
Deliberation in E-Rulemaking? The Problem of Mass Participation

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1 Introduction

The United States federal government has, over the past decade, facilitated the electronic submission of citizen comments during federal regulatory rulemaking comment periods.¹ In response, citizens of many stripes, but particularly environmentalists, are taking advantage of newly developed Web-based tools for generating large numbers of public comments. The confluence of these two trends has altered the rulemaking environment. Government agencies take comments on rules via their websites. Mass-mailed postcards initiated by interest groups, familiar from past activism, have been modestly enhanced as customizable e-form letters.² This type of Internet-enabled participation will likely become the dominant form of mass political communication between average citizens and decision makers in controversial rulemakings.

¹ The federal eRulemaking Initiative (<http://www.regulations.gov/eRuleMaking.cfm>, last accessed November 20, 2008) is one of twenty-four e-Government efforts at the federal level (<http://www.whitehouse.gov/omb/egov/>, last accessed November 20, 2008). On the progress of the President's Management Agenda to date, see GAO 2004.

² This strategy is often initiated by expensive for-profit intermediaries. See <http://www.getactive.com/> or <http://capitoladvantage.com/> (both last accessed November 20, 2008) for examples of firms that sell e-advocacy services.

As a result of these and other trends, a growing research community is looking closely at electronic rulemaking as a possible area for online political deliberation.³ This fledgling interdisciplinary research is generally long on theory, hopes, and predictions while too often short on empirical data. In this chapter, we discuss an attempt to collect such data, a survey of 1553 participants in regulatory public comment processes.

Our initial research question asked whether new electronic forms of participation introduce a degree of public deliberation absent in the traditional mailing or faxing of letters that dominated pre-Internet era public comment periods (Schlosberg, Shulman, and Zavestoski 2005; Shulman et al. 2003). Contrary to much research and development in this field, we did not seek to develop new forms of online interaction that optimize deliberative behavior. Rather, we set out to evaluate the deliberative nature of existing forms of electronic citizen participation. We also examine differences between those who submitted original letters and those who submitted a version of a mass-mailed form letter.

Overall, our survey failed to reveal evidence of deliberative differences between electronic and paper commenters, but we did find some support for the possibility that the comment process induces deliberative behaviors. We also discovered that some fundamental attitudinal differences exist between citizens who submit original comments and those who submit mass-mailed letters. Form letters, obviously, are less deliberative than original comments. These mass-mailed comments contribute to aggregative, rather than deliberative, democracy. The differences between these writers exist not just in terms of their self-described deliberative practices but also in terms of their overall trust in government and feelings of efficacy as participants in the rulemaking process. Stated bluntly, participants in form letter campaigns, whether using paper or the Internet, behave in a way that is more simplistic and cynical, and less inclined to deliberative behavior, whereas the writers of original comments report personal practices that embody many of the characteristics of deliberative democracy. The two obvious questions raised here are: (1) why is this the case, and (2) how can Internet-based participation in rulemaking become more deliberative and effective? This chapter begins with a discussion of our survey and findings and concludes with some reflections on those key questions.

³ On electronic rulemaking, see Shulman et al. (2003), Shulman (2004a), Coglianesi (2003, 2004), Lubbers (2002). On online political deliberation, see Beierle (2004), Schlosberg and Dryzek (2002), Shane (2004), Zavestoski and Shulman (2002).

2 Democracy, Online Deliberation, and E-Rulemaking

Public participation and citizen deliberation continue to be hallmarks of democratic theory. As Dryzek (2001) notes, ‘the essence of democracy itself is now widely taken to be deliberation’ (1). Our central aim in this project is to evaluate the move to Web-based public participation in rulemaking against various criteria established by theorists of deliberative democracy. For example, one of the basic concepts in the field is that deliberation is reflective rather than simply reactive (Bohman 1996; Dahlbergh 2001; Janssen and Kies 2004). We assume reflection is based on collecting diverse information and forming an understanding of various positions on an issue. A second central concept in deliberative theory is that such engagement with other positions will bring recognition of others in the process (Young 2000; Froomkin 2004; Witschge 2004). Participants in democratic deliberation ideally listen to others, treat them with respect, and make an effort to understand them. Third, deliberative theory examines the relation between discourse and the transformation of individual preferences (Bohman 1996; Dryzek 2000; Habermas 1996). The ideal of deliberation is that of communication which actually changes the preferences of participants as they engage the positions of others. Citizen efficacy and the perceived authenticity of the process are also central to deliberative democracy, as deliberation is offered as a more authentic form of political participation (Barber 1984).

Our questionnaire included items intended to measure each of these dimensions of deliberation. While we do not claim to cover the full range of concerns of every deliberative theorist, our measures capture the concepts central to recent developments in democratic theory and provide a reasonable proxy for deliberative activity.

Citizen access to rulemaking information is quite different from what it was when the Administrative Procedure Act (APA) was passed in the U.S. The framers of the APA could not have imagined the ways that new media and tools using information and communications technologies (ICTs) would create a complex and teeming digital landscape with such democratic and deliberative potential.⁴ The once reasonably straightforward processes of democratic participation found in the classic works of political science such as those written by Dahl (1961) or Truman (1960) are now largely anti-

⁴ We should not, however, ignore the important point of the very real digital divide. A recent report from the American Political Science Association Task Force on Inequality and American Democracy stated ‘the Internet may “activate the active” and widen disparities between participants and the politically disengaged by making it easier for the already politically engaged to gain political information’ (2004: 69).

quoted in the age of blogs, podcasts, listservs, mass email campaigns, and a proliferating array of Web services.

Research into the practice and potential of online deliberation covers a broad array of activities. One of the problems with this research is that there are so many avenues for such participation—websites, Usenet bulletin boards, chats, blogs, podcasts—making it difficult to systematically track and measure the impact of online deliberation. As Froomkin (2003) notes, ‘the Internet can be seen as a giant electronic talkfest, a medium that is discourse-mad’ (777).

We focus, however, on just one particular element in that ‘talkfest’: public participation in regulatory rulemaking. The development of rulemaking technologies appears to embody a democratic direction. Many agencies now use open electronic dockets, which allow citizens to review and comment on the rules proposed by agencies, supporting documentation, and comments of other citizens. In an early benchmark case of mass deliberation online, personnel managing the National Organic Program rulemaking at the United States Department of Agriculture (USDA) allowed citizens to read comments as they were posted, whether they came via fax, paper, or online (Shulman 2003).

Second, electronic rulemaking systems are highly structured, hence quite different from other Web-based discourse that is one-way, isolated, or homogenous. Sunstein (2001) argues that the Web enables people to pay attention to other like-minded people and ignore those who are unlike them or disagree with their positions on issues. The Web, for Sunstein, diminishes exposure to heterogeneity and is far from the ideal of an authentic public forum. Yet, the argument here is that the structure of e-rulemaking, in particular the open docket system, enables citizens to engage the positions of others, including those with whom they disagree. The open docket architecture of e-rulemaking may mitigate some of the anti-deliberative dangers engendered by the Web.

Other reasons to examine rulemaking are more specifically political. For example, on environmental issues, the big political battles have moved out of the legislative arena and into the realm of regulatory rulemaking. ‘Perhaps the most significant administrative law development during the last two decades’, notes Jeffrey Lubbers (1998), ‘has been the increased presidential involvement in federal agency rulemaking’ (19). While one of the reasons for this move has certainly been to try to avoid controversy, recent administration decisions and proposals have drawn considerable at-

tention to the rulemaking process itself, in turn increasing the likelihood of large numbers of public comments.⁵

Rulemaking also goes somewhere; it gets implemented. Simply put, the process frequently leads to actual changes of agency-enforced rules. Here, a focus on rulemaking differs from other examinations of Web-based discourse. A common critique of online deliberative polling, cyberjuries, or Web-based policy discussions is that the deliberative work often produces few if any tangible or pragmatic results. People spend time and energy working toward consensus, only to see it ignored or rejected politically. This problem of implementation deficit can deplete citizen energy devoted to discourse. Rulemaking requires agencies to respond to substantive public comments. It may be the only form of online deliberation that regularly ends in government policy implementation.

3 Why Environmental Rules?

Environmental rules, especially over the last few years, have been highly controversial, attracting large numbers of comments (Zavestoski et al. 2006). More comments potentially could mean more discourse and increasingly diverse participants. We also sought to ensure a chance for deliberation, which meant restricting ourselves to rules in which the lead agency posted citizen comments to its website so that visitors could see the comments of others. Both the Environmental Protection Agency (EPA) and Department of Transportation (DOT) implemented such 'open docket' systems.

Much of the environmental politics literature claims high levels of democratic involvement in environmental policy making. 'One of the most distinctive features of modern U.S. environmental protection policy', writes Andrews (1999), is the 'broad right of access to the regulatory process, which extends not only to affected businesses but to citizens advocating environmental protection' (240). Paehlke (1989) argues that the environmental arena has led all others in its scope and extent of innovations in public participation, including public inquiries, right-to-know legislation, alternative dispute resolution, advisory committees, and policy dialogues. Hence, a leading edge of democratic public participation in the U.S. is in the environmental field, and this seems to have continued into Web-based participation processes.

⁵ See Goldstein and Cohen (2004), the first of a series of three *Washington Post* articles on recent regulatory politics; see also Brinkley (2004).

Given our interest in controversial environmental regulations that elicited large numbers of public comments, we settled on the following cases (with the colloquial designations shown in bold):

- 1) EPA's advanced notice of proposed rulemaking on the Clean Water Act regulatory definition of the 'Waters of the United States' (**Waters**)⁶
- 2) EPA's proposed National Emissions Standards for Hazardous Air Pollutants (**Mercury**)⁷
- 3) DOT's advanced notice of proposed rulemaking on the Corporate Average Fuel Economy Standards (**CAFE**)⁸.

The proposed Waters rule was to clarify, and limit, the federal jurisdiction over so-called 'isolated' wetlands. Whereas development lobbies saw the prospect of a Bush administration rulemaking as an opportunity to free up considerable chunks of land that had been protected for thirty years, environmentalists feared the potential rollback of federal regulatory powers would undermine core principles articulated in the landmark 1972 Clean Water Act. Ultimately, after extensive criticism and approximately 133,000 public comments, the EPA dropped the proposal.⁹ The EPA claimed that the proposed Mercury rulemaking represented the largest air pollution reductions of any kind not specifically mandated by Congress, yet the vast majority of the nearly 500,000 public comments tended to disagree. After the comment process, the EPA issued a final controversial rule on March 15, 2005, and was met with promises of lawsuits by a number of states and nongovernmental actors. The CAFE rulemaking focused on reforming the automobile fuel economy standards program to address the continuing criticism related to energy security, traffic safety, economic practicability, and the definition of the separate category for light trucks. The process received 66,786 public comments.

4 The Survey Results

Submitted comments become part of the public record, so we were able to rely on relatively open access to the comment sets on each rule in order to contact individual citizen commenters.¹⁰ Respondents were asked a range

⁶ See *Federal Register* Vol 68, No. 10 pp. 1991-1998.

⁷ *Ibid.* Vol. 69, No. 20 pp. 4652-4752.

⁸ *Ibid.* Vol. 68, No. 248, pp. 74908-74931.

⁹ See <http://snipurl.com/dace> (last accessed November 20, 2008).

¹⁰ Comments either contained phone numbers or address information used in a reverse phone number look-up (<http://www.whitepages.com/>, last accessed November 20, 2008). We

of questions about their commenting behavior, including the number of times that they had commented on rules, how much information they obtained before commenting, how they typically submit a comment, the reasons that they commented, and whether they refer to other citizens' comments and, if so, the effect this has on their comments.¹¹ Respondents were also asked whether they thought their comments were reviewed by a government employee and whether they heard about, and were satisfied with, the final agency decision. Specific questions were also asked about the use of agency websites, including the frequency of visits, type of information accessed, whether they used these websites to submit a comment, and their general perceptions of the effect Federal agency websites have on commenting. Finally, respondents were asked if they believe submitting comments individually or as a group has the ability to change the outcome of the final rule.

Differences Between Paper and Electronic Commenters

Our survey of commenters on recent rulemakings brought us to three important conclusions about e-rulemaking and the potential of online deliberation in this area. First, electronic commenters do not appear to be any more deliberatively engaged than paper commenters. Second, despite failing to find that electronic commenters are more deliberative, we observed greater levels of self-reported deliberative activity across all types of commenters than expected. A surprisingly large number of respondents reported that they read other individuals' comments, acquire increased understanding of other people's positions as a result and even occasionally change their own positions. Third, rather than significant differences between electronic and paper commenters, the main differences we found were between individuals who submitted original comments and those who posted form letters.

The main goal of the survey was to look for differences between those who submitted comments on paper, either through postal mail or fax, and those who submitted comments electronically, through agency Web-based forms, interest group websites, or email. The survey suggests that those differences simply do not exist. This may be due to the fact that many submitters of original paper comments also use the Internet and Web-based

obtained phone numbers for more than 60% of the names and addresses entered. The survey was completed by 1553 respondents between the dates of August 30 and November 24, 2004. This represented a cooperation rate of 48%, with a margin of error of +/- 2.5%.

¹¹ While we are discussing 'citizen' commenters, we should make clear that a small percentage of our respondents were involved in the rulemaking process in roles other than private citizen. Of those surveyed, 86.4% reported that they generally commented as private citizen, 7.1% as a paid employee, 3.4% as an unpaid volunteer, and 3.2% as something else (though mostly as a representative of an interest group).

agency dockets extensively. While there is a distinction between the medium citizens use to *comment*, all types of commenters used electronic means to *gather* information in the commenting process. As for the lack of discursive indicators by electronic commenters, while technology makes commenting easier than before, it may also encourage the rapid submission of comments, which is antithetical to more thoughtful and carefully reasoned arguments.

The Prevalence of Deliberative Indicators

While differences between electronic and paper commenters are practically nonexistent, there are indicators that all types of commenters practice or benefit from certain types of deliberative activity. We found four significant indicators of such deliberative discourse: the frequency with which commenters seek out a variety of information, the tendency to review other citizens' comments, gaining an understanding of the positions of others, and changing one's own position after being exposed to the arguments of others.

First, the use of information in developing a public comment is quite high. Overall, commenters, regardless of medium, are information-seekers. Forty-five percent said they get a lot of information, while those that write original paper comments claim the most, at nearly 51%. Over 71% of those surveyed said that they referred to the arguments, studies, statements, or positions of agencies or independent organizations before submitting a comment. Again, those who submitted original paper comments were at the top with nearly 77%. Agency websites are important sources of information for commenters. Half of those surveyed said they used these sites in developing their comment. Again, a large majority of commenters are seeking out information, even those who submit form letters.

Commenters also review others' comments. Surprisingly, 68% said that they had read the comments of others at some point. As these comments are only available either in person in the agency docket rooms in Washington, DC, or on the newly developed agency websites, it may be that all types of commenters are using the agency websites to examine the docket, when such comments are available.¹² For those that specifically reported using the agency websites, 69% said that the site helped them review other citizens' comments. Overall reporting of the review of others' comments is high regardless of submission type, illustrating attention to the positions of others in the rulemaking process.

¹² Then again, as only 50% say they visited agency websites, and it seems unlikely that 18% physically visited a docket room, this number needs further explanation. It may be that some who report reading others' comments saw samples on interest group websites.

Reading of other citizens' comments is not just for information. Commenters report that they gain an *understanding* of the positions of others as well. Overall, nearly 75% say they get a better understanding of the positions of other citizens by reading their comments, and more than 41% say that they have found the comments of other citizens persuasive. Of the commenters who said that they visited and used agency websites, a very large percentage (72%) said that they somewhat or strongly agreed with the statement that the agency websites helped them to understand the positions of others. As the difference across types of commenters is insignificant, this finding suggests that commenters in general are gaining an understanding of the positions of other citizens commenting on a rule. Agency websites seem to have added to this particular indicator of democratic deliberation.

Finally, over 36% report that their position on an issue changed after reading others' comments. That is less than the 47% who report no change in their position. But the percentage that acknowledges such change is significant and serves as yet another indicator that the limited discourse made possible by access to others' comments is having an impact on the reasoning of citizen commenters. All of these findings suggest that elements necessary for deliberation—namely openness to information, willingness to understand others, and the possibility of preference transformation—are already present and information technology has made these opportunities more accessible.

Differences Between Original and Form Commenters

The most significant differences in this study are between those who submit original comments and those who submit form-based comments. A better understanding of these differences may impact how agencies respond to public comment and how interest groups refine their campaigns. Numerous civil servants have reported at workshops, focus groups, and interviews over the last four years that agencies are required to respond to substantive comments but not to sheer numbers. Notice and comment rulemaking was designed to bring diverse information into the rulemaking process not to be a referendum (Shulman 2004a).

Many interest groups, in addition to drawing on their legal and scientific staff to draft detailed comments, respond to the rulemaking process with an aggregative approach, soliciting mass numbers of identical or nearly duplicate comments from their members and other interested citizens. By all accounts, new ICTs have enabled the number of comments to increase well beyond the capacity of agencies to cope without expensive, outside private consulting firms to report on the content of citizen comments. A key question is whether or not this technology improves or degrades citizen discourse (Shulman 2004b).

In the survey findings, the differences between original and form commenters start with the use of information. More than 54% of original commenters report having used an agency website to read information on a proposed rule. This compares to only about 44% of the form commenters, a significant difference. Original commenters are also significantly more likely to report gaining a greater understanding of the positions or arguments of other citizens by reading their comments. While both sets of commenters read the positions of others, original submitters are more likely to report having a better understanding of those positions.

In addition to these differences, there are significant differences between original and form commenters on a number of indicators of trust in the process and the agency involved. For example, original commenters (both paper and electronic) are significantly more likely to believe their comments were actually read by a government employee, compared to form commenters. Electronic form commenters appear to be the most cynical in terms of their feeling that their participation will have an impact on their satisfaction with the final rule. Conversely, those who sent paper original comments are the most satisfied with their participation and the outcome. Not only are form submitters more cynical about having their comments read and making a difference, they are also more likely to say that their participation led to a negative view of the agency running the rulemaking. Original commenters are more likely to report a positive view of the agency and are slightly more satisfied than form commenters with agency decisions on issues on which they have commented. Users of form letters are simply more negative about the government in general and are significantly more likely to 'rarely' or 'never' trust the government to do what is right.

Overall, the survey illustrates the belief that form letters are less likely to be read by government employees or have an actual impact. It may be the case that a negative view of the agency and government in general was one of the reasons for commenting in the first place. A central question here is whether a lack of faith in the agency has led to some citizens' refusal to take the time to write an original letter.

On the Value of Electronic Comment and Mass E-Mail Campaigns

There is one other key finding regarding the difference between form and original commenters. Though it contradicts the lack of trust in government noted above, form commenters are more likely than original commenters to think that groups that organize mass mail campaigns have the ability to change proposed rules. This may partly explain why form commenters are much more likely to submit comments more often than original commenters. This faith that mass email campaigns have an impact has led to the increase in the popularity of the tactic. Nearly 50% of those surveyed said

they submitted their last comment through an interest group website, and almost 40% reported that this method will also be how they comment next time. While agencies such as the EPA and DOT have worked to improve the information on their Web-based docket systems, and the Federal government continues to develop a Federal Docket Management System as a single Web-based public comment portal, very few commenters plan to use such systems—only 12% versus the nearly 40% who plan to use interest group websites.

This practice should be worrisome for those interested in the potential of the Web to increase discourse on important issues in the rulemaking process. Commenters who submitted using form emails via interest group websites were the least likely to look at other information and the least likely to report that their positions have changed as a result of reading others' comments. In other words, electronic form commenters show the lowest scores on many deliberative indicators. Mass email campaigns, as they are currently designed, are only useful in an aggregative form of democracy. Such an approach is better suited to pressuring legislators than to influencing agency personnel.

In addition, there is little evidence to support the belief that mass email campaigns actually do change proposed rules. While the proposed Waters rulemaking was dropped, other highly controversial rulemakings went forward while tens of thousands and sometimes hundreds of thousands of comments came in against them. Interviews with agency rule writers show that agencies do not value and often openly resent form letters. The EPA, in fact, simply prints and stores an inaccessible hard copy of all but one example of each identical or similar mass email. Importantly, however, our interviews and focus groups show that these same officials would welcome more substantive and original comments, as they could return the rulemaking process to that designed by the APA—one based on the collection of information and substantive input from interested parties outside of the government.

5 Democracy, Online Deliberation, and E-Rulemaking

The distinction between paper and electronic commenters, which was the basis of our original set of hypotheses, simply does not exist as we imagined it might. A majority of commenters, regardless of the medium of submission, are using electronic means of researching an issue. Comparing paper and electronic commenters on recent rules does not help us understand whether the new electronic systems are more deliberative than past paper-based notice and comment processes.

That said, the issue of the difference between original and form-based mass participation is obviously at the forefront of the questions regarding the potential for deliberative activity in the rulemaking process. Original commenters embody many of the deliberative qualities we hypothesized given the move to an accessible open docket system. The range of significant differences between original letter writers and form letter submitters might be partially explained by the introduction of a large number of commenters (mostly form users) who are new to the rulemaking process. The ease with which interest groups can spread information to constituents about proposed rules open for public comment, and the sophistication of email action alert systems that allow individuals to ‘participate’ by doing little more than clicking the ‘send’ button on an interest group’s website, means agencies are getting more comments, especially from people who have not participated in the process in the past. Though many of these participants, even electronic form submitters, reported to us that they seek out information before sending in their comments, form submitters are nevertheless much more cynical about the process, and much less deliberative in their engagement. This leads us to conclude that there might be a certain amount of political capability that must be acquired before these new participants have a level of efficacy and trust in the process that will justify the effort required to become more deliberative participants.

Interest groups could develop this capability, so why don’t environmental groups, in particular, solicit more original, substantive, deliberative comments? Certainly, it is true that it is very easy to respond to a mass email by clicking ‘send’. It takes substantially more effort to participate in a deliberative process, but the existing deliberative shortfall could reflect movement strategy and assumptions rather than a lack of citizen interest or capability. Environmental groups simply respond to the rulemaking process with an aggregative approach, soliciting mass numbers of identical or near-duplicate comments, which the agencies then ignore. Yet, according to the survey, a good part of the environmental constituency has shown an interest in more deliberative participation—reading others’ comments, learning, and participating in something more substantive than mass emails. Environmental groups favoring mass email campaigns have been unable to take advantage of technological changes or the professed willingness of some of their constituents to be more deliberative.

Environmental groups simply need to use Web technology to solicit more substantive comments. For example, they can challenge members to think up new categories for agency cost-benefit analyses. They could also ask members to enter postal codes, and then prompt them to report something about a local stream, mercury emitting industry, or health problems.

Groups could also distribute parts of a proposed rule, and ask constituents to comment substantively on a specific section of interest.

From the agency side, the easiest way to improve the process would be to develop a better user interface in the open dockets. Agencies could also randomly respond to comments online during the rulemaking process, or supplement the formal comment process with online dialogues. Federal agencies do not necessarily need to figure out how to get more people to comment through their websites, but they do need to figure out how to get more commenters to trust the process and invest time in enhancing deliberation on a proposed rule.

The potential to increase both political capacity and deliberation exists in the practices of both agencies and interest groups. Perhaps as the very technology that has brought more participants into the process is better utilized to handle increased levels of participation, all types of participants—from paper original letter writers to electronic form submitters—will feel their participation is meaningful. In turn, theoretically, these participants will invest time in becoming more educated, thoughtful, and deliberative commenters.

So we conclude by noting the potential of electronic rulemaking to enhance democratic deliberation on key issues in the American polity. Certainly, we see that some citizens are interested in rules, information surrounding various issues, and what other citizens have to say in the comment process. Many citizens are also willing to have their own positions challenged and possibly transformed in the engagement with others. We also see that technology exists both to enhance the deliberative process (the open dockets and access to information on agency websites) and to degrade discourse (the easy click-to-send Web pages on interest group websites). Obviously, the technology will not stand still. We only hope that research like this will push the agencies and interest groups alike to develop systems that meet the ideals of both the APA notice and comment process and deliberative democracy to increase the amount of information, expand the exchange of views, and improve the democratic process in the development of better policy.

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