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The Internet and Public Participation in Rulemaking*

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Advances in digital technologies promise new ways of informing citizens and involving them in government decision making. One of the arenas of public decision making where such technologies appear to hold such promise has been the administrative rulemaking process. Each year, unelected officials from government agencies such as the Federal Aviation Administration, the U.S. Department of Agriculture, or the Environmental Protection Agency create thousands of regulations that affect nearly every aspect of social and economic life. Through the rulemaking process, government agencies collectively produce more binding laws each year than does the Congress, but the rulemaking process is by comparison remarkably hidden from the view of the general public. Those who study administrative rulemaking have therefore taken considerable interest in "e-rulemaking," that is, in using new information technologies to increase the transparency of the rulemaking process and to transform the public's role in this important sphere of government decision making.¹

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¹ See, e.g., Brandon H. Brandon and Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening our Civic Infrastructure*, 54 ADMINISTRATIVE LAW REVIEW 1421 (2002); Stephen Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 ADMINISTRATIVE LAW REVIEW 277 (1998); Henry H. Perritt, Jr., *Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication*, Report to the Administrative Conference of the United States (October 19, 1995). For additional material, see the John F. Kennedy School of Government's Regulatory Policy Program's e-rulemaking website at: http://www.ksg.harvard.edu/cbg/Conferences/rpp_rulemaking/home.htm

In this paper, I consider some new ways that digital technologies might be used in the rulemaking process and raise some of the possible effects of the application of these technologies. My larger purpose is to suggest that, even though the values of transparency and public participation may seem quite unassailable, proposals for e-rulemaking should be analyzed just as any other proposal for institutional or policy change would be. We should ask: Does a particular application of e-rulemaking address a significant public problem or achieve an important goal? Will the application help effectuate better or more responsive regulatory policy (or both)? Will it create any undesirable consequences? Do the advantages of a particular technological application overcome any disadvantages? How does the new application fare against the feasible or likely alternatives, including the status quo?

In many cases, the answers to these questions may well lead decision makers and process designers to adopt new technological applications. But in at least some cases, the answers will likely counsel against adoption of new Internet applications. Even though information technology may promise to enhance public participation and transparency in the regulatory process, new approaches or procedures need not be adopted just because technological advances make them possible. The corollary to the principle that "ought implies can" is that "can does not imply ought." Simply because information technologies can be used in certain transformative ways, even in ways that might engage the public or make government decision making more transparent, this does not necessarily mean that they ought to be implemented. Only after this point is acknowledged will decision makers and analysts be better able to undertake the more significant challenge of analyzing ways to use technology to improve the regulatory process.²

² For a somewhat similar argument in a more general context, see Frederick Schauer, *Talking as a Decision Procedure*, in STEPHEN MACEDO, ED., *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* 17-27 (1999).

I. Public Participation in Rulemaking

The way that government agencies issue regulations does not, at least at first glance, look like a robust democratic process. After all, the decision makers imposing these rules are not directly elected themselves, but instead are only indirectly accountable having been appointed and confirmed by elected officials who are typically too busy to oversee all of what their appointees do. Moreover, the appointees themselves typically do not write the rules that their agencies issue, but instead delegate most of the drafting, analysis, and policy design to career civil servants. Key deliberation and decision making by the career staff, as well as appointed superiors, takes place within the agency, often literally behind closed doors. In the vast majority of agencies, those headed by a single administrator, there is by definition nothing comparable to an open town hall or representative debate over regulatory decisions.

The Administrative Procedure Act (APA), which provides the legal framework for agency rulemaking, does require that agencies at a minimum provide notice of any proposed new rules by publishing them in the *Federal Register* and that they give "interested persons" an opportunity to comment on these rules.³ But by its own terms, the APA imposes what would seem to be a rather weak requirement for public participation. It does not require government to engage in any open deliberation with the public or even to adhere to the views contained in any comments submitted by the public. Agencies are given discretion to decide how to allow the public to comment on proposed rules, though the most typical practice is for agencies to allow a defined period (usually of a couple of months) during which members of the public can submit written comments to the agency headquarters. The APA does require agencies to give "consideration" to the "relevant" material submitted by the public, but not that it rely on any expressed views of the public as a basis for its decisions.⁴

³ 5 U.S.C. § 553.

⁴ *Id.*

In practice, of course, the rulemaking process has always been a much more permeable process than a bare-bones account of the APA requirements would appear to suggest. Owing in part to a series of legislative and judicial developments requiring openness and access to information, and in part to a variety of sociological and political factors, agency officials routinely engage in dialogue with interested persons even outside of the APA public comment period. It is commonplace for agency staff to meet with representatives from regulated industries, advocacy groups, and state and local government when they are developing new proposals for regulations. Agencies also routinely hold workshops and public hearings, convene advisory committees and regulatory negotiations, and interact with the media, again before issuing new proposed regulations. Rather than being completely insulated from the political process, agencies find themselves embedded in a web of relationships with individuals and organizations from outside of government, as well as in repeated interaction with congressional and presidential officials seeking to oversee and shape their decisions.⁵ Moreover, agency regulations are always subject to repeal or revision by Congress, an option which provides a democratic check on decisions made by government administrators.⁶

Nevertheless, the "public" that participates in the rulemaking process is actually a very narrow slice of the entire citizenry. Rather, most citizens, indeed most voters, do not even know about the rulemaking process, let alone participate in it. In earlier work, I examined more than 1,500 comments filed in about two dozen rulemaking proceedings at the U.S. Environmental Protection Agency and found that individual citizens submitted less than 6% of these comments.⁷ In contrast, corporations and industry groups filed

⁵ See, e.g., PETER L. STRAUSS, WALTER GELLHORN, CLARK BYSE, & TODD D. RAKOFF, *ADMINISTRATIVE LAW* 50 (9th ed. 1995) (showing web of institutional interactions in the bureaucratic environment).

⁶ The Congressional Review Act of 1996, 5 U.S.C. 801-808, now even permits Congress to consider the nullification of rules on a "fast track" basis.

⁷ Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 *LAW & SOCIETY REVIEW* 735 (1996); Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* (1994).

about 60% of the comments, with local, state, and federal government officials filing another approximately 25%.⁸ While it is far from clear what percentage of comments from individual citizens would reflect an appropriate level of participation from the general public, it is exceedingly clear that the vast bulk of "public" participation in rulemaking is not coming from "the public" in the broader sense.

II. E-Rulemaking: Digital Possibilities in Administrative Rulemaking

By taking advantage of the capabilities of the Internet, government might be able to increase the public's knowledge of, access to, and involvement in rulemaking. In recent years a number of agencies have constructed websites containing agency documents related to their rulemaking activities and have allowed citizens to submit comments electronically.⁹ For example, the Department of Transportation now stores all documents related to a rulemaking in an "electronic docket" that is accessible to everyone via the Internet. In the 1990s, the U.S. Department of Agriculture began allowing citizens to submit e-mail comments on a proposed regulation for the labeling of organic foods -- and subsequently the agency received more than 250,000 comments.¹⁰ Other agencies have begun to establish chat rooms or other on-line dialogue venues in connection with specific regulations.¹¹

⁸ *Id.*

⁹ See Brandon & Carlitz, *supra* note 1. For a list of such agency websites, see http://www.archives.gov/federal_register/public_participation/rulemaking_sites.html

¹⁰ Stuart W. Shulman, *An Experiment in Digital Government at the United States National Organics Program*, 20 AGRICULTURE AND HUMAN VALUES (forthcoming 2003).

¹¹ See, e.g., Thomas C. Beierle, *Democracy On-Line: An Evaluation of the National Dialogue on Public Involvement in EPA Decisions, Resources for the Future Report* (Jan. 2002).

Public officials appear to be embracing e-rulemaking. The Bush Administration has established an e-government agenda that includes, among its two dozen initiatives, a plan to increase e-rulemaking by federal agencies. As the first step in that plan, the Administration recently launched a government-wide portal, Regulations.gov, to help citizens locate and submit electronic comments on any proposed regulation by any agency. Congress has also supported these efforts. Last year, it passed the E-Government Act, which among other things creates a new Office of Electronic Government. Congress' stated aim in passing the legislation was "to promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government."¹²

By making documents available on-line and allowing citizens to submit electronic comments, government agencies can lower the costs to citizens, organizations, and analysts of obtaining information about rulemaking and providing input into regulatory decision making. Current efforts are therefore likely to help increase the comments filed by the public in some number of agency rulemakings. Nevertheless, the overall direction of current efforts seems to be focused on digitizing the existing rulemaking process, rather than transforming the rulemaking process or adding to it in ways that might more fully exploit some of the potential of new (or future) developments in information technology. Perhaps it is time to reconsider administrative procedure in a digital age. After all, the current rulemaking process was developed in the middle of the twentieth century, with the major shape of administrative procedures having been forged by the mid-1970s. Advances in technology will undoubtedly give rise to proposals to change the rulemaking process in a number of ways. The following four ideas, for example, reflect proposals that might very well loom on the not-so-distant horizon.

1. *Regulatory Polling.* The current approach to public participation is largely reactive, with the agency waiting for members of the public to submit comments. With the diffusion of

¹² E-Government Act of 2002, P.L. No. 107-347.

Internet access throughout society, it may become easier for agencies to become more proactive and reach out to solicit public comment. One approach would be to conduct opinion polling in connection with proposed regulations. In some cases, agencies already engage in survey research when they conduct contingent valuation studies that seek to determine how to monetize various non-market values. Contingent valuation studies will ask a random sample of the public questions about how much they would pay for incremental reductions in risks or amenities (such as how much is it worth to preserve a pristine wilderness or protect the visibility of the Grand Canyon). Such studies have their limitations, one practical one being the current expense of administering surveys.¹³ To the extent that on-line technologies make polling less costly to administer, regulatory agencies may well consider using such polling on a more widespread basis.

2. *Commenting via Simulation.* With advances in information technology, it will be increasingly feasible for agencies not only to direct polling questions to members of the public, but also to provide greater guidance and structure when seeking public feedback. Using something akin to what Keith Belton has termed an "on-line calculator" (or in a more sophisticated version might be something akin to a SimCity[®] game), regulatory agencies could provide the public with digital access to simulation software that reflects the agency's modeling of its regulatory problem.¹⁴ Members of the public could modify parameters in the agency's model (such as the stringency of the regulatory standard, frequency of risks, and so forth) and then run different simulations to see what outcomes could be expected to result (namely, the benefits and costs of the regulation). Such an approach may enable regulatory agencies to capture more deliberate public opinion about key tradeoffs the agency faces in crafting a new regulation.

¹³ Another obstacle, of course, is securing approval for such surveys under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

¹⁴ Keith B. Belston, *What if Everyone were a Policy Analyst?*, REGULATION (Fall 2000).

3. *Virtual "Juries."* A still more radical option would be to use information technology to convene regulatory "juries." Digital technology could be used to replicate the kind of face-to-face deliberation in traditional juries.¹⁵ Through such juries, agencies could charge randomly selected groups of citizens with making the core value judgments implicit in regulatory decision making. For example, when setting new air quality standards, an environmental agency needs to make tradeoffs between marginal increases in health benefits and the corresponding costs of complying with the new standards. The environmental agency implicitly faces a value choice of how much human lives saved or asthma cases avoided are worth. At present, regulatory officials make these decisions based on their own analysis and judgment (sometimes without even acknowledging that they are making such choices). With the aid of information technology, agencies could make these decisions more openly by facilitating a process of that could lead to a "verdict" by a random group of citizens. These regulatory juries may well still not make the ultimate regulatory decision, but they could provide agencies with a basis for key assumptions and value choices (such as by answering a series of specific questions). Since most federal regulatory agencies are headquartered in Washington, D.C., information technology could be used to connect citizens from across the country and perhaps even allow them flexibility to participate in deliberations while fitting their "jury duty" around work schedules. Agencies could communicate via digital technology to educate members of the jury on relevant technical issues and present competing arguments that can form the basis for deliberation. Chat rooms could then provide a forum for virtual deliberations by these regulatory juries.

4. *Enhanced Digital Transparency.* In addition to facilitating on-line deliberation, digital technology will make it easier to store agency communication and information in ways that make it easily accessible to the public. Already, several agencies such as the Department of Transportation and the Environmental Protection Agency are fully digitizing their agency dockets, the official record of all documents that form the basis for new

¹⁵ Another face-to-face parallel is the process of deliberative polling. JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995).

regulations. Instead of storing these documents in hard copy or microfiche format, agencies now scan documents and store them on-line. However, with further advances in digital technology, it will be increasingly feasible to take still further steps to make the rulemaking process transparent. Consider two possibilities:

- a) James O'Reilly has recently proposed that agencies should make available the internal drafts of an agency's new regulations, i.e., those drafts that were presented to a political appointee at the agency but then were later modified before the rule became final.¹⁶ He argues that disclosure of earlier drafts would help those who need to interpret agency regulations, offering clues about why a final rule reads as it does. One could imagine that agencies will be able easily to provide a clear history of its rulemaking drafting, perhaps utilizing a feature such as the "track changes" function on Microsoft Word[®].
- b) After an agency has issued a proposed rule and before it issues its final rule, separate communications between government officials and those outside of government are disfavored under existing principles of administrative law. In the well-known *Home Box Office* decision, the D.C. Circuit Court of Appeals criticized the Federal Communications Commission and its members for holding secret conversations with industry officials, arguing that such secrecy is inconsistent with "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."¹⁷ The Court in *HBO* held that when such ex parte communications take place following the publication of a proposed rule, agency officials must memorialize the communication in writing and place a summary of the conversation in the agency docket. While

¹⁶ James T. O'Reilly, Let's Abandon Regulatory Creationism: The Case for Access to Draft Agency Rules, 28 ADMINISTRATIVE & REGULATORY LAW NEWS 4 (2003).

¹⁷ *Home Box Office v. FCC*, 564 F.2d 458 (D.C.Cir.1977).

such an approach of summarizing a conversation seemed a reasonable strategy at the time, advances in digital technology should make it even easier in coming years for agency staff to create a digital recording of the communication (whether in person or on the telephone), and then to have that digital audio file loaded onto the agency's on-line docket. Imagine clicking link on the Department of Labor website and downloading a RealPlayer[®] file to hear a conversation that took place, say, between the OSHA Administrator and the head of the National Association of Manufacturers over a key decision in a new worker safety regulation.

These four ideas – simulations, polling, juries, and digitization of drafts and ex parte communications – provide an indication of the range of possible proposals for future procedural changes. Even these four proposals still largely keep the current rulemaking process intact, so it is possible that even more dramatic, less centralized processes of regulation could even be contemplated for the future.¹⁸ As Jeff Lubbers has written, new information technologies present a challenge to decision makers that may be "nothing less than how to design a transformation of the rulemaking process as a whole."¹⁹

¹⁸ Joseph S. Nye, Jr., *Information Technology and Democratic Governance*, in ELAINE CIULLA KAMARCK & JOSEPH S. NYE, JR., GOVERNANCE.COM: DEMOCRACY IN THE INFORMATION AGE 9 (2002) (noting that “[r]ather than reinforcing centralization and bureaucracy, the new information technologies have tended to foster network organizations...and demands for different roles for government”).

¹⁹ Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda*, Regulatory Policy Program Working Paper No. RPP-2002-4 (2002) (available online at: <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-04.pdf>).

III. Does Can Imply Ought? Assessing the Role of Digital Technologies in Rulemaking

We have seen that digital technologies open up new, perhaps even quite attractive, possibilities for informing the public and involving citizens in the rulemaking process. For those who are accustomed to shopping or banking on-line, allowing citizens to participate in lawmaking on-line will undoubtedly seem an obvious choice. No matter obvious it may or may not seem, though, the design of the rulemaking process is itself a policy choice.²⁰ This means that decisions to adopt ideas such as regulatory juries or requirements for digitizing ex parte communications merit careful consideration as would any other policy proposal.

After all, just as some have suggested that the Internet generally contributes to the fragmentation of civic life even as it expands information,²¹ it is likely that any new application of information technologies in the rulemaking process will also create, in varying degrees, both negative effects as well as positive ones. For example, digitizing internal drafts and ex parte communications may well increase transparency, but it may also have the effect of stifling helpful internal dissent or restricting access to valuable sources of information. Before deciding to transform the existing regulatory process, it will therefore be important to consider the goals any such transformation would be intended to serve, what ranges of effects such a transformation would be predicted to bring, and whether other strategies might better serve the various goals at stake.²²

²⁰ The positive political economy of bureaucracy has taught us that structural or procedural choices can be important political decisions. See, e.g., Terry Moe, *The Politics of Bureaucratic Structure*, in JOHN CHUBB & PAUL PETERSON, EDs., *CAN THE GOVERNMENT GOVERN?* (1989).

²¹ See, e.g., CASS SUNSTEIN, *REPUBLIC.COM* (2001).

²² For a related discussion in connection with other reforms to the administrative process, see Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 *UNIVERSITY OF ILLINOIS LAW REVIEW* 1111 (2002).

When it comes to public participation in the rulemaking (or any policy) process, at least four possible perspectives exist on why such participation is important.²³ First, public participation can be viewed as a mechanism for expressing individual preferences which the regulatory agency then aggregates and uses as a basis for making its regulatory decisions. This might be thought of as "participation as voting." Second, public participation can be viewed as a process by which individuals engage in a deliberative process that aims toward the achievement of a rational consensus over the regulatory decision. This might be thought of as "participation as deliberation." Third, public participation can be viewed as intrinsically valuable for citizens themselves, for such participation fosters important personal virtues. This is "participation as citizenship." Finally, public participation can be viewed as valuable because it helps provide government decision makers with additional information needed to make better decisions. The drafters of the Administrative Procedure Act appear to have had something like this in mind, advising agencies that when selecting among different ways of involving the public "[t]he objective should be to assure informed administrative action."²⁴ This is "participation as information."

Deciding whether to proceed with e-rulemaking reforms will depend initially on the priority given to these different perspectives. It will also depend on the kind of problem that e-rulemaking is intended to solve. What are some of the problems associated with the existing rulemaking process? For many, the rulemaking process has become too slow and cumbersome,²⁵ while for others it has

²³ For a cogent elaboration of the first three of these goals, see John Elster, *The Market and the Forum: Three Varieties of Political Theory*, in J. ELSTER AND A. HYLLELAND, EDS., *FOUNDATIONS OF SOCIAL CHOICE THEORY* (1989).

²⁴ ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947). The Manual also states that the objective should be to ensure "adequate protection to private interests," suggesting that another possible goal of public participation might simply be to check administrative abuse.

²⁵ Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE LAW JOURNAL 1385 (1992).

become too adversarial.²⁶ Those interested in participation for its citizenship virtues or as a means of aggregating preferences may well lament the overall absence of citizen involvement in the rulemaking process. Others will find problematic the sheer lopsidedness of the participation, the fact that so many voices are heard from industry and so few from ordinary citizens. However the problem is framed, it will be important to assess its degree, its trends, and its causes.²⁷ The last of these, understanding the cause of the problem, is a vital first step in making any improvement. When it comes to low levels of citizen involvement in administrative rulemaking, for instance, procedural designers would do well to ask whether this is due to the difficulty of accessing documents or preparing comments (factors that could be addressed through e-rulemaking) or through apathy or ignorance (factors that probably cannot be addressed well by e-rulemaking).

In addition to understanding goals and problems, deciding whether to adopt certain e-rulemaking proposals will call for making predictions about the results of adopting a new technology or a new technology-facilitated process. These predictions will be positive or empirical forecasts of changes in relevant behaviors or outcomes. Will the problems be reduced? Will goals be furthered? Will there be any offsetting consequences that arise? The specific effects to analyze will depend on the goal and the problem to be solved, but in general we can conceive of two main types of effects: (1) effects on members of the public, and (2) effects on government officials (and their decision making).

Effects on members of the public could occur along any number of potential dimensions. Good analysis will go beyond general claims that a proposal will "improve public participation"

²⁶ Robert Kagan, *Adversarial Legalism and American Government*, 10 JOURNAL OF PUBLIC POLICY & MANAGEMENT 369 (1991); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE JOURNAL OF REGULATION 133 (1985).

²⁷ For a similar treatment of policy analysis outside the context of regulatory reform, see DAVID L. WEIMER & AIDAN VINING, POLICY ANALYSIS: CONCEPTS AND PRACTICE 204-237 (1992).

and instead will consider concrete changes that might be induced. Some of the specific types of potential change could include:

- *Mobilization.* Do more people get involved in the rulemaking process?
- *Distribution.* Is there any change in the kinds of people who participate? (E-rulemaking efforts might well increase the total number of participants in the rulemaking process, but the distribution across types of participants, e.g., corporations versus ordinary citizens, could theoretically still remain the same.)
- *Frequency.* Do specific individuals and organizations participate more frequently? If greater participation occurs, how much is due to an increased number of participants versus an increase in the frequency of participation by the same participants?
- *Knowledge.* Is learning enhanced or inhibited? Do people get exposed to new or contrary views?
- *Tone.* Does the tone, style, or emphasis of expression change?
- *Ideas.* Do the ideas generated by the public or the views that get expressed change? Are views arrayed differently along the ideological spectrum? Do they convey new or better information? Are the ideas more complex or simpler?
- *Conflict.* Are conflicts mitigated or exacerbated? Which kinds of issues seem to generate reduced or heightened conflict?
- *Perceptions.* How do people feel about their participation and their engagement with others in the rulemaking process? Do they view the government any differently (such as with different levels of perceived trust, legitimacy, or approval)?
- *Spillovers.* Are there any effects that spillover into other policy forums or into other aspects of politics? Does the process tend to polarize the public?

- *Organization.* How, if at all, do the roles of political organizations like trade associations, unions, or public advocacy groups change? Does easier and more direct access to the rulemaking process diminish the value of "gatekeeper" organizations? Will such groups adapt to fill different roles?

Effects on agency decision making will also be arrayed along a number of dimensions. Some of the specific changes to government might include:

- *Time.* Does the process take more or less time from the beginning to the time the agency issues its final rule?
- *Cost.* Does the process demand more staff time and analysis? (Greater participation seems likely to increase the time for listening, reading, and responding to public input.²⁸)
- *Response.* How do government officials respond to public input? Do they view it as constructive or as a burden?
- *Role.* Do government officials perceive their role as a decision maker any differently?
- *Agency Deliberation.* Will changes that make government processes more transparent make it easier or more difficult for officials or staff to deliberate among themselves? To contact experts for advice?
- *Outcomes.* Are decisions improved? Are behaviors changed and conditions in the world improved relative to the status quo?

In all likelihood, different proposals will result in different predicted and actual changes along these various dimensions. This

²⁸ See, e.g., Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NORTHWESTERN UNIVERSITY LAW REVIEW 173 (1997).

is one reason why it will be important to specify goals and understand how they can be achieved. If the goal is to increase the quantity of participation so that more citizens will practice civic virtues, rather than to increase the quality of deliberation or policy decisions, then decision makers can properly focus on predictions about the impacts on the volume and frequency of participation. In many cases, though, decision makers will likely care about more than just one goal or attribute, and so it will be necessary to take the various different kinds of effects into consideration.

Ultimately, choices will be need to be made to adopt one or more of several e-rulemaking proposals, whether those outlined in Part II or different proposals altogether. That new technologies "can" make possible new forms of public participation or new types of procedures does not necessarily mean that we "ought" to deploy these technologies in the proposed ways. Instead, choices should be based on an analysis of how well these proposals will solve the problems or advance the goals of concern relative to other options and the status quo.²⁹ In the end, some proposals may well not fare better than the alternatives, in which case no change will be warranted at least until a better proposal can be found. After a policy decision is made to adopt a change in the rulemaking process, however, government should then seek to commission an empirical study of the actual results, collecting data on the kinds of effects on the public and on the government outlined here.

Conclusion

Recent advances in information technology lead some observers to make "rosy predictions" that through the Internet conflict can be reduced and "[c]itizens can ... play a more central role in the development of new agency policies and rules."³⁰ Digital

²⁹ See Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 UNIVERSITY OF CHICAGO LAW REVIEW 407, 407 (1990) (noting that "evaluation of regulatory controls and legal doctrine must depend in large part on their effects in the world").

³⁰ Johnson, *supra* note 1, at 303, 336.

technologies do make feasible new agency practices designed to make rulemaking more accessible to those who seek to follow and participate in it. They promise new opportunities for communicating and interacting, and raise possibilities for transforming existing rulemaking procedures so as to involve the public in new ways. As attractive as some of the forthcoming proposals will be in a digital age, designers of regulatory processes should keep in mind the credo of designers and engineers everywhere to make decisions based on an evaluation of how well each available option fares in terms of relevant goals, constraints, and effects. New procedures made possible by information technologies are deserving of our consideration, but this newness itself merits neither optimism nor skepticism. Instead it calls for careful, dispassionate analysis.