agencies, almost always in a way that favors less regulation; in this way and others, both the Bush and Obama White Houses inappropriately interfered in agency rulemaking (such as the EPA's determination of acceptable levels of ground-level ozone pollution under the Clean Air Act). Mass comments can signal to the rule writer and political appointees that their conduct will be scrutinized, and can thus play a moderating role.

Sometimes, public interest or industry organizations focus attention on a rule precisely so that there will be less chance that the rule will be subsumed by ideology. This provides a direct benefit to rule writers; they are less likely to feel pressure to make inappropriate changes to a rule, and it is less likely that their superiors will tamper with their work down the line. We shouldn't assume that anyone—from rule writers to commenters to political appointees—is immune to political influence.

We should be careful, too, not to design a system of feedback that can be used to further delay regulatory decision-making. Often, those who oppose a new or updated rule claim that we do not know enough about a given topic to develop a credible rule, and that further (often redundant) studies are necessary. Comment periods and many other mechanisms are used by all sides to delay the process while the government is blamed for being "bureaucratic." Regulators are asked to make decisions based on the best available information recognizing that in the future they will have access to even more knowledge.

IV. Transparency Builds Legitimacy

Transparency is critical to any rulemaking. A task force convened by OMB Watch (now the Center for Effective Government) suggested that a transparent rulemaking process is substantially more likely to lead to rules that are considered

both high quality and legitimate.² The need to foster legitimacy cannot be understated: an opaque process fosters a lack of faith in government, which undermines a rule's effectiveness.

The Occupational Health and Safety Administration is using a novel approach to transparency in its long-awaited silica rulemaking, requesting that commenters disclose financial conflicts of interest. This practice, which allows rule makers to ensure they have a balance of research to consider, should become the norm and be extended throughout the government. "It takes a willful obliviousness not to recognize just how harmful interested-science has been across the history of federal regulation—not always, but sometimes," writes Harvard Law Professor Lawrence Lessig.³

The public comment period also allows the public to understand and analyze arguments made by affected populations and industries, and to compare their public comments to previous positions. A recent UCS analysis found that there can be inconsistencies between a company's public comments and other public statements. For example, ConocoPhillips has acknowledged on its website that "human activity . . . is contributing to increased concentrations of greenhouse gases in the atmosphere that can lead to adverse changes in global climate."⁴ Yet in its comments on the 2009 EPA Endangerment Finding, the company claimed that, "the support for the effects of climate change on public health and welfare is limited and is typified by a high degree of uncertainty."⁵

Written public comments are not the only place that influence can be hidden; stakeholders also use public hearings to attempt to demonstrate "grassroots" support for their positions. At a 2012 hearing in Chicago on the EPA's proposed carbon pollution standard, several individuals were secretly given lunch and \$50 each to appear in t-shirts supporting the coal industry.⁶

V. Cultural Changes Can Improve Input

Better input requires cultural change with expert communities. Public engagement should be incentivized by employers and cultural institutions of experts, such as universities or scientific societies. Currently, career advancement in science is determined primarily by the strength of one's peer-reviewed publications portfolio, not on the quality of one's public service (including public comments submitted, op-eds published, meetings with government officials held, etc.).

2. See Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 925 (2009).

3. Lawrence Lessig, *The Republican Street Fight Over Transparency in Government*, DAILY BEAST (Mar. 26, 2014), <http://www.thedailybeast.com/articles/2014/03/26/the-republican-street-fight-over-transparency-in-government.html>.

4. See THE SCIENTIFIC INTEGRITY PROGRAM OF THE UNION OF CONCERNED SCIENTISTS, A CLIMATE OF CORPORATE CONTROL: HOW CORPORATIONS HAVE INFLUENCED THE U.S. DIALOGUE ON CLIMATE SCIENCE AND POLICY 28 fig. 10 (2012), available at http://www.ucsusa.org/assets/documents/scientific_integrity/a-climate-of-corporate-control-report.pdf.

5. *Id.*

6. Heather Moyer, *Pro-Coal Group Pays People to Wear Its Shirts at EPA Hearing*, COMPASS (May 24, 2012), <http://sierraclub.typepad.com/compass/2012/05/pro-coal-astrotrufing.html>.

In addition, the ways in which non-profits and industry groups use the Internet must improve. Current technologies and content management systems employed by many advocacy organizations are disastrously behind the curve; these systems tend to put a premium on accessibility and ease of use at the cost of innovation, and the vast majority of organizations work with just a few mediocre platforms. These outdated technologies make it easy to generate form letters, but more difficult to facilitate comments that incorporate expertise.

Bloggers and the media should also assume more responsibility. Reporters who cover public comment periods should, when reporting on raw numbers of comments, indicate whether there were any organizations behind mass comments and, if so, if those organizations' constituents stand to financially benefit from or be hurt by a rule. They can also link to resources that encourage readers to file their own comments.

Finally, advocacy organizations should look to become more effective at fully harnessing the contributions their supporters can make. Vanity metrics—sometimes meaningless measurements that look good but are not sufficient to measure actual impact—should be discouraged by those who support advocacy organizations and industry groups. Foundations and donors that fund advocacy organizations should ask for more sophisticated ways to measure success than numbers of comments submitted. Many advocacy organizations can easily rally supporters online, but have yet to effectively harness that energy into social movements.

VI. Reinventing the Process of Decisionmaking

The authors are smart to continue to pursue questions related to quality public participation in rulemaking. Regulation Room is one way to open up the process and curate good information, and there will (and should) be many others. To substantially improve how information is used to govern, we need to think in terms of new systems of collaboration.

Convening people digitally brings tremendous opportunities. "This linking together in turn lets us tap our cognitive surplus, the trillion hours a year of free time the educated population of the planet has to spend doing things they care about," wrote Clay Shirky, a Fellow at the Berkman Center for Internet and Society.⁷ "[O]ur cognitive surplus is so enormous that diverting even a tiny fraction of time from consumption to participation can create enormous positive effects."⁸

So far, policymakers and advocates have tried to tap into this cognitive surplus through electronic means with limited success. We have the opportunity to radically transform how government curates expertise and turns it into rules that create a level playing field and protect our health and environment while encouraging innovation. It is clear that people want to engage. And the Internet can help them do it. Those who

accept the current model of mass comments as being the only, or even main, way to engage large numbers of people in governance are simply not being sufficiently creative.

"The best minds of my generation are thinking about how to make people click ads," said former Facebook research scientist Jeff Hammerbacher.⁹ He wasn't satisfied, nor are countless social entrepreneurs who are working to transform how information is delivered and considered.

In *The End of Big*, Harvard Kennedy School Lecturer Nicco Mele looks at how government can be disrupted—in a good way—by technology and the people who yield it.¹⁰ "I still worry about . . . the absolute volume that our leaders and our institutions have to deal with," he told an audience at the Personal Democracy Forum in 2013.¹¹ "We have to build an infrastructure of participation. We have to build process and politics that understand the new distribution of power."¹²

Hundreds of start-ups and thousands of hackers are working on open-source programming to develop this infrastructure. The government can facilitate this process by going beyond transparency and reexamining how it allocates IT resources to improve input. This doesn't mean more physical infrastructure, however. It means developing a digital public square and lowering barriers to experimentation, where citizens and rule writers can innovate collaboratively and transparently.

Change, ultimately, will be dependent not on the adoption of new technologies but of new behaviors. Yet those who are experimenting with participation don't have legislative power, and those who possess this power are not experimenting with participation. "And being given a dashboard without a steering wheel," says Shirky, "has never been a promise that a democracy makes to its citizens."¹³

With more varied, robust methods of public input and collaboration, we could reduce the need and desire for mass public comments. The practice can go the way of the forwarded email petition, but only with better alternatives.

We should make this transformation happen quickly. The challenges we face, from climate change to sustainability, are increasingly global, complex, and interdisciplinary, and our existing institutions are not proving up to the task. All of this collective power is wasted if we can't figure out how to efficiently deploy it. Better access to high-quality, expert participation does not guarantee better decisions. But ultimately, more innovative projects and systems can build both the quality and legitimacy of government rules.

7. Clay Shirky, *Does the Internet Make You Smarter?*, WALL ST. J. (June 4, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748704025304575284973472694334>.

8. *Id.*

9. Ashlee Vance, *This Tech Bubble Is Different*, BLOOMBERGBUSINESSWEEK MAG. (Apr. 14, 2011), http://www.businessweek.com/magazine/content/11_17/b4225060960537.htm (quoting Jeff Hammerbacher).

10. See generally NICCO MELE, *THE END OF BIG: HOW THE INTERNET MAKES DAVID THE NEW GOLIATH* (2013).

11. Nicco Mele, *The Unwritten Future of Personal Democracy*, PERSONAL DEMOCRACY MEDIA: PDM VIDEOS at 9:02-9:27 (June 6, 2013), <http://personal-democracy.com/media/unwritten-future-personal-democracy>.

12. *Id.*

13. Clay Shirky, *How the Internet Will (One Day) Transform Government*, TED (June 2012), http://www.ted.com/talks/clay_shirky_how_the_internet_will_one_day_transform_government.