

C O M M E N T

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

by Michael Walls

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Cynthia Farina and her colleagues provide a sensible analysis of the problems attendant increased public participation in rulemaking.<sup>1</sup> The “magical thinking” they address—more public engagement in rulemaking equals better policies and regulatory outcomes—strikes at the very heart of democratic access to decisions and decision-makers. Their analysis provides a strong basis for concluding that there is some public input that is, or perhaps should be, more highly valued than other public input.<sup>2</sup> While the conclusion that *more* public participation is not a good thing in rulemaking may be jarring, the conditions Professor Farina outlines for participation that counts are a sound basis for principles that should be addressed in designing public outreach in rulemaking. The three basic principles they argue will ensure that additional public participation benefits the rulemaking process make a great deal of sense, particularly on when and how additional information and communication technologies (ICTs) should be deployed.

The focus on the “under-voiced” in the regulatory process, while important, needs to be better distinguished from the “under-voiced” in an electoral context. Identifying the “under-voiced” is not itself sufficient to ensure that the particular stakeholder knowledge we wish to extract and utilize in rulemaking will emerge. Rulemaking must account for the type of situated knowledge that stakeholders might have, and adopt methodologies for addressing the relevancy of that knowledge to the regulatory problem

at hand. There is a potential challenge in this approach, for the technology that may help create and increase the opportunities for public participation in rulemaking may also increase the range of “situated knowledge” some stakeholders may wish to impart. I suggest a rather low-tech and modest approach that may have some value in helping identify and leverage the situated knowledge held by key stakeholders.

## I. The Right Public Participation Counts

One of the important contributions Professor Farina and her colleagues have made is in articulating three necessary conditions for effective public participation, addressing the “who, what, when” of rulemaking. The “who” element addresses the “stakeholders and interested members of the public who have traditionally been under-voiced in the rulemaking process.”<sup>3</sup>

It is important to understand that the concept of the “under-voiced” as used here is not exclusively referring to those members of the public whose educational, occupational, or economic status puts them outside the groups of stakeholders that historically participate in the regulatory process. The problem of mass participation in rulemaking, characterized by e-mail or letter campaigns that seek an advantage on the quantity of input rather than their technical or policy value, suggests that there are some stakeholders who are not “under-voiced,” at least in the sense that there is some institutional bias against their participation. And just because there may be an under-voiced stakeholder in the regulatory process does not necessarily mean that their input is relevant to the problem.

As Professor Farina notes, the reference to “under-voiced” stakeholders is best understood to mean those stakeholders who have some knowledge relevant to the regulatory policy and options at hand. They are stakeholders possess-

1. Cynthia Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012).

2. The analysis has some interesting implications for the *weight* a regulatory agency might ascribe to input from a particular source. At least one study has found strong evidence that regulatory agencies adjust final regulations in the direction suggested in public comments. See Andrei A. Kirilenko, Shawn Mankad & George Michailidis, *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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377826). Perhaps there are cases where the agencies should not adjust the final regulations.

3. Farina et al., *supra* note 1, at 145.

ing particular “situated knowledge”—“information about impacts, problems, enforceability, contributory causes, unintended consequences, etc. . . . known by the commenter because of lived experience in the complex reality into which the proposed regulation would be introduced.”<sup>4</sup> But as Butch Cassidy (played by Paul Newman) in the iconic 1969 movie asks about the posse chasing him: “Who are those guys?”<sup>5</sup>

In an increasingly complex regulatory world, stakeholders with “situated knowledge” should be understood to mean those with particular technical and policy insight that would not ordinarily be expected to participate in a given rulemaking. The under-voiced, then, might well be members of one community or another, from local residents, to a group of manufacturers, to recognized scientific and technical experts. Many of them will (hopefully) already be aware of the participatory opportunities available to them. Understood as such, perhaps the problem of identifying the under-voiced may not be as broad or complex as it might be. If that is the case, perhaps we need to be less concerned with using new ICTs and more concerned with ensuring that regulatory agencies ask the right questions upfront.

## II. Identifying Relevant Situated Knowledge

Professor Farina and her colleagues make a persuasive case that Rulemaking 2.0<sup>6</sup> approaches can enhance public participation opportunities. In my view, they have asked the right questions about the effectiveness of some Rulemaking 2.0 design options, such as questions about the value of particular techniques (like voting/ranking/rating approaches).<sup>7</sup> While I agree that Rulemaking 2.0 is not necessarily appropriate in every regulatory proceeding, the approach holds important promise for more meaningful participation in major rulemakings by stakeholder groups that may not be aware of or included in the regulatory process.

One question that persists, however, is whether a technologically advanced Rulemaking 2.0 system is really necessary in order to engage those with situated knowledge and encourage their participation. Are there tools available

to an agency right now that can accomplish much the same objective? I believe there are.

The central challenge may well be ensuring that those with situated knowledge are well aware of a particular regulatory rulemaking. One relatively easy, low-cost and low-burden approach to enhancing awareness may be for agencies to make more use of the Advance Notice of Proposed Rulemaking (ANPRM) process. As described by the Office of the Federal Register, an ANPRM is “a formal invitation to participate in shaping the proposed rule and starts the notice-and-comment process in motion.”<sup>8</sup> Perhaps more importantly, an ANPRM process can constitute an agency’s first meaningful opportunity to articulate the design and implications of a rulemaking, and to do targeted outreach (perhaps using Rulemaking 2.0 approaches) to ensure that appropriate stakeholders are engaged.

With appropriate outreach at an earlier stage in the rulemaking process, and with the right information about scope and questions about impacts, it would appear that agencies could increase the chances of reaching those stakeholders with knowledge relevant to the proposal. The resulting stakeholder input can then be assessed and considered, and a more refined proposal produced in the Notice of Proposed Rulemaking (NPRM) stage.

It is critical that an agency appropriately describe the problem it is trying to solve in regulation, and to describe how the agency proposal addresses the concern. At this stage in the rulemaking process there is a corollary to the “charge” step in the peer review process. The charge questions to a peer review panel provide important guidance defining the scope, problems, and issues expected to be addressed.<sup>9</sup> Importantly, the charge questions help define what kinds of experts and expertise are needed to conduct an effective peer review.

Charge questions to a peer review panel can therefore help determine the make-up of the panel, the scope and depth of the review, and the required “situated knowledge” necessary to carry out the charge. Although there has typically been far less transparency and public comment on peer review panel charge questions than there should be, the use of an ANPRM process could help an agency initiate the development of questions similar to a peer review charge, and therefore help in identifying the knowledge and expertise necessary in that rulemaking.

This approach would seem to be particularly useful in rulemakings involving the consideration of alternative plausible scientific opinions by facilitating the identifica-

4. *Id.* at 148.

5. BUTCH CASSIDY AND THE SUNDANCE KID (Twentieth Century Fox Film Corporation 1969). For a short compilation of relevant clips from the movie, see SilentYoda, *Butch Cassidy in 5 Seconds*, YouTube (Nov. 2, 2007), <http://www.youtube.com/watch?v=Zlie9OosnEM>.

6. Rulemaking 2.0 as outlined by Professor Farina differs substantially from Web 2.0, as she notes. See Farina et al., *supra* note 1, at 153. Indeed, Rulemaking 2.0 appears to be an important contrast to a “wiki” approach to government that simply contends “more is better.” See, e.g., BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL (2010).

7. Farina, *supra* note 1, at 153-56.

8. OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS, available at [http://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (last visited Mar. 17, 2014).

9. ENVIRONMENTAL PROTECTION AGENCY, OVERVIEW OF THE PANEL FORMATION PROCESS AT THE ENVIRONMENTAL PROTECTION AGENCY SCIENTIFIC ADVISORY BOARD, EPA-SAB-EC-02-010, at 9 (Sept. 2002), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/WebFiles/OverviewPanelForm/\\$File/ec02010.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebFiles/OverviewPanelForm/$File/ec02010.pdf).

tion and engagement of scientists and technical experts with differing views. Note that this is a different question than reviewing the scientific sufficiency underlying a regulatory proposal; the concept here is that a more explicit description of the scope, basis, and implications of a rule-making proposal, in advance of a formal proposal, could help unlock access to situated knowledge. As Professor Farina notes, there is no reason why an agency cannot be selective about the rules it processes through a Rulemaking 2.0 approach.<sup>10</sup> At a minimum, it would seem that a more focused ANPRM and appropriate Rulemaking 2.0 approaches might be viable for major rulemakings (those anticipated to have more than \$100 million in economic impact) or those raising novel or difficult scientific or technical questions.

### III. The Continuing Challenge

Another important lesson from Professor Farina's work is that technology will continue to enable stakeholder access to the rulemaking process. It would appear that technology also has the capacity to influence the degree to which "situated knowledge" is obtained and, perhaps, reflected in rulemaking.

A new generation of smart-phone enabled environmental sensing technologies is emerging. In 2012, "Sensordrone" successfully obtained \$175,000 in start-up funds on Kickstarter, the web-based crowd-funding system.<sup>11</sup> Among other attributes, the Sensordrone measures ambient temperatures, VOC emissions, and CO<sub>2</sub> levels. "Livestrong" bracelets are now being used as passive environmental sampling devices.<sup>12</sup> Can we be far from the day when personal electronic devices measure emissions in real-time—say at the fence-line of a manufacturing facility—and influence the future direction of regulatory policy? The information so recorded may well be "situated knowledge," but what should regulators make of it?

The continuing challenge in regulation is not only who participates, but *what* information they are bringing to the discussion, and what *value* that information has. In the scientific arena, the weight-of-the-evidence concept emerged as a means to ensure that all relevant information is considered, but that some evidence is more relevant and reliable and should be given greater weight in a decision.<sup>13</sup> Professor Farina and her colleagues have once again made a valuable contribution in addressing who participates in the regulatory process but important questions still remain about whether and how that participation results in better rulemaking outcomes.

10. See Farina et al., *supra* note 1, at 151-53.

11. See Sensorcon, *Sensordrone: The 6th Sense of Your Smartphone... & Beyond!*, KICKSTARTER, <https://www.kickstarter.com/projects/453951341/sensordrone-the-6th-sense-of-your-smartphoneand-be> (last visited Mar. 20, 2014).

12. See Emily Levy, *A New Use for Your Livestrong Bracelet: Monitoring Pollutants*, VOACTIV (Mar. 4, 2013, 2:23 PM, updated Mar. 5, 2014, 3:04 PM), <http://www.vocativ.com/culture/health-culture/new-use-old-livestrong-bracelet-monitoring-pollutants>.

13. See, e.g., EUROPEAN CHEMICALS AGENCY, PRACTICAL GUIDE 2: HOW TO REPORT THE WEIGHT OF THE EVIDENCE 2 (2010) (defining the weight of the evidence as a "process of considering the strengths and weaknesses of various pieces of information in reaching and supporting a conclusion").