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### **The Internet and Citizen Participation in Rulemaking**

**Cary Coglianese**

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## The Internet and Citizen Participation in Rulemaking

Cary Coglianese\*  
Harvard University

Every year, unelected officials at government agencies such as the Federal Aviation Administration, the U.S. Department of Agriculture, and the Environmental Protection Agency create thousands of regulations that affect nearly every aspect of social and economic life.<sup>1</sup> Even though these agency officials each year produce about twenty times as many binding laws on society as Congress does,<sup>2</sup> the agency rulemaking process remains remarkably hidden from the view of the general public.<sup>3</sup> Since the insularity of the agency rulemaking process stands at odds with ordinary notions of democratic policymaking, many lawyers and policymakers look with hope to new digital technologies as a way of overcoming rulemaking's democratic deficit.

Just as the Internet has swept through global commerce and everyday life, it also promises to transform the rulemaking process by increasing transparency and enhancing

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\* Visiting Professor of Law, University of Pennsylvania and Chair, Regulatory Policy Program, John F. Kennedy School of Government, Harvard University. I am grateful for helpful comments I received on an earlier draft from Peter Shane, the anonymous reviewer for this journal, and participants in a conference on democracy and digital technology at the Yale Law School. Copyright © 2004 by Cary Coglianese. All rights reserved. Please address correspondence to the author at the Regulatory Policy Program, John F. Kennedy School of Government, Harvard University, Cambridge, Massachusetts 02138, [cary\\_coglianese@harvard.edu](mailto:cary_coglianese@harvard.edu). This paper is forthcoming in *I/S: Journal of Law and Policy for the Information Society* (2005).

<sup>1</sup> Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 354 (2004).

<sup>2</sup> *Id.* at 358 n. 18.

<sup>3</sup> See Cary Coglianese & Margaret Howard, *Getting the Message Out: Regulatory Policy and the Press*, 3 HARV. INTL. J. PRESS/POL. 39 (1998) (noting the limited coverage the media gives to rulemaking by government agencies).

opportunities for public participation.<sup>4</sup> Commentators have argued that the Internet will “change everything” about the dynamics of administrative rulemaking, “revolutionizing public participation” so that ordinary citizens “can play a more central role in the development of new agency policies and rules.”<sup>5</sup> Given how digital technologies have made communication easier in other areas of life, and given how few citizens currently participate in administrative rulemaking, such optimism is understandable.

Despite the allure of new information technologies, their application to the rulemaking process merits a realistic assessment, not just a hopeful embrace. As with any other proposal for institutional or policy change, policymakers should consider whether a particular application of e-rulemaking will help solve a significant public problem or achieve an important goal. Will e-rulemaking effectuate better or more responsive regulatory policymaking? Will it create undesirable consequences? Do the advantages of specific applications of e-rulemaking overcome their disadvantages?

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<sup>4</sup> See, e.g., Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L. REV. 1 (2004); Brandon H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening our Civic Infrastructure*, 54 ADMIN. L. REV. 1421 (2002); Stephen Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 ADMIN. L. REV. 277 (1998); HENRY H. PERRITT, JR., ELECTRONIC DOCKETS: USE OF INFORMATION TECHNOLOGY IN RULEMAKING AND ADJUDICATION, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (October 19, 1995). For additional material, see the Regulatory Policy Program’s e-rulemaking website at [www.e-rulemaking.org](http://www.e-rulemaking.org).

<sup>5</sup> Johnson, *supra* note 4, at 303, 336. The phrase “the Internet changes everything” was earlier made by former chairman of the Federal Communications Commission, Reed Hundt, in a much broader context. Reed Hundt, Speech at the INET ’96 Conference, Montreal, Canada (June 28, 1996), available at <http://www.fcc.gov/Speeches/Hundt/spreh629.txt>. On the dramatic changes the Internet may portend for government and policymaking, see also GRAEME BROWNING, ELECTRONIC DEMOCRACY: USING THE INTERNET TO INFLUENCE AMERICAN POLITICS 2 (1996) (arguing that by allowing citizens access to information and offering an easier means to communicate the Internet has the “potential to influence not only the course, but the very essence of national politics”); ELAINE CIULLA KAMARCK & JOSEPH S. NYE, JR., EDS., GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE (2002) (examining an array of potentially sweeping implications of the Internet for democratic governance); Brandon & Carlitz, *supra* note 4, at 1421 (“The Internet could fundamentally change how the American public participates in federal policymaking.”); Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 170 (2004) (arguing that “[a]dministrative law especially stands to be transformed by trends toward increased openness” created by e-rulemaking).

In some cases, the answers to these questions will properly lead to the adoption of new technologies. For many observers, e-rulemaking appears to be obviously desirable, if not even inevitable.<sup>6</sup> Yet in this article, I argue that there will be some cases where careful analysis will counsel against adopting new technologies. Some applications of technology to rulemaking are not likely to alter public participation or government decision making all that much, while others may prove to be undesirable even if they do help engage the public or make government decision making more transparent.

Policymakers and public managers should not let the enthusiasm for increased citizen participation and transparency distract them from realistically assessing the effects of different technologies on the public and government.<sup>7</sup> Decisions about whether and how to use information technology in the rulemaking process are policy choices, not purely technical decisions. In the end, it is even possible that some information technologies should be rejected precisely because they enable *too much* transparency or public involvement in administrative rulemaking.

In Part I of this article, I review the key avenues for public participation in the rulemaking process and show how few ordinary citizens currently participate in rulemaking. In Part II, I show how information technology is beginning to be applied with the aim of increasing citizen involvement in rulemaking and how that technology might be applied in the future in still more innovative ways to enhance public participation. In Part III, I argue that decisions about applying information technology to

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<sup>6</sup> Michael Tonsing, *Two Arms! Two Arms! E-Government is Coming!*, 51 FEDERAL LAWYER 18 (July 2004) (arguing that “it seems inevitable that much good will come of [e-rulemaking]”).

<sup>7</sup> See Frederick Schauer, *Talking as a Decision Procedure*, in STEPHEN MACEDO, ED., *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* 17-27 (1999) (urging a realistic assessment of deliberation that includes consideration of its drawbacks and obstacles); Renée Irvin & John Stansbury, *Citizen Participation in Decision Making: Is It Worth the Effort?*, 64 PUB. ADMIN. REV. 55, 63 (2004) (noting that “it behooves the administrator to consider the advantages and disadvantages of the decision-making process ... bearing in mind that talk is not cheap – and may not even be effective”).

rulemaking are policy choices that call for careful consideration of both the positive and negative impacts of e-rulemaking. I also elaborate on the specific kinds of effects that e-rulemaking may have on both public participation and government decision making. Although discerning the effects of e-rulemaking will require careful empirical study in the coming years, in Part IV I hypothesize about some of these effects and argue that the federal government's current e-rulemaking efforts are unlikely to result in any dramatic expansion of citizen participation in the rulemaking process.

### **I. Public Participation in the Rulemaking Process**

Technological enthusiasts' "rosy predictions"<sup>8</sup> about the positive impacts of e-rulemaking stem in part from the current low level of citizen participation in the regulatory process.<sup>9</sup> The way that government agencies issue regulations does not, at least at first glance, look like a robust democratic process. The key decision makers imposing government rules are not directly elected.<sup>10</sup> Instead, they are only indirectly accountable, having been appointed and confirmed by elected officials who are typically too busy to oversee all of what their appointees do. Moreover, even these appointees themselves rarely write the rules that their agencies issue, but instead delegate the drafting, analysis, and policy design to career civil servants. Key deliberation and decision making by career staff and political appointees takes place inside the agency, sometimes literally behind closed doors. The vast majority of agencies are headed by a

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<sup>8</sup> Johnson, *supra* note 4, at 303.

<sup>9</sup> *Id.* at 277 (noting that for many decisions made by regulatory agencies, "citizens are shut out of the decisionmaking process").

<sup>10</sup> CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 113 (3d ed. 2003) (noting that rulemaking "is conducted by persons with no direct electoral link to any constituency")

single administrator, so by definition there is nothing comparable to an open town hall meeting or representative debate immediately preceding final regulatory decisions in these agencies.

The Administrative Procedure Act (APA), which provides the legal framework for federal agency rulemaking, does require that agencies at a minimum provide the public with notice of proposed new rules by publishing them in the *Federal Register*.<sup>11</sup> They must also give “interested persons” an opportunity to comment on these proposed rules.<sup>12</sup> By its own terms, however, the APA imposes a rather weak requirement for public participation. It does not require government to engage in any open deliberation with the public or even to adhere to the views contained in any comments submitted by the public. Agencies are given discretion to decide how to allow the public to comment on proposed rules, though the most typical practice is for agencies to allow a defined period (usually of a couple of months) during which members of the public can submit written comments to the agency headquarters. The APA does require agencies to give “consideration” to the “relevant” material submitted by the public, but it does not require that they rely on any expressed views of the public as a basis for their decisions.<sup>13</sup>

In practice, of course, the rulemaking process has always been a much more permeable process than a bare-bones account of the APA requirements would suggest. Owing in part to a series of legislative and judicial developments requiring openness and access to information, and in even larger part to political and practical factors, agency officials routinely engage in dialogue with interested persons even outside of the APA’s

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<sup>11</sup> 5 U.S.C. § 553.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

public comment period.<sup>14</sup> Even in agencies headed by a single administrator, rulemaking often takes place in teams or work groups of staff from different offices within an agency.<sup>15</sup> It is commonplace for agency staff to meet with representatives from regulated industries, advocacy groups, and state and local government when they are developing new proposals for regulations.<sup>16</sup> Agencies also routinely hold workshops and public hearings and convene advisory committees or roundtable sessions before issuing new proposed regulations.<sup>17</sup>

Rather than being completely insulated from the political process, agencies find themselves embedded in a web of relationships with individuals and organizations from outside of government, as well as in repeated interaction with congressional representatives and presidential staff seeking to oversee and shape their decisions.<sup>18</sup> Furthermore, since agency regulations are always subject to repeal or revision by Congress, this provides another democratic check on decisions made by government administrators.<sup>19</sup>

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<sup>14</sup> Other legislation has required or permitted agencies to become more transparent and open to public input. Freedom of Information Act, 5 U.S.C. § 552; Government in Sunshine Act, 5 U.S.C. § 552b; Federal Advisory Committee Act, 5 U.S.C. App. 2; Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570. In addition, the judiciary has demanded that agencies base their policy decisions on reasons supported by an accessible administrative record. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>15</sup> See Thomas McGarity, *The Internal Structure of EPA Rulemaking*, 54 L. & CONTEMP. PROBS. 90 (1991).

<sup>16</sup> See, e.g., KERWIN, *supra* note 10, at 189 (3d ed. 2003) (noting the extensive and routine contact that takes place during the rulemaking process, often before a proposed rule is issued); *Home Box Office v. Federal Communications Commission*, 567 F. 2d 9, 57 (D.C. Cir. 1977) (describing “informal contacts between agencies and the public [as] the ‘bread and butter’ of the process of administration”).

<sup>17</sup> Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L. J. 386, 442 (2001) (noting the “individual meetings, public workshops, or formal advisory committees” used by agencies to solicit public input).

<sup>18</sup> See, e.g., PETER L. STRAUSS, WALTER GELLHORN, CLARK BYSE, & TODD D. RAKOFF, *ADMINISTRATIVE LAW* 50 (9<sup>th</sup> ed. 1995) (showing web of institutional interactions in the bureaucratic environment).

<sup>19</sup> The Congressional Review Act of 1996, 5 U.S.C. 801-808, now even permits Congress to consider the nullification of rules on a “fast track” basis. On the role of Congress in overseeing regulation, see generally KERWIN, *supra* note 10, at 213-24.

Notwithstanding the various avenues for holding regulatory agencies accountable, the fact remains that the “public” that participates in the rulemaking process is still a very narrow slice of the entire citizenry. Most citizens, indeed most voters, do not even know about agency rulemaking, let alone participate in it. In one study of more than 1,500 comments filed in about two dozen rulemaking proceedings at the U.S. Environmental Protection Agency, individual members of the public – ordinary citizens – were found to have submitted less than 6% of these comments.<sup>20</sup> In contrast, corporations and industry groups filed about 60% of the comments, and local, state, or federal government officials filed another approximately 25%.<sup>21</sup> Other studies confirm that, except for the rare rulemaking, citizens are the least frequent filers of comments in rulemaking.<sup>22</sup>

There are no available data on the proportion of the overall citizenry that files comments in rulemaking, but undoubtedly this is a very low number. According to a survey conducted in 2000 with about 1,000 randomly sampled adults, only about half of all Americans have reported visiting at least one federal agency’s website at least once.<sup>23</sup> According to another survey of randomly selected citizens conducted in the early 1990s, only eight percent of citizens report having made any “contact” with non-elected federal officials during the past year.<sup>24</sup> Of these contacts, however, 62 percent were specifically about “particularized concerns” that “pertain only to the respondents themselves or their

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<sup>20</sup> Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC’Y REV. 735 (1996).

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., Marissa Golden, *Interest Groups in the Rule-making Process: Who Participates? Which Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 252 (1998); ROSS CHEIT, *SETTING SAFETY STANDARDS: REGULATION IN THE PRIVATE AND PUBLIC SECTORS* (1990).

<sup>23</sup> Darrell M. West, *E-Government and the Transformation of Service Delivery and Citizen Attitudes*, 64 PUB. ADMIN. REV. 15, 22 (2004).

<sup>24</sup> SIDNEY VERBA, KAY LEHMAN SCHLOZMAN, & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 56 (1995).

immediate families,” such as benefits determinations or tax questions.<sup>25</sup> These survey data suggest that, as a generous upper bound, certainly no more than 3 percent of adults file comments on agency rulemakings; however, the actual percentage is undoubtedly much lower as the survey asked broadly about “contacts” rather than specifically about rulemaking comments. Furthermore, we know that survey responses about other forms of participation, such as voting, typically overstate actual levels of participation.<sup>26</sup>

It is exceedingly clear that the vast bulk of public participation in rulemaking is not coming from “the public” in the broadest sense of the term. Is this a serious problem? To gain some perspective on whether such low levels of citizen participation in rulemaking should be viewed as problematic, we should consider why participation in policymaking is valued. There are generally four main ways of characterizing the value of public participation.<sup>27</sup>

First, public participation can be viewed as a mechanism for expressing individual preferences that the regulatory agency then aggregates and uses as a basis for making its regulatory decisions. This can be thought of as *participation as voting*.

Second, public participation can be viewed as a process by which individuals engage in a deliberative process that aims toward the achievement of a rational consensus over the regulatory decision. This might be thought of as *participation as deliberation*.

Third, public participation can be viewed as intrinsically valuable for citizens themselves, for such participation fosters important personal virtues. This is *participation as citizenship*.

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<sup>25</sup> *Id.* at 57-58.

<sup>26</sup> *Id.* at 50 n. 2 (“As is always the case in surveys, ... reports of voting are exaggerated.”).

<sup>27</sup> For a cogent elaboration of the first three of these four perspectives, see John Elster, *The Market and the Forum: Three Varieties of Political Theory*, in JOHN ELSTER & AANUND HYLLAND, EDs., *FOUNDATIONS OF SOCIAL CHOICE THEORY* (1989).

Finally, public participation can be viewed as valuable because it helps provide government decision makers with additional information needed to make better decisions. The drafters of the Administrative Procedure Act appear to have had something like this in mind, advising agencies that when selecting among different ways of involving the public “[t]he objective should be to assure informed administrative action.”<sup>28</sup> This is *participation as information*.<sup>29</sup>

The low level of participation by ordinary citizens, especially relative to participation by industry groups, is problematic from any of these four perspectives. From the standpoint of participation as citizenship, low participation means few individuals are using rulemaking to cultivate or exhibit the virtues of citizenship. Low citizen participation can also mean that the preferences, ideas, and facts represented in the regulatory process will be limited or skewed. Whether from the vantage of participation as voting, deliberation, or information, the sheer lopsidedness of participation is problematic, since so many voices are heard from industry and so few from ordinary citizens.<sup>30</sup>

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<sup>28</sup> ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947). The Manual also states that the objective should be to ensure “adequate protection to private interests,” suggesting that another possible goal of public participation might simply be to check administrative abuse.

<sup>29</sup> See OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS (1993) [hereinafter IMPROVING REGULATORY SYSTEMS], available at <http://govinfo.library.unt.edu/npr/library/reports/reg04.html> (“Earlier and more interactive public participation ... provides information otherwise unavailable to the agency); KERWIN, *supra* note 10, at 159 (discussing how agencies acquire information through public participation in the rulemaking process); Cary Coglianese, Richard Zeckhauser, & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policy*, 89 MINN. L. REV. 277 (2004) (showing how regulators must act strategically to garner participation by industry in order to secure needed information).

<sup>30</sup> Mariano-Florentino Cuéllar, *Rethinking Public Engagement in the Administrative State* (2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=485063](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=485063).

## II. Technological Options for Increasing Citizen Participation

If we accept, for any of these reasons, that the low level of citizen participation in rulemaking is problematic, the next step is to search for ways of increasing participation. E-rulemaking's enthusiasts urge solutions that make use of the Internet, arguing that new information technologies will increase the ordinary citizen's knowledge of, access to, and involvement in rulemaking.<sup>31</sup> Of course, not all applications of information technology can be expected to have the same effects. Each application will deserve its own separate consideration, but we can distinguish between at least two broad sets of technological options for increasing citizen participation.<sup>32</sup> The first set includes options that digitize the current rulemaking process by making use of the Internet to post agency dockets on the web and allowing comments to be submitted by email. The second set of options include more innovative uses of technology that would most likely change the existing rulemaking process in significant ways. After describing these two sets of options in this Part, I will turn in the next Part to what policymakers should consider in deciding whether to adopt any of these options and how researchers can evaluate their impacts on participation and rulemaking.

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<sup>31</sup> See *supra* notes 5-6 and *infra* note 54 and accompanying text.

<sup>32</sup> For a similar distinction in types of e-government developments, see West, *supra* note 23, at 17, 21 (delineating four stages of e-government and concluding that "current usage [of information technology] has not produced dramatic changes or much evidence of the fourth stage of e-government – interactive democracy").

### A. Digitizing the Existing Process

In recent years a number of agencies have constructed websites containing rulemaking documents and have allowed citizens to submit comments electronically.<sup>33</sup> For example, the Department of Transportation stores all documents related to a rulemaking in an electronic docket that is accessible to everyone via the Internet.<sup>34</sup> In the 1990s, the U.S. Department of Agriculture allowed citizens to submit e-mail comments on a proposed regulation for the labeling of organic foods -- and subsequently the agency received more than 250,000 comments.<sup>35</sup> Other agencies have begun to establish chat rooms or other on-line dialogue venues in connection with specific regulatory initiatives.<sup>36</sup>

Congress has supported efforts to digitize agency rulemaking. In 2002, it adopted the E-Government Act,<sup>37</sup> which among other things creates a new Office of Electronic Government. Both Democratic and Republican Administrations have also embraced information technology's use in rulemaking. The Clinton Administration's National Performance Review urged regulatory agencies to use information technology to connect citizens more closely to government rulemaking.<sup>38</sup> The Bush Administration's e-government agenda specifically includes a plan to increase e-rulemaking efforts by

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<sup>33</sup> See Brandon & Carlitz, *supra* note 4. For a list of such agency websites, see [http://www.archives.gov/federal\\_register/public\\_participation/rulemaking\\_sites.html](http://www.archives.gov/federal_register/public_participation/rulemaking_sites.html)

<sup>34</sup> See U.S. Department of Transportation, Docket Management System, <http://dms.dot.gov/>.

<sup>35</sup> Stuart W. Shulman, *An Experiment in Digital Government at the United States National Organics Program*, 20 AGRI. & HUM. VAL. 253 (2003).

<sup>36</sup> See, e.g., Thomas C. Beierle, *Democracy On-Line: An Evaluation of the National Dialogue on Public Involvement in EPA Decisions, Resources for the Future Report* (Jan. 2002); Brandon & Carlitz, *supra* note 4, at 1431-33.

<sup>37</sup> P.L. No. 107-347

<sup>38</sup> IMPROVING REGULATORY SYSTEMS, *supra* note 29 (recommending that agencies explore the use of information technology in rulemaking to enhance public access to and participation in the regulatory process).

federal agencies.<sup>39</sup> As the first step in that plan, the Administration launched a government-wide portal, Regulations.gov, to help citizens locate and submit electronic comments on any proposed regulation by any agency.<sup>40</sup> The second step, currently underway, involves the creation of a government-wide on-line regulatory docket system.

Through these efforts, government is digitizing existing rulemaking practices. Government seeks to lower the costs to citizens of obtaining information about rulemaking and providing input into regulatory decision making. If current efforts succeed in achieving this goal, we should then expect to see an increase in the number, and perhaps quality, of comments filed by citizens in agency rulemaking proceedings.

#### B. New Uses of Digital Technologies

In addition to current efforts to digitize existing practices, information technology could be used in the future to transform the rulemaking process or add new features to it that more fully exploit developments in information technology.<sup>41</sup> Over time, advances in technology can be expected to give rise to proposals to change current administrative procedures in order to affect the public's access to and involvement in rulemaking. The following four examples represent reasonably feasible proposals that might very well loom on the not-so-distant horizon.

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<sup>39</sup> Office of Management and Budget, OMB Outlines New Federal E-Government Strategy (Oct. 25, 2001), *available at* <http://www.whitehouse.gov/omb/pubpress/2001-54.html>; Office of Management and Budget, OMB Accelerates Effort to Open Federal Regulatory Process to Citizens and Small Businesses (May 6, 2002), *available at* [http://www.ksg.harvard.edu/cbg/Conferences/rpp\\_rulemaking/OMB\\_Opens\\_Reg\\_Process.pdf](http://www.ksg.harvard.edu/cbg/Conferences/rpp_rulemaking/OMB_Opens_Reg_Process.pdf).

<sup>40</sup> For further information about Regulations.Gov, see Cindy Skrzycki, *US Opens Online Portal to Rulemaking*, WASH. POST (January 23, 2003), p. E01; Rick Otis, e-Rulemaking, presentation at conference at Harvard University (January 22, 2003), *available at* [http://www.ksg.harvard.edu/cbg/Conferences/rpp\\_rulemaking/Otis\\_Presentation.pdf](http://www.ksg.harvard.edu/cbg/Conferences/rpp_rulemaking/Otis_Presentation.pdf); Oscar Morales, eRulemaking Initiative: State of the Initiative, presentation at conference at American University (January 8, 2004), *available at* <http://www.american.edu/academics/provost/rulemaking/morales.htm>; Noveck, *supra* note 4; U.S. General Accounting Office, Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved, GAO-03-901 (September 17, 2003), *available at* [http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers\\_reports/GAO%20Report%209.17.03.pdf](http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers_reports/GAO%20Report%209.17.03.pdf)

<sup>41</sup> Coglianesi, *supra* note 1, at 363-71.

1. *Regulatory Polling.* Agencies' current approach to public participation is largely reactive, with regulators issuing proposals and waiting for members of the public to submit comments on them. With the diffusion of Internet access throughout society, it will become easier for agencies to be more proactive and reach out to solicit public comment. One proactive approach would be to conduct opinion polling in connection with proposed regulations. In some cases, agencies already engage in survey research when they conduct contingent valuation studies that seek to determine how to monetize various non-market values. Contingent valuation studies typically ask a random sample of the public questions about how much they would pay for incremental reductions in risks or amenities (such as how much is it worth to them to preserve a pristine wilderness or protect the visibility of the Grand Canyon).<sup>42</sup> Such studies have their limitations, one practical one being the current expense of administering surveys.<sup>43</sup> Yet to the extent that on-line technologies make polling less costly to administer in the future, regulatory agencies may well consider using such polling on a more widespread basis.

2. *Commenting via Simulation.* Advances in information technology make it more feasible for agencies not only to direct polling questions to members of the public, but also to provide greater guidance and structure when seeking public feedback. Using something akin to what Keith Belton has termed an "on-line calculator" (or in a more sophisticated version, something akin to a SimCity<sup>®</sup> game), regulatory agencies could provide public access to simulation software based on the agency's modeling and

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<sup>42</sup> For discussions of contingent valuation research, see Richard T. Carson, Nicholas E. Flores, & Norman F. Meade, *Contingent Valuation: Controversies and Evidence*, 19 ENVTL. RES. ECON. 173 (2001); James K. Hammitt, *Valuing Mortality Risk: Theory and Practice*, 34 ENVTL. SCI. & TECH. 1396, 1398 (2000); W. Michael Hanemann, *Valuing the Environment through Contingent Valuation*, 8 J. ECON. PERSP. 19 (1994); Maureen L. Cropper & Wallace E. Oates, *Environmental Economics: A Survey*, 30 J. ECON. LIT. 675, 700-21 (1992).

<sup>43</sup> Another obstacle, of course, is securing approval for such surveys under the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520.

assumptions.<sup>44</sup> Members of the public could modify parameters in the agency's model (such as the stringency of the regulatory standard, frequency of risks, and so forth) and then run different simulations to see what outcomes could be expected to result in terms of the benefits and costs of the regulation. Such an approach may enable regulatory agencies to capture more deliberate public opinion about key tradeoffs the agency faces in crafting a new regulation.

3. *Virtual "Juries."* Another option would be to use information technology to convene regulatory "juries." Digital technology could be used to replicate the kind of face-to-face deliberation in traditional juries.<sup>45</sup> Through such juries, agencies could charge randomly selected groups of citizens with making the core value judgments implicit in regulatory decision making. For example, when setting new air quality standards, an environmental agency needs to make tradeoffs between marginal increases in health benefits and the corresponding costs of complying with the new standards. The environmental agency implicitly faces a value choice of how much human lives saved or asthma cases avoided are worth. At present, regulatory officials make these decisions based on their own analysis and judgment, sometimes without even acknowledging that they are making such choices.<sup>46</sup> With the aid of information technology, agencies could make these decisions more openly by facilitating a process of that could lead to a "verdict" by a random group of citizens. These regulatory juries may well still not make the ultimate regulatory decision, but they could provide agencies with a basis for key assumptions and value choices by answering a series of specific interrogatories. Since

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<sup>44</sup> Keith B. Belston, *What if Everyone were a Policy Analyst?*, 23 REGN. 8 (Fall 2000).

<sup>45</sup> Another face-to-face parallel is the process of deliberative polling. See JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995).

<sup>46</sup> See Cary Coglianese & Gary Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PENN. L. REV. 1255 (2004); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

most federal regulatory agencies are headquartered in Washington, D.C., information technology could be used to connect citizens from across the country and perhaps even allow them flexibility to participate in deliberations while fitting their “jury duty” around work schedules. Agencies could communicate via digital technology to educate members of the jury on relevant technical issues and present competing arguments that can form the basis for deliberation. Chat rooms could then provide a forum for virtual deliberations by these regulatory juries.

4. *Enhanced Digital Transparency.* In addition to facilitating on-line deliberation, digital technology will make it easier to store agency communication and information in ways that make it easily accessible to the public. Already, the Bush Administration is working to create a government-wide system for on-line regulatory dockets that contain all documents that form the basis for new regulations.<sup>47</sup> However, using digital technology, it will be increasingly feasible to take still further steps to make the rulemaking process even more transparent. Consider two possibilities:

- James O’Reilly has recently proposed that agencies should make available the internal drafts of an agency’s new regulations, i.e., those drafts that were presented to a political appointee at the agency but then were later modified before the rule became final.<sup>48</sup> He argues that disclosure of earlier drafts would help those who need to interpret agency regulations, offering clues about why a final rule reads as it does, much as legislative history may help with statutory interpretation. One could imagine that agencies will be able easily to provide a

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<sup>47</sup> Coglianese, *supra* note 1, at 364-65.

<sup>48</sup> James T. O’Reilly, *Let’s Abandon Regulatory Creationism: The Case for Access to Draft Agency Rules*, 28 ADMIN. & REG. L. NEWS 4 (2003).

clear history of its rulemaking drafting, utilizing a feature such as the “track changes” function on Microsoft Word<sup>®</sup>.

- After an agency has issued a proposed rule and before it issues its final rule, secret communications between government officials and those outside of government have been generally viewed with suspicion. In the well-known *Home Box Office*<sup>49</sup> decision, the D.C. Circuit Court of Appeals criticized the Federal Communications Commission and its members for holding secret conversations with industry officials, holding that when such ex parte communications take place following the publication of a proposed rule agency officials must place a summary of the conversation in the agency docket.

Although the *HBO* holding has been narrowed if not repudiated by subsequent courts,<sup>50</sup> many agencies have still adopted internal practices that discourage ex parte communications and require summaries of such communications in their regulatory dockets.<sup>51</sup> Summarizing conversations has seemed a reasonable strategy, but advances in digital technology now make it feasible for agency staff to go further by creating digital recordings of their ex parte communications (whether in person or on the telephone) and loading digital audio files of these recordings onto the agency’s on-line docket. Imagine clicking a link on the Department of Labor website and downloading a RealPlayer<sup>®</sup> file to hear a

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<sup>49</sup> *Home Box Office*, 564 F.2d at 458.

<sup>50</sup> *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981) (declining to apply ex parte requirement in *Home Box Office* to OSHA notice-and-comment rulemaking); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (declining to follow *Home Box Office* requirement in EPA notice-and-comment rulemaking).

<sup>51</sup> PETER L. STRAUSS ET AL., *ADMINISTRATIVE LAW: CASES AND COMMENTS* 1056 (9th ed. 1995) (noting that “the general approach of *HBO* has been widely adopted, without legislative or judicial enforcement, by agency rulemakers”); Ashley C. Brown, *The Duty of Regulators to Have Ex Parte Communications*, 15 ELECT. J. 10 (2002) (discussing constraints that regulatory agencies have imposed on themselves with respect to ex parte communications).

conversation that took place, say, between the OSHA Administrator and the head of the National Association of Manufacturers over a key decision in a new worker safety regulation. Although no agency has yet to go to this length, this type of total transparency is now a technological possibility.

These four ideas – (1) simulations, (2) polling, (3) juries, and (4) digitization of drafts and ex parte communications – provide an indication of the range of innovations that could be introduced by agencies in the future.<sup>52</sup> As Jeff Lubbers has written, new information technologies could make possible “nothing less than . . . a transformation of the rulemaking process as a whole.”<sup>53</sup>

### **III. Tracking E-Rulemaking’s Effects**

We have seen that digital technologies open up new, even potentially dramatic, possibilities for informing the public and involving citizens in the rulemaking process. For those who are accustomed to shopping or banking on-line, allowing citizens to participate in rulemaking on-line may well seem an obvious if not desirable choice.<sup>54</sup> No matter how obvious, any decision about the design of the rulemaking process is itself a policy choice.<sup>55</sup> As a result, decisions about options ranging from on-line dockets to regulatory juries merit careful consideration. Just as some have suggested that the

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<sup>52</sup> Even more dramatic, less centralized processes of regulation could be contemplated in the future. Joseph S. Nye, Jr., *Information Technology and Democratic Governance*, in ELAINE CIULLA KAMARCK & JOSEPH S. NYE, JR., EDS., GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE 9 (2002).

<sup>53</sup> Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda*, Regulatory Policy Program Working Paper No. RPP-2002-4 (2002), available at <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-04.pdf>.

<sup>54</sup> Tonsing, *supra* note 6.

<sup>55</sup> The positive political economy literature has taught us well how structural or procedural design can have important policy ramifications. See, e.g., Terry Moe, *The Politics of Bureaucratic Structure*, in JOHN CHUBB & PAUL PETERSON, EDS., CAN THE GOVERNMENT GOVERN? (1989).

Internet might contribute to the fragmentation of civic life even as it expands information,<sup>56</sup> information technology in the rulemaking process might also create, in varying degrees, both negative effects as well as positive ones.

Before deciding to adopt new technologies, whether to digitize the existing process or transform it, policymakers and public managers will do well to consider carefully the effects of different technological options on the rulemaking process.<sup>57</sup> Will citizen participation increase? Will the relevant goals of participation be furthered? Will there be any offsetting consequences that arise? In general, we can conceive of two main categories of effects that policymakers should consider and researchers should study: (1) effects on public participation, and (2) effects on government officials and their decision making.

#### A. Effects on Public Participation

Effects on members of the public could occur along any number of potential dimensions. As such, policy analysis should go beyond general claims that a new application of information technology will “improve public participation” and instead will consider concrete changes that might be induced. Some of the specific types of potential change include:

- *Mobilization.* Do more people get involved in the rulemaking process?
- *Distribution.* Is there any change in the kinds of people who participate?

E-rulemaking efforts might well increase the total number of participants

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<sup>56</sup> See, e.g., CASS SUNSTEIN, REPUBLIC.COM (2001).

<sup>57</sup> For a related discussion in connection with other reforms to the administrative process, see Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111 (2002).

in the rulemaking process, but the distribution across types of participants, e.g., corporations versus ordinary citizens, could still remain the same.

- *Frequency.* Do specific individuals and organizations participate more frequently? If participation increases overall, how much is due to an increased number of participants versus an increase in the frequency of participation by the same participants?
- *Knowledge.* Is learning enhanced or inhibited? Do people get exposed to new or contrary views?
- *Tone.* Does the tone, style, emphasis, or sophistication of expression change?
- *Ideas.* Do the ideas generated by the public, or the views that they express, change? Are views arrayed differently along the ideological spectrum? Do they convey new or better information? Are the ideas more complex or simpler?
- *Conflict.* Are conflicts mitigated or exacerbated? Which kinds of issues seem to generate reduced or heightened conflict?
- *Perceptions.* How do people feel about their participation and their engagement with others in the rulemaking process? Do they view the government any differently (such as with different levels of perceived trust, legitimacy, or approval)?

- *Spillovers.* Are there any effects that spill over into other policy forums or into other aspects of politics? Does the process tend to polarize the public?
- *Organization.* How, if at all, do the roles of political organizations like trade associations, unions, or public advocacy groups change? Does easier and more direct access to the rulemaking process diminish the value of “gatekeeper” organizations? Will such groups adapt to fill different roles?

With such an array of possible effects on those outside of government, it will be important to specify precisely what effects are desired when using e-rulemaking to improve public participation.

#### B. Effects on Government Decision Making

Effects on government decision making will also be arrayed along a number of dimensions. Some of the specific changes to government agencies that e-rulemaking might induce include:

- *Time.* Does the process take more or less time from the beginning to the time the agency issues its final rule?
- *Cost.* Does the process demand more staff time and analysis? Greater participation seems likely to increase the time for listening, reading, and responding to public input.<sup>58</sup>
- *Response.* How do government officials respond to public input? Do they view it as constructive or as a burden? Do they become more focused on

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<sup>58</sup> See, e.g., Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997).

responding to those who participate than on fulfilling their statutory mandate or serving the interests of the broader public?

- *Role.* Do government officials perceive their role as a decision maker any differently? Does e-rulemaking diminish or alter their perceived role as expert decision makers?
- *Agency Deliberation.* Will changes that make government processes more transparent make it easier or more difficult for officials or staff to deliberate among themselves? To contact experts for advice? To obtain adverse information from industry?
- *Outcomes.* Are decisions improved? Are behaviors changed and conditions in the world improved relative to the status quo?

As long as regulatory officials remain the ultimate decision makers when it comes to setting regulatory policy, the impact of technology on their decision making will also remain one of the ultimate tests for e-rulemaking.<sup>59</sup>

#### **IV. Will E-Rulemaking Really Work. . . and Would that Necessarily be a Good Thing?**

Different e-rulemaking proposals will result in varied effects along the numerous dimensions just enumerated. This is why it will be important to specify the goals of e-rulemaking clearly and monitor the effects of different technological options in terms of these goals. If the goal is to increase the level of participation so that more citizens will

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<sup>59</sup> See Coglianesse, *supra* note 1, at 386 (noting that the ultimate test for e-rulemaking will be whether it makes any improvement to government regulation).

practice civic virtues, rather than to increase the quality of deliberation or policy decisions, then decision makers can properly focus on the volume and frequency of participation. Yet if the goal is to improve the quality of deliberation or provide better information, then more participation is not necessarily better.<sup>60</sup> Generating more comments that say little will not add much new information. Furthermore, if the goal combines multiple objectives, then policymakers should take various different kinds of effects into consideration, recognizing that the pursuit of one objective may sometimes come at the expense of others.<sup>61</sup>

Of course, discerning the actual effects of e-rulemaking will require careful empirical evaluation undertaken after agencies have decided to use new technologies in the rulemaking process. Although any verdict on e-rulemaking must therefore await further study made after the passage of additional time, at this point it is possible to offer some hypotheses about the likely effects of the two types of e-rulemaking efforts discussed in Part II. In brief, contrary to stated presidential and congressional goals, current efforts to digitize the existing rulemaking process will be unlikely to lead to any dramatic overall increase in citizen participation in rulemaking. Some of the more innovative and transformational ideas discussed in Part II will stand a greater chance of significantly enhancing citizen voices in the rulemaking process. However, these more dramatic changes to the rulemaking process may well have other, less desirable effects on rulemaking and therefore will raise the question of whether increased citizen participation is desirable.

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<sup>60</sup> A recent study by Bill West, for example, showed that public comments filed in rulemaking proceedings actually contribute relatively little new information. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 71-72 (2004).

<sup>61</sup> See Coglianese, *supra* note 1, at 378-80 (discussing tradeoffs between different goals for e-rulemaking).

Current efforts to digitize the rulemaking process are supposed to increase participation by making it easier for ordinary citizens to access information about policy proposals and communicate their ideas to government officials.<sup>62</sup> Congress' stated aim in passing the E-Government Act was "to promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government."<sup>63</sup> In describing his administration's e-government initiative, President George W. Bush announced that "our goal is to make your government more accessible to all Americans."<sup>64</sup> In developing both Regulations.Gov and the new online docket system, the Bush Administration's key priority has been to "mak[e] it easier for citizens and businesses to participate in the regulatory process."<sup>65</sup>

Although current efforts will almost certainly make it easier at the margin for the ordinary citizen to monitor and participate in rulemaking, these efforts are unlikely to decrease the costs of participation sufficiently to generate substantial changes in the median or modal level of citizen participation in rulemaking. Admittedly, electronic communication does make it easier for a large number of citizens to submit comments on highly salient rules,<sup>66</sup> but citizen voices will likely remain sparse in the overwhelming

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<sup>62</sup> See *supra* Part II.A.

<sup>63</sup> P.L. No. 107-347.

<sup>64</sup> President George W. Bush, Letter from the President on the Launch of the New FirstGov Web Site (March 14, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020314.html>.

<sup>65</sup> Mitchell E. Daniels, Jr., Memorandum for the Heads of Executive Departments and Agencies on Redundant Information Systems Relating to On-Line Rulemaking Initiative, May 3, 2002. See also eRulemaking Fact Sheet: The President's E-Government Initiative (describing the "ultimate goal" of e-rulemaking in terms of "allow[ing] the public to access and search all publicly available regulatory material [and] provid[ing] an easy and consistent way for the public to search, view and comment on proposed rules"); Kimberly T. Nelson, Assistant Administrator and Chief Information Officer for the U.S. Environmental Protection Agency, Testimony before the Committee on Government Reform (March 24, 2004) ("The eRulemaking Initiative will help overcome barriers to public participation in the federal regulatory process by improving the public's ability to find, view, understand, and comment on regulatory actions.").

<sup>66</sup> A very select number of rules in the past have generated tens of thousands of comments, sometimes facilitated in part by the use of electronic communication. See, e.g., Shulman, *supra* note 35 (describing

majority of agency rulemakings. It was not surprising that, in the first several months after the Bush Administration launched Regulations.Gov, only about 200 comments had been submitted through this otherwise highly publicized web portal.<sup>67</sup> Only about 8 of EPA's approximately 30,000 public comments submitted during this same time period, and 21 of DOT's 18,000 comments, came in through Regulations.Gov.<sup>68</sup>

To be sure, over time more people should become aware of Regulations.Gov and we can expect some more comments to be submitted through it. Nevertheless, even after both Regulations.Gov and the new government-wide docketing system are fully on-line, the core obstacles that keep citizens from participating in rulemaking will still remain. It takes knowledge and effort to participate in rulemaking. Even with the Internet, it still takes time to file a comment. Yet we know that many citizens do not even take the time to participate in a still more common and familiar process: voting. Engagement in elections, the most visible form of political participation, has declined since 1960.<sup>69</sup> In

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high volume of comments in USDA's organics rulemaking); KERWIN, *supra* note 10, at 194 (describing high volume of comments in BLM rangelands rule).

<sup>67</sup> U.S. General Accounting Office, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved* 23 (September 17, 2003) (GAO-03-901).

<sup>68</sup> *Id.* at 23-24.

<sup>69</sup> Voter interest and involvement in elections has been widely thought to have declined over the past four decades. See Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in the United States*, 76 AMER. POL. SCI. REV. 502 (1982); R. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* (1992); THOMAS E. PATTERSON, *THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY* (2002). But see Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AMER. POL. SCI. REV. 963 (2001) (finding a less substantial decline in turnout since 1960 after re-calculating the voting-eligible population to exclude felons and noncitizens but also to include overseas citizens). There is mixed evidence about trends in citizen contacts with public officials. Compare STEVEN J. ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* (1993) (reporting a decrease in the percentage of citizens writing members of Congress) with VERBA, SCHLOZMAN & BRADY, *supra* note 24, at 72-73 (reporting that citizens' communication with state and national officials over public policy issues increased from 11% to 22% between 1967 and 1987).

2000, only slightly more than half of the voting age public cast ballots in the presidential election<sup>70</sup> -- a voting rate lower than in other developed countries.<sup>71</sup>

To participate in rulemaking, citizens need to understand the rudiments of the rulemaking process, if only to know that agencies issue proposed rules and open themselves up to receive public comments for a designated period of time.<sup>72</sup> Citizens need to be able to understand what the agency is proposing and must be able to have some understanding of the underlying policy issues involved in the rulemaking. The issues in most rulemakings, though, are technical and complex, which is largely why Congress has delegated such decisions to regulatory agencies. However, according to the latest findings from the U.S. Department of Education, about 90 million adults (or over half of all adults in the U.S.) “experience considerable difficulty in performing tasks that require them to integrate or synthesize information from complex or lengthy texts.”<sup>73</sup> While agencies should certainly strive to display information clearly and in easy-to-read formats, simply digitizing existing paper records will not by itself make the rulemaking process much more accessible for most ordinary citizens.

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<sup>70</sup> Federal Election Commission, Voter Registration and Turnout 2000, *available at* <http://www.fec.gov/pages/2000turnout/reg&to00.htm>. Only slightly more than two-thirds of registered voters actually voted. *Id.*

<sup>71</sup> VERBA, SCHLOZMAN, & BRADY, *supra* note 24, at 69-70 (noting that “the United States lags far behind other democracies when it comes to voting turnout”). For other studies of voting levels, see RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* (1980); G. B. Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AMER. POL. SCI. REV. 17 (1986); LAWRENCE LEDUC, RICHARD NIEMI & PIPPA NORRIS, EDS., *COMPARING DEMOCRACIES 2: ELECTIONS AND VOTING IN GLOBAL PERSPECTIVE* (2002).

<sup>72</sup> As one participant in a recent e-rulemaking focus group noted, it is “insufficient simply to post information on the Web, since the rulemaking process and its imperatives [are] unfamiliar to many citizens.” Stuart Shulman, *The Internet Still Might (but Probably Won’t) Change Everything: Stakeholder Views on the Future of Electronic Rulemaking* 31 (2004), *available at* [http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking\\_final.pdf](http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking_final.pdf)

<sup>73</sup> Irwin S. Kirsch et al., *Adult Literacy in America: A First Look at the Findings of the National Adult Literacy Survey* (3d ed. April 2002), *available at* <http://nces.ed.gov/pubs93/93275.pdf>.

Even for those citizens with sufficient skill to process information about rulemaking, it takes time to learn about what agencies are doing or proposing to do. Citizens either need to be already well-informed about regulatory agencies' work or must actively monitor or research what agencies are doing. Contrast this with what it takes for a citizen to vote in a presidential election. Presidential campaigns spend millions of dollars actively seeking out voters through political advertising. The media gives extensive coverage to elections too. Citizens simply need to know where to vote and how to cast their ballot -- and political campaigns also spend large amounts of time and money to address these needs and get voters to the polls. In contrast with voting, rulemaking requires that citizens do some investigating on their own in order to participate. It is difficult to see many citizens going to much effort to learn about rulemaking. On the contrary, it seems Americans are tuning out news in general -- let alone paying a lot of attention to the relatively few specialized media stories about administrative agencies.<sup>74</sup>

Even those individuals who have the capacity or incentive to follow what agencies do, often fail to get involved in rulemaking. In 2003, Peter Strauss surveyed members of the American Bar Association's Section on Administrative Law and

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<sup>74</sup> S.E. Bennett, S.L. Rhine, & R.S. Flickinger, *The Things They Cared About: Change and Continuity in Americans' Attention to Different News Stories, 1989–2002*, 9 HARV. INTL. J. PRESS/POL. 75 (2004). Coverage of regulatory policymaking by mainstream media outlets has tended to be relatively sparse. Jeffrey R. Smith, *Covering the EPA, or, Wake Me Up if Anything Happens*, COLUM. JOURNALISM REV. 29 (Sept./Oct. 1983); John Gravois & Walt Potter, *How the Press Misses the Beat*, WASH. JOURNALISM REV. 29 (Jan/Feb 1982); Jules Witcover, *Washington's Uncovered Power Centers*, COLUM. JOURNALISM REV. 14 (Mar/Apr 1972). Media scholars explain the inattention to regulatory issues by pointing to the complexity of regulatory issues and the need to spend "endless hours in musty archives." STEPHEN HESS, *THE WASHINGTON REPORTERS* 52 (1981). See also Coglianesse & Howard, *supra* note 3 (discussing the difficulties journalists face in covering the regulatory beat). One effect of e-rulemaking will be to make it easier for journalists to cover rulemaking, so it is possible that e-rulemaking will lead to more extensive media coverage of rulemaking issues. Of course, even if it does have this effect, if Americans continue to exhibit declining attention to the news, increased media attention may still matter relatively little in activating broad citizen participation in rulemaking.

Regulatory Practice.<sup>75</sup> He found that 55 percent of the 320 lawyers who responded had not filed any comments in rulemaking proceedings in the past three years.<sup>76</sup> If the majority of the most relevant legal specialists do not file comments in rulemakings, we probably should not expect to see a large proportion of ordinary citizens filing comments, even with a more digitized and accessible rulemaking process.

To ensure citizens' voices play a much more significant role in most rulemakings, policymakers will probably need to turn to more innovative and transformational uses of information technology than those currently being implemented. Some of the new uses of technology discussed in Part II would likely fare better than existing proposals in enhancing citizen involvement. This is because, even when digitized, the existing notice and comment framework takes a reactive approach to public participation. Agencies that wait for comments to come in from citizens will not receive many. On the other hand, technology-aided processes like regulatory juries or simulations are more likely to make a difference because they reach out to citizens, educate them about the relevant regulatory issues, and proactively solicit their input.<sup>77</sup>

In addition, technologies used in novel ways to bring more transparency to rulemaking – such as through digitized recordings of *ex parte* communications – will likely have more substantial effects than existing efforts. Even if relatively few citizens follow or participate in rulemaking, public officials who know that everyone can easily see and hear everything they do will almost certainly act differently than they do now. On an optimistic view, such technologically induced transparency might lead political

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<sup>75</sup> Peter L. Strauss, *The ABA Ad Law Section's E Rulemaking Survey*, ADMIN. & REG. L. NEWS (Spring 2004), available at [http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers\\_reports/Strauss\\_Erulemaking\\_Survey.pdf](http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers_reports/Strauss_Erulemaking_Survey.pdf).

<sup>76</sup> *Id.*

<sup>77</sup> For an elaboration of one such idea, see Cuéllar, *supra* note 30.

appointees and career public servants to make decisions that better serve the broad public interest over special private interests.

Yet we need not be too optimistic about even these more innovative uses of information technology. Total transparency may well make government officials more circumspect, but it could also make them excessively risk averse. Furthermore, total transparency will almost certainly inhibit regulators' ability to gather necessary information and test out new ideas, to the detriment of developing sound public policy.<sup>78</sup>

Greater participation through more innovative forms of e-rulemaking may well mean that, as Daniel Esty has written, “[p]eople with good ideas -- even those who never get to Washington or their state capitals -- ... have a chance to shape policy outcomes.”<sup>79</sup> But if so, it would also mean that those with less accurate or helpful ideas would have a chance to shape those outcomes. Greatly expanding participation could very well exacerbate cognitive cascades and tendencies toward groupthink that can afflict policy deliberations.<sup>80</sup>

There is also the risk that systematic and substantial increases in citizen comments would shift regulators attention away from selecting the policy option that best fulfills their statutory mandate or the public interest, and instead lead regulators to strive to satisfy the views expressed by those who file comments.<sup>81</sup> Moving closer to making

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<sup>78</sup> For the argument that total transparency would severely constrain government regulators ability to make well-informed decisions, see Coglianese, Zeckhauser, & Parson, *supra* note 29.

<sup>79</sup> Esty, *supra* note 5, at 170.

<sup>80</sup> See Cass R. Sunstein, Group Judgments: Deliberation, Statistical Means, and Information Markets (2004) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=578301](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578301).

<sup>81</sup> For discussion of the role of citizen satisfaction in policymaking, see Derek Bok, *Measuring the Performance of Government*, in JOSEPH S. NYE, JR., PHILIP D. ZELIKOW, & DAVID C. KING, EDS., WHY PEOPLE DON'T TRUST GOVERNMENT 56 (1997); Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policy Making*, in ROSEMARY O'LEARY & LISA BINGHAM, EDS., EVALUATING ENVIRONMENTAL AND PUBLIC POLICY CONFLICT RESOLUTION PROGRAMS AND POLICIES 69 (2003).

rules by plebiscite risks giving undue prominence to expedient or even erroneous considerations. As Peter Strauss has noted, “it is not hard to imagine manipulative campaigns exploiting the tools of spam to proliferate comments dramatically.”<sup>82</sup>

Efforts to increase citizen participation through e-rulemaking will need to tread carefully so that those judgments that regulatory agencies are charged with making based on scientific or technical expertise do not become displaced by decision making by plebiscite. On the other hand, when policy decisions require making value judgments that have not been predetermined by an underlying statute, as they not infrequently do, then citizens’ preferences can provide a reasonable basis for making these value choices.<sup>83</sup> In such cases, technology could very well help by making it easier for regulators to estimate social preferences using Internet surveys of large, representative samples of the public.

If structured well, then, e-rulemaking might help enhance the democratic legitimacy of administrative rulemaking. However, to structure e-rulemaking well requires explicit analysis of how well different technological applications will solve specific problems or advance concrete goals relative to other options (including the status quo).<sup>84</sup> Simply because new types of information technology *can* make possible new forms of public participation or new administrative procedures, this does not necessarily mean that we ought to deploy all of these technologies. Some uses of e-rulemaking may

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<sup>82</sup> Strauss, *supra* note 75.

<sup>83</sup> For example, an environmental agency’s experts may identify health effects associated with exposure from varying levels of air pollutants, but scientific evidence of these health effects cannot determine at what level an air quality standard should be set. Setting such a regulatory standard would call for making a value judgment about how much risk to human health is acceptable and how much costs should be tolerated in achieving a given level of health protection. See Coglianese & Marchant, *supra* note 46.

<sup>84</sup> See Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 407 (1990) (noting that “evaluation of regulatory controls and legal doctrine must depend in large part on their effects in the world”).

turn out not to fare much better than the status quo. Other uses of technology, though, may well increase citizen participation, in which case policymakers will need to consider whether other, less desirable consequences could also arise from that increased participation. The future challenge for e-rulemaking mirrors what has been the fundamental challenge running throughout administrative law: how to design procedures and institutions that strike an appropriate balance between law, democratic politics, and expert judgment.<sup>85</sup>

### **Conclusion**

Recent advances in information technology have led many observers to predict that the Internet will lead citizen voices to be heard more loudly in the government conference rooms and offices where regulatory decisions are made. Digital technologies do make feasible new agency practices that can make the rulemaking process more accessible to those who seek to follow and participate in it. They also promise new opportunities for citizens to communicate and interact with government officials, and they raise possibilities for transforming existing rulemaking procedures so as to involve the public in still more central ways.

As attractive as some applications of digital technology undoubtedly seem, designers of regulatory processes should keep in mind the credo of designers and engineers everywhere: Decisions should be based on an evaluation of how well each available option fares in terms of relevant goals, constraints, and effects. New procedures

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<sup>85</sup> See CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990).

made possible by information technologies deserve consideration, but this newness itself merits neither optimism nor skepticism. Instead it calls for careful, dispassionate analysis.

Finally, whenever government officials do decide to add new technologies to the rulemaking process, they should ensure opportunities to collect data and learn more about the kinds of effects these technologies have on citizens and policymakers. To learn from e-rulemaking, we will need more empirical research investigating what difference, if any, information technology makes both in citizen behavior and in how government agencies develop rules.