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THE PROMISE AND LIMITS OF E-RULEMAKING

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When we talk about e-rulemaking, we often think about a first generation and a second generation of e-rulemaking. The first generation focuses on making all of the information related to regulation and the rulemaking process available online, as well as making it simple for citizens to participate electronically in traditional rulemaking. In this way government improves the transparency and accountability of the regulatory process. The second generation moves beyond the basics to leverage the new social technologies of the Internet to increase citizen participation and enhance agency expertise. This is the exciting stuff of using Twitter and Facebook and wikis and collaborative commenting systems to achieve a truly democratic, efficient, and responsive rulemaking process. While the prospect of this transformation is very exciting, some caution is in order.

First, it is not clear the federal government has graduated from the first generation successfully. Less than two years ago, I launched OpenRegs.com because Regulations.gov did not offer something as simple as RSS feeds and had a less than ideal user interface. Since then it has been much improved, but if we look at the recommendations of the ABA Administrative Law Section's report on e-rulemaking or the recommendations of OMB Watch's Task Force on e-rulemaking, we can see that we are a long way from where we should be to say that the first generation is complete.

The data available online is often not standardized or structured in a meaningful way. Also, Regulations.gov and other agency portals could also greatly improve their public interfaces. Technology is not the problem. Technologies that could vastly improve the accessibility and transparency of rulemaking dockets online exist—and they are often free as well. What are missing are institutional reforms requiring meaningful transparency. The E-Rulemaking Act of 2010, co-sponsored by Senators Lieberman and Collins, begins to address many of these concerns including how government funds e-rulemaking.

Also useful would be reform of federal contracting rules to allow agencies to entice open-source communities and the small firms at the cutting edge of web innovation to help them develop great tools for e-rulemaking. The Federal Docketing Management System and Regulations.gov were originally developed by Lockheed Martin, and they are now operated under contract by Booz Allen Hamilton. It would be wonderful to see the sorts of experiences that firms like 37 Signals or Adaptive Patch would create given the opportunity.

The first generation of e-rulemaking does not have to be complete before the government can begin experimenting in the second generation, but to the extent that there are trade-offs, government should allocate resources to making sure that we have access to all relevant rulemaking data in structured searchable formats. If we are given the data, third parties will be able to begin the second-generation experimentation by employing social networks to increase awareness, and collaborative tools to distill the wisdom of the crowds.

For example, look at the amazing work that Cynthia Farina has been doing with Cornell's e-Rulemaking Initiative. In partnership with the Department of Transportation, it has developed an experimental platform for citizen outreach through social media, human-moderated discussions, and collaboration on comments. With early access to data from Department of Transportation, it has been able to leverage networks, like

Facebook and Twitter, and off-the-shelf open source tools, including WordPress and Digress-It, to bring together hundreds of interested citizens to collaborate on two live rulemakings. If more agencies made more of data available early and in usable formats, we would see more experiments like Cornell's.

We should also be cautious about some of the rhetoric around the second generation of e-rulemaking. Ideally we should turn to regulation only when there is a market failure. One reason markets are better is regulators cannot possibly have all the information possessed by the myriad individual market actors—information that prices communicate. Because new technologies make it easy for regulators to tap into "the wisdom of the crowds," they may believe that they have solved what Friedrich Hayek called "the knowledge problem." That is a conclusion that we must resist.

Another thing the Cornell initiative's experience has taught us is that it is very difficult to engage ordinary citizens in a rulemaking, much less getting them to make useful contributions, and that doing so is very labor intensive. It is true that an incredibly small fraction of its users write and edit, and yet they are able to build a remarkable resource. But this small number of wikipedians forms a persistent community that has developed over the course of almost a decade with clear norms and a real culture. While the peer production of knowledge to improve regulation no doubt shows promise, we should understand that we have not solved the knowledge problem and may never be able to do more than marginally improve regulations.

Government should therefore focus on finishing the first step toward the promise of e-rulemaking—greater online transparency—so that it can facilitate experimentation toward the next.

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"Transparency and Performance in Government," 11 *North Carolina Journal of Law & Technology* 161 (2010).
"All Your Data Are Belong to Us: Liberating Government Data," *Open Government,* Daniel Lathrop & Laurel Ruma, eds. (New York: O'Reilly, 2010).
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