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BEYOND THE USUAL SUSPECTS: ACUS, RULEMAKING 2.0, AND A VISION FOR BROADER, MORE INFORMED, AND MORE TRANSPARENT RULEMAKING

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INTRODUCTION

In an ideal world, administrative agencies would develop regulations in an informal rulemaking process that would be transparent and efficient and that included broad input from the public, or an entity advocating for the public, as well as the regulated community. Instead, critics assert that the informal rulemaking process is opaque[1] and is dominated by regulated entities and industry groups, rather than public interest groups.[2] The process does not encourage a dialogue among the commenters or between the commenters and the agency.[3] Indeed, regulated entities are frequently strategic in the timing of their comments, withholding comment until the end of the comment period when it will be difficult for other commenters to respond to their input.[4] Further, critics complain that comments have little impact on the content of regulations adopted by agencies.[5] In addition, the process is time-consuming and costly for agencies.[6]

Although the Administrative Procedure Act (APA) only imposes minimal public participation requirements on the informal rulemaking process,[7]

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1. *See* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 896 (2006); *cf.* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 384–86 (2011) (noting that although rulemaking substantially affects the general public, very few "take advantage of their right to review the information" and their "right to comment").

2. *See* Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States*, ADMIN. CONFERENCE OF THE U.S., 1 n.5 (Mar. 15, 2011), *available at* http://www.acus.gov/wp-content/uploads/downloads/2011/04/COR-Balla-Report-Circulated.pdf; Farina et al, *supra* note 1, at 423–24; Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 245–67 (1998); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128–38 (2006) (evidencing the higher and more active participation of non-public interest groups).

3. *See* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 436–37 (2004) (characterizing the participatory nature of the public as nonexistent); *cf.* Balla, *supra* note 2, at 1 (arguing that comments lack weight and do not sway agencies).

4. *See* Farina et al., *supra* note 1, at 418–19 (contending that savvy participants delay comments favorable to their respective positions); Balla, *supra* note 2, at 30–32 (noting that the latter days of the comment period had the most comments).

5. *See* Balla, *supra* note 2, at 1 n.7 (citing William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 66–80 (2004)).

6. *See* Noveck, *supra* note 3, at 436 (discussing the reality that despite the public's right to be involved, the public is passive and the process is overwhelming to agencies).

7. *Id.* at 438, 449. The Administrative Procedure Act (APA) requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation" and to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5

broader, more informed, and more transparent public participation in rulemaking could provide significant benefits to agencies, as well as the public. First, broader and more informed public participation should produce "better" rules in that the rules are more rational and defensible because the agencies receive data and identify issues that they might not otherwise have considered adequately.[8] Broader, more informed, and more transparent public participation also increases the accountability of agencies and should instill a sense of legitimacy in the final rules that they adopt.[9] Further, the public and the regulated community are more likely to understand[10] and accept agencies' rules and are "less likely to challenge them when [they have] been heavily involved in the decisionmaking process and feel[ ] that the agency has listened to, and addressed, [their]

U.S.C. § 553(c) (2006). Critics argue, though, that the law does not provide a framework for effective public participation. *See* Noveck, *supra* note 3, at 438, 449 (suggesting that the APA does not create meaningful opportunities for the public to participate in the rulemaking process); *see also* Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 317–23 (noting that while numerous federal laws provide for "public participation" or "public involvement," few provide concrete definitions for those terms or frameworks to facilitate effective public participation).

8. *See* Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 702–07, 735 (2007) (intimating that agencies have narrow views and that the public may offer innovative ideas that the agencies overlooked); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 402 (2007) (advocating a focus on regulatory beneficiaries rather than regulated entities); Noveck, *supra* note 3, at 458–59 (rationalizing that broad participation promotes improving, even in a minor fashion, a proposed rule). Agencies would be able to review data from a broad range of experts, rather than simply relying on the regulated community, and could more readily access "local knowledge," which Professor Cynthia Farina describes as "the first-hand experience of those who deal directly with the objects and targets of rulemaking." Farina et al., *supra* note 1, at 423–26. Professor Bill Funk is less optimistic about the benefits of broader public participation, wondering whether "it [is] realistic to think that ordinary people with jobs to do, families to attend to, and lives to lead will be able to provide helpful information to an agency engaged in a rulemaking." Bill Funk, *The Public Needs a Voice in Policy. But Is Involving the Public in Rulemaking a Workable Idea?*, CPR BLOG (Apr. 13, 2010), http://www.progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED1507624B63809E.

9. *See* Johnson, *supra* note 8, at 703; Noveck, *supra* note 3, at 436; *see also* Balla, *supra* note 2, at 1 (citing the APA as advancing a "participatory environment"); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 289 (1998) (reiterating the importance of public input); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 202 (1997).

10. *See* Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1344 (2011).

concerns."[11] Even if broader, more informed, and more transparent public participation in the rulemaking process does not eliminate challenges to agencies' rules, it provides agencies with more information about the level of support for, or opposition to, those rules during their development.[12] The public also derives clear benefits from broader, more informed, and more transparent participation. A reformed process would be more democratic,[13] strengthen individual autonomy,[14] and reduce the opportunity for agency "capture[ ] by the regulated community or other special interest groups."[15] Under a pluralist or civic republican vision of agencies, public participation is an essential check on the broad congressional delegation of policymaking authority to agencies.[16]

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11. Johnson, *supra* note 8, at 735; *see also* David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 677–78 (2006) (proposing that irrespective of a negative outcome, a person is more likely to accept it if the procedural process was fair); Noveck, *supra* note 3, at 459 (averring the notion that public participation encourages rule compliance).

12. Even though agencies do not promulgate rules based on a popular vote, *see infra* note 115 and accompanying text, agencies may find this information useful in determining how to prioritize the development and enforcement of rules and how to react to concerns voiced by Congress regarding regulatory proposals. *See* Farina et al., *supra* note 1, at 428–29 (employing Department of Transportation (DOT) as an example of how the rulemaking process assisted it in addressing issues the public had raised).

13. *See* Johnson, *supra* note 8, at 735 (advancing the benefits of direct participation by citizens); Mendelson, *supra* note 10, at 1343 (suggesting the rulemaking process curbs agencies from overreaching); Noveck, *supra* note 3, at 459 (promoting public consultation as an egalitarian doctrine); *see also* Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 13–14 (2006) (advocating a deliberative process).

14. *See* Johnson, *supra* note 8, at 735 (emphasizing the fundamental notion of self-governance); Noveck, *supra* note 3, at 458 (advocating the public's right to be independent).

15. Johnson, *supra* note 8, at 703.

16. While agencies were once viewed as mere "transmission belts," applying their technical expertise to well-defined statutory questions, most academics have long recognized that Congress delegates broad policymaking authority to agencies. *See* Mendelson, *supra* note 10, at 1347 (intimating the headless fourth branch of the federal government as possessing extensive, often uninhibited, statutory power). As Professor Nina Mendelson explains, in a pluralist model of agency decisionmaking, when Congress has not constrained an agency's decisionmaking, the agency's decision is democratic "to the extent the agency hears [from] and considers, [even reconciles,] a wide variety of interests." *Id.* at 1349–50. Under a civic republican model, without congressional constraints, an agency's decision is legitimate "to the extent it facilitates and responds to democratic deliberation." *Id.* at 1350. While pluralist theorists view the public interest as an "aggregation of preferences of stakeholder[s]," civic republican theorists view the "public interest as the result of a democratic dialogue in which citizens fully disclose their interests and are open to hearing others' reasons and revisiting their own views." *Id.* at 1350–51. Under either model, though, broad, informed, and transparent public participation contributes to a democratic process. *Id.* at 1351.

Broader, more informed, and more transparent public participation is not, however, costless. Reforms are likely to make the rulemaking process more expensive and less efficient for agencies, even though they could provide the significant benefits outlined above.[17]

This Article examines two avenues of rulemaking reform that could yield broader, more informed, and more transparent rulemaking. First, the Article focuses on "e-rulemaking" efforts and the migration of the informal rulemaking process to the Internet.[18] So far, those efforts have been slow and have provided marginal improvements in public participation, as the preexisting process has simply been moved online instead of adapted to fit the new medium.[19] The next generation of e-rulemaking proposals (Rulemaking 2.0) is more ambitious, but may result in significant costs and delays in the rulemaking process if implemented on a wide scale.[20] At the same time that agencies are implementing technological changes in the rulemaking process, a resurrected Administrative Conference of the United States (ACUS) has issued recommendations for structural changes to the informal rulemaking process, including encouraging agencies to provide adequate time for public comments, to post comments in a timely manner, to use reply comment periods (where appropriate), and to provide the public with guidance regarding effective commenting.[21] ACUS has also issued recommendations regarding e-rulemaking that are designed to reduce resource demands on agencies when adopting rules through electronic means.[22] However, ACUS does not recommend any changes to the APA[23] and, on the whole, the Conference's recommendations are relatively modest.[24] It is likely, therefore, that the benefits that they produce will be similarly modest. More significant reforms are necessary to achieve broader, more informed, and more transparent public participation.

17. *See infra* Parts IV.B., VI.B.

18. *See infra* Part III.

19. *See infra* note 89 and accompanying text.

20. *See infra* notes 215–222 and accompanying text.

21. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (ACUS) RECOMMENDATION 2011-2 *Rulemaking Comments*, 3–5 (June 16, 2011) [hereinafter ACUS RECOMMENDATION 2011-2], *available at* http://www.acus.gov/wp-content/uploads/2011/10/Recommendation%202011-2%20(Rulemaking%20Comments).pdf.

22. *Id.*

23. *See id.* at 2 (commenting that the APA's comment procedures are "fundamentally sound").

24. *See infra* Parts IV–V.

I. BROADER PARTICIPATION

A. Who Participates and Who Could Participate?

In the vast majority of informal rulemaking proceedings, very few persons or organizations submit comments. Occasionally, however, proposed rules will generate significant public comment. For instance, approximately 95,000 comments were submitted for a 1991 rule addressing Medicare physician fees and over 250,000 comments were submitted for a 1997 rule addressing standards for organic products.[25] More recently, hundreds of thousands of comments were submitted for "revisions to the Federal Communications Commission's [ ] rules on the concentration of media ownership, an [Environmental Protection Agency (EPA)] rulemaking on mercury emissions," and a United States Forest Service rule that banned "road construction in wilderness areas."[26] But those rulemakings are the exception rather than the rule. Studies of rulemaking proceedings of several different agencies over several different time periods have consistently disclosed that fewer than thirty-five comments are submitted for most rules.[27]

Regulated entities, rather than regulatory beneficiaries or members of the public at large,[28] usually submit the very few comments that are submitted in most rulemaking proceedings. For instance, "[a] study of . . . significant EPA hazardous waste rules from 1989 to 1991 found that industry filed nearly 60 percent of all the comments" on the rules and

25. *See* Balla, *supra* note 2, at 25–26 (rationalizing that these extensive comments indicate the nature of the investment that stakeholders have in the rules).

26. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 954 (2006); *see also* Mendelson, *supra* note 10, at 1345 (noting that 670,000 comments were submitted on the United States Fish and Wildlife Service's rule regarding the listing of the polar bear as a threatened species under the Endangered Species Act).

27. *See, e.g.*, Coglianese, *supra* note 26, at 950 (study of seventy-two hazardous waste rules issued by the Environmental Protection Agency (EPA) in 1989 found an average of twenty-five comments for the nine "significant" rules and six comments for the others); Golden, *supra* note 2, at 250–64 (1998) (study of eleven rules issued by EPA, the National Highway Traffic Safety Administration, and the Department of Housing and Urban Development between 1992 and 1994 found a median of twelve comments per rule); West, *supra* note 5, at 68 (study of forty-two rules issued by fourteen agencies in 1996 found a median of thirty-three comments per rule); *see also* Balla, *supra* note 2, at 25–26 (study of 463 actions completed by DOT during 1995–1997 and 2001–2003 found a median of thirteen comments per rule). Steven Balla found similar results when he examined all of the rules that were published in the Federal Register between January 1, 2011 and February 14, 2011. *Id.* at 26–27.

28. *See* Mendelson, *supra* note 10, at 1357; Noveck, *supra* note 3, at 457.

"individual citizens submitted only about 6 percent."[29] Other studies revealed a similar lack of participation by individual citizens.[30]

For all of the reasons outlined above, it would be beneficial to broaden the scope of persons and entities that are commenting on rules and participating in the rulemaking process. As Professor Cynthia Farina notes, the new information that agencies could acquire through broader participation includes "local knowledge . . . disinterested expert input—data and other knowledge from experts beyond those produced by interested regulatory parties; [ ] [and] better vetted comments."[31] Broader participation should lead to "vigorous conflicts between interest groups that draw out the most important issues and test the reliability of key facts."[32]

Some critics express skepticism that additional commenters will raise issues or points that existing commenters have not raised or that the agency has not already considered.[33] With regard to comments that address the public interest, Professor Stuart Minor Benjamin notes that since agencies are supposed to act in the public interest, one would presume that "the agency itself may have thought of the points that the additional individual participants would make."[34] Benjamin and others also question whether agencies are truly interested in soliciting public comments from anyone by the time a rule has reached the proposed rulemaking stage, or whether the agency has already decided most of the important issues regarding the rule based on conversations with regulated entities prior to the proposed rulemaking stage.[35] Signals that agencies send regarding their openness to comments play some role in limiting public participation in rulemaking, but there are a wide variety of barriers to broader public participation.

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29. Coglianese, *supra* note 26, at 951.

30. *See* Johnson, *supra* note 8, at 735 n.205. There are, however, some rulemakings that have generated significant numbers of comments from ordinary citizens, just as there are some rulemakings that have generated significant numbers of comments though most do not. *See* Coglianese, *supra* note 26, at 952–53.

31. Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 407 (2011) (internal quotation marks omitted).

32. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10,732, 10,733 (2011).

33. *See* Benjamin, *supra* note 1, at 911.

34. *Id.*

35. *Id.* at 912–13. Similarly, Professor Beth Noveck argues that

> [t]he APA's spare public consultation provisions have institutionalized the deep-seated belief that the public, especially unorganized individuals or small interest groups, is an irritant—the pea to the agency's princess—unduly influencing and burdening the expert who alone possesses the knowledge and impartial sangfroid to govern in the public interest.

See Noveck, *supra* note 3, at 450 (footnotes omitted).

B. Barriers to Broader Public Participation

One of the most significant barriers to broader public participation in rulemaking is a lack of information. In some cases, nonparticipants may not be aware that an agency is conducting a rulemaking on an issue that impacts them and that they can get involved in the process.[36] In many cases, though, nonparticipants lack information about the substance of the agency's proposed rulemaking or the issues surrounding the rulemaking that they need in order to make informed comments on the proposal.[37] Regulated entities, on the other hand, have that information readily available.[38] The technocratic tone of agency rulemaking may also intimidate potential commenters who are not regulated entities, convincing them that they lack the expertise to provide worthwhile comments.[39] Nothing in the APA requires agencies to provide broader notice of their proceedings or reach out to broader constituencies to facilitate participation.[40]

While a lack of information may present a barrier to broader participation, so too can information overload. The sheer volume of information provided to agencies and accessible to the public in some cases may overwhelm potential commenters and discourage them from providing any comment in the rulemaking process.[41] Professor Wendy Wagner

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36. *See* Farina et al., *supra* note 31, at 417–18; Johnson, *supra* note 8, at 735; Noveck, *supra* note 3, at 452. Although agencies issue press releases about important rulemakings and communicate directly with major regulated entities, associations, and advocacy groups regarding those rulemakings, those efforts often do not reach many affected individuals and entities. *See* Farina et al., *supra* note 31, at 417–18. Even when potential commenters are aware that an agency is developing a rule, they may not understand how the process works or how to provide effective comments. *Id.* at 417.

37. *See* Johnson, *supra* note 8, at 735; Noveck, *supra* note 3, at 457.

38. *See* Mendelson, *supra* note 10, at 1358; Noveck, *supra* note 3, at 457.

39. *See* Noveck, *supra* note 3, at 454.

40. *See* Bingham, *supra* note 7, at 317–23.

41. *See* Farina et al., *supra* note 31, at 418; *see also* Wagner, *supra* note 32, at 1351–53. Professor Wagner points out that the voluminous submissions of regulated entities are

> bulging with undigested facts . . . and include redundancies and peripheral issues that must be culled out; discussions pitched at too specialized a level or demanding an unreasonable level of background information . . . ; and discussions delving into very intricate details, many of which are of trivial significance.

Id. at 1335. She notes that

> [p]luralistic processes integral to administrative governance threaten to break down and cease to function when an entire, critical sector of affected interests drops out due to the escalating costs of participation. Instead of presiding over vigorous conflicts between interest groups . . . , the agency may stand alone, bracing itself against a continuous barrage of information from an unopposed, highly engaged interest group.

argues that the structure of the APA and judicial interpretations of the requirements of the Act encourage regulated entities to flood agencies with information to gain control over the process.[42] She notes that administrative proceedings lack the filters that exist in judicial and other proceedings.[43]

Resource limitations are another barrier to participation. Frequently, potential commenters may lack the financial resources, technical resources, or time to provide effective input on agency rulemaking.[44] Similarly, as expected under classical collective action theory, many potential commenters may not be sufficiently motivated to get involved in the rulemaking process due to the costs of participation or may decline to provide comments based on the hope that they can "free ride" on the comments of someone else.[45]

As noted above, some potential commenters may choose not to participate in the rulemaking process because they feel that their comments are unlikely to influence the agency to make changes to the proposed rulemaking. In some cases, the skepticism arises because the commenters misunderstand the nature of the rulemaking process and believe that their

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Id. at 1332.

42. *See* Wagner, *supra* note 32, at 1353–55. Professor Wagner refers to the phenomenon as "information capture." *Id.* at 1329. She notes that administrative law principles encourage excessive commenting because persons who intend to challenge agency rulemakings must raise any concerns that will be the subject of later challenges during the rulemaking process and there are no restrictions on the size, number, detail, or technicality of issues that comments can raise. *Id.* at 1355–65. She also notes that the requirement that agencies provide a concise general statement of the basis and purpose for their rules, coupled with the judicial "hard look" standard of review, leads agencies to create very detailed and technical records of decisions that address the comments raised in minute detail. *Id.* at 1355–62. She argues that such a rule may be "more likely to escape rigorous judicial scrutiny and . . . discourage thinly financed parties from taking on the rule as a litigation project." *Id.* at 1352. She also suggests that because courts limit the changes that an agency can make to a rule between proposed and final rulemaking by requiring that the final rule be a "logical outgrowth" of the proposed rule, agencies tend to engage regulated entities and other readily identifiable interested parties prior to the proposed rulemaking, in a non-transparent manner "even though this might defeat the idea of ensuring balanced and vigorous participation by a diverse set of interest groups." *Id.*

43. Professor Wagner notes that while courts frequently limit the pages, margins, and font size for briefs and limit the time allocated for oral arguments, administrative law places no such filters on the comments provided in the rulemaking process. *Id.* at 1330–31.

44. *See* Johnson, *supra* note 8, at 735; Mendelson, *supra* note 10, at 1357–58; Noveck, *supra* note 3, at 455–58.

45. *See* Mendelson, *supra* note 10, at 1358; *see also* Coglianese, *supra* note 26, at 966–67. In the regulatory context, regulated entities tend to be more concentrated and incur fewer costs to organize collectively while regulatory beneficiaries are diffuse and, therefore tend to incur substantial costs to organize collectively. *See* Mendelson, *supra* note 10, at 1358.

comments are votes and that the agency should make a decision based on the will of the majority. When an agency adopts a rule that runs counter to the popular will, commenters who were involved in the process may be reluctant to take the time to express their views in future proceedings.[46] Even if persons have not submitted comments in prior proceedings that they felt were ignored, they may be reluctant to participate in the rulemaking process if they believe that the agency is "captured" by regulated entities,[47] or that commenting is futile because the agency has already made up its mind on the direction it plans to take in a rule by the time the rule reaches the proposed rulemaking stage.[48] Agencies frequently foster these perceptions among commenters by soliciting input from regulated entities and a small group of interested parties prior to issuing proposed rules.[49]

II. EFFECTIVE PARTICIPATION

A. What Types of Comments Do Commenters Submit and How Effective Are These Comments?

Decades ago, Professor E. Donald Elliott wrote: "Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[50] As noted above, agencies frequently solicit input from regulated entities and other interest groups prior to, or outside of, the informal rulemaking process.[51] Cynics might argue, therefore, that public comments have very little impact on the development of agency rules, and that the real decisionmaking process lacks transparency.

However, because this Article is examining reforms of the rulemaking

46. *See* Mendelson, *supra* note 10, at 1346, 1373. Professor Mendleson notes that federal agencies finalized rules that ran counter to the overwhelming weight of public comments in rulemakings regarding restrictions on snowmobile use in Yellowstone National Park, jet ski use in Assateague National Seashore, and media ownership limits imposed by the Federal Communications Commission (FCC). *Id.* at 1364–65; *see also* Farina et al., *supra* note 31, at 430–32 (describing the manner in which an electronic rulemaking pilot project incorporated voting as a means to engage participants).

47. *See* Benjamin, *supra* note 1, at 913; Noveck, *supra* note 3, at 456.

48. *See* Mendelson, *supra* note 10, at 1368–69; Noveck, *supra* note 3, at 452, 455; Wagner, *supra* note 32, at 1352.

49. *See* Benjamin, *supra* note 1, at 912; Mendelson, *supra* note 10, at 1369; Noveck, *supra* note 3, at 457.

50. *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

51. *See* Noveck, *supra* note 3, at 457; Mendelson, *supra* note 10, at 1369.

process to expand public participation and make it more effective, it proceeds from a premise that agencies can be, and will be, influenced by comments raised during the informal rulemaking process. After all, the APA requires agencies to consider "the relevant matter presented" in the informal rulemaking proceedings and to support final rules with "a concise general statement of their basis and purpose."[52] The D.C. Circuit has stated that "[c]onsideration of comments as a matter of grace is not enough. It must be made with a mind that is open to persuasion."[53] Furthermore, in his research that formed the basis for ACUS's recent recommendations on public commenting, Steven Balla cited several rulemakings where public comments had a significant outcome on the shape of the final rule.[54] To determine how the process might be reformed to provide opportunities for broader and more effective public participation, it is useful to examine the type of comments that agencies typically receive during the rulemaking process and to identify which comments are likely to have the greatest impact on agencies' decisionmaking.

Agencies tend to be more responsive to comments from regulated entities and to other "repeat players" in the rulemaking process because they have the type of information that the agencies need to develop their rules and they are the entities that are most likely to sue if they are disappointed with the final rules.[55] In most rulemaking proceedings, when regulated entities, trade associations, and similarly interested parties submit comments, the comments tend to address scientific and technical issues and the commenters often provide data and analyses to support their comments.[56] Agencies tend to give such comments significant weight in determining the substance of the final rule[57] because they recognize that these commenters are more likely to challenge their decision in court if they adopt a rule that these commenters oppose[58] and because they recognize that courts will likely invalidate their rule under "hard look" or "arbitrary and capricious" review if they do not adequately address the issues raised in

52. 5 U.S.C. § 553(c) (2006).

53. Advocates for Hwy. & Auto Safety v. Fed. Hwy. Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994) (alteration in original) (citation omitted) (internal quotation marks omitted).

54. *See* Balla, *supra* note 2, at 33.

55. *Id.* at 33–35. Balla notes, though, that it is often difficult to attribute specific changes in a regulation to specific comments raised by participants in the comment period. *Id.* at 35.

56. *See* Wagner, *supra* note 32, at 1351–53.

57. *See* Mendelson, *supra* note 10, at 1362; Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005); *see also* Balla, *supra* note 2, at 33–34.

58. *See* Mendelson, *supra* note 10, at 1370.

these comments.[59] Agencies will accord similar deference to comments that raise legal issues, as the agency's final rule could be invalidated on the grounds that it is *ultra vires*, "arbitrary and capricious," or otherwise illegal.[60] It is not surprising that agencies consider the potential for litigation in designing their final rules. For years, scholars, journalists, and government officials have asserted that more than 80% of the rules that EPA issues every year are challenged in court.[61]

While regulated entities, trade associations, and similar interested parties submit comments that tend to address scientific and technical issues, laypersons, or persons or entities outside of the cohort identified above, frequently submit comments that raise issues relating to values and policy. To the extent that commenters raise such issues, agencies tend to give those comments significantly less weight.[62] This is true regardless of the volume of comments in support of a specific value or policy position.[63]

Professor Nina Mendelson suggests that there are several reasons why agencies are reluctant to give much weight to "value-laden" comments. First, she notes that agencies frequently attempt to resolve most of the major policy- or value-laden issues prior to the notice of proposed rulemaking so that it will not be necessary to make fundamental changes to a rule after it is proposed, as the agency would have to begin the rulemaking process over if the final rule were not deemed to be a "logical outgrowth" of the proposed rule.[64] Second, she notes that it is easier for agencies to reject value-laden comments and to provide less explanation for those decisions under applicable standards of judicial review than it is to reject or give short shrift to technical or scientific comments.[65] Third, she

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59. *See id.*; Wagner, *supra* note 32, at 1351–53.

60. *See* Mendelson, *supra* note 10, at 1360.

61. *See* Johnson, *supra* note 9, at 287; Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1296 (1997) (including, as an appendix, a bibliography of citations to the 80% figure). My own empirical research of EPA rulemakings finalized between 2001 and 2005 found that 40% of the significant rules finalized during that time period were challenged in court and 75% of the "economically significant" rules were challenged. *See* Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767, 785 (2008) [hereinafter Johnson, *Ossification's Demise?*].

62. *See* Mendelson, *supra* note 10, at 1362; *see also* Balla, *supra* note 2, at 33–34.

63. *See* Mendelson, *supra* note 10, at 1363. Professor Mariano-Florentino Cuéllar argues, though, that based on the broad delegation of authority in many statutes, agencies frequently can make a broad range of policy decisions, so that most policy or "value-laden" comments raise issues that could fit within the agencies' legal authority. *See* Cuéllar, *supra* note 57, at 414.

64. *See* Mendelson, *supra* note 10, at 1368–69.

65. *Id.* at 1370. Even when there are significant numbers of value-laden comments, courts do not view rulemaking as a process in which "the majority of commenters prevail by

notes that since most value-laden comments are submitted by laypersons, agencies often feel that it is less likely those commenters will challenge the agency's decision in court than if the comments were submitted by regulated entities.[66] Finally, she suggests that resource constraints may encourage agencies to give minimal attention to responding to value-laden comments.[67] Even if agencies are persuaded by the policy- or value-laden comments, they are reluctant to admit that their decision was based on those factors, and, eschewing transparency, will frequently justify their decision based on other scientific, technical, or legal bases.[68]

B. Barriers to Effective Commenting

To the extent that persons other than regulated entities, trade associations, and similar repeat players engage in the commenting process, they face several barriers to providing effective comments. Obviously, the reluctance of agencies to give serious weight to comments that address values and policy issues presents a major barrier to laypersons and persons who do not routinely participate in the rulemaking process in formulating comments that will influence the outcome of the process.

Since agencies will tend to focus more heavily on scientific, technical, and legal comments, information barriers can prevent laypersons and non-repeat players from submitting influential public comments, just as those barriers may prevent them from participating in the process at all.[69] Unlike regulated entities, laypersons and persons who do not routinely participate in the rulemaking process often lack knowledge about (1) many of the issues that the agency is considering in developing its rules, (2) the information and data that the agency is relying on in developing its rules, (3) the limits of the agency's discretion in formulating its rules, and even (4) the process by which the agency makes its rules.[70] This information deficit makes it difficult for those persons to submit the scientific, technical, or legal comments that carry the most weight with agencies, and to provide the data and studies to support those types of comments.[71]

Similarly, just as financial limitations may prevent persons other than regulated entities, trade associations, and similar repeat players from

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the sheer weight of numbers." *Id.*

66. *Id.*

67. *Id.* at 1371.

68. *See* Benjamin, *supra* note 1, at 908; Mendelson, *supra* note 10, at 1373.

69. *See supra* notes 36–38.

70. *See* Farina et al., *supra* note 31, at 395, 417–18; Johnson, *supra* note 8, at 735; Noveck, *supra* note 3, at 452, 455, 457–58.

71. *See* Noveck, *supra* note 3, at 457 ("Most public comments are of little value and overburden the regulator with excessive paperwork.").

participating in the commenting process, those limits will prevent them from formulating, or hiring experts to formulate, the scientific, technical, and legal comments that carry the most weight with agencies.[72]

Those financial and information barriers are exacerbated when regulated entities engage in information capture by overloading agencies with data, studies, and comments in the rulemaking process.[73]

The structure of the commenting process also reduces the transparency of the process and the effectiveness of comments, regardless of whether the comments are provided by regulated entities, repeat players, or laypersons. The public comment period could, in theory, provide an opportunity for a dialogue and interchange between commenters and the agency, as well as among commenters. This could improve the accuracy of the information provided to agencies and identify areas of consensus among participants and the agency.[74] However, that has rarely happened in the past.[75] Until the evolution of e-rulemaking, in most cases, commenters were not even aware of the issues raised by other commenters unless they examined the official docket in a records room of an agency office.[76] Furthermore, many commenters wait until the last minute of the comment period to submit comments, so that no other commenters will have an opportunity to respond to those comments.[77] Finally, due to the adversarial relationship between agencies and some parties, commenters may take extreme positions when submitting comments, even though they may be satisfied with a more moderate position in the final rule.[78]

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72. *See supra* notes 44–45.

73. *See supra* note 43.

74. *See* Balla, *supra* note 2, at 14.

75. *Id.* at 1 n.6; Noveck, *supra* note 3, at 436–37.

76. *See* Balla, *supra* note 2, at 14; *see also* Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451, 454 (2010); Mendelson, *supra* note 10, at 1345–46; Benjamin, *supra* note 1, at 908.

77. *See* Balla, *supra* note 2, at 30. Reviewing several rulemakings by DOT and the Animal and Plant Health Inspection Service, Steven Balla found that one-third of all of the comments filed for the rules were filed on the last three days of the comment periods, and one-fifth of the comments were filed on the last day of the comment periods. *Id.* at 30–31. Most of the comments addressing technical issues and providing analytical data were provided near the end of the comment periods. *Id.* at 31–32. Balla also found that one-fifth of the comments were filed within the first few days of the comment period, since "[s]ubmitting information at the outset of comment periods offers interested parties the opportunity to influence the nature of the arguments and evidence that are subsequently filed by other stakeholders and ultimately considered by agency decisionmakers." *Id.* at 31.

78. *See* Noveck, *supra* note 3, at 456.

III. EFFECT OF INITIAL E-RULEMAKING EFFORTS ON PUBLIC PARTICIPATION

Congress and the federal government began to address some of the barriers to public participation outlined above by launching e-rulemaking initiatives. Congress passed the E-Government Act of 2002 to increase transparency and access to government.[79] In the Act, Congress delegated to the Office of Management and Budget (OMB) the obligation to implement e-rulemaking.[80]

E-rulemaking has been defined as "the use of digital technologies in the development and implementation of regulations before or during the informal rulemaking process."[81] The centerpiece of the e-rulemaking system implemented at the federal level is Regulations.gov, a website where agencies post notices of proposed and final rulemaking, as well as background information about those rules. Regulations.gov also provides a forum for the public to post comments about the rules and read the comments posted by others.[82] All of that material can now be searched with one click of a mouse, and over 90% of agencies post their regulatory material on the website.[83] While Regulations.gov provides public access to the regulatory materials, the backbone of the federal e-rulemaking system is the Federal Docket Management System (FDMS), a website that is restricted to agency staff, where agencies are required to maintain electronic dockets for all of the materials related to rulemakings.[84]

Although several agencies implemented some forms of electronic rulemaking before Congress passed the E-Government Act,[85] the federal

79. Pub. L. No. 107-347, 116 Stat. 2899 (2002) (codified at 44 U.S.C. §§ 3601–3606 (2006)).

80. *Id.* § 206. The Office of Management and Budget (OMB) delegated authority for e-rulemaking to EPA's Office of Environmental Information. *See* Noveck, *supra* note 3, at 467.

81. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 1 (footnote omitted) (internal quotation marks omitted).

82. *See* REGULATIONS.GOV, http://www.regulations.gov (last visited Feb. 10, 2013). The E-Government Act requires agencies to accept comments electronically, see E-Government Act, Pub. L. No. 107-347, § 206(c), 116 Stat. at 2899, and requires that the government establish a website to provide access to material in electronic dockets for each rulemaking. *Id.* § 206(d). Regulations.gov also provides for e-mail notification and an RSS feed. *See* Bingham, *supra* note 7, at 314.

83. ACUS RECOMMENDATION 2011-2, *supra* note 21, at 2.

84. FDMS.GOV, http://www.fdms.gov (last visited Feb. 10, 2013); *see also* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 1. In addition, electronic docketing significantly reduces costs for agencies. *Id.* at 2.

85. *See* Farina et al., *supra* note 31, at 402–03; *see also* Noveck, *supra* note 3, at 472 (noting that DOT managed its dockets electronically beginning in 1995 and the agency has made those dockets available on the Internet since 1997).

government has centralized and standardized e-rulemaking with Regulations.gov and the FDMS.[86] Although e-rulemaking could also encompass "hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings,"[87] or efforts to reach out and provide compliance assistance to regulated entities,[88] most of the federal efforts thus far have focused on moving the paper processes of notice-and-comment online, instead of adapting and transforming the processes to take advantage of the tools provided by technology.[89]

Although the e-rulemaking efforts so far have been evolutionary rather than revolutionary, e-rulemaking could reduce many of the barriers to the broader, more effective, and more transparent public participation outlined above. First, e-rulemaking addresses the information deficit problem outlined above by making the rules, the rulemaking process, and supporting information that agencies rely upon in *developing* rules more accessible to the public.[90] The information is much easier to find and to search when it is accessible on the Internet than when it is stored in records rooms in agency offices.[91] In addition, agencies can increase the scope of notice provided regarding rules through the use of technology.[92] E-rulemaking reduces another barrier to public participation by reducing the cost of participation.[93] Government agencies also benefit from those cost savings.[94]

86. *See* Bingham, *supra* note 7, at 314; Noveck, *supra* note 3, at 434. Over 170 rulemaking entities in fifteen cabinet departments, independent agencies, and commissions use the Federal Docket Management System (FDMS) and Regulations.gov. *See* Bingham, *supra* note 7, at 314. However, agencies are prohibited from developing more sophisticated databases and consequently the new federal system has been criticized, at times, as the "lowest common denominator." *Id.* Critics also lament the lack of transparency and public participation in development of the federal e-rulemaking system. *See* Noveck, *supra* note 3, at 434.

87. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 1.

88. *See* Noveck, *supra* note 3, at 492.

89. *Id.* at 466, 474; *see also* Bingham, *supra* note 7, at 314. Professor Noveck complains that e-rulemaking notices do not "enrich the information with links to other data or put it within the social context of rulemaking practice." *See* Noveck, *supra* note 3, at 474. She also notes that nothing in the design of the e-rulemaking process "reduces regulatory capture, fosters less adversarial posturing or encourages better informed participation or greater representation of those who are not participating in the process." *Id.* at 479.

90. *See* Benjamin, *supra* note 1, at 899; Johnson, *supra* note 9, at 304; Lubbers, *supra* note 76, at 453; *see also* Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 896 (2011).

91. *See* Noveck, *supra* note 3, at 473–74.

92. *See* Lubbers, *supra* note 76, at 453.

93. *See* Johnson, *supra* note 9, at 299–300.

94. *See* Dooling, *supra* note 90, at 896 (noting that a recent report estimated $30 million cost savings over five years).

Reducing the notice, information, and cost barriers should make it easier for persons to become aware of, understand, and provide comments on rules.[95]

The early e-rulemaking efforts have also made it easier for persons to find, read, and respond to the comments raised by others by making them accessible and searchable online during the comment period.[96] While this should improve the quality of comments, and could lead to a more collaborative process for developing rules in the long term,[97] e-rulemaking efforts alone cannot prevent commenters from submitting comments at the end of the comment period when it is difficult for anyone else to rebut or respond to the comments. Finally, e-rulemaking can make it easier for the public to receive notice of the final rules that are adopted and to monitor implementation of the rules.[98]

While the early e-rulemaking efforts have reduced barriers to participation to some degree, critics argue that the changes have done little to increase the diversity of commenters in the rulemaking process or to increase the number of comments submitted to agencies.[99] Based on his review of several empirical studies of rulemaking after the launch of Regulations.gov, Professor Cary Coglianese concluded that e-rulemaking efforts have not increased the number of comments submitted in most rulemaking proceedings.[100] Although a few recent proceedings have generated significant numbers of comments from individuals rather than regulated entities or other repeat players, Professor Coglianese and others point out that prior to e-rulemaking it was not unusual to find significant

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95. *See* Johnson, *supra* note 9, at 304; Coglianese, *supra* note 26, at 945.

96. *See* Benjamin, *supra* note 1, at 898; Lubbers, *supra* note 76, at 453–54; Mendelson, *supra* note 10, at 1345.

97. *See* Lubbers, *supra* note 76, at 454; Benjamin, *supra* note 1, at 896–97.

98. Lubbers, *supra* note 76, at 453–54; *see* Benjamin, *supra* note 1, at 895–96.

99. *See* Benjamin, *supra* note 1, at 933; Coglianese, *supra* note 26, at 949. *But see* Cuéllar, *supra* note 57, at 414 (finding that comments from the public make up the vast majority of comments about some rulemakings since the launch of e-rulemaking); Lubbers, *supra* note 76, at 465 (noting that 72% of federal rulemakers surveyed in Professor Lubbers's study *felt* that e-rulemaking had led to an increase in public comments).

100. *See* Coglianese, *supra* note 26, at 952–54, 956–58. Coglianese cites (1) a study by Ioana Munteanu and J. Woody Stanley of seventeen DOT rulemakings in which the researchers concluded that most DOT rulemakings continued to receive only a few public comments after the launch of electronic docketing; (2) a study by John de Figueiredo of FCC proceedings, in which Professor de Figueiredo concluded that in 99% of the proceedings, the e-filing opportunity did not seem to cause an increase in individual or interest group participation in the proceedings; and (3) a study by Steven Balla and Benjamin Daniels of 450 DOT rules issued before and after the introduction of DOT's online rulemaking system, in which the researchers found that the patterns of commenting were roughly the same before and after the launch of online rulemaking. *Id.* at 956–58.

numbers of comments from individuals in isolated rulemaking proceedings.[101] Professor Coglianese argues that while e-rulemaking efforts have lowered some barriers to broader participation,

> it takes a high level of sophistication to understand and comment on regulatory proceedings. Moreover, even though information technology lowers the absolute cost of submitting comments to regulatory agencies, it also dramatically decreases the costs of a wide variety of entertainment and commercial activities that are much more appealing to most citizens.[102]

Professor Beth Noveck proposes an alternative explanation for the minimal increase in commenting. She suggests that the e-rulemaking efforts thus far have not reduced information barriers for most citizens because the rulemaking information is not well organized or easy to find. As a result, most citizens still lack information about the rulemaking process and how to engage in the process.[103]

Critics also complain that e-rulemaking has done little to improve the quality of public comments. Empirical studies of e-rulemaking demonstrate that most comments by individuals do not advance new arguments or data and that most comments from individuals are form letters or form letters with a few additional sentences but no new rationales, data, or arguments.[104] Based on a survey of federal agency officials engaged in rulemaking, Professor Jeffrey Lubbers found that 60% of the respondents indicated that they received the same amount of comments containing new useful information or arguments under e-rulemaking as they did before the launch of e-rulemaking.[105] In addition, half of the respondents indicated that e-rulemaking led to an increase in the number of comments that provide only opinions without supporting facts or arguments.[106] To some extent, agencies may be missing out on opportunities to increase the quality

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101. *Id.* at 952–53; Benjamin, *supra* note 1, at 933.

102. Coglianese, *supra* note 26, at 943–44.

103. *See* Noveck, *supra* note 3, at 474–75; *see also* Bingham, *supra* note 7, at 314–15 (noting criticism of the design of the FDMS); Farina et al., *supra* note 31, at 403. Federal agency officials, however, remain positive about the power of e-rulemaking to inform and educate the public. In a survey of federal agency officials engaged in rulemaking, Professor Lubbers found that 59% of the respondents indicated that e-rulemaking made it easier to conduct proactive notification and outreach to the public by maintaining targeted mailing lists of persons interested in selected aspects of rulemaking and 74% of the respondents indicated that e-rulemaking made it easier to disseminate information relevant to the agency's proposed rulemaking "so as to generate more informed commenters." *See* Lubbers, *supra* note 76, at 460–61, 476.

104. *See* Benjamin, *supra* note 1, at 934; Coglianese, *supra* note 26, at 952–53 (discussing findings of Cuéllar, see *supra* note 57).

105. Lubbers, *supra* note 76, at 465–66.

106. *Id.* at 466.

of public comments because e-rulemaking efforts thus far have done little to facilitate dialogue among commenters or between commenters and the agency during the comment period. As noted previously, though, some critics question whether individuals have any useful information to add to the rulemaking process.[107]

Many of these criticisms suggest that early e-rulemaking efforts have not improved the rulemaking process in ways that it was hoped that they might. Some critics go further, though, and argue that e-rulemaking efforts have created bigger problems for the rulemaking process. For instance, as noted above, to the extent that there has been an increase in citizen participation in individual rulemakings during the e-rulemaking era, it has tended to be limited to the submission of form letters. Critics of e-rulemaking argue that the new technologies have transformed the rulemaking process into a "notice and spam" process by making it too easy for individuals to submit public comments.[108] Interest groups can provide form letters on their websites that potentially tens or hundreds of thousands of persons can electronically copy and submit online to agencies in the rulemaking process.[109] This practice exacerbates the "information overload" problem identified above.[110] The flood of comments increases the cost and time that it takes for agencies to review and respond to comments.[111] Although the multitude of e-form letters will contain mostly duplicative comments, agencies can only discover the limited value of those additional comments by reviewing them.[112] In addition, agencies may be less responsive to comments when the volume of comments is too great.[113] Critics also argue

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107. *See, e.g.,* Funk, *supra* note 8; *see also* Benjamin, *supra* note 1, at 910–12 (arguing that regulated entities and repeat players in the rulemaking process, or the agencies themselves, are likely to have identified and considered most, if not all, of the issues and arguments that would be raised by individual citizens).

108. *See* Coglianese, *supra* note 26, at 958; Dooling, *supra* note 90, at 899–900; Noveck, *supra* note 3, at 441; Johnson, *supra* note 8, at 735 n.206.

109. *See* Noveck, *supra* note 3, at 442.

110. *See supra* notes 41–43; *see also* Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N. U. L. REV. 469, 481 (2008); Noveck, *supra* note 3, at 442.

111. *See* Farina et al., *supra* note 31, at 408–09; Lubbers, *supra* note 76, at 455; Noveck, *supra* note 3, at 479–80.

112. *See* Noveck, *supra* note 3, at 442–43. Professor Lubbers notes that agencies will rely increasingly on software to process the multitude of comments, potentially leading to "an arms race between well-financed computer-generated comment machines on one hand, and computer-aided comment-sorters in the agencies, on the other." Lubbers, *supra* note 110, at 479.

113. *See* Noveck, *supra* note 3, at 479–80. Professor Lubbers's survey of federal rulemakers suggests that despite the "tendency toward more opinionated and more similar comments, most rulemakers . . . reported that e-rulemaking has not caused them to place

that the public will criticize agencies and view them as anti-democratic if they adopt rules or policies in rules that run counter to the majority view expressed by commenters in the rulemaking process.[114] The rulemaking process is not designed as a democratic process to be decided based on a vote of the citizens, yet public misunderstanding of the process and opposition to the outcome of the process can be exacerbated when agencies ignore the clearly expressed sentiments of overwhelming majorities of commenters.[115] As noted above, when commenters feel that their comments are not being adequately considered, they are more likely to oppose agencies' rules and less likely to participate in future rulemaking proceedings.[116]

Critics also complain that, to the extent that there is a "digital divide," wherein segments of society effectively lack access to the Internet, relying on the Web as a participation tool intensifies the inequity created by that divide and disadvantages persons that do not have access to the Internet.[117] In a 2009 report on "The Internet and Civic Engagement," the Pew Internet and American Life Project concluded that, "just as in offline politics, the well-off and well-educated are especially likely to participate in online activities that mirror offline forms of engagement."[118] In the short term, persons who lack Internet access may still participate in the rulemaking process off-line, as they did prior to the launch of e-rulemaking. As agencies add more value to the online experience, though, it may be necessary to find ways to provide access to that experience to persons who lack access to the Internet. Regardless of the reforms implemented in the rulemaking process, agencies need to rely on a broad mix of tools, so that no one is foreclosed from participation in the process.

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less 'value on the comments by the average citizen.'" Lubbers, *supra* note 76, at 467.

114. *See* Mendelson, *supra* note 10, at 1346, 1359.

115. *Id.*

116. *See supra* notes 11, 46, and accompanying text.

117. *See* Johnson, *supra* note 9, at 305–10.

118. Aaron Smith et al., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CIVIC ENGAGEMENT 1 (2009), *available at* http://www.pewinternet.org/~/media/Files/Reports/2009/The%20Internet%20and%20Civic%20Engagement.pdf. However, the 2010 report also concluded that patterns of online usage are evolving rapidly and that African-Americans and Latinos were "significantly more likely than whites to consider government use of social media as helpful and informative." Aaron Smith et al., PEW INTERNET & AM. LIFE PROJECT, GOVERNMENT ONLINE 6 (2010), *available at* http://www.pewinternet.org/~/media//files/reports/2010/PIP_Government_online_2010_with_topline.pdf

IV. ACUS RECOMMENDATIONS REGARDING COMMENTS IN RULEMAKING

While early e-rulemaking efforts have had limited success in achieving broader, more effective and more transparent public participation in rulemaking, federal agencies and ACUS continue to explore rulemaking reforms to achieve those goals. Last year, ACUS issued a "Recommendation on Rulemaking Comments" to identify a series of "best practices" designed to increase "public participation and improve rulemaking outcomes more effectively."[119] First, to promote more effective public comments, ACUS recommended that the federal government consider publishing and posting on Regulations.gov a document that explains what types of comments are most beneficial and identifies "best practices" for persons submitting comments.[120] Second, ACUS recommended that agencies set comment periods "that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted effectively," and that the comment periods should generally be at least sixty days long for "significant" rulemakings.[121] Third, ACUS recommended that agencies post all comments, whether received electronically or in paper format, on Regulations.gov in a timely manner.[122] Further, ACUS recommended that agencies, "[w]here appropriate, . . . make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted."[123] The Conference also made

119. ACUS RECOMMENDATION 2011-2, *supra* note 21, at 2.

120. *Id.* at 3. The recommendation also suggests that individual agencies can publish supplements to the effective commenting guidelines, which should be published on Regulations.gov and other venues. *Id.*

121. *Id.* For rulemakings that are not "significant," ACUS recommends a minimum thirty-day comment period. *Id.*

122. *Id*. at 3.

123. *Id.* at 4. ACUS and the Office of Management and Budget (OMB) made similar recommendations in the past. *See* ACUS RECOMMENDATION 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,653, 29,655 (July 19, 1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto "present new and important issues or serious conflicts of data"); ACUS RECOMMENDATION 72-5, *Procedures for the Adoption of Rules of General Applicability*, 38 Fed. Reg. 19,782, 19,792 (July 23, 1973) (recommending that agencies consider providing an "opportunity for parties to comment on each other's oral or written submissions"); CASS R. SUNSTEIN, OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-11-10, EXECUTIVE ORDER 13563 IMPROVING REGULATION AND REGULATORY REVIEW 2 (2011) *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf (noting that Executive Order 13,563 "seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the

recommendations regarding anonymous comments,[124] late comments,[125] and stale comments.[126] ACUS did not believe, however, that it was necessary to make any changes to the APA and did not believe that agencies should be required to adopt all of the recommendations as uniform practices.[127]

A. Benefits of ACUS Recommendations

While the ACUS recommendations are unlikely to promote broader public participation in rulemaking, several of the recommendations could improve the quality of public comments and facilitate more effective commenting. For instance, the "effective commenting" guidelines that ACUS recommends could help laypersons develop comments that go beyond simply making value or policy statements.[128] Similarly, the recommendations for timely posting of comments and reply comments could facilitate the development of a dialogue between the agency and commenters and among commenters that is frequently lacking. This could improve the information available to agencies by facilitating "vetting" of the public comments.[129]

In the e-rulemaking era, agencies have been criticized at times for failing to post comments that they receive, either electronically or in print, on Regulations.gov in a timely manner.[130] For comments that are received in print, the delays are frequently attributable to the time it takes to route the

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comments, arguments, and information of others during the rulemaking process itself").

124. ACUS recommended that agencies establish and publish policies regarding the submission of anonymous comments. ACUS RECOMMENDATION 2011-2, *supra* note 21, at 4. ACUS did not, however, take any position regarding whether agencies should prohibit anonymous comments. Based on a survey of rulemakings of twenty-five agencies, Steven Balla concluded that there was a significant split in agency practices, as ten agencies required commenters to provide information about their identities, while fifteen agencies did not. *See* Balla, *supra* note 2, at 22–23.

125. ACUS recommended that agencies adopt and publish policies on late comments, provide notice to the public about such policies, and apply the policies consistently. ACUS RECOMMENDATION 2011-2, *supra* note 21, at 4. ACUS also indicated that agencies could adopt policies that disfavor late comments and only consider such comments to the extent practicable. *Id.*

126. ACUS recommended that agencies closely monitor their rulemaking dockets and consider the use of mechanisms to refresh the rulemaking record, including supplemental notices of proposed rulemaking, when the agencies believe that the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale. *Id.* at 5.

127. *Id.* at 2.

128. *See infra* notes 169–73, and accompanying text.

129. *See infra* notes 130–134, and accompanying text.

130. *See* Dooling, *supra* note 90, at 905 n.43.

comments to the appropriate agency staff, scan the comments into electronic form, and upload the comments into the electronic docket for the rulemaking.[131] In other cases, regardless of whether the comments are received electronically or in paper, there are delays in uploading comments to the electronic docket for a rulemaking because the agency must determine whether the comments contain any confidential or private information or trade secrets that should not be made public.[132] Regardless of the reasons for the delays in posting comments, the longer it takes for the agency to post comments, the less time commenters have to respond to those comments during the comment period. Consequently, ACUS recommended that agencies adopt and announce policies for posting comments they receive within a specified number of days, although ACUS did not recommend a specific number of days.[133] If agencies comply with the recommendation, it will increase opportunities for commenters to review and respond to the comments posted by others during the comment period.[134]

By minimizing the ability of commenters to strategically wait until the end of the comment period to submit comments, and by encouraging commenters to avoid extreme comments in the initial comment period, ACUS's recommendation for reply comment periods could also increase opportunities for a dialogue during the comment period. Reply comment periods are additional comment periods that extend beyond the closing date of the initial comment period for a proposed rulemaking.[135] They are generally shorter than the initial comment period and may only extend for about a week or two.[136] Although there are a few situations where reply comment periods are required by law,[137] in most cases there is no legal requirement for agencies to provide these additional opportunities for public participation and, in practice, they are used infrequently.[138]

131. *Id.* at 905.

132. Although DOT generally posts comments submitted electronically within eight hours and the FCC generally posts such comments within twenty-four hours, to the extent that agencies screen comments before posting them, there will be delays in posting even for comments that are submitted electronically. *See* Balla, *supra* note 2, at 15; Dooling, *supra* note 90, at 907.

133. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 3.

134. *See* Balla, *supra* note 2, at 14.

135. *Id.* at 9.

136. *Id.* at 11.

137. *See, e.g.*, 42 U.S.C. § 7607(d)(5) (2006); 15 U.S.C. § 2605 (c)(3)(A) (2006).

138. *See* Balla, *supra* note 2, at 10 (reporting that a review of Federal Register notices between 2008 and 2011 revealed that ten agencies utilized reply comment periods during that time frame, although the majority of the proceedings in which they were utilized were conducted by the FCC).

Generally, when agencies provide reply comment periods, they limit the focus of comments that are acceptable in the reply comment period to comments that address issues raised in the initial comment period.[139] Consequently, commenters can respond, positively or negatively, to comments posted during the original comment period, even those filed at the end of the comment period.[140] In theory, because all of the comments submitted during the initial comment period will be subject to public review and comment, commenters should have less incentive to articulate indefensible, extreme positions in comments during the initial comment period[141] and should have less incentive to wait until the end of the initial comment period to submit their comments.

While ACUS's recommendations could, therefore, improve the quality of public comments, the recommendations are modest. As noted above, while ACUS encourages agencies to adopt policies for the timely posting of comments, it does not recommend a specific amount of time within which comments should be posted.[142] Similarly, while ACUS expresses approval for reply comment periods, it indicates that agencies should make use of them "where appropriate," without providing further guidance regarding when they would be appropriate.[143] In addition, with regard to all of its recommendations, ACUS stresses that "different agencies have different approaches to rulemaking and . . . individual agencies [should] decide whether and how to implement" the recommendations.[144]

B. Costs of ACUS Recommendations

Although ACUS's recommendations, if implemented by agencies, have the potential to improve the quality of public comments, they also impose some costs on agencies and the rulemaking process. First, depending on the nature of the rulemaking and the types of comments received, a policy that requires agencies to post all comments received on Regulations.gov within a very short time frame could impose significant resource demands on an agency.[145] Before posting comments online, agencies must ensure

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139. Without such limits, rather than waiting for the end of the initial comment period to submit comments, strategic commenters might wait until the end of the reply comment period to submit comments.

140. Balla, *supra* note 2, at 9–12.

141. *Id.* at 12.

142. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 3.

143. *See id*. at 4.

144. *Id.* at 2.

145. *See* Balla, *supra* note 2, at 19; *see also* Dooling, *supra* note 90, at 908 (noting that "screening 10,000 comments for two minutes each accounts for over 333 staff hours, or $8200 . . . [excluding] any time taken to redact comments").

that posting does not disclose confidential information, trade secret information,[146] copyrighted information, or information that violates the Privacy Act.[147] Agencies must also determine whether and how to post information that may be viewed as obscene or threatening by some.[148] Reply comment periods could also create additional resource demands for agencies because without sufficient filters they provide additional opportunities for regulated entities to engage in "information capture," overloading agencies with additional data, studies, and comments.[149] Creating effective commenting guidelines will be less resource intensive for agencies, but will require additional resources that agencies are not currently allocating to the rulemaking process.

Just as some of ACUS's recommendations may increase the resource demands on agencies, they may also increase the potential for legal challenges to the rules adopted by agencies or to actions taken by agencies during the process. First, if agencies do not divert sufficient resources to screening comments prior to publication on Regulations.gov, it is more likely that agencies may inadvertently disclose material that is legally protected from disclosure and thus be sued for such disclosure.[150] Further, to the extent that extended comment periods and reply comment periods exacerbate the information overload on agencies, it is more likely that agencies may fail to adequately respond to all of the issues raised in the

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146. While various laws impose stringent penalties for disclosing confidential or trade secret information, it is not clear that agencies have a legal obligation to screen the comments submitted for such information if the persons submitting it have not identified the material as protected. *See* Dooling, *supra* note 90, at 913.

147. *Id.* at 909. However, many agencies did not screen and redact commenters' submissions when the submissions were only accessible in physical reading rooms, and many still do not screen and redact submissions even though they will be accessible online. *Id*. at 907–08. Although the Privacy Act prohibits disclosure of various types of personal information, it allows disclosure with the written consent of the individual to whom the information pertains. *Id.* at 909.

148. *Id.* at 915. At the same time, agencies are wary of screening comments too rigorously for fear of violating the First Amendment's guarantees. *Id.* at 915.

149. *See* Balla, *supra* note 2, at 12–13.

150. Some agencies do not screen comments and hope that they can avoid liability by relying on the notice to commenters placed on the Regulations.gov website, which provides that everything that commenters submit in a comment will be made available online. *See* Dooling, *supra* note 90, at 910–11. It is not clear, however, whether agencies have a legal obligation to monitor the content of the public comments that are automatically uploaded to Regulations.gov. *Id.* at 908. As an alternative to screening comments before posting, agencies could allow commenters to post their comments directly and provide a link on the comment page where readers could flag comments that contained inappropriate content. *Id.* at 915–16. Agencies could subsequently redact material that they determine should not be posted publicly.

rulemaking proceeding.[151] Similarly, to the extent that extended comment and reply comment periods raise issues that lead agencies further away from proposed rules, it is more likely that rules adopted by agencies at the end of the process might be challenged on the grounds that they are not a "logical outgrowth" of the proposed rules.[152]

ACUS's recommendations might also increase the length of the rulemaking process. While the recommendations for a minimum thirty- or sixty-day comment period and for reply comment periods will increase opportunities for public participation and should improve the quality of public comments, they will also increase the time that it takes to issue a final rule.[153]

Finally, if implemented, the recommendations could significantly increase the cost of rulemaking and the likelihood of judicial challenges. Furthermore, the likelihood of successful judicial challenges or the time that it takes to finalize rules could exacerbate the ossification of the rulemaking process and encourage agencies to make fewer rules, instead implementing policies through more informal means.[154]

V. ACUS RECOMMENDATIONS REGARDING E-RULEMAKING

In addition to the "Recommendation on Rulemaking Comments," in 2011 ACUS also issued a "Recommendation on Legal Issues in E-Rulemaking."[155] Standing alone, the recommendation will do little to

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151. *See supra* notes 41–43 and accompanying text.

152. Courts have generally interpreted the APA to require that the final rule an agency adopts through notice-and-comment rulemaking be a "logical outgrowth" of the proposed rule. *See, e.g.*,Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3d Cir. 2011); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 94–95 (D.C. Cir. 2010); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

153. *See* Balla, *supra* note 2, at 10 (noting that, despite an internal memorandum encouraging their use, DOT has not increased the use of reply comment periods because agencies have incentives to develop regulations quickly and reply comment periods have the potential to greatly increase the time it takes to promulgate rules).

154. For several decades, academics and policymakers have argued that agencies increasingly avoid notice-and-comment rulemaking because of the frequency of judicial challenges to the rules and because procedures imposed by courts, Congress, and the Executive Branch have ossified the rulemaking process. *See* Johnson, *Ossification's Demise?*, *supra* note 61, at 768. Many factors are blamed for the "ossification" of rulemaking, including judicial interpretation of the rulemaking provisions of the APA, the procedural requirements imposed by the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act and similar laws, and the review procedures imposed by the Executive Branch through Executive Order 12,866 and a variety of executive orders addressing takings, federalism, and children's health protection, among other topics. *Id.* at 769.

155. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21.

broaden the scope of public participation, facilitate more effective commenting, or ensure a more transparent process. Since e-rulemaking and the e-rulemaking reforms discussed later in this Article can promote those goals, however, the recommendation can advance the goals by making e-rulemaking more efficient.

One of the issues that ACUS addressed in the recommendation is the "notice and spam" issue. As noted above, in a few high profile rulemakings, organizations and interest groups have mobilized e-mail campaigns to flood agencies with hundreds of thousands of form letter comments that are nearly identical.[156] Processing, reviewing, and responding to those comments requires substantial agency resources. In its recommendation, ACUS concluded that the APA "does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments" and recommended that agencies "consider whether . . . they could save substantial time and effort by using reliable comment analysis software to organize and review public comments."[157] ACUS also addressed some of the commenting issues mentioned in the preceding section of this Article, recommending that agencies explore procedures for (1) flagging inappropriate or protected content in comments; (2) allowing persons to indicate that their comments contain confidential or trade secret information; and (3) taking action regarding inappropriate or protected content, or confidential or trade secret information in public comments.[158]

ACUS also outlined several recommendations for electronic docketing. First, ACUS noted that the APA provides agencies with the flexibility to use electronic records instead of paper records and that in many cases agencies are not required to retain paper copies of the materials that have been converted into electronic forms.[159] ACUS also recommended that agencies include in their electronic dockets a descriptive entry or photograph for every physical object that is submitted during a comment period.[160] Additionally, ACUS suggested that agencies' electronic dockets should include all studies and reports on which the rulemaking proposal draws.[161]

As with the recommendations on commenting, ACUS concluded that the APA did not need to be amended to address any legal issues created by

156. *See* Coglianese, *supra* note 26, at 954.

157. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 4. ACUS also recommended that agencies work together to share their experiences and best practices regarding the software that they use. *Id.*

158. *Id.* at 5.

159. *Id.*

160. *Id.* at 6.

161. *Id.*

e-rulemaking.[162] ACUS was careful to note, though, that agencies may face other legal issues in e-rulemaking when they use wikis, blogs, and other technologies to solicit public input, and that ACUS's recommendations did not address those issues, which "warrant[s] further study."[163]

A. Benefits and Costs of ACUS's Recommendations

Although ACUS's "Recommendation on Legal Issues in E-Rulemaking" will only indirectly promote the goals of broadening the scope of public participation and making it more effective and transparent, the recommendation is not likely to raise any concerns raised by the "Recommendation on Rulemaking Comments." Unlike the rulemaking comments recommendation, the comment analysis software and the elimination of retention and storage of paper comments proposed in the e-rulemaking recommendation hold out the promise of reducing, rather than increasing, agency resources used in rulemaking. Additionally, there is little in the recommendation that would increase the length of the rulemaking process.[164] Finally, the recommendation is not likely to increase the likelihood of legal challenges, unless the software that agencies choose to process comments is ineffective and causes agencies to ignore comments because they were flagged as identical or repetitive.[165]

VI. RULEMAKING 2.0 REFORMS

While ACUS's recommendations on rulemaking comments and e-rulemaking could play a minor role in broadening public participation in rulemaking and making it more effective and transparent, the next generation of e-rulemaking reforms are likely to have a much greater impact. Unlike early e-rulemaking efforts that simply created an electronic version of the paper process used for notice-and-comment rulemaking, the "Rulemaking 2.0" reforms aim to take advantage of new technologies to transform the notice-and-comment process into a more social and collaborative process.[166]

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162. *Id.* at 3.

163. *Id.* at 3–4.

164. After all, many agencies are already making supporting documents and analyses available as part of the rulemaking process through Regulations.gov. The recommendation that agencies describe or include a photograph of physical objects in the e-docket should not delay the rulemaking process for long.

165. Further, litigation risks should be reduced by the recommendation to the extent that agencies implement its suggestions to flag inappropriate or protected content and confidential or trade secret information and to take action when such information is included in public comments. *Id.* at 5–6.

166. *See* Farina et al., *supra* note 31, at 406; Noveck, *supra* note 3, at 435–37, 471–72.

Some of the e-rulemaking reforms that have been suggested or implemented focus on providing broader notice about proposed and final rules and how to get involved in the rulemaking process. For instance, agencies have already begun to use RSS feeds to push information about rules and events in the rulemaking process to interested subscribers.[167] Similarly, agencies are increasing the use of social media, like Facebook and Twitter, in addition to the agencies' own websites, as tools for informing the public about proposed and final rules and the rulemaking process.[168]

Many agencies are also providing, along with notices of proposed rulemaking, guidelines on how to write effective comments along the lines of the ACUS recommendation.[169] Those guidelines frequently encourage commenters to (1) identify any expertise that the commenter may have and whether the commenter is speaking on behalf of anyone else; (2) provide clear reasons for the position taken in the comments; (3) provide data and scientific justifications with the comments, if possible; (4) avoid making value statements or expressing general support for policy positions; and (5) be aware of any legal limits on the scope of the agency's authority in developing the rule.[170] The guidelines also generally encourage commenters to clearly identify the issues upon which they are commenting and the portion of the proposed rule to which their comments are directed and to focus the comments on issues that are within the scope of the proposed rule.[171] Most guidelines also encourage commenters to be

167. *See* Noveck, *supra* note 3, at 477–78. Professor Noveck notes that dissemination of final rules should take advantage of new technologies in the same way as dissemination of proposed rules, and she argues that agency compliance should be indexed and easily searchable. *Id.* at 493.

168. *See, e.g.*, Fed. Commc'ns Comm'n, FACEBOOK, http://www.facebook.com/FCC (last visited Jan. 29, 2013); U. S. Envtl. Prot. Agency, FACEBOOK, http://www.facebook.com/EPA (last visited Jan. 29, 2013).

169. Noveck, *supra* note 3, at 485; *see* Fed. Commc'ns Comm'n , *Rulemaking Process at the F.C.C.*, FCC ENCYCLOPEDIA, http://www.fcc.gov/encyclopedia/rulemaking-process-fcc (last visited Jan. 29, 2013) [hereinafter FCC]; NOAA Fisheries Serv., Alaska Reg'l Office, *Tips for Submitting Effective Public Comments*, *available at* http://www.fakr.noaa.gov/prules/effectivecomments.pdf (last visited Jan. 29, 2013) [hereinafter NOAA]; U.S. Dep't of Transp., *The Informal Rulemaking Process*, http://regs.dot.gov/informalruleprocess.htm (last visited Jan. 29, 2013) [hereinafter DOT]; U.S. Food & Drug Admin., *The Importance of Public Comment to the FDA*, http://www.fda.gov/Drugs/ResourcesForYou/Consumers/ucm143569.htm (last visited Jan. 29, 2013) [hereinafter FDA]. Interest groups have also developed effective commenting guidelines for their members. *See, e.g.*, Nat'l Bus. Aviation Ass'n, *NBAA Member Resource: Writing Comments to Federal Regulatory Proposals*, http://www.nbaa.org/advocacy/rulemaking-comments.pdf (last updated March 2009).

170. *See, e.g.*, NOAA, *supra* note 169; FCC, *supra* note 169; DOT, *The Informal Rulemaking Process*, *supra* note 169.

171. NOAA, *supra* note 169, at 5; DOT, *supra* note 169.

professional and respectful in their comments rather than combative.[172] Finally, the guidelines stress to commenters that rules are not developed based on the will of the people and that submitting comments is not the same as voting on a rule.[173]

Other e-rulemaking reforms focus on making it easier for the public to understand the rules and the issues surrounding the rules. For instance, Professor Beth Noveck suggests that agencies should post proposed and final rules in "plain English," or at least provide alternative versions of rules online.[174] One version could include the full text of the agencies' proposal, targeted to sophisticated users, and another version could include a plain English summary of the proposal, targeted to less experienced users.[175] She also suggests that agencies should divide rules into smaller segments for commenting so that users will be able to focus more easily on issues that concern them and limit their input to those issues, and she suggests that agencies could include, in their rules, a list of specific questions upon which they are seeking feedback.[176] In addition, she suggests that the website that provides access to rulemakings should organize rules by subject matter so that persons can find them more easily, that the rules should be indexed in a manner that makes them much easier to search, and that attachments should be posted in a standard format that can be read by most users without downloading several software programs.[177]

Further e-rulemaking reforms focus on promoting collaboration and dialogue during the comment period. Some proposals are fairly straightforward, such as providing for "threaded" comments in online rulemaking that allow commenters to reply to each other's comments during the comment period with the replies being visually linked to the comments referenced.[178] Reformers have also proposed a mechanism whereby persons could approve of comments posted by others, similar to "liking" content in Facebook, or whereby persons could rate comments posted by others on a scale, perhaps from one to ten.[179] Professor Noveck

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172. NOAA, *supra* note 169, at 6; DOT, *supra* note 169.

173. *See* NOAA, *supra* note 169, at 3; Council on Envtl. Quality, *A Citizen's Guide to NEPA: Having Your Voice Heard*, December 2007, *available at* http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf.

174. Noveck, *supra* note 3, at 475–77.

175. *Id.*

176. *Id.* at 477, 484–85; *see also* Fred Emery & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, ADMIN. & REG. LAW NEWS, Fall 2005, at 8 (noting that "agencies don't do an effective job at inviting comments").

177. Noveck, *supra* note 3 at 482, 486.

178. *See* Benjamin, *supra* note 1, at 899–900; Noveck, *supra* note 3, at 484, 489.

179. *See* Benjamin, *supra* note 1, at 900; Farina et al., *supra* note 31, at 443–44; Noveck, *supra* note 3, at 439–40.

even suggests that the rulemaking website could include mapping tools that would create charts and graphs to quantify comments on, or support for, various portions of a rule or issues in a rule.[180] Reformers have also suggested that blogs and wikis could be used as an adjunct to the rule development process.[181]

A good example of a Rulemaking 2.0 project encompassing many of these reform proposals is "the Regulation Room."[182] The Regulation Room is a rulemaking pilot project administered by the Cornell eRulemaking Initiative (CeRI), in cooperation with the United States Department of Transportation (DOT).[183] The Regulation Room online rulemaking website is not a government site, and the project is not directed by the federal government.[184] The Regulation Room has been used with a DOT rulemaking proposal to ban texting by commercial motor vehicle drivers and a rulemaking proposal addressing airline passenger rights.[185] For those rulemakings, DOT provided an advance copy of the notice of proposed rulemaking to CeRI.[186] Prior to the notice, the students and faculty at CeRI divided the proposed rule into several different topics and posted summaries of each topic, along with the language of the rule, on the Regulation Room website.[187] CeRI also added hyperlinks to statutes, regulations, and various secondary sources cited in the rulemaking.[188]

Prior to the publication of the notice of proposed rulemaking, CeRI then engaged in outreach to stakeholder groups that it identified in conjunction with the agency, encouraging the groups, through the use of social media and otherwise, to get involved in the rulemaking process.[189] When the notice of proposed rulemaking was published in the Federal Register and made available online at Regulations.gov and the DOT website, the notice informed the public that CeRI was administering the Regulation Room pilot project in conjunction with the rulemaking.[190] Persons who went to the Regulation Room website were able to submit comments on sections of the rule or the whole rule and CeRI staff moderated communications on the website, policed inappropriate content, and asked and answered

180. *See* Noveck, *supra* note 3, at 440, 491; *see also* Farina et al., *supra* note 31, at 406.
181. *See* Farina et al., *supra* note 31, at 406.
182. *See* Cornell eRulemaking Initiative (CeRI), REGULATION ROOM, http://regulationroom.org/ (last visited Jan. 29, 2013).
183. *See* Farina et al., *supra* note 31, at 396.
184. *Id.* at 397.
185. *Id.* at 398.
186. *Id.* at 412–13.
187. *Id.*
188. *Id.* at 413.
189. *Id.* at 416–17.
190. *Id.* at 398.

questions from commenters.[191] CeRI hopes that the moderation of the site will facilitate discussion and collaboration among the commenters.[192]

CeRI staff also mentored effective commenting on the site.[193] In addition to providing commenters, at the outset, with a document that describes how to write an effective comment,[194] CeRI staff flagged specific comments submitted during the comment period as "Recommended."[195] The staff was not endorsing the views espoused in those comments, but was identifying the comments as effective. As the administrators of the project note on the website, "[C]omments are Recommended not for what they say, but for how they say it: they give reasons, bring in information, consider alternatives, show that the writer is trying to consider the issue from all sides, etc."[196] The CeRI staff continued to engage in outreach to actively solicit stakeholders to participate in the process during the comment period. Translation of the rulemaking materials, moderation of the commenting process, and outreach to stakeholders are all very time consuming and resource intensive.[197] It is important to stress, though, that all of those activities were carried out by students and faculty in CeRI, and there was limited communication with agency officials after the comment period began.[198]

At the end of the comment period for the proposed rules, the CeRI staff prepared a summary of the comments provided to the Regulation Room for everyone who participated in the Regulation Room to review.[199] After the summary was reviewed, CeRI staff submitted the summary as a comment in the official rulemaking record.[200] This is necessary because the Regulation Room is simply an adjunct to the official rulemaking proceeding. Comments submitted to the Regulation Room are not directly submitted to DOT.

In some ways, the Regulation Room process and similar e-rulemaking

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191. *Id.* at 413–14.

192. *Id.* at 397.

193. *Id.* at 414.

194. *See* CeRI, *The Regulation Room, Learn More,* http://www.regulationroom.org/learn-more/ (last visited Feb. 10, 2013). The guidance is similar to the guidance provided on many agency websites. Specifically, the guidance encourages commenters to provide data and examples to support comments, explain positions in an organized and rational manner, and adopt a civil tone. *Id.* It also asks commenters to recognize both the limits on the agency's legal authority when commenting and that commenting is not voting. *Id.*

195. *See* Farina et al., *supra* note 31, at 414.

196. *See* CeRI, *supra* note 194.

197. *See* Farina et al., *supra* note 31, at 416–17.

198. *Id.* at 413.

199. *Id.* at 414.

200. *Id.*

reforms resemble negotiated rulemaking. Just as in negotiated rulemaking, proponents of e-rulemaking reforms envision stakeholders engaging in a dialogue with each other and the agency and collaborating on developing a rule.[201] Similarly, just as in negotiated rulemaking, e-rulemaking reformers stress the importance of identifying stakeholders and actively soliciting their input in the rulemaking process.[202] However, the reformed e-rulemaking process differs from negotiated rulemaking in important ways. In negotiated rulemaking, collaboration occurs early in the process, before a rule is proposed for public comment, whereas in e-rulemaking collaboration occurs during the comment period after the rule has been proposed.[203] Furthermore, in negotiated rulemaking, the agency plays an active role in the pre-notice collaboration, working toward developing a consensus proposal, whereas the agency plays a more passive, reactive role in e-rulemaking, and there is usually no express goal of achieving consensus.[204]

A. Benefits of Rulemaking 2.0 Reforms

The e-rulemaking reforms outlined above could facilitate broader, more effective, and more transparent public participation in rulemaking in several ways. First, the reforms make it easier for more people to become aware that rulemaking processes are occurring and to understand how to get involved in those processes.[205] In the Regulation Room project, for

201. *Id.* at 418–21. Professor Jeffrey Lubbers vividly describes the shortcomings of the traditional process, unreformed by negotiated rulemaking or e-rulemaking as follows:

> The dynamics of this process tend to encourage interested parties to take extreme positions in their written and oral statements—in pre-proposal contacts as well as in comments on any published proposed rule. They may choose to withhold information they view as damaging. A party may appear to put equal weight on every argument, giving the agency little clue as to the relative importance it places on the various issues. There is usually little willingness to recognize the legitimate viewpoints of others. . . . What is lacking is an opportunity for the parties to exchange views and to focus on finding constructive, creative solutions to problems.

Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 991 (2008) (footnote omitted).

202. Farina et al., *supra* note 31, at 419–22.

203. *See* Benjamin, *supra* note 1, at 922–24.

204. *Id.* However, in describing the Regulation Room project, Professor Cynthia Farina, one of its developers, noted that "we will eventually extend facilitative moderation to a collaboration phase, in which moderators experiment with formats and methods for building areas of consensus. DOT is especially interested in possible consensus building." *See* Farina et al., *supra* note 31, at 415.

205. For instance, more than 90% of the persons who participated in the Regulation Room project for the DOT airline passengers' rights rulemaking indicated that they had not previously participated in the federal rulemaking process. *See* Farina et al., *supra* note 31, at

instance, organizers worked with agencies to identify a broad range of stakeholders that would likely be affected by proposed rules and invited those stakeholders to participate in the process.[206] In addition, the organizers provided notice of the rulemaking process through Twitter and Facebook and monitored other social networks and blogs to identify groups that might be affected by, or interested in, the rulemaking, posting notices about the proceedings in the comment sections of those blogs and networks.[207] They continued to monitor the involvement of the stakeholder groups and encourage groups to participate throughout the rulemaking process.[208] The new methods of outreach supplement, rather than replace, existing tools. In the Regulation Room project, for instance, agencies continued to rely on the conventional media, such as newspapers, television, and radio, as well as lists of interested parties maintained by the agencies, to publicize rulemakings.[209]

The e-rulemaking reforms also make it easier for the public to understand proposed rules and the process by providing background information about the rules and clear explanations of the process.[210] In addition, the reforms can greatly improve the quality of commenting by providing, through the effective commenting guidelines, clear information

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206. *Id.* at 420–21. For the DOT proposal to ban texting by commercial drivers, the organizers of the Regulation Room identified and contacted more than 100 groups that might have an interest in the rulemaking by e-mail and then by phone. *Id.* at 422.

207. *Id.* at 421–22. The organizers of the Regulation Room project estimate that they provided notice to more than a quarter of a million people as part of their outreach plan for the DOT rule on texting. *Id.* at 420. Professor Cynthia Farina notes, though, that the organizers "quickly lose[ ] control of the message as users redistribute it." Farina et al., *supra* note 1, at 395. She also notes that there are limits to the effectiveness of "viral" transmission of notice via social networking when the comment period for a rule is limited to sixty days. Farina et al., *supra* note 31, at 416.

208. Farina et al, *supra* note 31, at 422. Although the organizers of the project tried to solicit input from competing stakeholders on a variety of issues, they were not always successful in prompting participation by those stakeholders. *Id.* at 426–27 (describing the refusal of organizations representing pilots, flight attendants, and other airline employees to provide comments on the airline passengers' rights rulemaking).

209. *Id.* at 422–23. In the DOT rulemaking on airline passenger rights, a significant number of commenters visited the Regulation Room website after they received news about the rulemaking from an article in the Washington Post and other newspapers. *Id.* at 422–23. Professor Farina also noted, though, that "a focused group of stakeholders . . . can leverage the power of social networking to disseminate a call to action." Farina et al., *supra* note 1, at 411. In the airline passengers' rights rule, for instance, although only about 4.5% of the visits to the Regulation Room website originated from Facebook or Twitter, almost 18% of the comments addressing the peanut allergy issue in the rulemaking originated from Facebook. *Id.* at 412.

210. *See supra* notes 174–177 and 187–188.

about the nature of public commenting and the types of comments that are most helpful to agencies.[211] Furthermore, the reforms hold out the promise of reducing the barriers created by information overload. Organizers of the Regulation Room project attempted to make rulemakings significantly easier to understand by providing plain English translations of the rules and background materials, dividing the rules into several parts for commenting, and providing moderators to address questions from commenters.[212]

Finally, e-rulemaking reformers argue that the interactive nature of commenting in the reformed process will positively reinforce commenters and stimulate broader public participation.[213] Ideally, new and more

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211. *See* Farina et al., *supra* note 31, at 427; *see also supra* notes 169–173. Professor Farina noted, though, that visitors to the Regulation Room viewed such materials infrequently and "users spent considerably less time on [those] pages than the site-wide average." *See* Farina et al., *supra* note 31, at 427. She also hypothesized, based on the commenting pattern in the airline passengers rule of persons concerned about peanut allergies, that "single issue" commenters are not likely to spend much time reviewing educational materials provided with a rulemaking. *Id.* at 428–29.

212. *See supra* notes 187–188. *See also* Farina et al., *supra* note 31, at 435–40. The organizers of the Regulation Room project divided the texting rule into seven parts and divided the airline passengers' rights rules into ten parts. *Id.* at 436–37. As Professor Farina noted, proponents argue that "targeted commenting" "encourage[s] commenters to focus on specific aspects of the proposal rather than making global, generalized comments; [and] it might even inspire . . . specific suggestions for alternative language." *Id.* at 435. Regarding the plain English translations of rules, Professor Farina noted, "According to national statistics, about half of Americans read at no more than the eighth grade level [which is why] . . . the recommended readability level for government publications and other text written for broad public consumption is no higher than 8.0 on the Flesch-Kincaid scale (in which units correspond to grade levels)." *Id.* at 438. The organizers of the Regulation Room project incorporated translations of the texting and airline passengers' rights rules in the project because the Flesch-Kincaid score for DOT's notice of proposed rulemaking for the texting rule was 15.0 (third year of college) and the score for the airline passengers' rights rule was 17.8 (first year of post-graduate education). *Id.* at 438. The translations supplement, but do not replace, the official agency notices. *Id.* at 439–40.

213. *See* Benjamin, *supra* note 1, at 902. Professor Farina describes the moderation that takes place in the Regulation Room project as follows:

> Moderators may encourage a user to give reasons for a stated position, ask her to provide support for fact assertions and sources for data claims, or challenge her to suggest an alternative for a proposal being criticized. They may suggest relationships between what two commenters have said, or encourage a commenter to address a different part of the rule that seems relevant to the point she has just made. They also help lower the barriers of information complexity by pointing commenters to other materials on the site.

Farina et al., *supra* note 31, at 433. She notes that moderator comments designed to elicit further information or discussion generated responsive comments between sixty and seventy percent of the time. *Id.* at 434. She also notes that data regarding the percentage of commenters who made more than one comment in the Regulation Room rulemakings and the percentage of multiple commenters who commented on more than one issue indicate

educated commenters will provide information that would not have otherwise been provided to agencies. However, even if the commenters do not provide any new information, an increase in the volume of commenters raising the same issues might provide valuable information to agencies regarding the intensity of public sentiment on various issues.[214]

B. Costs of Rulemaking 2.0 Reforms

Despite those potential benefits, e-rulemaking reforms have generated criticism on a wide range of issues. First, some of the proposed reforms could be quite expensive, resource intensive, and time consuming if implemented on a wider scale.[215] Imagine, for instance, the resources required to translate every rule and all of the background information for every rule into plain English, to segment the rules into separate parts, and to moderate discussion about the rules during the comment period. Similarly, imagine the resources required to engage in the level of public notice utilized for the Regulation Room project for every rulemaking. In addition, the reforms open up new avenues for litigation, as opponents of rules may challenge the translations of rules and segmentation of rules, or argue that comments made in blogs or by moderators are part of the rulemaking record to be considered by agencies in issuing final rules.[216]

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that participants in the Regulation Room rulemakings are very engaged in the rulemaking process. *Id.* at 440–42.

214. *See* Benjamin, *supra* note 1, at 905–06.

215. *See* Farina et al., *supra* note 31, at 443–45; Benjamin, *supra* note 1, at 903.

216. *See* Farina et al., *supra* note 31, at 445. If agencies provide translations of rules, as the organizers of the Regulation Room have done, to make the rule accessible, they run the risk of mischaracterizing the rule or misleading commenters, which could lead to challenges that the agency failed to provide adequate notice or opportunity for comment, see 5 U.S.C. § 553 (2006), or that the final rule was not a logical outgrowth of the plain English version of the rule. *See supra* note 152. This may happen even if agencies include disclaimers with the plain English translations that indicate that the translations do not substitute for the formal language being proposed by the agency. Furthermore, if agencies conduct online discussions or moderate blogs during the comment period, persons who participate in the dialogues or blogs may consider their comments to be part of the rulemaking record, regardless of any disclaimers provided by agencies, and may challenge agencies' rules if the agencies do not adequately respond to any comments raised in the online dialogues or blogs. *See* Bingham, *supra* note 7, at 315; Farina et al., *supra* note 31, at 445–46; Peter M. Shane, *Empowering the Collaborative Citizen in the Administrative State: A Case Study of the Federal Communications Commission*, 65 U. MIAMI L. REV. 483, 498 (2011). Bridget Dooling, however, argues that the APA requirement that agencies give interested persons an opportunity to participate in rulemaking "through submission of written data, views or arguments" does not create an obligation for agencies to include, as comments on rules, statements made in blogs or online dialogues. *See* Dooling, *supra* note 90, at 924–25 (emphasis omitted). In addition to those issues, e-rulemaking raises several other legal issues that could spur litigation. As

Furthermore, the increase in comments on rules will lead to an increase in the time that it takes agencies to consider and adequately respond to comments in order to avoid litigation.[217] All of those increased costs, resource demands, and increased litigation risk could further ossify the rulemaking process and encourage agencies to issue fewer rules and make more decisions informally, outside of the rulemaking process.[218]

At a minimum, the reforms could slow down the rulemaking process significantly, delaying the implementation of rules that could provide significant health, safety, or environmental benefits. Critics contend that the e-rulemaking reforms will be as ineffective in the long term as negotiated rulemaking, which similarly promised a more open, transparent, and collaborative rulemaking process.[219] Despite that promise and congressional efforts to encourage the process,[220] negotiated rulemaking has been used infrequently because it is very resource and time intensive[221] and

Professor Jeffrey Lubbers notes, those issues include unauthorized disclosure of copyrighted material, disclosure of information that could compromise security, disclosure of private information, and censorship of information. *See* Lubbers, *supra* note 110, at 480–81. ACUS also identified many of these issues in its recommendation on the legal issues in e-rulemaking. *See* ACUS RECOMMENDATION 2011-2, *supra* note 21, at 5. In his survey of federal regulators, Professor Lubbers discovered that regulators' concerns about those issues have increased as agencies have adopted e-rulemaking procedures. *See* Lubbers, *supra* note 76, at 463–64.

217. *See* Lubbers, *supra* note 110, at 481; Benjamin, *supra* note 1, at 904–05. As commenters raise more issues and alternatives in the rulemaking proceeding, agencies must be diligent to review and respond to those issues and alternatives in order to avoid judicial invalidation of their decisions under the hard look application of the arbitrary and capricious standard. *See* Benjamin, *supra* note 1, at 916–17. As Professor Benjamin notes, "[I]f [an] agency receives a hundred thousand comments, it may simply miss a good argument presented in one of them. . . . Just one such failure can be fatal to a regulation." *Id.* at 917-18. Professor Benjamin recognizes, though, that if the new participants in the rulemaking process are simply making the same comments and raising the same issues as persons who would otherwise have been involved in the process, the cost and resource burdens on agencies can be reduced through the use of software to identify repetitive comments. *Id.* at 904–05; *see also* Dooling, *supra* note 90, at 901–02.

218. *See* Benjamin, *supra* note 1, at 910. Congress, courts and the Executive Branch have imposed so many procedural requirements on rulemaking that most academics and policymakers agree that the rulemaking process has become ossified. *See* Lubbers, *supra* note 110, at 470–73; Johnson, *supra* note 154, at 768–70; Stephen M. Johnson, *Junking the "Junk Science" Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 61 (2006). Professor Jeffrey Lubbers noted that federal agencies published 48% fewer final rules and 61% fewer proposed rules in 2005 than they did in 1979. *See* Lubbers, *supra* note 110, at 473.

219. *See* Benjamin, *supra* note 1, at 922–24; *see also supra* notes 201–204 and accompanying text.

220. *See* Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–70 (2006).

221. A 1995 report found that EPA spent almost $100,000 per negotiated rulemaking proposal, including costs for convening, facilitation, analysis, travel and per diem, and

it may neither reduce the potential for litigation of the rules adopted through the process nor speed up the rulemaking process.[222]

Critics are also concerned about the ways that agencies might respond to an increase in public participation due to the e-rulemaking reforms. Some are concerned that increases in the volume of comments on an issue spurred by reforms may pressure agencies to make more decisions based on the will of the people rather than based on agency expertise and statutory mandates.[223] Others are concerned that if agencies appear to ignore the will of the people—as expressed by the volume of comments on a particular issue—the public will stop participating in the rulemaking process or may lose faith in the democratic legitimacy of the agency decisionmaking process.[224] Some critics fear that a more transparent e-rulemaking process will lead to more oversight and potential pressure on agencies from Congress and the White House.[225]

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consultants. *See* Lubbers, *supra* note 201, at 997.

222. *See* Benjamin, *supra* note 1, at 922–23; Coglianese, *supra* note 26, at 944. In theory, rules developed through a negotiated rulemaking process should be adopted more quickly than other rules after the notice of proposed rulemaking is issued and should be less likely to be challenged because the negotiated rules were developed by consensus of all of the major stakeholders who would be affected by the rules. *See* Benjamin, *supra* note 1, at 922–23; Farina et al., *supra* note 1, at 418–19; Lubbers, *supra* note 201, at 987. Sixty-three negotiated rulemaking committees were created by agencies between 1991 and 1999 to develop rules, but only twenty-two committees were created between 2000 and 2007. *See* Lubbers, *supra* note 201, at 996. In addition, almost 68% of the committees created between 2000 and 2007 were created due to statutory mandates, compared to only 36.5% of the committees created between 1991 and 1999. *Id.* The data suggest that since 2000 most agencies have stopped using negotiated rulemaking voluntarily. *Id.* Professor Jeffrey Lubbers, though, challenges the assertions that negotiated rulemaking does not speed up rulemaking or reduce judicial invalidation of rules. *Id.* at 1003. He suggests that several other factors have contributed to the demise of negotiated rulemaking, including (1) the disbanding, for over a decade, of ACUS, a major supporter of negotiated rulemaking; (2) the lack of enthusiasm of OMB for the process; and (3) the applicability of the Federal Advisory Committee Act to the process. *Id.* at 996–1001.

223. *See* Lubbers, *supra* note 76, at 455–56, 481; Benjamin, *supra* note 1, at 924–25; Farina et al., *supra* note 31, at 409. If agencies adopted that approach, though, it would not be surprising to see a significant increase in efforts by regulated entities to engage in "astro-turfing" public relations campaigns, manufacturing "grass roots" support for their positions in the form of "public" comments. *See* Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 361 (2010) (discussing "Astroturf" lobbying in another context).

224. *See* Benjamin, *supra* note 1, at 903, 921; Noveck, *supra* note 3, at 448, 454.

225. *See* Benjamin, *supra* note 1, at 913–14; Lubbers, *supra* note 110, at 481. Professor Benjamin suggests that if e-rulemaking makes the rulemaking process more transparent and more citizens participate in the process, more citizens may lobby Congress regarding rules or issues raised in rules, which may lead to greater Congressional oversight. *See* Benjamin, *supra* note 1, at 914. He is somewhat skeptical, though, that increased lobbying by citizens

In addition to those concerns, some critics argue that e-rulemaking reforms could skew the pool of participants in the commenting process by disproportionately focusing on outreach efforts through the Web.[226] Others are skeptical that any of the e-rulemaking reforms will increase public participation in the rulemaking process because most members of the public will continue to lack any interest in participating even if they are educated and informed about the process.[227]

VII. ALTERNATIVE PATHS

The reforms suggested by ACUS and the "Rulemaking 2.0" e-rulemaking reforms outlined above may have very different impacts on the informal rulemaking process. As described above, the ACUS recommendations on commenting and the legal issues involved in e-rulemaking are very modest, and ACUS encourages agencies to take various actions "where appropriate," recognizing that agencies can choose to implement none of the recommendations.[228] Even if agencies adopt all of ACUS's recommendations, it is unlikely that the changes implemented by agencies will lead to significantly broader participation, although the proposals could improve the quality of public commenting and promote a dialogue during the comment period on rules.[229] While the benefits of ACUS's recommendations are modest, the costs are also modest. Although some of the proposals could increase the resources or time required to adopt rules through informal rulemaking or could increase the potential for litigation involving those rules, the increased risks appear to be small.[230]

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will lead to increased action by Congress. *Id.* at 914. Regarding Executive oversight, as e-rulemaking reforms make the rulemaking process more transparent to citizens, they will also make it more transparent to the White House and several commentators have speculated that the President may become more involved in agencies' decisionmaking. *See, e.g.*, Lubbers, *supra* note 110, at 481–82.

226. This could exacerbate problems relating to the "digital divide," to the extent that it still exists. *See supra* notes 117–118 and accompanying text.

227. *See* Benjamin, *supra* note 1, at 902; Coglianese, *supra* note 26, at 943. Professor Coglianese noted that EPA's online dialogue on revisions to its public involvement policy primarily attracted government officials and attracted very few "ordinary citizens." *Id.* at 961–62. He acknowledged, though, that an online forum that DOT's Federal Motor Carrier Safety Administration created to address the development of a strategic plan for the agency attracted many comments from commercial truck drivers and others who normally did not participate in the agency's rulemaking proceedings. *Id.* at 962–63. However, Coglianese stressed that the scale of public involvement in both proceedings was very modest. *Id.* at 964.

228. *See supra* notes 143–144 and accompanying text.

229. *See supra* notes 128–141 and accompanying text.

230. *See supra* notes 145–154, 164–165 and accompanying text (discussing the risks of potential delays).

While the potential benefits and costs of ACUS's recommendations are modest, the costs and benefits of the "Rulemaking 2.0" e-rulemaking reforms may be significant. As noted above, those e-rulemaking reform proposals could substantially broaden the scope of possible participation in the rulemaking process and could facilitate more effective commenting and a more transparent process.[231] At the same time, though, the reforms have a far greater potential than the ACUS recommendations to increase the cost and length of rulemaking, increase the likelihood of litigation, ossify the rulemaking process, and delay the implementation of rules.[232]

It may be possible, however, to capture the benefits of those "Rulemaking 2.0" reforms while avoiding the costs by limiting the implementation of the reforms. Instead of applying the e-rulemaking reforms to all rules adopted by agencies through informal rulemaking, the reforms could be applied to a subset of rules adopted by agencies. The two most natural choices would be to limit the use of the reformed e-rulemaking process to "significant regulatory actions"[233] or to rules where agencies intend to issue an "advanced notice of proposed rulemaking" (ANPR).[234]

It would make sense to apply the reformed e-rulemaking procedures to "significant regulatory actions" because those rules are likely to have greater impacts on stakeholders than other rules, or are more likely to raise novel legal or policy issues than other rules, while relatively few of the rules

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231. *See e.g.*, *supra* notes 205–214 and accompanying text (discussing the potential effects of the Regulation Room project).

232. *See supra* notes 222–217 and accompanying text (discussing the potential negative consequences to e-rulemaking).

233. A "significant regulatory action" is defined by the OMB in Executive Order 12,866 as:

> [A]ny regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

234. Agencies are not required to issue advanced notice of proposed rulemakings (ANPRs) for any rule, but will issue them when they are seeking input on questions or approaches relating to a rulemaking prior to drafting a proposed rule for public comment. *See* Ronald M. Levin, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 33 (2002) (detailing some agency considerations in issuing an ANPR); Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1465–66 (2002) (discussing the potential merits of issuing an ANPR).

adopted by agencies each year are "significant regulatory actions."[235] Similarly, it would make sense to apply the reformed e-rulemaking procedures to rules where agencies intend to issue an ANPR because agencies generally issue an ANPR when they are affirmatively seeking earlier and broader input before they develop the language for a rule and issue a notice of proposed rulemaking.[236] The percentage of agency rules that include ANPRs is also very small.[237] Thus, in both cases, the e-rulemaking reforms would be limited to a small universe of rules, but they would be applied to rules that would seem to be particularly good candidates for the broader, more effective, and more transparent public participation that the reforms could generate.

As an alternative to either of those approaches, it might make sense to encourage agencies to implement the new Rulemaking 2.0 e-rulemaking reforms, but give agencies discretion to determine when to use those processes, based on the consideration of various criteria. Congress took this approach when it passed the Negotiated Rulemaking Act of 1990 to promote the last great informal rulemaking experiment.[238] Several of the criteria that Congress encouraged agencies to consider in deciding whether to engage in negotiated rulemaking would seem to be relevant to an agency's choice to engage in Rulemaking 2.0 processes, including consideration of (1) the number of identifiable interests that will be significantly affected by the rule, (2) whether the process will unreasonably delay issuance of the rule, and (3) whether the agency has adequate resources to support the process.[239]

Other academics have provided their own suggestions with regard to the next generation of e-rulemaking reforms. Like others, Professor Stuart Minor Benjamin is critical of the standardization and uniformity in the first generation of federal e-rulemaking, and he argues that future federal efforts

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235. Fewer than 4% of the final rules issued by EPA between 2001 and 2005 were "significant" rules triggering OMB review under Executive Order 12,866. *See* Johnson, *supra* note 154, at 770. John Graham, the former Administrator of the Office of Information and Regulatory Affairs within OMB, estimated that only about 7.5% of the rules initiated by all federal agencies each year are "significant" rules. *See* John D. Graham et al., *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 983 (2006) (emphasizing the focus of OIRA oversight).

236. *See supra* note 234.

237. In 2011, for instance, federal agencies issued fifty-eight ANPRs, compared to 852 notices of proposed rulemaking. These results are based on the following searches in the Federal Register (FR) database of Lexis: (1) "Action: Advance Notice of Proposed Rulemaking" & date (after 1/01/2011 & before 12/30/2011); and (2) "Action: Notice of Proposed Rulemaking" & date (after 1/01/2011 & before 12/30/2011).

238. *See supra* note 220.

239. *See* Lubbers, *supra* note 201, at 990–91.

should loosen the reins and allow agencies to engage in more experimentation with a variety of new e-rulemaking tools.[240] Benjamin envisions individual federal agencies as "laboratories of democracy," stepping into the vacuum created by the lack of state-level experimentation, the normal "laboratories of democracy."[241] However, he advocates narrow experimentation by agencies.[242] Benjamin writes:

> Although the data on e-rulemaking are discouraging, they are also incomplete. Our experience with the current experiments is fairly brief, and broader changes (such as wikis and reputation-based systems) have not been attempted. . . . [I]t could be . . . that merely allowing citizens to e-mail agencies changes fairly little, whereas creating opportunities for meaningful collaboration with or rating by individuals will present points and data that agencies would not otherwise receive.[243]

Benjamin sees another important benefit to e-rulemaking experiments by agencies, noting that:

> [E]-rulemaking initiatives may give policymakers valuable information about the rulemaking process. . . . If, for example, e-rulemaking increases the

240. *See* Benjamin, *supra* note 1, at 898–99.

241. *Id.* at 898. A few states have adopted rudimentary systems for online commenting on proposed rules. *See, e.g.*, Fla. Dep't of State, Div. of Library & Info. Servs., *Florida Administrative Weekly and Florida Administrative Code*, http://www.flrules.org (last visited Jan. 30, 2013) (allowing online submission of public comments on Florida administrative regulations); N.Y. Dep't of State, Div. of Admin. Rules, *NYS Register*, http://www.dos.ny.gov/info/register.htm (last visited Jan. 30, 2013) (allowing online submission of public comments on New York administrative regulations); N.J. Dep't of Envtl. Regulation, *Rules and Regulations—Comment on DEP Regulation*, http://www.nj.gov/dep/rules/comments/ (last visited Jan. 30 2013) (allowing online submission of public comments on administrative regulations issued by New Jersey's Department of Environmental Protection). More States may do so, though, in light of the release in 2010 of the Revised Model State Administrative Procedure Act, which includes a few provisions to encourage agencies to make rulemaking materials available online. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT (2010), *available at:* http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf. Section 201 of the Model Act requires the State agency that publishes the Administrative Code or Bulletin to make the official record of a rulemaking that is filed with the publishing agency available on the Web. *Id.* § 201. Section 202(a) of the Model Act requires agencies to publish proposed rules, final rules, and a summary of regulatory analyses for each rule on the Web. *Id.* § 202(a). The Model Act does not require agencies to make rulemaking dockets accessible online or to accept public comments electronically, but Section 302 of the Model Act requires agencies to make a rulemaking record for each rule available on the Internet. *Id.* § 302.

242. *See* Benjamin, *supra* note 1, at 936. Benjamin argues that the costs of many of the e-rulemaking proposals are too high and the benefits too uncertain to justify across-the-board implementation of the proposals at this time. *Id.* at 938.

243. *Id.* at 936.

> quantity and quality of citizen participation in the commenting process, but these increases have no impact on agencies' behavior, that fact will suggest that agencies' decisions are not affected by those comments and instead are influenced by other inputs. This result would be disappointing to e-rulemaking proponents, but it might be useful for those trying to understand how agencies work—and in particular the degree to which they are captured by powerful entities. . . . The outcome that would most likely produce benefits greater than the costs would arise if it appeared that the additional participation resulting from new e-rulemaking initiatives did have a positive impact on the agency. In those circumstances, e-rulemaking would thus not only change agency behavior for the better but also provide valuable evidence about agency decisionmaking.[244]

Professor Beth Noveck agrees that agencies, policymakers, and academics can learn much from e-rulemaking experiments, and she argues that the Office of Management and Budget should measure and quantify the success of new e-rulemaking initiatives as they are implemented.[245] Specifically, she proposes that OMB examine the extent to which e-rulemaking experiments increase the number and diversity of participants in the rulemaking process, increase the deliberative quality of comments, increase agency satisfaction with the process, increase compliance with rules, decrease the time spent to process comments received, decrease the time required to conduct public participation, and decrease litigation, among other factors.[246] In addition, Professor Noveck proposes an Executive Order on E-Rulemaking Planning that would require agencies to develop citizen participation plans for e-rulemaking, develop metrics with OMB to evaluate the success of the plans, and submit reports outlining the implementation of those plans.[247] As part of her proposal, OMB would provide financial support and technological assistance for the agencies' plans.[248]

In addition to e-rulemaking reforms and the ACUS recommendations, academics and policymakers have other proposals to foster broader, more informed, and more transparent public participation. Almost a decade ago, EPA adopted a "public involvement policy" that could facilitate broader and more informed public participation if it were adopted more broadly across federal agencies.[249] The policy applies to a variety of EPA programs

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244. *Id.* at 936–37.

245. *See* Noveck, *supra* note 3, at 510–11 (detailing potential metrics OMB could use in evaluating the success of e-rulemaking).

246. *Id.*

247. *Id.* at 514–15.

248. *Id.*

249. *See generally* U.S. ENVTL. PROTECTION AGENCY, EPA-233-B-03-002, PUBLIC INVOLVEMENT POLICY OF THE ENVIRONMENTAL PROTECTION AGENCY (2003), *available at*

and activities, including the promulgation of "significant" regulations, and requires the agency to create public involvement plans for actions, and make public involvement a centerpiece of the process.[250]

The policy outlines the seven basic steps for public involvement in any activity, which are:

1. Plan and budget for public involvement activities;
2. Identify the interested and affected public;
3. Consider providing technical assistance to the public to facilitate involvement;
4. Provide information and outreach to the public;
5. Conduct public consultation and involvement activities;
6. Review and use input and provide feedback to the public; and
7. Evaluate public involvement activities.[251]

Regarding identification of the interested and affected public, the policy encourages the agency to partner with community groups and external organizations to publicize activities and to use "comprehensive or creative means that consider the community structure, languages spoken, local communications preference and the locations . . . where the community regularly congregates."[252] The policy stresses the need to involve members of the public at an early stage in the process "before making decisions" and to "[m]ake every effort to tailor public involvement programs to the complexity and potential for controversy of the issue, the segments of the public affected, [and] the time frame for the decision."[253]

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http://www.epa.gov/publicinvolvement/policy2003/finalpolicy.pdf. The policy stresses the value of public involvement in improving agency decisionmaking, enhancing the deliberative process, promoting democracy and civic engagement, and building public trust in government. *Id.* at 1. EPA's goals for public involvement include:

> Learn[ing] from individuals and organizations representing various public sectors and the information they are uniquely able to provide (community values, concerns, practices, local norms, and relevant history, . . . potential impacts on small businesses or other sectors . . .)[;] [s]olicit[ing] assistance from the public in understanding potential consequences of technical issues[; and] . . . [u]nderstand[ing] the goals and concerns of the public . . . .

Id. at 2.

250. *Id.* at 1–3. The policy stresses the importance of making the decisionmaking process "open and accessible to all interested groups, including those with limited financial and technical resources, English proficiency, and/or past experience participating in environmental decisionmaking." *Id.* at 1. The policy, however, "is not a rule, is not legally enforceable, and does not confer legal rights or impose legal obligations." *Id.* at 3.

251. *Id.* at 6.

252. *Id.* at 8–9. The policy also stresses the need to "[u]se public input to develop options that facilitate resolution of differing points of view." *Id.* at 3.

253. *Id.* at 2–3. The policy also stresses the need to distribute outreach and educational

The policy also suggests that EPA should use "questionnaires or surveys to find out levels of awareness and the need for tailored public education and outreach" in the decisionmaking process, and encourages EPA to "develop information and educational programs so all levels of government and the public have an opportunity to become familiar with the issues, technical data and relevant science behind the issues."[254] Closely related to the educational goal, the policy suggests that EPA should "[c]onsider providing technical or financial assistance to the public to facilitate public involvement."[255]

Although other federal agencies have not adopted similarly broad public involvement policies, President Obama stressed the importance of public participation in agency decisionmaking by issuing a memo to federal agencies on the day after his inauguration, directing them to use information technologies to increase transparency, participation, and collaboration in their decisionmaking.[256] Two years later, President Obama issued Executive Order 13,563, which stressed the importance of public participation and an open exchange of ideas and required agencies to ensure that regulations are "accessible, consistent, written in plain language, and easy to understand."[257] The order required agencies to provide timely online access to rulemaking dockets in an open format that can be easily searched and downloaded,[258] and encouraged agencies, *before* issuing a notice of proposed rulemaking, to seek the views of those who are likely to be affected by the rulemaking.[259]

While EPA's public involvement policy and the President's executive order play a role in facilitating broader, more informed, and more transparent public participation, they will not overcome all of the barriers outlined above. Professor Cary Coglianese is skeptical that reforms of the rulemaking process alone will be sufficient to overcome the educational barriers to public participation in many rulemakings.[260] He argues that the technological barriers to public involvement pale in comparison to the

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materials as early in the process as possible. "The more complex the issue and greater the potential for controversy and misunderstanding, the earlier the agency should distribute the materials." *Id.* at 13.

254. *Id.* at 8–9, 11.

255. *Id.* at 9–11.

256. *See* Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009). President Obama stressed the importance of those principles to strengthen democracy, ensure the public trust, and promote efficiency and effectiveness in government. *Id.*

257. *See* Exec. Order No. 13,563 § 1(a), 76 Fed. Reg. 3821 (Jan. 21, 2011).

258. *Id.* § 2(b).

259. *Id.* § 2(c).

260. *See* Coglianese, *supra* note 26, at 965–66.

educational barriers. As he notes:

> Participating in a rulemaking process requires, at a minimum, understanding that regulatory agencies make important decisions affecting citizens' interests, as well as knowing about specific agencies and the new rules they propose. Yet regulatory agencies receive little attention in civics education at nearly every level, and the media generally neglect regulatory policymaking. As a result, the average citizen, who already shows a declining involvement in politics, simply does not know a great deal about regulatory agencies or the policy issues underlying specific rulemakings.[261]

Perhaps, therefore, it is important to incorporate instruction about agencies and the regulatory process into civics education classes in primary and secondary schools, to strengthen the focus on those topics in college courses, and to engage in a concerted effort to focus media attention on the administrative process and the role of citizens in the process at times other than when an agency issues a controversial rule. Even if the public had a deeper understanding of the regulatory process, though, Professor Coglianese notes that "[i]f Congress delegates rulemaking authority at least partly because certain issues are so complex or technical that they require agency expertise, then the policy issues in rulemakings will tend systemically to be ones that are harder, rather than easier, for citizens to understand."[262]

Although Professor Coglianese may be correct that it could be very difficult to provide sufficient background and education to the public to enable them to provide highly technical or expert comments on many rulemakings, Professor Nina Mendelson argues that agencies should give more weight to the values- and policy-based comments that citizens *can* provide in most rulemakings.[263] Professor Mendelson argues that public commenting communicates the public's preferences in a more concrete context than voting and enables agencies to hear from many more members of the public than it could consult outside of the rulemaking process.[264] Professor Mendelson also argues that public comments are less

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261. *Id.* (footnote omitted). Professor Coglianese notes that it is difficult for many persons to even find regulatory information online, let alone to understand it. *Id.* To support that assertion, he describes a 2004 study involving two dozen students in Harvard's Kennedy School of Government, in which the students could only locate half of the rulemaking dockets that they were instructed to find. *Id.*

262. *Id.*

263. *See* Mendelson, *supra* note 10, at 1346 (stating that given the democratic claims for rulemaking, discounting valuable citizen comments is "deeply problematic").

264. *See id.* at 1372 (extolling the benefits of public commenting, including more targeted suggestions, high levels of public participation, and the collection of viewpoints from a diverse array of people).

likely to be controlled by interest groups or political groups.[265] Further, when agencies ignore values- or policy-based comments, they are more likely to bury those issues in the resolution of scientific or technical issues and undermine the transparency of the rulemaking process.[266]

While Professor Mendelson acknowledges that agencies should not make decisions based solely on the will of the people, she argues that agencies should pay close attention to values- and policy-based comments when they are particularly numerous, raise an issue that is relevant under the agency's statutory authorization, and are coherent and persuasive, especially if they point in a direction different from that considered by the agency.[267] In fact, she suggests that it might make sense to require elevation of issues to a higher level within the Executive Branch when there are significant volumes of comments submitted on the issue.[268] She also suggests that Congress could include provisions in laws that require agencies to take specific actions in response to such comments.[269] However, she is reluctant to advocate for a change in the standards of judicial review to require agencies to give "adequate consideration" to values-based comments, since judges might decide such issues based on political pressures or personal preferences.[270] Instead, she argues that judicial review of these matters should be "limited to requiring agencies to give *some* acknowledgment of significant views expressed through lay comments, and courts should then defer to the content of any subsequent response from the agency."[271] Ultimately, Professor Mendelson asserts that self-regulation within the Executive Branch might be the best way for agencies to address values- and policy-based comments.[272] She proposes that "[b]y internal agency rule, guidance, or executive order, agencies could commit to weigh layperson

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265. *See id.* at 1373 (comparing how individuals vote and how congressional members may vote).

266. *See id.* (positing that disregarding large numbers of valuable comments undermines the democratic process and the agency's candor, which discourages participation).

267. *See id.* at 1374–75 ("The reality . . . is that agencies are already fully engaged in deciding value-laden questions. For those decisions to be legitimate, we must be able to understand them as democratically responsive, and public comment can be an important source of information on the values agencies must weight or balance.").

268. *Id.* at 1377 (reasoning that elevating an issue with a significant number of comments in a rulemaking would promote transparent discussion among high-level officials).

269. *See id.* at 1378 (suggesting that judicial enforcement might be an option for lay commenting that reaches a certain threshold).

270. *See id.* at 1378–79 (cautioning that judges would likely be ill-equipped to evaluate adequate response issues with respect to value-laden comments given the political implications).

271. *Id.* at 1379.

272. *See id.* (asserting that self-regulation within the Executive Branch would be the most straightforward way to accomplish accountability).

comments in a particular way or to conduct additional proceedings if layperson comments suggest that the public does not support the balance of values proposed by the agency."[273]

Rather than ignoring or simply tolerating values- and policy-based public comments in the rulemaking process, Professor Mendelson suggests that agencies should affirmatively seek out such input.[274] Specifically, she suggests that agencies could include more focused questions in their notices of proposed rulemaking, as well as using more advanced notices of proposed rulemaking to solicit values- and policy-based input before publishing a proposed rule.[275]

Wendy Wagner has suggested some of the most interesting and revolutionary proposals to reform the rulemaking process to encourage broader, more informed, and more transparent public participation. She is especially concerned about the "information capture" techniques employed by regulated entities that frustrate broader participation.[276]

Wagner proposes addressing the problem by having courts adopt a sliding scale of judicial review.[277] Under this approach, considerable deference will be afforded if a diverse and balanced group of affected persons participated in the rulemaking process, or if one person or group challenging the rule dominated the rulemaking process. An agency's rule will be reviewed under a hard look standard if the person challenging the rule lacked sufficient resources or specialized knowledge to participate vigorously in the rulemaking process.[278]

Wagner argues that this approach to judicial review would give agencies

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273. *Id.*

274. *See id.* at 1380 (encouraging agencies to engage with comments, even lay comments, seriously).

275. *See id.* at 1377–78 (detailing procedural steps agencies could take to encourage useful input from the public commenting process); *see also* Emery & Emery, *supra* note 176, at 8–9 (suggesting that in a notice of proposed rulemaking, agencies should provide "a list of questions they have and issues they want commented on" for efficiency purposes, even though this might shut out some potentially useful information by narrowing the focus of the inquiry). Asking commenters to focus on a specific list of questions and issues may be more efficient for agencies and may reduce the instances in which commenters are disappointed because agencies ignored comments that the agencies felt were outside the scope of the rulemaking. However, agencies might shut out some potentially useful information by narrowing their focus of inquiry to a list of questions and issues to be addressed during the comment period.

276. *See* Wagner, *supra* note 32, at 10,732–33 (cautioning that "information capture" techniques can inundate an agency with excessive information).

277. *See id.* at 10,736 (calling attention to the necessity of changing the standard of judicial review).

278. *See id.* (describing the benefits of adopting a sliding scale of judicial review, which would help alleviate participatory imbalances).

incentives "to reach out and engage groups that are likely to be underrepresented in the rulemaking process."[279] Some of her other suggestions focus on reforming the rulemaking process itself, instead of the standard of review. For instance, she proposes that government intermediaries, whether ombudsmen, advocates, or others, could be appointed to represent, in the rulemaking process, "significantly affected interests that might otherwise be under-represented in rulemakings."[280] Similarly, she proposes that the government could subsidize participation in rulemakings in which groups representing the diffuse public would be underrepresented.[281]

Alternatively, she argues that restrictions on the amount of information that participants can submit in the rulemaking process, similar to the restrictions imposed in judicial proceedings, would lead to more balanced engagement by all affected interests.[282] Finally, she proposes that agencies could develop a draft of a rule before the proposed rulemaking stage by convening a "small team of . . . policy wonks" within the agency who would develop the draft without *any* input by *any* stakeholders.[283] The draft would then be subject to peer review or review by an advisory committee, but the agency staff would not be required to modify the draft based on input from the review process.[284] Wagner argues that this "policy-in-the-raw" approach would allow agency staff to be more innovative and creative in the planning stages and evaluate alternatives in light of the statutory goals, rather than based on pressure from stakeholders or higher level decisionmakers in the agency itself.[285]

Although many of Professor Wagner's proposals could promote broader, more informed, and more transparent public participation in rulemaking, it is unlikely that the courts or Congress are ready for such significant transformations in the rulemaking process. Indeed, it may not even be wise to make such sweeping changes apply to all rulemakings because the costs of providing government advocates, funding citizen involvement, or cutting

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279. *See id.* at 10,737 (acknowledging that it will be difficult, at times, to determine whether a rulemaking process was imbalanced).

280. *See id.* (conceding that such a proposal could be quite expensive).

281. *See id.* (distinguishing subsidized rulemaking as a more moderate approach to encouraging balanced engagement).

282. *Id.* at 10,738 (proposing specifically that page and volume limits could be imposed on submissions, or that participants could be required to verify the reliability of data presented and to supply supporting analyses for critical facts included in the submissions).

283. *See id.* (stating that, ideally, this team would not even be aware of pressures from stakeholders, litigation concerns, or other legal risks).

284. *See id.* (clarifying that there would be no judicial reprimand for disregarding suggestions made during this review).

285. *Id.*

off the submission of data and input from stakeholders at an arbitrarily selected limit may outweigh the benefits of those reforms for many rulemakings.[286]

Change comes slowly for the informal rulemaking process. ACUS's recommendations are modest, and while they may provide only modest benefits, they should impose only modest costs. Many of the proposals by academics outlined above might lead to broader, more informed, and more transparent public participation, but for the time being, they are simply words on the pages of academic journals. In the short term, therefore, the Rulemaking 2.0 e-rulemaking reforms hold out the greatest promise for transformation of the rulemaking process. The Internet may still change everything, as I hypothesized over a decade ago.[287] However, even the Rulemaking 2.0 reforms must be implemented on a limited basis to avoid imposing costs that drive the rulemaking process toward greater ossification, causing delays and leading agencies to adopt more policies through guidance documents and other forms of shadow law.

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286. *Cf.* Benjamin *supra* note 1, at 936–38 (reasoning that modest experimentation with e-rulemaking would be worth the costs, if for no other reason than to conduct a complete, in-depth study of e-rulemaking, which has yet to be undertaken).

287. *See generally* Johnson, *supra* note 9 (identifying the many ways in which the Internet will change the rulemaking process).