

# Reflections on e-Rulemaking: Challenges, Limitations and Unrealistic Expectations

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**Abstract:** In 2002 the cross-agency e-government initiative was established, quickly followed by the e-rulemaking program. Excitement over digital opportunities from information communication technology (ICT) for citizens to participate in the agency rulemaking process has however been met with a mixed response. In this essay we review popular thought surrounding technology and democratic participation, explain e-rulemaking and explore whether e-Rulemaking has led to greater meaningful participation. Factors such as the timing of the comments, administrative restraints in analyzing the comments and characteristics of the participants themselves are examined. We explain e-Rulemaking and discuss this relatively new area of literature while critically examining the premise that e-Rulemaking will lead to meaningful participation and engagement. In particular, we focus on the period of time from 2003 when the eRulemaking Program Management Office launched the Regulations.gov website. Here we pose the following questions: Will greater access to the comment process in agency rulemaking increase the number of views expressed and improve the quality of the regulatory framework; and what will be the effect on democracy?

**Keywords:** e-Rulemaking: Challenges, Limitations and Unrealistic Expectations

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## 1. Introduction: Setting the Discourse on Technology and Democratic Participation

The revolutionary character of information communication technologies (ICTs) has led many academics to embrace the nature of the digital space as a potential answer to reviving an apparently apathetic citizenry (Johnson 1998). Scholars view an engaged civil society as a feasible, desirable and probable outcome of e-government (Dunleavy 2006). Electronic communications and unanimity across agencies intuitively would seem to increase public access for rulemaking. Thus, on the surface, the dynamics behind the use of ICTs for purposes of governance appear irresistibly intuitive and attractive. Of particular interest is the capacity of information communication technologies to reduce the financial and time constraints of civic participation. In theory, within the context of e-Governance, geography and time cease to be redoubtable barriers to bringing citizens together for collaboration or dialogue (Roman & Miller, 2013). The decreased opportunity costs of public engagement that could ultimately result from the diffusion of digital infrastructures, should, in principle, motivate higher levels of authentic participation and engagement as the method of notice and docketing increases transparency (Schwartz 1996).

## 2. On Public Policy Trends and E-Rulemaking Assumptions

Rulemaking, as defined by the Administrative Procedure Act (APA) of 1946, by its nature, was set at the forefront of areas that were expected to be genuinely transformed by increased citizen participation. President Clinton's National Performance Review (NPR) targeted rulemaking as one of administrative aspects that could benefit significantly from a broader reliance on ICTs (Kerwin & Furlong 2011; NPR 1994). E-Rulemaking was also a significant focus of the George W. Bush administration's E-government Strategy (OMB, 2003). To formerly embolden this policy trend, the Obama administration has emphasized and encouraged a substantial role for e-Rulemaking within the Executive Order 13563 (OMB 2012). Agencies, such as the Department of Transportation (DOT), the Nuclear Regulatory Commission (NRC) and Environmental Protection Agency (EPA), have experimented with digitalization of rulemaking communication as early as the 1990s (Farina 2010). These agencies were seen as models of how rulemaking discussions should occur online. Popular discourse predicted and continues to do so that e-Rulemaking will not only lead to increased citizen participation, but will also improve the overall regulative framework.

In this paper we draw on the available body of literature in order to examine some of the critical questions, related to the use of ICTs in rulemaking. The essay does not address all possible questions, nor is it intended to

be exhaustive in nature. We do not hope to achieve comprehensiveness in our discussion, but rather suggest, what we believe to be, an underemphasized perspective. Our main focus is the construction of a pragmatic understanding of the ICT-rulemaking nexus within the context of the demands of deliberative democracy, under significant economic and political stress. In general lines, we agree with those warning against the immediate and unquestioned acceptance of e-Rulemaking.

(Benjamin 2006). The digitalization of the rulemaking process raises serious administrative and legal questions (Coglianese 2004); yet, these questions are rarely adequately considered by scholars, who prefer to entrust positive outcomes to the supposedly deterministic nature of technology and thus focus on improvement in mechanics as opposed to the level of authentic citizen representation. We believe that much remains to be understood about the larger administrative and democratic implications of digitalizing rulemaking, before the process can be entrusted to the domain of cyberspace on a regular basis. To these ends, the article reviews the questions associated with understanding rulemaking, public deliberation, process effectiveness and the administrative constraints imposed by e-Rulemaking. We find these dimensions to be central to the successful evolution of e-Rulemaking, and we now turn to this discussion.

### **3. Critical Questions**

The critical questions we seek to answer in this work include: can ICTs allow for greater equity and reduce the democratic divide? Can the level of discourse be improved through the ICTs to provide more accepted rules and improve regulation? Have ICTs enhanced coordination and efficiency created better regulations that are more coherent and effective in carrying out the purpose of the enabling statute and improve implementation and enforcement?

### **4. Defining and Understanding Rulemaking and e-Rulemaking**

Before the critical questions of e-Rulemaking can be discussed, we provide a short overview of rulemaking and e-Rulemaking. In broad terms rulemaking “is the process by which agency officials seek to turn the often general language of legislation into specific rules that determine compliance with law” (Muhlberger 2011). In other words rules and laws leave ambiguity and interpretation to the point of ineffectiveness (Kerwin 2011). “A rule is the skin of a living policy...it hardens an inchoate normative judgment into the frozen form of words.... Its issuance marks the transformation of policy from the private wish to public expectation” (Kerwin 2011). Rules originate as a result of the actions and interpretations made by agencies. “Rules are by-products of the deliberations and votes of our elected representatives, but they are not themselves legislation...rules do not originate with the president or some other chief executive...judges do not write rules in the first instance either, except, like Congress, to establish procedure for their colleagues and the operation of the courts over which they preside.” (Kerwin 2011).

Holistically, then, rules are constructed by bureaucratic institutions in order to undertake the implementation and administration of legislative requirements and public policy. It is often overlooked, or at least importantly underestimated, that although bureaucracies do not enjoy the constitutional power of any of the three branches, the rules issued by agencies are still, in essence, enforceable, binding public law. Paradoxically, by engaging in rulemaking, bureaucracies carry out, implicitly or explicitly, executive, legislative and even judicial functions. The Constitutional checks and balances regarding power become morphed when administrative agencies engage in rulemaking. However, as our society has become increasingly technologically complex, the need for expertise beyond those of judges and other elected officials is indisputable. Yet rulemaking is an essentially legislative function carried out with in administrative agencies and largely removed from consequences of accountability by the electorate.

Traditionally rulemaking has been considered an informational and technically intensive process, often satiated with partisan interests. Agencies have to generate various types of analyses to meet public and legislative demands. Thus information and political maneuvering are key ingredients of rulemaking. Contrary to what might otherwise transpire through the simplistic interpretations under APA, rulemaking is not a well behaved process; it does not start with notice of rulemaking nor does it end with the publication of the final rule in the Federal Register. In important ways, the most meaningful e-Rulemaking efforts occur outside the patterns offered in textbook templates. The stage of political appointees and their relationship with Congress play a role in both the timing and substance of the rule, as well as the allocation to enforce these rules.

Notwithstanding popular rhetoric and outside a few salient cases, substantial decisions in rulemaking are indeed restricted to a set of elite few leaving this process vulnerable to be determined by politics.

Annually public agencies collectively issue an astounding number of rules. These rules are based on enabling statutes passed by Congress, and which the executive branch, through its vast number of agencies is charged with implementing. In 2011 alone the executive agencies promulgated 54 major rules, with 30 being budgetary transfer rules (OMB 2012). On the whole it is estimated that the 2011 annual costs of federal rulemaking and disclosure efforts was between \$43.3 billion and \$67.3 billion; the benefits, on the other hand, were believed to range from \$141 billion to \$700 billion (OMB 2012). Budgetary summaries for inherently governmental functions come with an added layer of complexity. Despite the appeal of such exacting estimates, a healthy dose of academic skepticism is in order here, since quantification and monetization are often an outcome of discretionary assumptions and are not immune to political rhetoric. It is probably unknowable how many benefits or funds will be saved or generated from disclosure requirements. In other cases, monetization of particular categories of benefits (such as protection of homeland security or personal privacy) can present significant challenges. As Executive Order 13563 recognizes, some rules produce benefits (such as reductions in discrimination on the basis of disability or prevention of rape) that cannot be adequately captured in monetary equivalents. In fulfilling their statutory mandates, agencies must sometimes act in the face of substantial uncertainty about the likely consequences. In addition, and significantly, prospective estimates may contain erroneous assumptions. Agency discretion is unfortunately all too frequently based on limited information. The financial benefits of safety regulations are particularly difficult to quantify as the effects of the protection may not reveal themselves for years to come (such as lead based paint notices and childhood health). Moreover, consequences of regulations may be especially nebulous in areas such as information transparency and quality of democratic government.

Some have argued that digitalizing rulemaking has the capacity to instill important changes in the rigid and bureaucratic structures and procedures of paper-based rulemaking. (Coglianese 2004). E-Rulemaking can be defined as “the use of technology (particularly, computers and the World Wide Web) to : (i) help develop proposed rules; (ii) make rulemaking materials broadly available online, along with tools for searching, analyzing, explaining and managing the information they contain; and (iii) enable more effective and diverse public participation (Farina 2010, p. 2). In more general terms, e-Rulemaking “refers to the use of digital technologies in the development and implementation of regulations.” (Coglianese 2004, p. 355) The use of ICTs for rulemaking is often associated with transformative improvements along efficiency and democratic dimensions. For instance, agencies can employ ICTs to automatically collect needed data, monitor adherence to already enacted rules or evaluate the scope of necessary modifications. ICTs could also be helpful in identifying and foreseeing possible future conflicts with extant regulatory frameworks and thus streamlines the process. Furthermore, centralizing and unifying access to e-Rulemaking through Federal Docket Management System (FDMS) and through web portals such as [www.regulations.gov](http://www.regulations.gov), facilitates transparency and might lead to economies-of-scale type benefits as more information can be collected.

## **5. Technology and Democracy**

In terms of democratic considerations, digital based rulemaking is often expected to motivate and enable the participation of voices that may not otherwise have been heard; hence, leading to improved communication and public deliberation (Brandon 2003, p. 3). Taken together, the advocates of e-Rulemaking argue that improved access to the process, enhanced ability to monitor and participate, and the decreased costs of communications – all resulting from the use of ICTs – have the potential to fundamentally reshape rulemaking. “Specifically, e-Rulemaking – effectively implemented --- can open the rulemaking and implementation materials, facilitate dialogue among interested parties about policy and enforcement, enhance regulatory coordination, and help produce better decisions that lead to more effective, accepted, and enforceable rules. If realized, this vision would greatly strengthen civic participation and our democratic form of government” (Farina 2010). However, these assertions beg the question whether coordination and facilitating dialogue produce better regulatory results.

Despite unanimous agreement and wide normative acceptance of the critical role played by rulemaking, it is rather curious how relatively little we know about the underlining dynamics behind the generation of rules by agencies (Furlong 2011). At the moment the literature does not provide an accepted theoretical model that could help guide research in the field. In addition, the area appears to receive significantly less academic

attention than other aspects of politics or public administration. For instance, much of the discourse centers on best practices and improvements in the architectural technology (Farina 2010). Many of the details of rulemaking occur in the Legislative and Regulations Division of General Counsel Offices within various agencies. Whilst, similar to budgeting, rulemaking represent an allocation of interests and interpretations, hence a political exercise; there is still a significant need and benefit from discussing and delineating rulemaking within theoretical terms, creating a language upon which additional scholarly work can be built.

Going forward, in order to provide coherence to our critical discussion concerning questions of e-Rulemaking, our arguments can be interpreted as following the general logic provided by the classical political utility of voting model (Downs 1957). In broad terms the model assumes that an individual will consider voting if  $R$  in the equation  $R=PB-C+D$  is positive. Where  $R$  - the utility in voting (net benefit), is a function of  $P$  - the probability of the vote to affect the outcome,  $B$  - the benefit of the voters' candidate winning,  $C$  - the cost of voting and  $D$  - the utility of participating in the act regardless of the outcome. If  $R < 0$  the voter will not participate. Still, even in the case of a positive  $R$ , the individual is not guaranteed to participate. The logic behind this model is intuitive and widely accepted, and since the literature in rulemaking is devoid of an established theory or parsimonious model, we find this perspective appropriate for the scope of this paper.

## **6. On the Timing of Comments**

Although the literature on rulemaking has yet to provide a strong theoretical lens, scholars appear to agree that the attitude maintenance bias, or the tendency to continue with the view they already have, and early participation effects are important dimensions to consider when discussing rulemaking on a large scale (Stern 2002). It is believed that interactions that take place at the early stages of the elaboration of a rule are more likely to shape the final choices, than similar interactions during the later stages. Once an agency has developed a general expectation of a rule and has made significant investments in a specific form, it will most likely resist any major changes to its perspectives (Stern 2002).

Based on the political utility of voting model, we assume and posit, for the purposes of this paper, that a citizen will participate in e-Rulemaking if  $R$  is positive in  $R=PB(1+e)-C+D$ . Where  $R$  is the benefit from participating in rulemaking,  $P$  is the probability of participation shaping the final rule,  $B$  identifies the benefits associated with the rule being designed in a specific manner (or delayed),  $C$  represents the cost participation in rulemaking,  $D$  is the altruistic utility received from participation, and  $(1+e)$  is the early participation effect for small  $e > 0$ . Thus, a larger  $e$  (earlier participation) will increase the probability of the agency listening to the participator and allowing the input to shape the final outcome. In terms of the agency we assume that the agency will consider the input if  $L$  in  $L=PB(1+e)-C+D$  is positive. Where  $L$  represents the benefit from "listening" and considering the input,  $P$  is the probability of the rule being passed in a specific form,  $B$  represents the benefits to the agency of passing the rule under a specific design,  $C$  represents the cost of considering the input,  $D$  is the utility of upholding to legislative mandates that require public participation and the utility associated with benefits that come from external input, and  $(1+e)$  is still the early participation effect for small  $e > 0$ .

The equations themselves provide the intriguing grounds for debate and future inquiries. For instance, implications such as those associated with the quality of information or profile of the participants warrant important empirical research. Similarly, the question of whether those with political strength and connections are the first to comment warrants data collection. For the purposes of this essay, nevertheless, the above equations should be treated as nothing more than overarching logical umbrellas within which to place the arguments that follow.

## **7. On Deliberation in Rulemaking**

One could unpretentiously define a democracy as the rule or the power of the people. Whoever "these people" might be, or what is the nature of their power, or how their rule is to be constructed remains the area of intense philosophical and political debate (Crick 2002). Nonetheless, despite their ambiguity, "public" and "deliberation" are commonly embraced as fundamental aspects that need to be met for democracy to function. A large number of scholars have placed government legitimacy on the public's approval of governance decisions (Barber 1984), which represents a "deliberative turn" in the manner of conducting politics and public administration. When it comes to levels of publicness, however, there is something inherently odd about the rulemaking and public policy literature. According to academic accounts, interest

groups, institutions, political actors, bureaucracies and policy entrepreneurs, as main players, enter in direct contact with rulemaking and shape the policy process. Citizens, on the other hand, are delineated as rather distant and equivocal reference points that are muddled somewhere in the background. Thus views of genuine access are imbalanced. Dahlberg (2007) argues that asymmetries of power allow certain groups to determine the logic and buzzwords for any issue which will always put them the frontrunners.

When “the public” does enter the equation, it does so by negotiated trickle down effects through the avenues and associations to chief actors, rather than on its own. “Deliberative public engagement lands in this world like a brother form another planet – not understood and in some cases actively rejected” (Muhlberger 2011, p. 198). This “quarantine” of the public is probably due to the fact that the making of American public policy is commonly associated with adversarial politics. From this perspective increasing the number of voices in the decision-making process is perceived as adding unnecessary complexity without producing greater clarity. Yet, given that ultimately every citizen belongs to one interest group or another, in essence then, the only difference among different levels of representativeness or having one’s voice heard might in fact be a matter of organization. Better organized voices will also become the most powerful ones, who have the ability to frame a clearer message agenda setting and the language with which it is discussed. In terms of practice, measuring and evaluating rulemaking is by all means a daunting task. Little is understood about the interworking of regulatory offices and the agencies’ relationships with Congressional oversight bodies. Thus scholars may hesitate before diving into this abyss.

On the whole, there are no challenges in identifying the possible theoretical benefits of increased democratic deliberation. Research has suggested that authentic deliberation can motivate better policies, (Baraba 2004) increase future engagement, (Gastil 2008) and enhance governance legitimacy (Tompkins 2010). Most scholars agree that democratic legitimacy is fundamentally dependent on citizen participation and their political involvement (Durkheim 1957/1992). Because citizens receive the notice to develop awareness to make involvement possible, the rulemaking process likely elevates the level of perceived agency for citizens. Finally, participation has also been delineated as inherently valuable for citizens, given that such associations might nurture critical personal values, creating a level of personal agency action (Shulman 2003).

Although plenty of theoretical discussions on rulemaking are published, only limited empirical knowledge exist upon which present scholars can draw. In terms of e-Rulemaking and deliberation one has even less data upon which to rely. The little empirical evidence about practice that we do have, unfortunately, is not overly positive. For instance in the context of Deliberative E-Rulemaking Project, an attempt to use ICTs to facilitate discussion, the scholars in charge of the project concluded:

After three years of effort to recruit agency and public interest group partners, hundreds of phone calls and email messages, consideration of dozens of potential deliberation issues, and the support of top Department of Transportation (DOT) and Environmental Protection Agency (EPA) officials involved in rulemaking, our project succeed in conducting only two deliberations with some degree of government agency backing...Both deliberations involved turnouts too small to be considered successful as demonstrations of the value of deliberative rulemaking comment processes (Muhlberger 2011)

Still, because of the heavy reliance on the of comments process to represent public opinion, this part of the rulemaking process is where there is the most room for democratic debate on prescribed agency action “of their extensive use in federal and in many state agencies and their impact on actual rules enforced by government, the rulemaking comment process represents perhaps the most substantial arena within which the public, in true democratic spirit, could directly influence public policy” (Muhlberger 2011, pp. 197-198). It is often believed that if citizens are able to communicate and collaborate with agencies during the rulemaking process, such relationships would improve administrative efficiency by means of better rules. Interestingly, the larger part of this literature that touts the benefits of citizen participation is constructed around the experiences and assumptions underlying face-to-face deliberation and not those of cyberspace. The dynamics of online dialogue, nevertheless, may significantly differ from the personal nature of traditional civic engagement, and not necessarily for the better (Hindman 2009). Democratic deliberation is grounded within communicative rationality (Habermas 1984), which can be importantly at odds with the instrument rationality of the institutional and normative designs of e-Rulemaking. In many ways, then, it is highly questionable whether the lack of face-to-face interaction in the digital environment can become a favorable condition for the construction of dialogue-driven communicative rationality.

## **8. On Those Who Participate**

Before discussing the dynamics behind actual participation, it would be valuable to note that active public input in decision-making is not necessarily a universally accepted norm. Shared governance and opinion forums have been viewed as having efficiency drawbacks. It has been argued that some level of public participation is desirable; beyond a certain threshold, however, the institutional and administrative costs of such deliberation can become prohibitively high (Rossi 1997). In addition, “public participation which is automatic, unrestrained, or ill-considered can be dangerously dysfunctional to political and administrative systems” (Cupps 1977). Public input, to be sure, often suffers from critical shortcomings in terms of its quality, its depth, its sporadic nature and biasedness. It has been suggested that mass opinion is easily redirected and influenced by what might appear insubstantial messages or with trivial amount of information (Gilens 1995).

Political scientists, for instance, have raised concerns regarding the fact that the American public is alarmingly under-informed about politics, let alone the complex area of regulation. (Carpini & Keeter 1996). Disengagement from politics among citizens, especially within the youth, also appears to be constantly increasing (Macedo et al. 2005). One can see the possibility that misunderstanding of information caused by disengagement can further lead to a sense of alienation.

The use of ICTs can indeed motivate fundamental changes in the manner in which ordinary citizens participate in rulemaking. Individuals can interact with the agency by tracking the writing of the rule, proposing modifications, debating assumptions or challenging the rationale behind certain claims. Within the context of salient policy issues, early participants, inspired by their initial success, might draw in other individuals or networks in what could end up being a significant snowball effect. From an agency’s perspective, increased numbers of challengers can lead to improved rules and wider acceptance rates of the regulations. More information of the potential effect of the new or changed rule provides the possibility of agencies acquiring greater data. Citizens, private parties, interests groups and alliances can simultaneously serve as experts in developing and active collaborators in enforcing rules. For instance, scholars have suggested that regulated parties are more willing to follow rules that they have helped shape and that they find to be representative of their needs (Fiorino 2006). Moreover, when citizens are able to delineate outcomes directly out of their involvement, they might enjoy the agency that comes with active participation in policymaking. As a result, it is highly likely that through active participation in rulemaking, citizens would develop a more positive image of the agency and government generally. Hence, perception is essential. On the whole, the most optimistic supporters of e-Rulemaking would argue that the use of ICT for rulemaking leads to more participation; better rules; lower costs of rulemaking; improved enforcement and monitoring; increased levels of legitimacy of governance; and perhaps a more positive outlook of government and public administration in the long run.

Empirical research on the general effects of technology on citizen governance engagement, however, provides some contradictory conclusions. Some researchers contend that ICTs could lead to some of the benefits suggested by the dominant discourse – for example - better informed citizens (Gainous 2011). Yet, others have argued that ICTs will be primarily used by those who are already actively involved, with the rest being overtaken by apathy. If one analogizes social media and campaigns to ICTs, information may be gained regarding citizen engagement and equality. Morris and Morris in “Digital Inequality and Participation in the Political Process: Real or Imagined” examine internet access and the 2012 Presidential Convention, the Republican Convention specifically (2013). The authors analyze data collected by the Pew Research Center. Specifically the period after the Iowa Caucus and the New Hampshire Primary through the mediums Facebook, Twitter, Googleplus and LinkedIn. They look at whether computer usage can effect inequities in knowledge for Socioeconomic Status (SES) when politics dominate the political scene. For example if users may come across information and they begin to develop an interest. In this situation the authors did find that the lower SES end do benefit from increased access (Morris 2013). However, regulatory issues may or may not dominate the political scene in the area if rulemaking as it does a presidential election. Nam in Dual Effects of the Internet on Political Activism Reinforcing and Mobilizing finds that online and offline participation are not too different and tend to be associated with socio economic status. However, because of comfortability with technology, more youth participate online (2012). Therefore, technology effects also need to be examined at the generation level. Bekafigo and McBride analyze the use of Twitter and Gubernatorial Election Data from 2011 to assert that users who are politically active offline and those who are partisan in their viewpoints, as expected, manifests itself in the same way online (2013). It is noted however, that some marginalized groups

do gain more access to a political forum that may not participate offline. Thus, in some cases for political campaigns, technology may lessen inequality.

However, in the area of rulemaking, dishearteningly, no empirical data exists to support that the increased reliance on ICTs, in both private life and governance, has motivated higher levels of public participation in rulemaking. Most of the extant studies suggest that while the level of commentary might have increased, public participation, as envisioned by theory, has remained largely unrealized (Kerwin 2011). It is highly likely that the ranks of participators will continue to be dominated by major and better organized stakeholders. Certain scholars remain skeptical even regarding whether e-Rulemaking can lead to improved commentary or whether technology can motivate any fundamental changes in the deliberative nature of rulemaking (Schlosberg 2005). Within the pressures of habitual social and professional constraints, individuals might become less willing or apt for collective action (Putnam 2000) and might never fully develop the social and cognitive bases needed to understand politics; thus, they will remain fully satisfied within a lethargy dominated continuum (Neuman 1986). The intricate nature of regulation may intensify this phenomenon.

Furthermore, the technical character of participating in e-Rulemaking deliberation and the nature of the dialogue itself might stymie non-technical oriented citizens from engagement. This group of citizens may include the poor and elderly, whose voices may greatly contribute to the discussion. Those who have the time, resources and knowledge needed to participate are not always representative of the broader public. Political science and public administration scholars have suggested that web infrastructures favor citizens who are wealthier and better educated (Dijk 2005). Dahlberg (2007) takes this argument further and contends that is often absent from these conversations is the asymmetries of power and struggle for domination involved in the merits of arguments is naïve and the meaning of words reflect and frame this reality. We believe that there are valid concerns that the most active commentators in e-Rulemaking will be made up from the ranks of those who best organized and most resourceful. Deliberation in rulemaking is certainly not a function of quantity. What is most important to remember for the purpose of this discussion is, however, that once an e-Rulemaking platform is developed it will demand high investments regardless of whether or not it would actually lead to more participation on the part of ordinary citizens or motivate any of the benefits expected in principle.

Notwithstanding the reality of public participation in policy process, many contend that the public is capable of playing a critical and active role in political and administrative decision-making (Luia & McCubbins 1998). In spite of their limited levels of knowledge and attention, in the aggregate, citizens can be productive and necessary contributors to policy design. It has also been argued that the public should play a critical role in rulemaking (Bonfield 1970). In the case of e-Rulemaking, for instance, citizens can use ICTs to communicate, comment and form alliances behind a specific idea or rule design. Wikis<sup>1</sup>, online shared collaborations in which everyone can shape the final outcome, have proved to be rather successful models of public cooperation and could provide the experience necessary to mold e-Rulemaking into meeting the expectations attributed by theory.

## **9. On the Administrative Constraints and Effectiveness of Deliberation**

While theoretically appealing, a genuine embrace of deliberation in e-Rulemaking is rather strenuous for both logistic and financial reasons. Stakeholders might be reluctant to participate due to limited trust or due to the belief that they lack the ability to influence the process. No determinative data conclude e-Rulemaking technology necessarily creates greater trust. Those with significant interests in the outcome of a rule will most likely see the additional avenue for deliberation provided e-Rulemaking - either as a threat, since this would provide other parties with easy access, or as an additional pressure point that they can use in their power struggle with agencies. Thus one cannot assume that understanding power politics would not influence rulemaking. It is critically to note that while ICT does allow stakeholders to speak it also demands investing additional resources in order to listen. “[C]reating more ambitious mechanisms for meaningful interaction will consume agency resources” (Benjamin 2006, p. 903). Each agency will have to reconsider its structure and expertise supply in order to accommodate its higher level of cyberspace presence. Putting up a website is obviously not sufficient; it also not as easy as common wisdom would otherwise suggest.

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<sup>1</sup> [www.wikipedia.org](http://www.wikipedia.org) – is arguably the best known and most successful shared public collaboration.

Additionally, whether the comments received by agencies are of high quality or not, the agency will still have to study them regardless. Considering that a great bulk of rules end up being challenged in courts on the basis that the agencies failed to “take a hard look” at arguments against a given position – the increased number of comments, that would have to be reviewed as a result of e-Rulemaking, would increase the probability of courts rejecting agencies’ actions. The latter could generate significant additional administrative costs. (Benjamin 2006). It would take only one solidly built argument that a significant comment was overlooked in order for a rule to be successfully challenged in court. If the court does find a rule to be unlawful that would mean that the agency would have to redesign the rule or fully abandon the endeavor. The former would call for additional investments; while the latter would mean that the agency efforts have failed to yield any outcomes and administrative resources have been wasted. Furthermore, it has been suggested that agencies could face claims to damages and their staff could even face criminal sanctions, under 18 U.S.C. § 1905, in case of incidental disclosure of confidential information through e-Rulemaking (Dooling 2011).

Within the current austere budgetary constraints it should come as no surprise if agencies might resist, within the limits imposed by law, to hear what stakeholders have to say. Traditionally agencies have not been inclined to emphasize public comments in rulemaking and until recently few statutes pressured agencies into seriously considering public deliberation (Kerwin 2011). Scholars have noted that rulemaking is a resource intensive undertaking, with high rates of “do-overs” (Kerwin 2011); as a result, agencies are often satisfied with the meeting minimum requirements and are eager to move forward towards completion. Interest groups will participate in e-Rulemaking only under the presence of some guarantees that the desired outcome is feasible (Kerwin 2011). Stakeholders might not have time to participate in deliberation for the sake of some ambiguous “greater good” and where they do not have a direct financial stake. Hence, somewhat contradictory to the telos of e-Rulemaking, the combination of administrative and financial constraints, and increased numbers of access points available to external parties - could create the perverse incentive for agencies to shop, implicitly and explicitly, for supportive stakeholders.

Moreover, agencies have their own legal Handbooks that interpret what the regulations mean and how they are supposed to be applied. These interpretations happen outside the rulemaking process. Assume the following hypothetical scenario. Let’s posit that due to increased access, on average 5% percent of Americans would make at least one comment for every rule issued by the government. According to estimates in 2010 there were approximately 230 million American who were 18 or older (US Census Bureau 2012). If 5% of them make just one comment, that will add up to roughly 11.5 million comments. If we make an additional assumption that it takes two minutes to review a comment, then that would sum up to a total of 23 million minutes, or approximately 384 thousand hours, or 184 years at a standard 2088 hours/year. Notwithstanding the philosophical naivety of the scenario, it becomes rather obvious that embracing increased public input can easily become financially taxing for agencies. Even at a .05% participation rate, the scenario is by no means any more encouraging. Automatically generated comments or spam postings will require the same amount of effort and administrative attention as valid and useful public commentary. The only manner to deal with such a stream of comments is to rely on technology to analyze and code them, which would mean “taking” the administrator out of the comments review and interpretation. The latter, however, exposes us to a whole new set of organizational and ethical questions, including whether the software will produce a certain amount of faulty coding.

More importantly, with sufficient resources and adequate organization, any interest group can generate support and valid arguments for any perspective. Thus, with time every powerful view will be supported by equally powerful arguments; in essence, nullifying the scale effects of particular input. Somewhat concerning, although most of these interest groups will construct themselves as representative of broader public opinions and interests, they rarely do in fact represent ordinary citizens. Within this context, it becomes rather easy for agencies to overlook critical aspects and perhaps even tempting, for purposes of administrative efficiency, to ignore public input. Ironically, then, rather than causing fundamental shifts in administrative decision-making, e-Rulemaking might simply re-enforce extant institutional habits. As such, institutional constructs remain a powerful force that needs to be accounted for; hoping that technological adoption alone will lead to desired transformation is unrealistic (Coglianese 2004). The Federal Communications Commission’s 2003 rulemaking regarding media ownership is a case in point. The public submitted over one million comments, with 99.9 % being critical to the proposed rule design; yet the rules were promulgated for the most part in their original form, with citizens’ comment making no apparent difference (Benjamin 2006).

Captured by unchecked-optimism, many scholars fail to acknowledge that institutional routines remain commanding barriers to the transformations that are often associated with e-Rulemaking. For example, out of practical reasons such as administrative efficiency or the possibility of future litigation, agencies maintain paper copies of larger part of e-comments (Lubbers 2010). The latter dynamic reduce e-commenting to a sophisticated administrative gadget, with limited institutional impacts, which agencies might delineate primarily as a burden. Intrinsically, then, regardless of our normative beliefs we cannot negate that agencies' administrative realities might, more often than not, prioritize efficiency over deliberation. "We would be remiss if we did not note that there is also a strain in literature that views e-Rulemaking as a threat to the ability of agencies to do their work effectively. E-Rulemaking raises the specter of vast expansion of the electronic equivalents of form letters and postcard comment campaigns by savvy interest groups. Scholars have cautioned that electronic participation in rulemaking, taken to extremes by groups with narrow agendas, can immobilize rulemakers with huge volumes of comment" (Kerwin & Furlong 2011, p. 204).

Moreover, the increase in the number of comments does not guarantee the supply of innovative ideas. Oddly, the administrative effort needed to deal with the mere flow of comments could decrease the likelihood of a critical suggestion being seriously considered and hence having any significant impact. Given the nature of participation in rulemaking, higher numbers of comments would not necessarily provide additional information, represent an improvement over what the agency would have done on its own nor will such commentary necessarily represent the overall public opinion (Coglianese 2004). While the literature does not provide many empirical accounts in this regards, those accounts that do exist suggest little deviations from the paper-based model. Despite the fact that public servants are open and positively oriented to the idea of e-Rulemaking, they do not believe that the digitalization of rulemaking has led to significant improvements in participation, administrative effectiveness, quality or representativeness of the commentary (Lubbers 2010). Furthermore, public servants are concerned that privacy risks posed by e-Rulemaking are higher than under traditional rulemaking.

Lastly, scholars regularly and inadvisably reduce the role of politics in e-Rulemaking to a petty external variable. This is obviously the case, as e-Rulemaking, like any other aspect of policy, is inherently a political struggle, particularly as companies are being regulated. Moreover, political appointees exist at the upper echelon of the Office of General Counsel which frequently contain the office of legislation and regulations. For nontrivial rulemaking, substantial political support is indispensable; yet, sometimes even the slightest of well-organized resistance by political actors can stymie the implementation of a rule that could have been years in the making. The embeddedness of politics in rulemaking does, not bode well with the attempt to uphold the assumed neutral bureaucratic nature of the rulemaking process. Presence of politics does not guarantee results and makes outcomes less predictable; hence, agencies might equate the increased number of voices with growth in opposition, thus administrative complexity. In essence, by increasing the number of access points, e-Rulemaking could make the process even more political. While the use of ICTs in rulemaking can support increased deliberation it can just as easily provide the means for rulemaking filibustering. In the politics of rulemaking, delay is at times as desirable as favorable regulation. Interest groups that are directly affected by an inevitable adoption of a specific rule might equate delays in rulemaking with political victories (Kerwin & Furlong 2011). Comments can also be made with the sole purpose to have them on file for a later judicial challenge or political mobilization. There are many ways in which victories in turf battles over rules are won; technology might simply provide an additional tool for most sophisticated and best organized players to use in this struggle.

## **10. Implications for Rulemaking at the State Level**

It is important to remember much significant rulemaking occurs not only at the federal level but also at the state level. Recently a more empirical look is being conducted at the state level. Rinfret, Cook and Pantz examine rulemaking and hydraulic fracking in various states including Colorado, Ohio and New York. This article applies federal theory to the states. The study included telephone interviewed of trade associations, industry representation, environmental organizations and citizen groups. Hydraulic fracking is a particularly relevant issue area to examine state rulemaking because it is exempted from oversight by the U.S. Environmental Protection Agency (EPA) (Energy Policy Act of 2005, 2005).

However, this study focuses on various stages of participation rather than electronic accessibility. Similar to the federal level, structure is critical and the drafting stage is where there can be the greatest impact. (Rinfret

2014). As with the federal government political actors, one should not overlook political influences on a state agency and structural components are important as to help us to observe where gatekeepers exist.

In this study the authors examine whether environmental groups are having their concerns weighed equally to those representing industry. In all cases either the state legislature or governor played an important role as to how much interest group participation occurred.

This point is further demonstrated by the state of New York prohibiting hydraulic fracking to extract oil and natural gas and state agency putting the matter on hold and the governor taking the lead (Kaplan 2014).

The authors examined the role of web technologies in facilitating the flow of transparent and information with a case study of the Forest Service vegetation management treatments in California's Sierra Nevada. They conducted their research using an analysis of web hits, an email survey and content analysis of a discussion board (Kelly 2012).

In state rulemaking, as with the federal government, multistakeholder participation may increase the likelihood sustainability of rules. Top down management approaches lead to instability as the public is less accepting of the rules at all levels of government.

Public participation and citizen buy in were analyzed in the case of environmental management in California.

This line of inquiry may or may not be generalizable beyond the U.S., because of different democratic histories. But some data is available for the idea that there is some great technological solutions reaching citizens in the European context. Although not examining the specific topic of e-ruling, understanding participation can help delineate who would be the best target of a social media public relations campaign. Vesnic-Alujevic (2012) looks at how public relations can impact less involved users from the users who are already more involved in sixteen European Union states.

Himmelboim (2011) notes that participation and access are important for the level of influence that they can provide. Although online discussions can make civil society stronger, increased discussions within a civil society can also make them more hierarchical.

Identification may also influence the quality of online deliberation. Halpern and Gibbs in "Social media as a catalyst for online deliberation?" explore the affordances of Facebook and YouTube for political expression by comparing the individualized nature of Facebook and the deinstitutionalized nature of Youtube (both sites managed by the White House). The authors find that Facebook expands the amount of information to other networks and has more symmetrical conversations than deindividualized Youtube (Gibbs 2012).

Further research is suggested as this process evolves and morphs with the use of smart phones and other devices. Convenience and accessibility will no doubt increase with these objects, however, the quality of discourse is currently unknown.

## **11. Conclusions**

The main argument, that we sought to suggest in this paper, is that the implications e-Rulemaking under austere budgetary conditions are more complex than they might appear at first. The questions that need to be answered cannot be offhand placed in the domain of technical considerations. Notwithstanding the "e" in e-Rulemaking, there is considerably more to e-Rulemaking than the mechanisms of the digital environment. As it has been argued, the optimists might have been hast in their conclusions that "e" will solve many of the shortcoming of rulemaking. This is obviously not the case, as at the core the challenges faced by e-Rulemaking remain painfully familiar and fall outside the capacity reach of ICTs. Yet, this paper should not be interpreted as a call for alarm because for all challenges and obstacles in constructing genuine deliberation in digitally-mediated rulemaking, when "working as expected" e-Rulemaking provides ample room for enthusiasm (Muhlberger 2011). After all, the answer to authentic and productive public deliberation lies in the "improvement of the methods and conditions of debate, discussion, and persuasion" (Dewey 1927/1988, p. 208) and we should continue strive toward betterment of extant constructs.

Scholars have already called for hesitation when it comes to accepting the zealous benefits that are often associated with e-government (McCue & Roman 2012; Roman 2013, 2015) and e-Rulemaking in particular. "Even in light of these new tools [ICTs], however, there are still good reasons to be skeptical about the impact and desirability of e-Rulemaking. The problem is that the experience with e-Rulemaking has been too modest,

and thus the level of experimentation has been too small, to reach a firm conclusion that the costs of e-Rulemaking outweigh the benefits. The combination of justified skepticism and the lack of empirical confirmation leads...[to] the ultimate conclusion that the government should self-consciously, rigorously, and narrowly experiment with e-Rulemaking, treating agencies as laboratories of democracy” (Benjamin 2006).

We do not argue that e-Rulemaking does not provide the positive capacity for which it is often touted or that it does not lead to cost savings or administrative efficiency. The adoption of e-Rulemaking as an administrative habit may indeed play out in various ways. For example the recent eRulemaking Initiative, implemented under the E-government Strategy, has been a success in many regards (Farina 2010). We simply suggest that such realizations are not guaranteed, and the implications associated with e-Rulemaking are much more complex than widely assumed and the costs associated with proper adoption are by no means trivial. Questions about who participates, how participation affects agencies and administrative dynamics, the quality of public commentary, the cost of increased probabilities of congressional or judicial invalidations and whether agencies actually react to digital commentary are questions that we have yet to properly delineate or answer.

All things considered, we simply cannot exclude the possibility that ill implemented e-Rulemaking structures might in the long run occupy more of already limited agency resources, with only marginal improvement over the current condition. If rulemaking does become more resource intensive and agencies are not provided with additional funds to adequately cover their needs, which is often the case (Dooling 2011)- we foresee two possible reactions. Agencies will either generate fewer rules or the rules will suffer in terms of timing, quality enforcement and monitoring. In this sense, there is a dangerous tradeoff in play when it comes to the use of ICTs for purposes of rulemaking. On the one hand, digitalizing the review of citizens’ comments will insure that as many voices as possible are at least received. On the other hand, entrusting technology to evaluate originality and sentiments expressed by comments minimizes the chances of any particular voice, regardless of its merits, being heard within the avalanche of commentary. If citizens, however, are not able to track any effects from their participation they are likely to become frustrated and disengaged. It is not implausible to imagine that e-Rulemaking for the sake of e-Rulemaking can come dangerously close to a hollow, apathy motivating, formality. The consequence of a heavy reliance on e-Rulemaking can easily become a slippery slope.

In grand lines, even under best case scenarios, current digital rulemaking experiences mimic the paper rulemaking patterns (Farina 2010). That is, what citizens can do online does not go beyond the structure and rationale of the brick-and-mortar agencies. Although transformational type changes are a feasible possibility; e-Rulemaking, in its current form, does not appear to have attained such fundamental shifts. What agencies have been doing on paper has been extended to the cyberspace, but without the resources that should probably be associated with such extensions. Consequently, it should not come as a shock if e-Rulemaking fails to deliver on its expectations. Constructing a successful e-Rulemaking process is obviously more demanding and complex than the mere placement of a comment sections online. The implications of e-Rulemaking are neither simple nor inexpensive. As is most often the case, ICTs are only as deterministic and transformational in nature as the institutional frameworks allow them to be.

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