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Democratic Deliberation in the Wild: The McGill Online Design Studio and the Regulation Room Project

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DEMOCRATIC DELIBERATION IN THE WILD: THE MCGILL ONLINE DESIGN STUDIO AND THE REGULATIONROOM PROJECT

Cynthia Farina, Hoi Kong,** Cheryl Blake,*** Mary Newhart,**** Nik Luka******

ABSTRACT

Although there is no single unified conception of deliberative democracy, the generally accepted core thesis is that democratic legitimacy comes from authentic deliberation on the part of those affected by a collective decision. This deliberation must occur under conditions of equality, broadmindedness, reasonableness, and inclusion. In exercises such as National Issue forums, citizen juries, and consensus conferences, deliberative practitioners have shown that careful attention to process design can enable ordinary citizens to engage in meaningful deliberation about difficult public policy issues. Typically, however, these are closed exercises—that is, they involve a limited number of participants, often selected to achieve a representative sample, who agree to take part in an extended, often multi-stage process.

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The question we begin to address here is whether the aspirations of democratic deliberation have any relevance to conventional public-comment processes. These processes typically allow participation that is universal (anyone who shows up can participate) and highly variable (ranging from brief engagement and short expressions of outcome preferences to protracted attention and lengthy brief-like presentations). Although these characteristics preclude the kind of control over process and participants that can be achieved in a deliberation exercise, we argue that conscious attention to process design can make it more likely that more participants will engage in informed, thoughtful, civil, and inclusive discussion. We examine this question through the lens of two action-based research projects: the McGill Online Design Studio (MODS), which facilitates public participation in Canadian urban planning, and RegulationRoom, which supports public comment in U.S. federal rulemaking.

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INTRODUCTION

For more than thirty years, political philosophers and others have advocated a conception of democracy in which deliberative discussion among citizens¹ plays a key role in determining the course of public policy.² The possibilities for citizen involvement radically expanded with the emergence of the Internet and, over the last decade, thought leaders within and outside academia have urged governments to tap the potential “wisdom of the crowd.”³ Of course, not everyone has been persuaded. The deliberative democracy model has been criticized as utopian, elitist, and exclusionary.⁴ Much online political engagement has been dismissed as low value “slacktivism,”⁵ or “click-

1. When we use “citizen” in this Article, we do not mean to limit the term to its legal meaning of an individual who by birthplace, nationality of one or both parents, or completion of a naturalization process has sworn loyalty to a nation. *See Citizen*, BLACK’S LAW DICTIONARY (9th ed. 2009). In neither land use planning nor rulemaking is public participation limited to citizens in this formal sense. Rather, we intend the more inclusive meaning of “a person considered in terms of his or her acceptance or fulfillment of the duties and responsibilities of a member of society.” *Citizen Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/33513?rskey=YOYS1b&result=1&isAdvanced=false#eid> (last visited Dec. 18, 2014).

2. *See* discussion *infra* Part I. Joseph Bessette is credited with introducing the term “deliberative democracy” in *Deliberative Democracy: The Majority Principle in Republican Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 102–16 (Robert A. Goldwin & William A. Schambra eds., 1980).

3. *E.g.*, BETH SIMONE NOVECK, *WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL* 146–47 (2009); *see also* DON TAPSCOTT & ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 3 (2006).

4. *E.g.*, IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 31–45 (2000); Lynn M. Sanders, *Against Deliberation*, 25 *POL. THEORY* 347 *passim* (1997).

5. *E.g.*, Monty Phan, *On the Net, “Slacktivism” / Do-Gooders Flood In-Boxes*, *NEWSDAY*, Feb. 26, 2001, <http://www.newsday.com/news/on-the-net-slacktivism-do-gooders-flood-in-boxes-1.386542>. Although it does not use the term “slacktivism,” an influential indictment of technology-enabled political participation was Malcolm Gladwell’s article *Small Change: Why the Revolution Will Not Be Tweeted*, *NEW*

through democracy.”⁶ Still, the lure of the digitally empowered citizen-participant has generated considerable pressure on governments—at all levels and all over the world—to make their policy processes more open, transparent, and collaborative with the help of new information and communication technologies.⁷

Here we describe two projects, both being conducted by university researchers, that use innovative technological tools to motivate and support broader, better citizen engagement in government decision making. One is a digitally-mediated community-based urban design studio.⁸ A collaboration among law and urban planning faculty of McGill University and a Montréal community organization, this project aims to involve area residents in the redevelopment of a forty-five acre post-industrial site in Montréal’s midtown Bellechasse sector.⁹ The second is RegulationRoom.org, an online website that supports informed public participation in the process of making government regulations (rulemaking).¹⁰ This project, created by the multi-disciplinary Cornell eRulemaking Initiative (CeRI) working in collaboration with several U.S. government agencies, has recruited and successfully engaged historically silent stakeholders in learning about and commenting on proposed new safety and consumer

YORKER, Oct. 4 2010, http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell?currentPage=all.

6. Stuart Shulman, *The Case against Mass E-Mails: Perverse Incentives and Low Quality Participation in U.S. Federal Rulemaking*, 1 POL’Y & INTERNET 23, 30 (2009).

7. The Open Government Partnership, an international organization created in 2011, “provide[s] an international platform for domestic reformers committed to making their government more open, accountable, and responsive to citizens.” OPEN GOV’T PARTNERSHIP, <http://www.opengovpartnership.org/> (last visited Dec. 18, 2014). As of November 2014, sixty-five countries are members. *Id.* Members pledge to develop, and periodically report publicly on the progress of, a National Open Government Action Plan that promotes transparency and civic participation, fights corruption, and uses new technologies to make government more open, effective, and accountable. *Id.*

8. The urban design studio is an integrated complex of offline and online participation opportunities. *See* discussion *infra* Part II.A.1. The online phase that was completed during the writing of this Article can be seen at IMAGINONS BELLECHASSE, <http://imaginonsbellechasse.com/> (last visited Aug. 19, 2014).

9. *See* Mark Witten, *Open Door Policy*, 8 HEADWAY 1, 9 (Spring 2014), available at http://publications.mcgill.ca/headway/files/2014/04/HW8_1_Eng_FINAL_Web_Opt.pdf.

10. REGULATIONROOM, <http://regulationroom.org/> (last visited Dec. 18, 2014). RegulationRoom is one of a suite of sites using the SmartParticipation platform. *See infra* note 61.

protection regulations.¹¹ Most recently, the RegulationRoom website hosted public comment on possible new regulations on consumer debt collection practices that would be promulgated by the Consumer Financial Protection Bureau.¹²

In some respects these two projects are very different. The McGill Online Design Studio (MODS) project involves land use planning in a Canadian city.¹³ The researchers have employed a variety of online and off-line methods to reach out to and elicit participation from area residents, many of whom share social networks originating in community, occupational, religious, or other activities, and all of whom share the strong physical tie of place.¹⁴ Participation has involved several stages, during which residents' priorities and preferences were voiced, discussed, refined, and translated into specific design proposals.¹⁵ The RegulationRoom project involves national regulations being proposed by U.S. federal agencies.¹⁶ Outreach and participation have been entirely online, and participants have been located across the country with few, if any, common bonds other than their status as members of a group (e.g., consumers, debt collectors) that will be directly affected by the proposed regulation. Participation involves a single, time-limited event: discussion of the agency's draft during a specified formal public-comment period.

Still, the projects share a fundamental commitment: creating technology-enhanced participation processes that tap the potential of broader public engagement in public policy decisions, while avoiding (or at least minimizing) the problems identified by critics. In other words, these are efforts to realize digitally-supported democratic deliberation on the ground. They aim to discover how the digitally

11. See *History*, REGULATIONROOM, <http://regulationroom.org/about/history> (last visited Dec. 18, 2014).

12. *Consumer Debt Collection Practices (ANPRM)*, REGULATIONROOM, <http://regulationroom.org/rules/consumer-debt-collection-practices-anprm> (last visited Dec. 18, 2014).

13. For more on the project, see *À propos du projet de recherche [About the Research Project]*, IMAGINONS BELLECHASSE, <http://imaginonsbellechasse.com/a-propos/> (last visited Dec. 18, 2014).

14. See Witten, *supra* note 9, at 11.

15. See *generally Forum de design [Design Forum]*, IMAGINONS BELLECHASSE, <http://imaginonsbellechasse.com/forum-de-design/> (last visited Dec. 18, 2014) (providing a list of projects on which the public has the opportunity to leave comments and express preferences).

16. For more information on the project, see *Overview*, REGULATIONROOM, <http://regulationroom.org/about/overview> (last visited Dec. 18, 2014).

empowered citizen-participant can be meaningfully engaged through processes designed to prime deliberative discussion and knowledge production, rather than mere voting and venting.

These projects are grounded in theory—indeed, in various theories from several disciplines. However, because they are what the field of human computer interaction calls “research in the wild,”¹⁷ they sacrifice the kind of control that typifies the social science experiment and instead wrestle with mapping the purity of theory onto the messiness of real people and situations. For this reason, some of what we describe and argue here may be unsatisfying (or worse) to deliberative democracy advocates or to partisans of crowdsourcing. For example, although participants in both projects sometimes engage in the reasoned argumentation prized in the deliberative democracy model, they often convey their knowledge and value preferences in the form of highly contextualized, experiential information communicated through personal stories.¹⁸ We propose that this kind of public input can be a distinctive contribution of digitally-supported citizen deliberation, even though work remains to be done on specifying the appropriate uses of such situated knowledge and personal narrative as evidence in policymaking.¹⁹ Similarly, although designing user-friendly participation spaces was a prime goal in both projects, we argue that devising online tools to channel users toward informed and thoughtful discussion is more important than the conventional web-design focus on making participation simple and easy.²⁰ Supporting participants of varying competencies and

17. *E.g.*, Alan Chamberlain et al., *Research in the Wild: Understanding ‘In the Wild’ Approaches to Design and Development*, 2012 PROC. DESIGNING INTERACTIVE SYS. CONF. 795, 795–96 (2012).

18. Prominent deliberative democracy theorists who insist that true civic deliberation must involve rational argument from abstract principles include AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 1–9 (1996), and Joshua Cohen, *Deliberation and Democratic Legitimacy*, reprinted in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 67, 67 (James Bohman & William Rehg eds., 1997). Whether deliberation should “be restricted to rational argument, or admit other kinds of communication” is a point of contention among deliberative theorists. *See* JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 6 (2000).

19. *See* Dmitry Epstein et al., *The Value of Words: Narrative as Evidence in Policy Making*, 10 *EVIDENCE & POL’Y* 243 (2014); *see also* Sheila Jasanoff, *Technologies of Humility: Citizen Participation in Governing Science*, 41 *MINERVA* 223, 235–44 (2003), available at <http://www.hks.harvard.edu/sdn/articles/files/Jasanoff-Humility.pdf>.

20. “Make it easy” is a prime directive of much e-participation design advice. *See, e.g.*, Pat Florenza, *How Can We Improve Citizen Engagement Initiatives? Here’s 5*

circumstances is essential, but our approach to process design expects citizens to choose whether to invest the effort required for meaningful participation in public policy decisions.²¹

The Article proceeds as follows: Part I discusses the problematic yet promising relationship between the theory of deliberative democracy and the practice of public participation in government decision making. Part II gives an overview of the MODS Bellechasse project and the RegulationRoom project, and then focuses on how each project uses technology and human effort to lower the principal barriers to broader, better public participation. Part III discusses lessons learned from the projects and identifies challenges that remain.

I. DELIBERATIVE DEMOCRACY VS. DEMOCRATIC DELIBERATION: CONCEPTUALIZING PUBLIC PARTICIPATION PROCESSES WITHIN GOVERNMENT DECISION MAKING

There are several different articulations of deliberative democracy theory, but they share a core claim about process: democratic legitimacy comes from authentic deliberation on the part of those affected by a collective decision.²² This deliberation must occur under conditions of equality, broadmindedness, reasonableness, and inclusion.²³

It is extremely challenging to achieve these conditions in practice—especially (as discussed below) in public comment processes that are open to all²⁴—but there may be an even more fundamental objection to evoking deliberative democracy theory in the context of public participation processes. Both Canada and the United States are

Ways, GOVLOOP (Mar. 14, 2013), <http://www.govloop.com/profiles/blogs/how-can-we-improve-citizen-engagement-initiatives-here-s-5-ways>. Such advice is rooted in fundamentals of web design. See, e.g., STEVE KRUG, *DON'T MAKE ME THINK: A COMMON SENSE APPROACH TO WEB USABILITY* 10–19 (2d ed. 2006). The challenge is how to translate those fundamentals from the context of designing sites for Amazon or MSNBC to the task of building platforms for civic engagement.

21. See Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 160–62 (2012).

22. See Daniel Weinstock & David Kahane, *Introduction to DELIBERATIVE DEMOCRACY IN PRACTICE* 1, 12 (David Kahane et al. eds., 2010) (overview and synthesis of principal ideas); James Bohman, *Survey Article: The Coming of Age of Deliberative Democracy*, 6 J. POL. PHIL. 400, 401 (1998).

23. See, e.g., Cohen, *supra* note 18, at 67.

24. See *supra* note 1 (explaining the inclusive sense in which the term “citizen” is used in this Article).

representative, not direct, democracies. Both countries have highly developed administrative structures in which elected representatives delegate important public policy decisions to unelected heads of departments and bureaus. When final decisions are made about the precise elements of the Bellechasse redevelopment or the specific rights and obligations in new federal regulations on consumer debt collection, these decisions will be made by elected officials and career bureaucrats—not by decision (authentically deliberative or not) of the people who are affected.²⁵

Still, in both cases, government decision makers are subject to a formal legal mandate of public participation. In Canada, provincial legislation largely governs municipal planning. In the case of the Bellechasse redevelopment, the relevant Quebec statute stipulates that public participation is required both for comprehensive plans and for special area-specific initiatives such as the Bellechasse plan.²⁶ In the United States, most federal agency rulemaking must comply with the Administrative Procedure Act, which typically requires the agency to give “notice [of] either the terms or substance of the proposed rule or a description of the subjects and issues involved” and to allow “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”²⁷ In both cases, the judiciary will enforce the public participation mandate against the government, if necessary, at the request of a citizen who would be affected by the ultimate decision.²⁸

The public participation mandate is not conventionally conceptualized as creating a democratic deliberative process. Certainly (as we discuss in Part II below) in neither municipal planning nor rulemaking could the actual historical practice be described in such terms. Yet, the conventional conception does recognize two key characteristics of these legal mandates to consult

25. The condition that the deliberation is “binding,” in that it produces an enforceable outcome, is part of the classic deliberative democracy model. *See, e.g.*, GUTMANN & THOMPSON, *supra* note 18, at 53; Cohen, *supra* note 18, at 74.

26. An Act Respecting Land Use Planning and Development, C.Q.L.R., c. A-19.1 § 2.8 (Can.) (for development plans); *Id.* § 88 (for site-specific, “special planning programs”).

27. 5 U.S.C. § 553(b), (c) (2012)

28. For more on this topic in the context of Canadian land use planning, see *Wiswell v. Metro. Corp. of Greater Winnipeg*, [1965] S.C.R. 512 (Can.); MARC-ANDRÉ LECHASSEUR, *ZONAGE ET URBANISME EN DROIT MUNICIPAL QUÉBÉCOIS* 70 (2009). For more in the context of U.S. rulemaking, see JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 295–303 (4th ed. 2006).

the public. First, the right of participation extends to all.²⁹ Anyone who considers himself or herself to be affected by the policy decision is entitled to be involved. Second, a mere aggregation of citizen preferences is not the kind of consultative input sought by, or especially useful to, government decision makers.³⁰ If it were, the role for the public would be structured in the form of petition submission or referenda, as it is in some other government decisional contexts.

Given these key characteristics, we suggest that deliberative democracy principles are an appropriate source of inspiration for those designing tools and practices to elicit public participation in proposed planning exercises or new government regulations. The statutory decision to give all affected citizens a right to have input into the decision is a fundamentally *democratic* process choice; the evident intent that this citizen input be more than a tally of existing outcome preferences argues for tools and practices that can elicit a *deliberative* exchange of information and views.

Moreover, thinking about the appropriate role of the public in both land use planning and rulemaking has evolved over the last several decades. This reconceptualization further supports our argument that the best way to realize the underlying commitments of the statutory public participation mandates is to consciously design citizen engagement processes that facilitate democratic deliberation. Scholars and practitioners of urban and regional planning have increasingly emphasized wider public involvement in the decision-making process, including “joint definition of the action situation and of the sharing of interests, aims and knowledge.”³¹ This collaborative approach treats ordinary citizens, who have traditionally been marginalized in land use planning exercises, as participants having as much standing as powerful private interests and public agencies.³² When citizens are empowered as meaningful participants through a

29. Even though the APA speaks in terms of “*interested persons*” (emphasis added), the universal practice is for agencies to consider comments from anyone.

30. Farina et al., *supra* note 21, at 135.

31. *E.g.*, Louis Albrechts, *Strategic (Spatial) Planning Reexamined*, 31 ENV'T & PLAN. B: PLAN. & DESIGN 743, 743 (2004); *see also* Diane Day, *Citizen Participation in the Planning Process: An Essentially Contested Concept?*, 11 J. PLAN. LITERATURE 421, 424–25 (1997); Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5 PLAN. THEORY & PRAC. 419, 426 (2004).

32. For the classic statement of how deliberative planning works in practice, and for concrete examples of how citizens are treated as equal participants in the planning process, see generally JOHN FORESTER, *THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES* (1999).

deliberative planning process, the result can be innovation, learning, conflict resolution, and joint fact-finding.³³ In rulemaking, a similar movement to broaden participation was accelerated by the spread of the Internet.³⁴ Early agency-specific online rulemaking systems such as the Department of Transportation's Docket Management System were eventually superseded by www.regulations.gov, the government-wide rulemaking portal of the U.S. federal government.³⁵ These efforts aimed to make it easier for citizens to find rulemaking documents and submit comments. Most recently, the Obama Administration has directed agencies to use Web 2.0 technologies to increase rulemaking participation.³⁶ "Knowledge," said the President, "is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information."³⁷

We are hardly the first to argue that principles of deliberative democracy can guide the design of participatory processes in representative, as well as direct, democratic decision making. Deliberative practitioners in the United States, Canada, and other representative democracies have run National Issue Forums, citizen juries, consensus conferences, and other kinds of deliberative exercises that bring citizens together to engage with difficult public policy questions.³⁸ Typically, these efforts involve a limited number

33. Innes & Booher, *supra* note 31, at 426.

34. See LUBBERS, *supra* note 28, at 217–20.

35. For more details about this history, see COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING: A REPORT TO CONGRESS AND THE PRESIDENT 21–32* (2008), *available at* <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2505&context=facpub>.

36. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, on the Open Gov't Directive, to the Heads of Exec. Dep'ts & Agencies (Dec. 8, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf [hereinafter Open Gov't Directive Memorandum]. The defining characteristic of Web 2.0 technologies is that users participate in creating content, through technologies that support interaction and collaboration, rather than simply receiving content on static webpages controlled by the site owner. Examples include blogs and discussion fora, wikis, and social networking services such as Facebook and Twitter.

37. Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009).

38. For chapters devoted to each of the listed examples, see THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY (John Gastil & Peter Levine eds., 2005) [hereinafter THE DELIBERATIVE DEMOCRACY HANDBOOK].

of participants, often recruited selectively in an effort to achieve a representative sample of citizens.³⁹ These individuals agree to participate in a highly structured process that has been designed to provide information, support reasoned analytical discussion, and ensure respectful and egalitarian interactions.⁴⁰ Indeed, one leading scholar in the field has argued that only such carefully constructed processes can satisfy the “high standards both for democracy and deliberation” necessary to qualify as democratic deliberation.⁴¹

This, then, is a different kind of objection to invoking deliberative democracy principles in projects such as ours. Neither the MODS project nor RegulationRoom are government-sponsored projects, but both adhere to the public participation standard that would apply to the government: anyone who wishes may participate.⁴² The next Part describes the ways in which each project is designed to elicit and support informed, civil, and inclusive engagement. However, the commitment to open participation necessarily sacrifices a substantial amount of control over both process and participants—hence our description of these projects as efforts to cultivate democratic deliberation in the wild. As a result, neither the way the engagement proceeds nor the resulting body of public comment will meet the

39. For an overview of the ways participants are selected for various kinds of deliberative efforts, see Mark Button & David Michael Ryfe, *What Can We Learn From the Practice of Deliberative Democracy?*, in *THE DELIBERATIVE DEMOCRACY HANDBOOK*, *supra* note 38, at 20, 23.

40. James Fishkin, a pioneer in this area, described the basic idea as follows: Ideally, all citizens would participate, but under normal conditions, citizens in mass society are not effectively motivated to do so. So the idea is to engage a microcosm, in a good social science experiment, and then use that to represent what informed public opinion would be like—to fellow citizens, to policymakers and politicians.

James S. Fishkin, *Consulting the Public—Thoughtfully*, *DISP. RESOL. MAG.*, Winter 2006, at 11, 13–14.

41. John Gastil & Robert Richards, *Making Direct Democracy Deliberative through Random Assemblies*, 41 *POL. & SOC'Y* 253, 256 (2013); *see also* JOHN GASTIL, *POLITICAL COMMUNICATION AND DELIBERATION* (2008) (analyzing past, present, and possible future deliberative qualities of archetypal democratic processes, including elections, public meetings, and juries, as well as social discourse at large).

42. There is a small caveat: as a federally-funded research project, RegulationRoom complies with the ethical standards for human subjects research and must receive informed consent from participants. In the six years the project has been running, we have not received any questions about, or objections to, this from would-be participants. Similarly, the MODS project, as a project funded by the federal Social Sciences and Human Council, is subject to consent requirements. In the three years of this project, there have been no objections to the consent forms administered.

exacting specifications of deliberative democracy experts. Nonetheless, we argue that consciously designing for democratic deliberation can produce public participation that is more satisfying for citizens and more useful to government decision makers than the alternative, which is traditional public hearing and public comment processes.

We turn now to the question of how a public participation process open to all might be designed to increase the chances of eliciting informed and thoughtful—i.e., deliberative—citizen engagement.

II. DESIGNING TO OVERCOME THE BARRIERS TO DEMOCRATICALLY DELIBERATIVE PUBLIC PARTICIPATION

Although opportunities for public participation are required by statute in both Canadian land use planning and U.S. federal rulemaking, the reality of citizen involvement in both contexts notoriously falls far short of the formal promise of consultative government decision making.⁴³ Citizens are often excluded from meaningful participation in urban and regional planning because of constraints on time, resources, and capacity.⁴⁴ Moreover, opportunities for their input often occur so late in the process that plans, policies, or design strategies have already been developed, making path dependency likely, if not inevitable.⁴⁵ In rulemaking, participation tends to be highly selective. Sophisticated stakeholders (e.g., large corporations, professional and trade associations, national advocacy groups) understand the process and can comment effectively, while other types of stakeholders (e.g., small business owners, consumers) and interested members of the public are silent or comment in ways that have little value in agency decision making.⁴⁶ Rulemaking also has been criticized for getting public input too late in the policymaking process—i.e., after the agency has already

43. For planning, see, e.g., Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 216–18 (1969). For rulemaking, see, e.g., COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, *supra* note 35, at 8; CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW & MAKE POLICY* 111–13 (3d ed. 2003).

44. *E.g.*, Innes & Booher, *supra* note 31, at 424–25.

45. See generally CARY COGLIANESE ET AL., *TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS: A NONPARTISAN PRESIDENTIAL TRANSITION TASK FORCE REPORT* (2008), available at <http://www.hks.harvard.edu/hepg/Papers/transparencyReport.pdf>.

46. Cynthia R. Farina et al., *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1186 (2012).

produced a draft regulation and become invested in written elaborate policy and cost justifications.⁴⁷

These well-recognized shortcomings in the actual operation of statutory public participation rights motivate the MODS and RegulationRoom projects. Even though rulemaking and municipal planning are, in many ways, very different policymaking processes, they pose several very similar challenges in getting broader, better citizen involvement. This Part begins with a short overview of each project. Then we identify four major barriers to public participation and describe how each project attempts to lower these barriers.

A. Overview of the Projects

1. *The McGill Online Design Studio*

Rooted in the work of many other collaborative planning advocates,⁴⁸ the MODS project builds on several experimental projects undertaken in other parts of Montréal in the past five years.⁴⁹ The three-year Bellechasse project comprises several phases that are designed to involve a broad spectrum of those who live near the mid-town area in deliberating about the goals, challenges, and specific

47. COGLIANESE ET AL., *supra* note 45, at 6.

48. *See, e.g.*, BRIAN MCGRATH, *DIGITAL MODELING FOR URBAN DESIGN* (2008); Maarit Kahila & Marketta Kyttä, *SoftGIS as a Bridge-Builder in Collaborative Urban Planning*, in *PLANNING SUPPORT SYSTEMS BEST PRACTICE AND NEW METHODS* 389 (Stan Geertman & John Stillwell eds., 2009); Keiron Bailey et al., *Integrating Visualization into Structured Public Involvement: Case Study of Highway Improvement in Central Kentucky*, 1817 *TRANSP. RES. REC.* 50 (2002); Pedro Leão Neto, *Public Perception in Contemporary Portugal: The Digital Representation of Space*, 11 *J. URB. DESIGN* 347 (2006); Michael B. Lowry, *Online Public Deliberation for a Regional Transportation Improvement Decision*, 37 *TRANSP.* 39 (2010); Zhong-Ren Peng, *Internet GIS for Public Participation*, 28 *ENV'T & PLAN. B: PLAN. & DESIGN* 889 (2001); Heli Rantanen & Maarit Kahila, *The SoftGIS Approach to Local Knowledge*, 90 *J. ENVTL. MGMT.* 1981 (2009); Claus Rinner et al., *The Use of Web 2.0 Concepts to Support Deliberation in Spatial Decision-Making*, 32 *COMPUTERS ENV'T, & URB. SYS.* 386 (2008); Maged Senbel & Sarah P. Church, *Design Empowerment: The Limits of Accessible Visualization Media in Neighborhood Densification*, 31 *J. PLAN. EDU. & RES.* 423 (2011); Chris Steins & Josh Stephens, *Building Cities in the Virtual World: It's Time for Web 2.0*, 74 *PLAN.* 32 (2008); Eliahu Stern et al., *Web-Based and Traditional Public Participation in Comprehensive Planning: A Comparative Study*, 36 *ENV'T & PLAN. B: PLAN. & DESIGN* 1067 (2009).

49. *See* JILL LANCE ET AL., *RETHINKING SAINT-VIATEUR: EXPLORING DIGITALLY-MEDIATED COMMUNITY-BASED URBAN DESIGN IN THE MILE END NEIGHBOURHOOD* (2011), available at <http://www.arch.mcgill.ca/prof/luka/urbandesignhousing/klwb/vision/Lance&al.2011.pdf>.

design elements of the city-led rebuilding.⁵⁰ The university-based research team is collaborating with local civil-society organizations, including the Comité logement de la Petite-Patrie.⁵¹ Although the project has been discussed with municipal authorities, a deliberate decision was made not to seek their direct involvement in the consultation process, so that community stakeholders (citizens, merchants, NGOs, etc.) could speak freely about what they like or dislike about current processes of state-led planning and other general or specific concerns that cannot always be shared when local authorities are present.

The first phase, completed in 2013, involved a mix of participation activities. The researchers held information sessions, organized exploratory neighborhood walks, and held design-development workshops. Approximately eighty people participated in one or more of these activities. In addition, an online questionnaire asked those living near the site about their use of the neighborhood around the proposed site, their housing situation (rental, ownership, other; number of people in the household), their typical mode of transportation, their perception of the site (liked moderately, a lot, or disliked), what they liked about the site (from among a list of possibilities), concerns about the site, and their hopes for the site. In addition to these specific questions, there was a section where participants could make open-ended comments. The questionnaire was available for a twenty-four week period and was targeted at both those who could participate in live activities and those who could not. One hundred forty people responded, none of whom reported any physical disability. The two largest age groups were 25–34 and 35–44. Sixty-nine percent of the respondents were women. Six percent self-

50. See generally PROGRAMME PARTICULIER D'URBANISME POUR LE SECTEUR BELLECHASSE [SPECIAL PLANNING PROGRAM FOR THE BELLECHASSE SECTOR], BOROUGH OF ROSEMONT—LA PETITE-PATRIE (2012), available at <http://ocpm.qc.ca/sites/import.ocpm.aegirvps.net/files/pdf/P70/3b12c.pdf> (preliminary version dated November 5, 2012).

51. The group website explains:

The Housing Committee of the Petite-Patrie is 20 years old. Our main source of funding is Centraide of Greater Montreal. Since our inception, the Housing Committee works and operates in order to promote the tenure of the resident population without intimidation or undue increase in the cost of rent while maintaining a good quality of the built environment.

Comité logement de la Petite-Patrie CLP [*Housing Committee of the Petite-Patrie CLPP*], ARRONDISSEMENT, <http://www.arrondissement.com/montreal/comitelementdelapetitepatrie> (last visited Dec. 18, 2014) (follow “Description” tab) (translated from French).

identified as visible minorities, and 3.8% of the participants spoke a language other than French or English at home; 93% reported speaking French at home. The largest annual household income group earned 20,000–29,000 CAD per year (18%), followed by a group that earned less than 20,000 CAD per year (17.5%), and 10% had a household income of greater than 100,000 CAD per year.

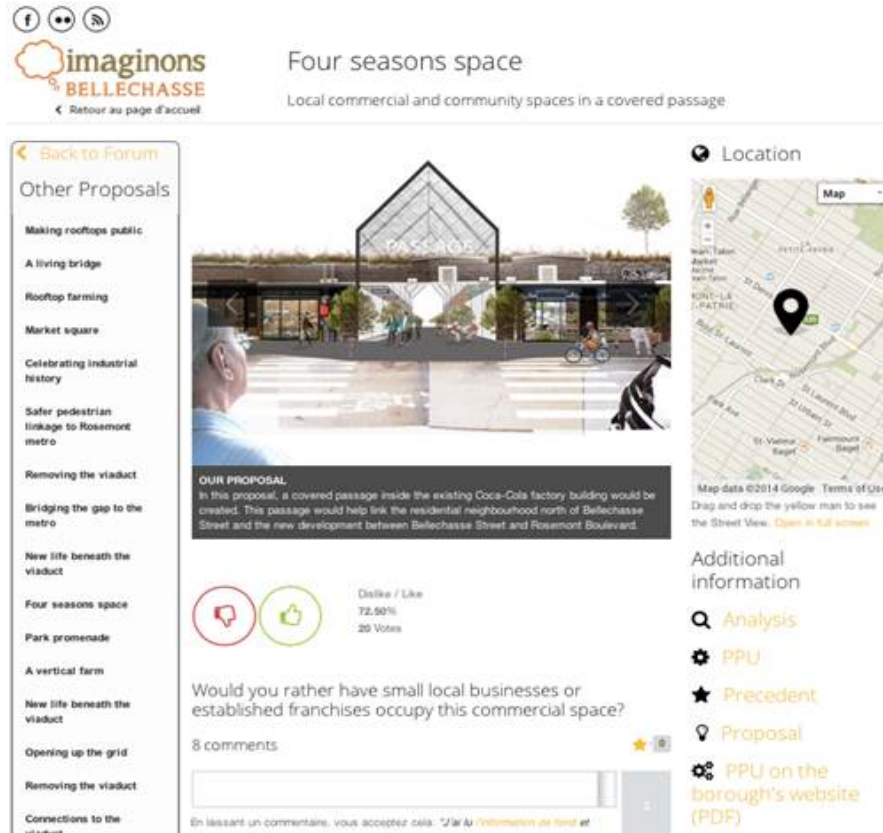
From the activities in the first phase, four themes emerged: (1) the need for more/preservation of public space; (2) the need for/preservation of increased diversity of housing; (3) the challenges and opportunities posed by the unique characteristics of the site's built environment (e.g., the presence of heritage industrial buildings; a viaduct that transverses the site); and (4) existing physical barriers to pedestrian circulation.

Next was a design-development phase in which students in law, urban planning, and architecture, under the supervision of professors, proposed design interventions guided by and responsive to the four themes. These activities included a short description of the project, sketches, and renderings. The students also found and included images and descriptions of successful design solutions ("precedents") in similar contexts.

The next phase, which was concluding as this Article was being written, involved publicly vetting the proposed design interventions. Again, both offline and online methods were used. During the offline sessions, the research team presented participants with specific design interventions that provided two different alternatives for each targeted area. Participants could then offer their concerns and suggestions, in light of the four themes identified above. The homepage for the online forum consisted of an aerial map on which participants could click to access design proposals.⁵² Once a participant clicked on a proposal, they were presented with visualizations of the design proposal, a short description of the proposal, and an online poll followed by general questions as well as comment boxes (*Figure 1*). In addition, the proposal page included a Google map that identified exactly where the design proposal was situated on the site, as well as links to background information. This information includes: (a) the rationale for the proposal; (b) the treatment of the area in the borough's site-specific plan; (c) a case study that served as the inspiration for the design (*Figure 2*); and (d) a detailed description and more precise rendering of the proposal.

52. IMAGINONS BELLECHASSE, *supra* note 8.

FIGURE 1. MCGILL ONLINE DESIGN STUDIO SITE, PROPOSAL PAGE⁵³ (TRANSLATED FROM THE ORIGINAL FRENCH)



53. *Espace quatre saisons* [Four Seasons Space], IMAGINONS BELLECHASSE, <http://imaginonsbellechasse.com/portfolio/a1/> (last visited Aug. 19, 2014).

FIGURE 2. MCGILL ONLINE DESIGN STUDIO SITE, SUPPORTING CASE STUDY⁵⁴ (TRANSLATED FROM THE ORIGINAL FRENCH)



Four seasons space
Local commercial and community spaces
in a covered passage

3/4
Additional
information

Case study
The Forks Market, Winnipeg, Manitoba

The Forks Market is located on The Forks National Historic Site of Canada at the junction of the Red and Assiniboine rivers in downtown Winnipeg. The market was created by transforming two historic stables in a market around a courtyard. The two-storey market is home to art vendors, food stands and local products. The courtyard is a comfortable public space with tables, benches and sculptures. The site around the market features information panels, a dock, a canoe landing, a garden of plants indigenous to the Prairies and an amphitheatre along the river for performances and events.



<http://www.forksmarket.com/2013/05/canada-winnipeg-travel-1pa.html>
The Forks Market, Winnipeg, Manitoba



<http://www.bicobyn.com/2013/10/forks-ridge-winnipeg/>

In an initial phase of the online consultation (which lasted six weeks), participants were required to register on the site and fill out a lengthy questionnaire before they could leave comments. The questionnaire aimed primarily at participant attitudes towards public officials, and their familiarity with the Bellechasse site and the site-specific plan. In an effort to increase participation, the research team shortened the questionnaire to target primarily demographic information and the registration requirement was eliminated, so that any visitor to the site could leave comments.

The research team will bring final proposals resulting from this iterative process to the attention of the relevant planning authorities. The team will aim to demonstrate the utility of such an approach and will propose ways in which this kind of consultation process can be incorporated into the existing regulatory framework through specific regulations. Alternatively, the team will offer suggestions as to how

54. *Espace quatre saisons* [Four Seasons Space], IMAGINONS BELLECHASSE, <http://imaginonsbellechasse.com/portfolio/a1/> (follow “Précédent [Precedent]” hyperlink) (last visited Aug. 19, 2014).

municipal practices might include processes that similarly engage citizens deeply in land use design.

2. *RegulationRoom*

The RegulationRoom project originated in a collaboration between CeRI researchers and the Department of Transportation (DOT) when DOT officials, wanting to use new technologies to broaden participation, encountered difficulties in setting up DOT's own rulemaking blog.⁵⁵ As screenshots of the site show, the RegulationRoom website bears only slight resemblance to a traditional blog. Moreover, as the following sections explain, CeRI researchers quickly realized that some of the most significant barriers to broader, better participation could not be solved by technology alone. Still, the basic format of the project has remained the same over the intervening six years: university researchers collaborate with federal agencies that are interested in getting additional public participation in their rulemaking or other policymaking processes.⁵⁶ RegulationRoom is not a federal government website—design and operation remain solely the responsibility of CeRI researchers and, during the rulemaking, anyone can file comments on the official federal rulemaking portal, www.regulations.gov, or through more traditional, non-electronic methods. However, the partner agency includes information about the RegulationRoom website in its formal Notice of Proposed Rulemaking (NPRM) and, in its publicity materials about the rulemaking, urges the public to use the RegulationRoom website.⁵⁷

55. The Obama Administration took office the following year, bringing a strong White House emphasis on using new technologies to create a more open, participatory government. *See, e.g.*, Open Gov't Directive Memorandum, *supra* note 36. The various obstacles that DOT had encountered in its early Web 2.0 efforts were resolved and agency blogs became ubiquitous. These are, however, typically general information blogs, which include occasional posts alerting people to important rulemakings, rather than blogs designed to directly elicit public comments on proposed new rules.

56. CeRI researchers have worked with the National Coordinator for Health IT, in the Department of Health and Human Services, to host public comment on revisions to the national strategic plan for using new technologies to improve health and health care. This discussion took place on PlanningRoom.org, another variation of the SmartParticipation platform. Another variation, RecommendationRoom.org, hosted public comment on recommendations for best practices in agency use of social media in rulemaking, proposed by the Administrative Conference of the United States (ACUS). Both sites remain available for viewing.

57. “[W]e want to make it easier for consumers and small businesses to tell us what they think about debt collection practices. To do that, we’ve partnered with

To date, the RegulationRoom website has hosted four DOT rulemakings⁵⁸ and two rulemakings from a newer partner, the Consumer Financial Protection Bureau (CFPB).⁵⁹ The most recent public engagement involved a pre-rulemaking discussion—referred to as an advance notice of proposed rulemaking (ANPRM)—in which CFPB sought public input on possible new regulations on consumer debt collection practices. In this Article, we focus on this engagement, the public-comment period, which ran from November 6, 2013 to February 28, 2014.

RegulationRoom.org, operated by the Cornell University's eRulemaking Initiative, where you can provide your comments in an interactive and intuitive way.” Kelly Cochran & Scott Putta, *Your Chance to Weigh in on Debt Collection Practices*, CONSUMER FIN. PROTECTION BUREAU (Nov. 6, 2013), <http://www.consumerfinance.gov/blog/your-chance-to-weigh-in-on-debt-collection-practices/>.

58. Two rulemakings involved commercial motor vehicle regulation: one that proposed to prohibit texting, *Texting*, REGULATIONROOM, <http://archive.regulationroom.org/texting/> (last visited Dec. 18, 2014), and another that proposed to require truckers to install automated equipment to police compliance with maximum driving/minimum rest time requirements, *Electronic On-Board Recorders*, REGULATIONROOM, <http://archive.regulationroom.org/eobr/> (last visited Dec. 18, 2014). Two others involved airline travel: one that proposed new protections in areas such as tarmac delay and baggage fees, *Airline Passenger Rights*, REGULATIONROOM, <http://archive.regulationroom.org/airline-passenger-rights/> (last visited Dec. 18, 2014), and the second that proposed handicap-accessible airport check-in kiosks and air travel websites, *Air Travel Accessibility*, REGULATIONROOM, <http://archive.regulationroom.org/air-travel-accessibility/> (last visited Dec. 18, 2014). Details about the first three of these public engagements can be found in Cynthia R. Farina et al., *Regulation Room: Getting “More, Better” Civic Participation in Complex Government Policymaking*, 7 *TRANSFORMING GOV'T: PEOPLE PROCESS & POL'Y* 501, 504–05 (2013) [hereinafter Farina et al., *Regulation Room*]; Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 *PACE L. REV.* 382, 396–414 (2011).

59. CFPB is a relatively new agency, created by the Dodd-Frank Act, 12 U.S.C. § 5511 (2012). Since its inception, CFPB has included a strong focus on using new technologies to engage citizens in its work. See Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Remarks at the American Bar Association (Apr. 3, 2014), *available at* <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-american-bar-association/>. The two rulemakings were complementary efforts, under the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1693 (2012), and the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617 (2012), to address problems with the handling of residential mortgages that had been revealed by the mortgage crisis. For an overview of the two proposed rules and links to hypertext versions of the original agency documents, see *Home Mortgage Protection: Agency Documents*, REGULATIONROOM, http://archive.regulationroom.org/mortgage-protection/agency-documents/tila_nprm/ (last visited Dec. 18, 2014). For more details, see Farina et al., *Regulation Room*, *supra* note 58.

To prepare for the consumer debt collection practices engagement, the RegulationRoom team analyzed the original rulemaking documents and created ten “topic posts.” These used more concise, simple language to explain the problems and practices CFPB was concerned about and the kind of information it sought from commenters.⁶⁰ Participants could attach their comments to specific subtopics within each of the ten topic posts. This “targeted commenting” structure not only focuses commenting, but also organizes the comment stream by substantive content, so that both participants and policymakers can more quickly locate all the discussion related to a particular issue.⁶¹ Participants could create comment threads by replying to other commenters, and could share comments via Facebook, Twitter, email, and other social media (*Figure 3*).

60. Each post also contained links to the relevant section of the ANPRM, for users who wanted to read the original rulemaking documents. *See infra* Part II.B.2 (discussing information layering).

61. CYNTHIA R. FARINA & MARY J. NEWHART, RULEMAKING 2.0: UNDERSTANDING AND GETTING BETTER PUBLIC PARTICIPATION 28–30 (2013), available at <http://scholarship.law.cornell.edu/cei/15/>.

FIGURE 3. REGULATIONROOM TOPIC POST IN CONSUMER DEBT COLLECTION PRACTICES ANPRM⁶²

The screenshot shows the RegulationRoom website interface. At the top, the logo and navigation links (Home, Closed Rules, Learn, About, Announcements) are visible. The main content area features a topic post for "Consumer Debt Collection Practices (ANPRM)" with a subtopic "Unlawful collection practices" and 193 comments. A sidebar on the right lists navigation options like "Discussion", "Draft Discussion Summary", and "Final Discussion Summary". Below the main post, a "Subtopics" section is expanded to show "1 | Harassment or abuse - 113". The "Agency Proposal" section contains text about the Fair Debt Collection Practices Act (FDCPA) and a list of three abusive practices: publishing consumer names, repeated harassment, and calling without disclosing identity. A comment thread on the right shows a user named "Daves" commenting on the harassment practice, and another user "gmt512" replying with a request for more information.

62. *Consumer Debt Collection Practices (ANPRM): Discussion*, REGULATIONROOM, <http://regulationroom.org/rules/consumer-debt-collection-practices/discussion/unlawful-collection-practices#mid-172> (last visited Dec. 18, 2014).

During the public comment period, the site had 8480 unique visitors.⁶³ Three hundred seventy-seven people registered as users,⁶⁴ and 224 users made 956 comments.⁶⁵ Many people joined the discussion to share stories about their own debt collection experience. The topic posts on debt collection litigation and use of phones and mobile phones in debt collection received the most comments.⁶⁶

The discussion on RegulationRoom is moderated by students enrolled in Cornell Law School's e-Government clinic, who have been trained in the facilitative techniques used by mediators and other professionals for in-the-room dialogues and consensus building. Bringing these practices to the online environment, moderators mentor effective commenting practices and encourage participants to engage with different ideas and positions.⁶⁷ At the end of the official comment period, the RegulationRoom team created detailed summaries of the comments on each topic post. These were posted as Draft Summaries, and all users were emailed and invited to review the drafts and suggest corrections or additions. In the four days that people could comment on the drafts, 403 visitors came to the site and three people made six suggested changes. The team reviewed the suggestions and prepared Final Summaries. These were submitted to CFPB and remain posted on the site (as do all the comments and Draft Summaries).⁶⁸

As this Article is written, CFPB is still considering the comments it received on the debt collection practices ANPRM. However, in a

63. There were 12,629 total visits, with some people returning multiple times. *Consumer Debt Collection Practices (ANPRM): Final Summary Introduction*, REGULATIONROOM, <http://regulationroom.org/rules/consumer-debt-collection-practices-anprm/final-discussion-summary/final-summary-introduction#all> (last visited Dec. 18, 2014) [hereinafter *Debt Collection Final Summary*]. More details can be found in the final summaries posted on the RegulationRoom website. *Id.*

64. *Id.* Registration requires a user name (which need not be and typically is not the person's real name), password, and email address. It also requires consent to participate in the RegulationRoom research. *See supra* note 42.

65. Note that this figure does not include comments made by site moderators. *Debt Collection Final Summary, supra* note 63.

66. The topic posts, and associated number of comments, can be viewed by selecting the "Discussion" phase in the issue carousel below the overview. *Id.*

67. *See infra* Part II.B.3.

68. In a rulemaking, the summarization process occurs close to the end of the comment period, timed so that the team can file the Final Summaries as a formal public comment on Regulations.gov on the last day of the official comment period. Because this was a pre-rulemaking discussion, there was more flexibility to leave the discussion open until the end of the official comment period, and then summarize and file the summary with the agency.

public speech on April 3, 2014, CFPB Director Richard Cordray described the RegulationRoom project as an important part of the agency's efforts to "reimagine the notice-and-comment process for [their] rulemakings":

This interactive process produces a level of engagement that deepens knowledge on both sides, and allows citizens to participate in rulemaking by means of a controlled forum. We did this when we proposed mortgage servicing rules and we did it again in connection with an advance notice of proposed rulemaking on debt collection. The Cornell website attracted more than 8,000 unique visitors and received over 900 comments through a moderated process designed to draw out additional information and allow participants to react to each other's postings. The Bureau received another 22,000 comment letters directly. More than [eighty] percent of those who took part through the Cornell initiative had never previously provided feedback on a federal government rulemaking. We are finding it worth the effort to engage the public in new and different ways.⁶⁹

Results from the RegulationRoom research have been distilled into a set of recommendations for agency officials wanting to use Web 2.0 technologies to broaden and deepen public participation.⁷⁰ In addition, the Administrative Conference of the United States (ACUS), a federal agency charged with making research-based recommendations about improving the regulatory process, has adopted recommendations on agency use of social media in rulemaking⁷¹ that draw heavily on the RegulationRoom research.⁷²

B. Lowering Barriers to Public Participation and Supporting Deliberative Engagement

Municipal planning and rulemaking are policymaking processes that can have direct and substantial impacts on individual citizens. Whether it be through site specific plans, which include communal

69. Cordray, *supra* note 59.

70. The report was commissioned by the IBM Center for the Business of Government. FARINA & NEWHART, *supra* note 61, at 28–30.

71. ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2013-5: SOCIAL MEDIA IN RULEMAKING (2013), *available at* http://www.acus.gov/sites/default/files/documents/Social%20Media%20Rec_Final_12_9_13.pdf.

72. MICHAEL HERZ, USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS 32–33 (2013), *available at* <http://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf> (consultant's report commissioned by ACUS as basis for formulating recommendations).

rooftop gardens in sustainably designed neighborhoods or limiting how many calls per day creditors can make to consumers through automated calling technology, these government decisions will matter in people's lives. Why don't more citizens participate, or participate effectively, in these policy processes?

In this section, we discuss four barriers that impede broader, better public engagement in complex policymaking processes such as land use planning and rulemaking: (1) lack of awareness; (2) information overload; (3) low participation literacy; and (4) motivational issues tied to citizen fatigue and cynicism. We describe the practices and tools our two projects use to lower these barriers.

1. *Lack of Awareness*

Often, people simply do not know that a policymaking process that will have an impact on them is taking place. Even if they know generally that something is happening, they may not understand its specific relevance to their lives. The potential scope and implications of a decision are not always evident to people outside the planning or rulemaking process; ordinary citizens may not recognize effects that seem obvious to government officials and interested parties. Finally, even if people understand why they should care about an impending policy decision, they may not realize that they have a right to participate or know how to exercise that right.⁷³

For these reasons, efforts to move public participation towards the democratic deliberative ideal of being inclusive, representative, and equal must include new kinds of outreach strategies to alert and engage those who would otherwise be absent or silent.

a. *The McGill Online Design Studio*

In the land use planning context, notice of an impending planning decision is usually given through newspaper announcements and, sometimes, posting of notices in affected areas. The MODS team used a more multi-faceted strategy that: (1) built relationships with community partners; (2) leveraged those relationships to bring participants into the live and online activities; and (3) engaged in direct outreach through new and conventional media. For the purposes of building relationships, the design studio organized exploratory walks around the site, identified community

73. See also *infra* Part II.B.3.

organizations as potential partners, met with representatives, and attended community events in order to introduce the project. Once relationships with community organizations were established, the design studio leveraged them to engage in outreach. For instance, the studio invited organizations to live focus groups and workshops, asked organizations to send invitations to participate in the online forum through their email lists, requested that those organizations retweet the design studio's announcements and share its Facebook posts, and used community events to promote live and online forums. In addition, the design studio undertook direct outreach measures. For example, the studio circulated flyers in the neighborhood and metro stations, targeted advocacy groups with design proposals, and sent out messages to academic departments and design firms. Finally, the studio sent direct email, including regular updates, to residents who filled out consent forms and to registered online users; sent out press releases and did interviews in media as diverse as large daily newspapers, lifestyle blogs, and community radio; handed out the design studio's business cards at various local events; and paid for advertising in local newspapers.⁷⁴

The impact of the recruitment measures was varied, with different measures yielding different levels of participation. For instance, immediately after researchers attended a local community event, the website saw a significant increase in visits and comments. By contrast, after media mentions, the website registered a dramatic spike in visits, but not more active participation in the form of comments. Finally, some recruitment measures yielded inconclusive results. According to the online forum questionnaire, the vast majority of respondents visited the site despite having no prior experience with the project's live activities.

b. RegulationRoom

In rulemaking, United States federal agencies increasingly use a variety of outreach techniques in addition to publishing notice in the government's official publication, the Federal Register.⁷⁵ These include not only such traditional media strategies as press releases,

74. Documented in SIMON CHAUVETTE ET AL., *VISION PLANNING LTD., IMAGINONS BELLECHASSE: EVALUATING DELIBERATIVE DEMOCRACY IN COMMUNITY PLANNING* (2013); NIK LUKA ET AL., *IMAGINONS BELLECHASSE: SHORT REPORT ON THE ONLINE FORUM* (2015).

75. A massive physical publication numbering more than 20,000 pages a year, the Federal Register is also available online at <https://www.federalregister.gov/>.

but also new media approaches like publicizing their most important rulemakings in the agency's blog, Facebook page, or Twitter feed.⁷⁶ Many agencies also maintain listservs, or at least lists of organizations that will be notified when a comment period is opening.⁷⁷ These methods commendably expand the range of notice beyond the narrow group of stakeholders who read the Federal Register, but they still have a serious shortcoming—most require knowing that one *ought* to be reading the agency's blog or Facebook page, following it on Twitter, or subscribing to its listserv. To reach people who are not regular consumers of agency communications, the RegulationRoom team works with the agency to develop an outreach plan tailored to the specific rule and targeting those we call “missing stakeholders”—that is, individuals and entities (e.g., small businesses) who may be affected by the rule but historically have not participated, or participated effectively, in rulemakings. In the consumer debt collection practices engagement, these missing stakeholders included consumers who had defaulted on loans or otherwise were contacted by debt collectors; groups facing distinctive issues, including senior citizens as well as service-members and their families; small debt collection companies; smaller businesses that handle their own debt collection; and consumer credit counseling organizations.

The goal of the outreach plan is to put notice of the rulemaking in places where missing stakeholders are already accessing information related to their interests or needs. The plan includes conventional and social media, and involves not only direct communication with missing stakeholders, but also efforts to enlist organizations and influential opinion leaders (such as bloggers and newsletter authors) in passing along the message to members and readers. The message communicated has three components: (1) the proposed action will affect you in the following [specified] ways; (2) you have a right to comment on the proposal; and (3) the agency wants public input and has a legal responsibility to review and consider every comment before making a final decision.

In the consumer debt collection practices discussion, eighty-three percent of those who commented on RegulationRoom reported never having participated in a federal rulemaking before. Two-thirds self-identified as consumers, nearly one-quarter were in the debt collection business, and the remainder included researchers, people

76. See, e.g., Cochran & Putta, *supra* note 57.

who worked for state, local, or tribal government entities, consumer credit counseling organizations, and miscellaneous others.

2. Information Overload

True deliberation requires information. Democratic deliberative exercises are always structured to include an educational component that prepares participants to discuss the relevant facts and issues, recognize the competing values at stake, and weigh alternatives from multiple perspectives.⁷⁸ In the contexts of land use planning and rulemaking, the challenge in moving public participation towards the democratic deliberative ideal is generally not a lack of information *per se*. Government decision makers typically generate, or pay consultants to generate, a mass of studies, analyses, and assessments during the process of developing a proposal. Unfortunately, even when this material is available to citizens, it is rarely comprehensible to them without help. Often voluminous and filled with technical, legal, or other jargon, such material is virtually always written from the “inside” perspective of the professional consultant, regulator, or planner—with little effort to present context, problems, constraints, and options in terms that make sense to ordinary people.⁷⁹

For this reason, efforts to make public participation processes more deliberative must include ways to present the information people need in forms that they are able and willing to consume.

a. The McGill Online Design Studio

Land use planning gives rise to several challenges relating to information overload. The first is legal. Planning law is elaborate, and is comprised of intricate and often technical statutes and regulations. Even apart from the law, planning is a complex activity that requires an understanding of the distinctive features of the land that is the object of a plan, the interactions of citizens in that space, and the aspirations of those who live in it. To make these information burdens more manageable, the MODS team used a set of strategies that mirror those of RegulationRoom (described below).

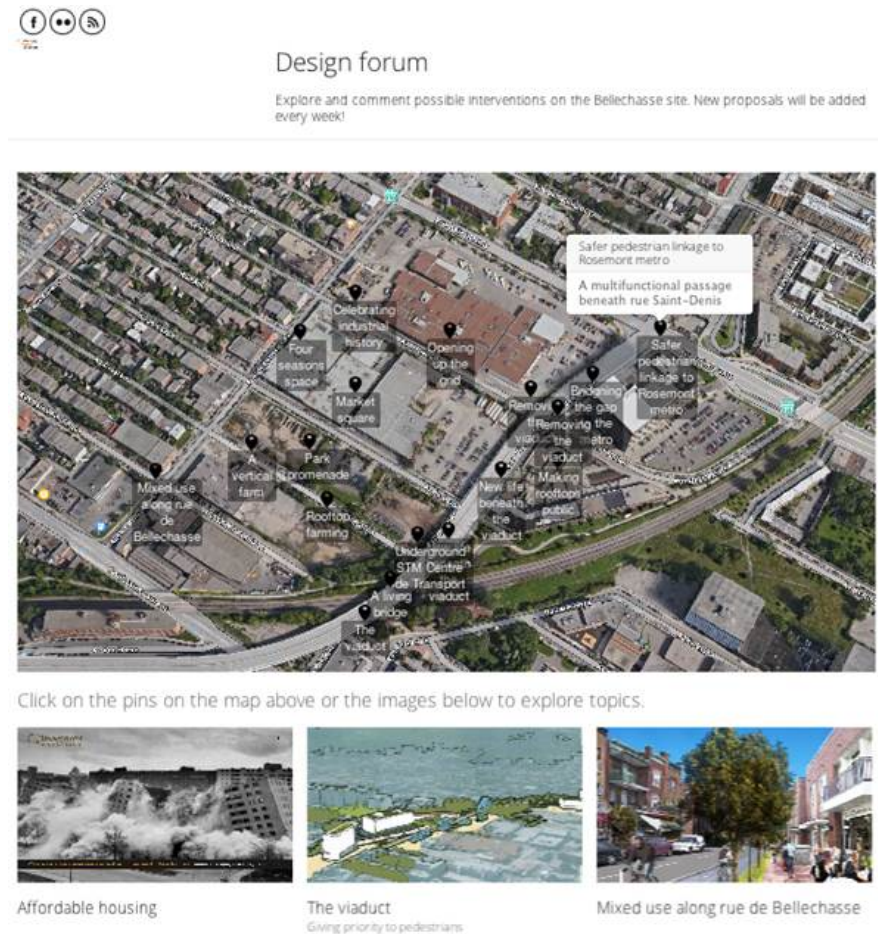
For instance, the project team prioritizes the most relevant information from the primary planning documents. The statutory provisions that govern a site-specific plan are multiple, lengthy, and

78. See, e.g., Gastil & Richards, *supra* note 41, at 257 (identifying the first goal for a democratic deliberative event as “[c]reat[ing] a solid information base”).

79. See Farina et al., *supra* note 46, 1186–96.

complicated. Moreover, a site-specific plan is meant to be responsive to the features of the relevant land and to the priorities of the local community with respect to that land; as such, these materials are also quite extensive. To reduce informational burden on participants, the team focuses attention on the particular features of the Bellechasse site that the community has identified as important, and highlights the regulatory outcomes the site-specific plan aims to achieve. Furthermore, the project website organizes information in a way that enables the user to identify what the site-specific plan has proposed regarding the community's priorities in the Bellechasse site, and to explore (or discover) and comment on what the user finds significant about that element of the site. The website does so by presenting a map that, through a collection of markers, identifies the specific geographic locations on the site that consultations revealed to be areas of interest to the community (*Figure 4*). Each marker, when clicked, navigates users to a page containing a condensed version of the site plan's proposals for that area, coupled with a variety of pictures, maps, and hyperlink resources that enable the individual users to identify and explore their own preoccupations with the Bellechasse site (*Figures 1, 2*).

FIGURE 4. MCGILL ONLINE DESIGN STUDIO SITE HOME PAGE⁸⁰
(TRANSLATED FROM THE ORIGINAL FRENCH)



The statutory language of planning law and the jargon of planning professionals can appear to the layperson to be impenetrable or inaccessible. The project website responds to this obstacle by translating complex statutes into comprehensible text and maps. Similarly, the website makes the expertise of planners accessible through a combination of clear and simple descriptions and analyses, as well as through design proposals that are presented visually. Finally, the MODS project website allows users to navigate to and explore information at the level of detail they choose. For example,

80. *Forum de design [Design Forum]*, IMAGINONS BELLECHASSE, supra note 15.

an individual user can decide to engage the Bellechasse project exclusively through the design drawings and short descriptions of the design proposals. Those who want a more in-depth understanding of the project can seek the relevant information in links that are labelled “supplemental information.” There, the user can find more detailed descriptions of and rationales for the proposals, as well as explanations of the sources of the designers’ inspiration. This layering of information seeks to make information manageable by tailoring it to the user’s own level of interest and capacity.

b. RegulationRoom

Rulemaking is an especially challenging context for providing citizens with necessary information in a comprehensible form. A combination of reasons—including statutes and Executive Orders that require various impact analyses as well as the risk of judicial reversal for failure to adequately support or justify a new regulation—have produced rulemaking documents of formidable length and complexity. Even the consumer debt collection ANPRM (which, as a pre-rulemaking document, was subject to many fewer legal requirements⁸¹) was 150 manuscript pages in length written at the readability level⁸² of a college freshman.

RegulationRoom uses a combination of human effort and design strategy to lower the barrier of information overload. *Information triage* is the first step: the team assesses the relative importance of information in the principle rulemaking documents and identifies what participants most need to know in order to comment effectively. The resulting, substantially reduced content is organized into the topic posts (*Figure 3*). *Providing signposts* is accomplished through website design. The list of informatively titled topic posts allows participants to quickly assess the scope of possible discussion, while informatively titled subtopic sections within each post allow users to identify and proceed to the specific issues that interest them most (*Figure 5*).

81. See LUBBERS, *supra* note 28, at 210–11.

82. Measured by the Flesch-Kincaid method. See generally WILLIAM H. DUBAY, THE PRINCIPLES OF READABILITY (2004), available at <http://www.impact-information.com/impactinfo/readability02.pdf>.

FIGURE 5. REGULATIONROOM TOPIC POST SHOWING POSSIBLE SUBTOPICS FOR DISCUSSION⁸³

Open Rule

Consumer Debt Collection Practices (ANPRM)

Summary ▾

Discussion | **The "validation notice" sent to consumers** - 104

Select other topics ▾

Discussion
 Draft Discussion Summary
 Final Discussion Summary
 Agency Documents

Subtopics collapse all ▲ expand all ▼

- 1 | Info that might help consumers recognize the debt - 45 ▾
- 2 | Info about the amount owed - 9 ▾
- 3 | Info about the consumer's right to dispute the debt - 32 ▾
- 4 | Format of the notice - 13 ▾
- 5 | Languages other than English - 5 ▾

All topics

COMMENT ON

<
Telling consumers what's happening with their debts
124 6
The "validation notice" sent to consumers
104 7
When consumers dispute a debt
133 3
Making sure debt collectors & buyers have info about the debt
41 2
>

Translation occurs when the team restates the information from the rulemaking documents in shorter, less complex sentences that avoid jargon and technical terms as much as possible. Presenting participants with dense, convoluted, bureaucratic-sounding text not only excludes those with limited English-reading skills, but also, more broadly, undermines the message that government wants genuine public participation. Finally, *information layering* uses the Web 2.0 functionalities of hyperlinking and glossaries to structure information in a way that allows users, at their individual choice, to find deeper or broader information—or, conversely, to get more help than triage and translation has already provided (*Figure 6*).

83. *Consumer Debt Collection Practices (ANPRM): The "Validation Notice" Sent to Customers*, REGULATIONROOM, <http://regulationroom.org/rules/consumer-debt-collection-practices/discussion/validation-notice-sent-consumers> (last visited Dec. 18, 2014).

FIGURE 6: EXAMPLE OF INFORMATION LAYERING IN REGULATIONROOM TOPIC POST⁸⁴

The screenshot shows a web interface for a topic post. The title is "4 | Format of the notice - 13". The main content is an "Agency Proposal" with several paragraphs of text. A comment from "emmacollector" is visible, dated "November 7, 2013 - 6:40pm". The comment text reads: "A standard first letter would be an excellent idea - especially if states would agree on the content. Consumers could recognize the format and know where to look for the information they need. Consumer testing would be a very good idea. I believe that industry members would favor this to reduce litigation over technical violations. Taxpayers would benefit by reduced federal court expenses." The interface includes a "Make a comment" input field, "Comment" and "Cancel" buttons, and "Endorse" and "Reply" buttons for the comment.

Through creative information layering, the team can embed all the information from the original rulemaking documents in a way that is accessible to any participant who wants it without overwhelming others. In the consumer debt collection engagement, users visited the ANPRM text 506 times, spending an average of four minutes and thirty-eight seconds on-page—a lengthy amount of time for Internet reading.⁸⁵ Finally, when the discussion is open, moderators are available to point participants to information that answers questions, corrects misimpressions, encourages further discussion, etc.

84. *Consumer Debt Collection: The “Validation Notice” Sent to Customers (Format of the Notice)*, REGULATIONROOM, <http://regulationroom.org/rules/consumer-debt-collection-practices/discussion/validation-notice-sent-consumers#nid-148> (last visited Dec. 18, 2014).

85. See Jakob Nielsen, *How Long Do Users Stay on Web Pages?*, NIELSON NORMAN GROUP (Sept. 12, 2011), <http://www.nngroup.com/articles/how-long-do-users-stay-on-web-pages/> (“The average page visit lasts less than a minute . . . [I]f you can convince users to stay on your page for half a minute, there’s a fair chance that they’ll stay much longer—often 2 minutes or more, which is an eternity on the Web.”).

3. *Low Participation Literacy*

Democratic deliberation stands in sharp contrast to a decisional process in which each citizen privately casts her individual vote and the government simply tallies the ballots.⁸⁶ Moving public participation processes toward the deliberative ideal means providing participatory structures and guidance that nudge citizens towards being active and engaged problem solvers, willing to work with those who have different interests and values, to exchange knowledge and experiences, and to discover solutions.

This kind of public participation is most likely to produce outputs of value to government decision makers. But it is also much less familiar to most citizens than voting, responding to an opinion poll, or signing a petition. Many people will need help in understanding why merely voicing outcome preferences is not an especially effective form of participation in planning or rulemaking. Further, they may require support and encouragement to offer facts or data, give reasons, consider competing arguments and claims, make suggestions, and discuss alternatives.

Deliberative democracy practitioners have shown that ordinary citizens can achieve this kind of participation literacy.⁸⁷ However, in a public participation process open to all comers, even the best process design will not achieve a level of deliberative output comparable to what can be attained in a well-constructed deliberation exercise with a closed set of invited participants. Deliberation is hard work. Even when resources and support are offered, many people will engage in more limited or superficial ways. Still, thoughtful participation design can produce more deliberative public input than what planners and rulemakers get from conventional public hearing or notice-and-comment processes.

a. *The McGill Online Design Studio*

Several elements of the MODS project enable and facilitate informed and thoughtful citizen engagement. Consider first some aspects of the offline consultations that encourage deliberative

86. See, e.g., DRYZEK, *supra* note 18, at 1.

87. See, e.g., JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009); *THE DELIBERATIVE DEMOCRACY HANDBOOK*, *supra* note 38 (describing structure and results from numerous case studies in applied deliberative democracy, demonstrating participants' experiences in deliberative and consensus-building policy discussions).

exchanges among citizens. In activities such as exploratory walks, participants are invited to reflect on their and others' perceptions of the Bellechasse sector. Similarly, when the research team presents the project's design proposals to community members for live comment, they make clear that the objective is a reasoned conversation that allows proposals to be cooperatively refined.

The design of the website reinforces these deliberative aims. The juxtaposition of design proposals and their rationales with precedent images and their explanatory texts makes transparent the reasoning behind the project proposals, and makes clear that the latter are not mere expressions of designers' preferences or fancies. Moreover, the analytical and informational sections of the website provide resources for users to engage thoughtfully with the proposed designs. These resources and hints may, of course, be ignored by users who would prefer to engage with the proposals in the binary logic of approval or disapproval that is more common in online discussion forums. This risk is somewhat attenuated by the presence of trained moderators who steer the comments onto a deliberative track through prompting questions. These interventions typically take the form of queries that ask users to provide fuller reasons for opinions expressed.

b. RegulationRoom

In RegulationRoom, more deliberative participation is encouraged and supported by design of the website, design of the substantive content, and the practice of facilitative moderation. The website has a prominent educational component in the form of a carousel that provides both video and text explanations of the rulemaking process and effective commenting (*Figure 7*).

FIGURE 7: REGULATIONROOM HOMEPAGE SHOWING LEARN CAROUSEL⁸⁸



The structure of the topic posts, which places text about the agency proposal side-by-side with the comment stream (see Figure 3), both makes it easier for participants to become informed and signals that

88. *Consumer Debt Collection Practices (ANPRM)*, REGULATIONROOM, *supra* note 12.

the proposal is central to the discussion. The use of topic and subtopic headings, with the requirement that users comment on a specific subtopic, helps to focus comments and organize contributions in a way that makes it easier for participants (and, ultimately, the agency) to locate and follow the discussion on a particular issue. Information layering⁸⁹ recognizes that citizens will enter the discussion with different levels of substantive knowledge and interest, and so aims to support a range of information-seeking behaviors by participants.

Even with these various supports built into the participation space, many participants need additional help to contribute most effectively. Student moderators trained in active listening, neutral and open-ended questioning, and other techniques of group facilitation periodically review and respond to comments.⁹⁰ Their role goes beyond the traditional online moderator function of policing civility; rather, they fulfill many of the functions that a facilitator would play in an offline deliberative exercise.⁹¹ They point participants to information, prompt them to give reasons for positions, urge them to consider other perspectives, and encourage them to offer alternative solutions (*Figure 8*). In the consumer debt collection practices discussion, moderators posted two hundred fifty responses to commenters.

89. See *supra* Part II.B.2.

90. Comments post to the site immediately, without being approved by a moderator. The moderators periodically review newly posted comments and, if appropriate, respond. Automatically-generated emails tell participants that the moderator or another user has responded to one of his/her comments, and provide a link to the response.

91. On the importance and role of facilitation in in-the-room deliberation, see Gastil & Richards, *supra* note 41, at 258; Alfred Moore, *Following from the Front: Theorizing Deliberative Facilitation*, 6 CRITICAL POL'Y STUD. 146 (2012). On group facilitation generally, see SAM KANER ET AL., FACILITATOR'S GUIDE TO PARTICIPATORY DECISION-MAKING (2d ed. 2007).

FIGURE 8: REGULATIONROOM TOPIC POST SHOWING MODERATION⁹²

3 | Calls at the workplace - 27

Agency Proposal

Collectors can't call the consumer's workplace if the collector should know that the "employer prohibits the consumer from receiving such communication." (FDCPA § 805(a)(3)). Do employers typically have policies about debt collection calls, as opposed to personal calls in general? Are employer policies about these things usually the same for all employees?

Can collectors generally figure out who the consumer's employer is? If the collector has dealt with other consumers who work for a particular employer (for example, a national chain), the collector might already know what the employer's policy is. Suppose a new federal rule said that once the collector finds out an employer's policies, it has to respect those policies from then on, for all consumers who work for this employer. Would the benefits to consumers outweigh the costs to collectors of having to keep track of this information?

Would a better approach be a simple rule that calls at the consumer's workplace are always inconvenient?

See what CFPB said in the ANPRM about [Place of Employment Communications and Inconvenient Places](#).

Comments 27

Make a comment.

← Link Comment Cancel

R N
November 6, 2013 - 9:08pm

I think calls at work should be allowed.

Endorse Reply

Moderator
November 7, 2013 - 2:02pm

Welcome to Regulation Room, R.N. Can you tell us more about when collectors should be able to call consumers at work, and why? Knowing more about your reasons or personal experiences will help CFPB know what things it should keep in mind if it decides to make a rule about how, when, and where collectors can call consumers.

Reply

R N
November 7, 2013 - 7:26pm

I don't think limiting the time to call a person at work is an option. Everyone works at different times. Some people moves, change cell phone numbers, so call them at work is sometimes the only option. It's hard to know what place "prefers" no

92. The commenter shown here, R.N., self-identified as a debt collector. Here is the full and unedited text of his response to the moderator:

I don't think limiting the time to call a person at work is an option. Everyone works at different times. Some people moves, change cell phone numbers, so call them at work is sometimes the only option. It's hard to know what place "prefers" no personal calls, and a list could be an option, but most people work for smaller company's and the lists will cater to the large company's. Most people have information about where they work somewhere on the web. I don't see a problem if a debt collector calls a customer at work if they don't know prior of any inconvenience. Would a customer prefer to be called at work, or have a message left with a relative for them?

Consumer Debt Collection Practices: Questions About Phones & Mobile Phones in Debt Collection (Calls at the Workplace), REGULATIONROOM, <http://regulationroom.org/rules/consumer-debt-collection-practices/discussion/questions-about-phones-mobile-phones-debt#nid-161> (last visited Dec. 18, 2014).

4. *Motivational Barriers*

Modern life, especially with the burgeoning of social media, makes huge demands on citizens' attention. Winning the "battle for attention"⁹³ to elicit broader participation in planning or rulemaking can be complicated not only by the effort required for meaningful engagement, but also by distrust of government institutions, cynicism about the impact of public input, and fatigue with the often glacial-seeming pace of official policymaking processes.⁹⁴ These systemic problems are largely beyond the reach of projects such as ours, but there are steps that can be taken to at least marginally lower these motivational barriers.

a. *The McGill Online Design Studio*

The MODS project addresses these problems of motivation by: (1) making clear the relevance of official policy-making processes to the everyday lives of citizens; (2) engendering dynamics among users that encourage them to engage with policies; and (3) enlisting officials in the project of creating responsive and deliberative democratic institutions.

The online forum and the larger process of which it is part aim to highlight how official policies have concrete and very real significance in a neighborhood that is undergoing rapid change.⁹⁵ The project aims to reveal to citizens the relevance of official policy to deeply-felt preoccupations about their neighborhood. Although the recognition that official policies are relevant to everyday life is an important step in overcoming motivational barriers, it is not sufficient to overcome

93. Arthur Lupia, *Deliberation Disconnected: What It Takes to Improve Civic Competence*, 65 LAW & CONTEMP. PROBS. 133, 143–45 (2002). This phrase has become ubiquitous in discussions of how to capture and keep people's attention online. See, e.g., Katie Burke, *The Internet Trifecta & the Battle for Attention: Lessons from Mary Meeker's Internet Trends Report*, HUBSPOT (May 29, 2014, 12:30 PM), <http://blog.hubspot.com/marketing/internet-trends-report-2014-mary-meeker>.

94. See, e.g., JOHN GASTIL, BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS 66 (2000); Sidney Shapiro, *The Regulatory Accountability Act of 2011: Way Too Much of a Good Thing*, ADMIN. & REG. L. NEWS, Spring 2012, at 10.

95. The Bellechasse project offers a rare opportunity because the detailed draft plan for the 45-acre site has been released by the local authorities (Borough of Rosemont—La Petite-Patrie, 2012), but this is currently in suspense because the province will have to provide a special capital budget to enable the rebuilding of a maintenance facility for the transit authority (presently occupying about twenty percent of the site area). What normally is done hurriedly can be discussed in greater detail both in terms of the planning process and substantive content of the plan itself.

the fatigue and cynicism that citizens feel when faced with distant and unresponsive governments. The MODS project aims to lessen the barrier of cynicism by motivating citizens to participate in the project of designing their neighborhoods and negotiating official planning processes. ‘Like’ and ‘dislike’ buttons enable participants to ‘vote’ on diverse propositions and specific points raised in discussion, while comments made by moderators encourage participants to engage thoughtfully with one another’s comments.

Finally, the MODS project aims to address what is perhaps the most intransigent motivational barrier to citizen participation, which is the belief that government is indifferent to the considered views of the citizenry. The project will do so in its final phases, as it proposes to government officials ways of incorporating the project’s deliberative processes into regulatory regimes and municipal practices. The project hopes to convince officials that if these processes can yield valuable insights and foster good will with respect to a project as complex as the sustainable development of large tracts of land in a rapidly changing borough, the processes will have value in a wide range of land use planning contexts. If the MODS project is successful in this regard, it will provide what is perhaps the most powerful antidote to citizen cynicism about the non-responsive governments: a means by which governments can demonstrate their willingness to deeply and deliberatively engage their citizens.

b. RegulationRoom

The RegulationRoom team begins every participation engagement by brainstorming with agency officials about what kinds of information, critiques, and other feedback broader public participation could add to the rulemaking. This exercise not only identifies missing stakeholder groups and helps the team in preparing rulemaking information for the site,⁹⁶ but also primes the rule makers to think about what, specifically, new citizen voices might contribute. A fundamental principle guiding the project is that a democratic government should not solicit public participation that it does not value.⁹⁷

Outreach messages try to motivate participation by highlighting the relevance of the rulemaking to the targeted recipients, as well as by

96. *See supra* Part II.B.2.

97. This commitment, which we refer to as the “No bread and circuses principle,” is discussed further in Farina et al., *supra* note 21, at 150–56.

emphasizing that citizens have a right to participate and the agency has a responsibility to consider every comment. The message that the agency *wants* public comments is underscored when the availability of RegulationRoom is advertised in the NPRM and in other agency communications about the rulemaking. Educational materials on the site emphasize that a single good comment can make a difference to the outcome. The role of public comments in the process is pointed out again when participants are emailed and invited to give feedback on drafts of the summaries that will be submitted to the agency.

If and when the agency issues a final rule, the RegulationRoom team posts it on the site and emails participants, highlighting to the extent possible how commenters had an impact. Still, the length of time between citizen input and finalization of the rule—as well as the fact that the impact of a commenter or group of commenters is not always clear from the final rulemaking document—can make it difficult for citizens to see that their effort was worthwhile. However, from surveys of participants after the comment period ends, we have some evidence that participants perceive that they better understand the rulemaking process, what the agency was trying to accomplish, and the arguments of others as a result of their participation.⁹⁸ Researchers on procedural justice have found, in a number of contexts, that when citizens are given the opportunity to explain their position to the decisionmaker, their sense of the legitimacy of, and the rates of their compliance with, government decisions increases even when the substantive outcome is not what they sought.⁹⁹ Work remains to be done to determine whether these findings carry over into broad-scale public participation processes.

III. LESSONS AND CHALLENGES

The MODS and RegulationRoom projects represent possible ways to reinterpret the conventional public participation phase of

98. The survey response rate is small enough that we do not claim statistical significance for these results, but this has been the consistent pattern of responses across multiple rulemakings.

99. See, e.g., David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008). See generally Nancy Welsh et al., *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in *THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION 57*, 65–69 (Tania Sourdin & Archie Zariski eds., 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2282055 (reviewing procedural justice literature).

policymaking processes in order to achieve broader, better citizen engagement. Participation opportunities that are open to everyone *can* be structured to encourage and support democratic deliberation even though, inevitably, the quality of output will be more variable and the conditions (e.g., equality, inclusion) will be further from ideal than what more controlled deliberation exercises can attain.

The two projects also underscore that recasting public participation in the democratic deliberation mold is far more resource-intensive than conducting a short series of public hearings or opening a ninety-day period for receiving public comments. Hence, it is important for government officials to be able to predict when this kind of investment is most likely to be worthwhile. It is also important to recognize the challenges that remain. Here we offer some preliminary thoughts on these issues.

A. Choosing the Best Opportunities: Missing Stakeholders and Situated Knowledge

In the same pragmatic sprit that motivates our projects to aim for as much democratic deliberation as realistically can be achieved in real-world conditions, we advocate openly acknowledging that broad-based public participation is not equally valuable in all instances of planning or rulemaking. The reality for both government and citizens is that time and attention, as well as money, are scarce resources. Effort should be concentrated where broader public input is most likely to make a significant contribution to policymaking. Neither citizens nor policymakers ultimately benefit from exercises that produce high-volume but low-value participation.

Our work suggests that policymakers should invest in more deliberative forms of public participation when the following conditions are met:

- There exist one or more identifiable groups of individuals or entities who will be directly affected by the policy decision and who historically do not engage, or engage effectively, in conventional public participation processes—i.e., “missing stakeholders.”
- These missing stakeholders are likely to have experiential knowledge about the circumstances, concerns, elements of causation, or potential implementation issues of the problem the policymaker is trying to address—i.e., “situated knowledge.”

- It is reasonably possible to provide the kind of support these missing stakeholders will need to engage in informed and thoughtful discussion and reaction.

With careful and candid inquiry into each of these three areas, government officials can identify the policymaking initiatives in which an investment in deliberative structures for broader citizen engagement is most likely to produce valuable and satisfying results. We want to be clear that these are decisional guidelines for *supplementing* existing statutory public participation processes with more inclusive deliberative supports. We are not suggesting that the baseline statutory mandates should be narrowed.

These three conditions are likely to be met in some policymaking contexts more regularly than in others. Our two projects provide a good illustration. Land use planning is a category of decision making in which government officials usually need information and feedback from the people who live in the space that the plan will affect.¹⁰⁰ Local stakeholders are uniquely privy to place-knowledge. Vetting design proposals can be challenging because of the diversity of needs, expectations, and concerns among multiple stakeholder groups, but uncovering this diversity can help reframe understandings of existing conditions and spur development of a more robust definition of problems and goals.¹⁰¹ Moreover, failing to engage all affected populations as the planning process proceeds can ultimately delay, or even derail, worthwhile projects with protests, litigation and other forms of late-stage opposition.¹⁰² For these reasons, scholars and practitioners have long advocated systemic revision of planning processes to institutionalize more democratically deliberative forms of public engagement,¹⁰³ and the final phase in the MODS project is an effort to persuade local officials to adopt at least some of the techniques developed by the researchers.

By contrast, the experience of RegulationRoom researchers has been that many United States federal agency rulemakings do not meet the three conditions outlined above. We can offer no empirical

100. See, e.g., Raymond J. Burby, *Making Plans that Matter: Citizen Involvement and Government Action*, 69 J. AM. PLAN. ASS'N 33 (2003); Ann Van Herzele, *Local Knowledge in Action: Valuing Nonprofessional Reasoning in the Planning Process*, 24 J. PLAN. EDUC. & RES. 197 (2004).

101. See Donald Schön, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in METAPHOR AND THOUGHT 137–63 (A. Ortony ed., 1993).

102. See, e.g., Samuel D. Brody et al., *Mandating Citizen Participation in Plan Making: Six Strategic Planning Choices*, 69 J. AM. PLAN. ASS'N 245, 246 (2003).

103. See *supra* notes 44–47 and accompanying text.

data on this point, but our impression, from several years of reviewing proposed rules as possible candidates for hosting on RegulationRoom, is that many of the 2500–4400 new or revised regulations issued annually by United States regulators¹⁰⁴ involve relatively narrow issues on which affected stakeholders are already effectively commenting. In other cases—many environmental regulations being a good example—missing stakeholder groups could be identified, but it is not clear that individuals could offer a kind of situated knowledge that would improve the agency’s substantive decision making. To be sure, complex regulations that rest on scientific or other highly technical evidence or predictions often also involve value choices that are appropriately the province of citizens, rather than experts, in a democracy.¹⁰⁵ However, in order to apprehend the various health, social, and economic tradeoffs and reach deliberative judgments about values in such rulemakings, laypeople need a formidable amount of background information and assistance, as well as the willingness to invest significant effort in becoming informed and deliberating.¹⁰⁶ It is simply quixotic to expect that this can be accomplished in a large-scale public participation setting. The better option, in such rulemakings, may be to supplement statutory notice-and-comment with one of the carefully limited and controlled deliberative processes that are constructed around a representative sampling of participants who agree to contribute the required effort.¹⁰⁷ For these reasons, rather than lobbying for structural reform of the notice-and-comment process, RegulationRoom researchers have focused on creating guidance for

104. See MAEVE P. CAREY, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 5 (2013), <http://fas.org/sgp/crs/misc/R43056.pdf>.

105. See Hoi Kong, *The Deliberative City*, 28 WINDSOR Y.B. ACCESS TO JUST. 411, 416–19 (2010); Nina A. Mendelsohn, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1347–52 (2011); Martin Carcasson & Leah Sprain, *Key Aspects of the Deliberative Democracy Movement*, PUB. SECTOR DIG. (July 31, 2010), <https://www.publicsectordigest.com/articles/view/722>.

106. See Farina et al., *supra* note 21, at 132–45, 151–53.

107. See *supra* note 41 and accompanying text. Recent proposals for controlled, representative (although not necessarily deliberative) citizen input in rulemaking include David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1493–1503 (2013) (proposing a citizen jury of more than 1000 randomly selected citizens), and Reeve T. Bull, *Making the Administrative State “Safe for Democracy”*: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking, 65 ADMIN. L. REV. 611, 640–47 (advocating for a representative citizen advisory committee).

regulators in how to select the right rules and the right participation tools for broader, better public engagement.¹⁰⁸

B. Online or In-the-Room? Moderated or Unmoderated?

The MODS project deliberately employs a mix of physical and virtual participation spaces. RegulationRoom involves wholly online participation—largely for the practical reason that federal rulemakings involve policymaking at the national level and participants live in all parts of the country.¹⁰⁹ Each type of participatory process has pros and cons.

In-the-room processes provide the full range of nonverbal social cues (body language, tone, facial expression, etc.) that help humans more accurately gauge meaning and comprehension. Some research suggests that the absence of such cues contributes to the speed and intensity with which online discussion can become uncivil.¹¹⁰ At the same time, emotional contagion can impede in-the-room processes as well, particularly around policy decisions that involve conflicting core values or stakeholder groups with a history of conflict.¹¹¹ Moreover, a problem frequently (but not uniquely) encountered in the planning context is domination of in-the-room participation by a subgroup of well-educated, articulate individuals already familiar with the policymaking process.¹¹²

Power dynamics and attempts to control the discussion occur in the online environment as well, where volume of participation varies

108. See FARINA & NEWHART, *supra* note 61 *passim*.

109. Some federal agencies—including some of RegulationRoom’s partner agencies—do hold physical meetings in various parts of the country in connection with rulemaking. Sometimes these are formal public hearings; other times, they are more informal informational, or “listening,” sessions. These geographically-selective opportunities always supplement the universal opportunity to submit comments to Regulations.gov during the public comment period. See *generally* LUBBERS, *supra* note 28, at 304–13 (describing range of agency options for oral hearings during rulemaking).

110. See Adam N. Joinson, *Disinhibition and the Internet*, in *PSYCHOLOGY AND THE INTERNET: INTRAPERSONAL, INTERPERSONAL, & TRANSPERSONAL IMPLICATIONS* 80 (Jayne Gackenbach ed., 2007); Elaine W. J. Ng & Benjamin H. Detenber, *The Impact of Synchronicity and Civility in Online Political Discussions on Perceptions and Intentions to Participate*, *J. COMPUTER-MEDIATED COMM.*, April 2005, at 00 available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1083-6101.2005.tb00252.x/full>.

111. See Hiro N. Aragaki, *Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons*, 24 *OHIO ST. J. ON DISP. RESOL.* 407, 438–40 (2009).

112. See Daren C. Brabham, *The Effectiveness of Crowdsourcing Public Participation in a Planning Context*, *FIRST MONDAY* (Dec. 3, 2012), <http://firstmonday.org/ojs/index.php/fm/article/view/4225/3377>.

dramatically and typically includes a small set of “serial commenters” who post a large number of long comments.¹¹³ However, because online participation spaces are not bounded in the same way as physical meetings, such users have less ability to crowd out other participation. The simple ability to scroll through such comments gives every online participant some ability to screen out overbearing users, and other design measures can further mute their impact.¹¹⁴ Of course, this same ability to selectively ignore certain comments makes the online environment more vulnerable than in-the-room processes to participants’ refusing to “listen” to views and arguments from a perspective different than their own.

Physical meetings are scheduled and synchronous, requiring participants to show up at a specified time and place; online participation can be asynchronous and done at the individual’s convenience. Flexibility of time and location can greatly benefit citizens in a range of circumstances—from caregivers who cannot afford a sitter, to people who work evenings and other times that physical meetings tend to be scheduled, to seniors and other citizens whose health or physical circumstance makes travel difficult. Of course, online participation implicates digital divide concerns from lack of hardware, to inadequate Internet connection services, to lack of knowledge or comfort in using computers.¹¹⁵ At the same time, not all individuals feel equally comfortable speaking in a public setting. Even when domination by elite participants is not a factor, less well-educated people or those for whom English is a second language may find the untimed and private online setting a less intimidating environment, both for seeking information and for making a contribution.

Thoughtful process design can mitigate some of these various shortcomings and, as described earlier, both projects use a number of strategies to improve online and, in the case of the MODS project, in-

113. This is the “long-tail distribution” of participation that is characteristic of online user activity in a broad range of contexts. See Robin W. Spencer, *A Pervasive Model for Participation in Voluntary Forums*, RES. TECH. MGMT., May–June 2012, at 23. The term ‘long-tail’ means that a small number of users are very active while the vast majority are occasional contributors.

114. For example, the comment stream in RegulationRoom displays only the first portion of long comments; users wanting to read the entire text can click “More” to open the full comment. We have found that this simple design change dramatically lessens the visual impact of long comments as well as reduces the scrolling time to get past them.

115. See Dmitry Epstein et al., *Not by Technology Alone: The Analog Aspects of Online Public Engagement in Policymaking*, 31 GOV’T INFO. Q. 337, 338–39 (2014).

the-room participation. One of the most important of these strategies is moderation by people trained in group facilitation techniques. Although this adds significantly to the cost, moderation adds value by maximizing benefits as well as minimizing problems. A skilled moderator not only manages conflict and tempers power dynamics but also fosters norms of deliberative discourse and helps those with less participatory facility. The crucial contribution of the facilitative moderator is widely recognized in offline deliberative engagement settings,¹¹⁶ but skilled moderation is at least as important in the online context.¹¹⁷ Unlike conventional online moderation, which is generally limited to regulating misbehavior, facilitation of deliberative discussion involves providing information, eliciting reasons and supporting facts, prodding participants to consider conflicting views, and encouraging them to suggest alternate solutions. Both of our projects have found that the conventional role of policing civility requires a very small amount of moderator attention and energy. This may seem surprising at a time when abusive commenting has led several news and public affairs websites to suspend or permanently shut down their public comment function.¹¹⁸ We believe that active and visible deliberation-supporting moderation can powerfully signal site norms of informed and thoughtful discussion, thereby reducing the need for explicit civility controls. Moreover, when reminders are needed, moderators can frame them in ways that reinforce the communal enterprise of providing citizen input that improves policy outcomes.¹¹⁹

116. Gastil & Richards, *supra* note 41, at 258; *see, e.g.*, Aragaki, *supra* note 111, at 438–78; Lawrence Susskind, *Deliberative Democracy and Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL., 395, 395–96 (2009); *see also* Arthur R. Edwards, *The Moderator as an Emerging Democratic Intermediary: The Role of the Moderator in Internet Discussions about Public Issues*, 7 INFO. POLITY 3 (2002).

117. *See, e.g.*, Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U.J. SCI. & TECH. L. 1, 16–17 (2003); *see also* Edwards, *supra* note 116, at 6.

118. *E.g.*, Tim Grieve, *Why We're Changing Our Comments Policy*, NAT'L J. (May 16, 2014), <http://www.nationaljournal.com/domesticpolicy/why-we-re-changing-our-comments-policy-20140516>; Suzanne LaBarre, *Why We're Shutting Off Our Comments*, POPULAR SCI. (Sept. 24, 2013), <http://www.popsoci.com/science/article/2013-09/why-were-shutting-our-comments>; *see also* Paul Farhi, *Some News Sites Cracking Down on Over-the-top Comments*, WASH. POST (May 7, 2014) http://www.washingtonpost.com/lifestyle/style/some-news-sites-cracking-down-on-over-the-top-comments/2014/05/07/4bc90958-d619-11e3-95d3-3bcd77cd4e11_story.html.

119. For example, *see* the following actual RegulationRoom moderator intervention in the consumer debt collection discussion:

C. The Challenges of Success: Adapting to the Outputs of New Participation

Up to now, this Article has focused on the challenges of getting missing stakeholders into the physical or virtual room, helping them understand the substantive and procedural elements of the policy process, and encouraging them to deeper forms of engagement than simple expressions of outcome preference or emotional venting. In this final section, we switch focus to the equally challenging issue of what policymakers do with the kind of outputs produced by more inclusive public participation processes.

The problem is simply put: the contributions of citizen participants new to the planning or rulemaking process will sound very different from the comments and other submissions that government officials are accustomed to getting from experienced stakeholders. New participants will rarely be practiced in making technical, legal, or regulatory policy arguments. They will typically lack the vocabulary, the ability to invoke precedents for or against their position, and the institutional knowledge to make connections with other programs and activities. Even though new participants may live, literally or figuratively, at ground zero of the proposed policy impact, they are outsiders to the policymaking process.¹²⁰ Not even the most supportive participation environment will transform them to insiders

[commenter name], the purpose of Regulation Room is to provide an environment where people can learn about important agency proposals and discuss them in ways that help the agency make a better decision. Everyone who comments on the site is expected to remain civil and respectful. We welcome you to continue commenting on CFPB's questions and ideas about debt collection practices.

Consumer Debt Collection Practices (ANPRM), REGULATIONROOM, <http://regulationroom.org/rules/consumer-debt-collection-practices/discussion/unlawful-collection-practices#nid-172> (scroll down to comment number twelve). This was one of only six civility interventions in a discussion with nearly 1000 comments, some of which were quite emotional. Only one comment was partially redacted for using abusive language.

Although neither the MODS nor RegulationRoom projects are government-sponsored, both groups of researchers have a strong commitment to free speech for both principled and pragmatic reasons. The credibility of the participation exercise very much depends on public perception that moderators are viewpoint-neutral and are not engaging in substantive censorship under the guise of maintaining civility.

120. See Farina et al., *supra* note 46, at 1188–96, 1229–33 (explaining how rulemaking has become a “community of practice” and exploring the outsider status of new participants).

who have the strategic understanding of when, where, and how to advocate effectively within the particular policy domain.¹²¹

One of the most visible signs of this difference is the propensity of “ordinary” people to use personal narrative to communicate both what they know and how, or why, they know it.¹²² Like most stories, narratives told in the course of participation have a message or make a point. However, this is unlikely to be spelled out as an objectively framed conclusion; rather, the meaning tends to be built into the story itself.¹²³

Based on observations over several rulemakings, RegulationRoom researchers have suggested several patterns in the use of personal narrative to convey participants’ situated knowledge:

- *Revealing complexity.* These stories use personal experience to reveal and explore contradictions, tensions, or disagreements within what otherwise may appear to be a unitary set of interests or practices.
- *Identifying contributory causes.* In these stories, the participant’s situated knowledge suggests contributing causes of the problem the government is trying to solve. The factors identified may or may not be within the policymaker’s control, but awareness of them is important because they could affect the cost or efficacy of new policy measures.
- *Predicting unintended consequences.* These stories use personal experience to identify possible outcomes and effects of the policy proposal that are different than those the government seeks to achieve.

121. See Peter J. May, *Policy Learning and Failure*, 12 J. PUB. POL’Y 331, 340 (1992) (distinguishing substantive “policy learning” from the “political learning” of elite insiders).

122. This propensity has been observed in public participation both in the room, e.g., Laura W. Black, *Stories of North Omaha: Conveying Identities, Values, and Actions through Storytelling in a Public Meeting*, 3 INT’L J. PUB. PARTICIPATION 36 (2009), available at http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/imported/Journal_10January_Black.pdf, and online, e.g., Francesca Polletta & John Lee, *Is Telling Stories Good for Democracy? Rhetoric in Public Deliberation after 9/11*, 71 AM. SOC. REV. 699 (2006). See generally JEROME BRUNER, ACTS OF MEANING 45 (1990) (describing humans’ “predisposition to organize experience into a narrative form”).

123. Polletta & Lee, *supra* note 122, at 703.

- *Reframing the issues.* These stories draw on situated knowledge to redefine the issues at stake, including the competing values that may be involved in the decision.¹²⁴

The findings of the MODS project are more tentative with respect to these patterns, but the research team can make some general observations. When citizens with vastly different personal experiences discuss official policies, the *complexity* of governance can become particularly salient. For instance, when long-time residents in a neighborhood who live below the poverty line engage in conversation with newly arrived middle class professionals about the siting of affordable housing, the diversity of interests in this policy domain can appear with striking clarity. Similarly, when residents in a neighborhood who bike through a highly trafficked underpass share their experiences, urban planners can *identify* risk factors that novel design interventions may overcome. At this stage in the MODS project, it is difficult to determine whether grounded experiences of residents allow them to *foresee consequences* different from those that are envisaged by officials for whom such experiences are foreign. Such divergences may not reveal themselves until the Bellechasse site is actually developed. However, what the exercise revealed is that the *framing* priorities for this site that emerged from in-depth live discussions were related to, but different from, those expressed in the borough site-specific plan. Whether these differences can be attributed to the weight given to personal experience in the MODS project remains to be seen, but at least as a preliminary hypothesis, it seems reasonable to suggest that policy orientations grounded in the repeated exchange of personal experiences, whether offline or online, will differ from those that are developed in the absence of such exchanges.

Although results from the MODS project are still provisional, both projects shed light on a significant, and often underappreciated, challenge to achieving more inclusive, democratically deliberative public participation processes: government officials must be prepared to examine critically their own attitudes and assumptions about the kinds of comments that have value. Policymakers accustomed to the objectively framed, analytically cast, and formally argued presentations of experienced participants can too quickly dismiss the personal, experiential, emotion-laden, and often narrative

124. See Epstein et al., *supra* note 19, at 14–19; Farina et al., *supra* note 46, at 1196–1217.

contributions of new participants. This reaction may seem justified by the increasing emphasis on “data-driven,” “evidence-based” policymaking.¹²⁵ Yet, even advocates of evidence-based policymaking readily acknowledge that “evidence” comprises more than empirical data and statistical modeling.¹²⁶ A growing literature explores the value, and appropriate uses, of citizens’ deliberative input in even highly technical policy decisions.¹²⁷ This literature points out that the situated knowledge of laypeople can “show[] the relevance of dimensions (e.g., culture and traditions, local economic practice) that have so far been omitted from expert knowledge claims.”¹²⁸ It can contribute to problem characterization by identifying aspects that need further analysis, raising fact questions that have not been addressed, and providing information about specific conditions that can refine assumptions for analyses.¹²⁹ It can

125. “[T]erms such as ‘evidence-based’ and ‘data-driven’ are the coin of the policy world today.” Fitzhugh Mullan, *Me and The System: The Personal Essay and Health Policy*, 18 HEALTH AFF. 118, 123 (1999).

With respect to U.S. federal regulation, see, e.g., RON HASKINS & JOHN BARON, NESTA, BUILDING THE CONNECTION BETWEEN POLICY AND EVIDENCE: THE OBAMA EVIDENCE-BASED INITIATIVES 6–7 (2011), available at http://www.brookings.edu/~media/research/files/reports/2011/9/07%20evidence%20based%20policy%20haskins/0907_evidence_based_policy_haskins.pdf; Peter Orszag, Peter Orszag, *Building Rigorous Evidence to Drive Policy*, OMBLOG (June 8, 2009, 8:39 AM), <http://www.whitehouse.gov/omb/blog/09/06/08/buildingrigorousevidencetodrivepolicy>.

For a Canadian overview of the relevant debates, which focuses on the capacity of governments to engage in evidence-based decision-making, see Michael Howlett, *Policy Analytical Capacity and Evidence-Based Policy-Making: Lessons from Canada*, 52 CANADIAN PUB. ADMIN. 153 (2009). For an analysis of evidence-based planning and its limits, see Simin Davoudi, *Evidence-Based Planning: Rhetoric and Reality*, 42 DISP. THE PLAN. REV., NO. 165, 2006, at 14.

126. E.g., Richard Cookson, *Evidence-based Policy Making in Health Care: What It is and What It Isn't*, 10 J. HEALTH SERVICES RES. & POL'Y 118, 119 (2005) (arguing that evidence relevant to predicting policy outcomes may include “stakeholder opinions and other sources of intelligence that might not qualify as scientific research”); Brian Head, *Evidence-Based Policy: Principles and Requirements*, in STRENGTHENING EVIDENCE-BASED POLICY IN THE AUSTRALIAN FEDERATION: ROUNDTABLE PROCEEDINGS 13, 17, 19 (2009), available at http://www.pc.gov.au/_data/assets/pdf_file/0007/96208/03-chapter2.pdf (arguing for “[m]ixed methods . . . to explain complex problems and assess complex interventions” that include tapping “the experiential knowledge of service users and stakeholders”).

127. See Epstein et al., *supra* note 19, at 8–12; Farina et al., *supra* note 46, at 1217–38.

128. José A. López Cerezo & Marta González García, *Lay Knowledge and Public Participation in Technological and Environmental Policy*, 2 PHIL. & TECH. 53, 59 (1996).

129. FRANK FISCHER, REFRAMING PUBLIC POLICY: DISCURSIVE POLITICS AND DELIBERATIVE PRACTICES 206 (2003).

offer new perspectives on unanticipated social and other impacts of the policy decision.¹³⁰ It can counteract some of the recognized biases in experts' thinking (e.g., overconfidence; reductionism), thus complementing and refining, rather than supplanting, expertise.¹³¹ Indeed, some scholars have argued for recognizing that the situated knowledge of citizens renders them, in some instances, "experts without formal qualifications."¹³²

Finally, government officials must take care to "close the loop" by demonstrating that decision makers have in fact considered what participating citizens said. To be sure, the policy outcome may not be what participants sought: planners may approve more change than residents want because of the many roles the area plays in the larger urban landscape; regulators may impose less protection than consumers ask for and more than small businesses prefer. But government must make good on the representations, made to motivate missing stakeholders, that it *wants* public input—at least it must do so if it wants to avoid a backlash of resentment in the present, and a deaf ear to calls for citizen engagement in the future. Making good on these representations means an explanation of the outcome that genuinely engages, in a forthright and non-cursory way, with participants' concerns, questions, objections, and suggestions.

Some policymaking processes formally require decision makers to explain their decisions. United States federal rulemaking is a good example, and agencies routinely produce lengthy documents that describe comments received and justify their decision on the final rule.¹³³ However, even legally imposed explanation requirements do not assure that participants will feel they have been heard. As just noted, laypeople tend to include a broader range of considerations when thinking about policy issues than do experts;¹³⁴ indeed, this is part of the value that missing stakeholders can bring to the table.

130. See Greg Hampton, *Narrative Policy Analysis and the Integration of Public Involvement in Decision Making*, 42 POL'Y SCI. 227, 237–38 (2009); Jasanoff, *supra* note 19, at 240–42.

131. López Cerezo & González García, *supra* note 128, at 60; see also Tom Horlick-Jones et al., *Citizen Engagement Processes as Information Systems: The Role of Knowledge and the Concept of Translation Quality*, 16 PUB. UNDERSTANDING SCI. 259, 260–61 (2007).

132. HARRY COLLINS & ROBERT EVANS, *RETHINKING EXPERTISE* 48–49 (2007); see also Jasanoff, *supra* note 19, at 217, 240–42 (arguing for recognizing "different expert capabilities").

133. KERWIN, *supra* note 43, at 63–64.

134. Horlick-Jones et al., *supra* note 131, at 260.

This means that citizen participants may accord great importance to aspects that policymakers consider peripheral. From the context of their situated personal experience, they will not see problems as delimited by statutory jurisdiction, operating authority, or political boundaries. They may perceive values to be involved that the responsible government decision makers are not charged with considering, or accustomed to thinking about. Hence, it is quite possible for policymakers to produce an explanation that meets the legal standard of adequately addressing the relevant issues, yet fails to demonstrate to participants that anyone even looked at their comments.

We are not suggesting that officials address every citizen concern and suggestion, no matter how inapposite or fanciful. Rather, we are advocating heightened awareness that there can easily be a disjunction between what experienced policymakers want to say about their final decision and what citizen-participants want to hear—a disjunction born of the fundamental differences in how these two groups perceive policy problems and approach the task of developing solutions. If officials listen in an open-minded and active way to the outputs of public participation, they can identify what really matters to various participants.¹³⁵ Then they can respond to these issues and concerns, even if the response is, for example, to describe legal limits on their decision making authority or explain why factors important to some participants are actually not implicated in the particular decision. In this way, the explanation of decision serves an important civic education function and appropriately acknowledges the investment citizens made in informed and thoughtful participation,

CONCLUSION

The MODS and RegulationRoom projects are efforts to supplement existing public participation processes in ways that make it more likely that public officials will gain access to what President Obama calls the “[k]nowledge [that] is widely dispersed in society.”¹³⁶ The projects use new information and communication technologies to elicit and channel citizen engagement into more deliberative forms,

135. “Active listening” is a communication technique, used in conflict resolution and some other fields, in which the listener restates what they hear to the speaker, both to help the listener focus fully on what the speaker is saying and to confirm the understanding of both parties. See LAURENCE J. BOULLE ET AL., *MEDIATION: SKILLS & TECHNIQUES* 124–26 (2008).

136. Open Gov’t Directive Memorandum, *supra* note 36.

even when participation processes are open to all comers. With appropriate support, even first-time participants can contribute situated knowledge that helps policymakers better understand the causes and dimensions of problems, as well as the impacts and implications of possible solutions.

Paradoxically, these projects demonstrate both the potential and the limits of using technology to support broad-scale democratic deliberation. Creative use of social networking and careful design of online participation spaces can alert missing stakeholders, provide an environment conducive to informed, thoughtful discussion, and enable citizens to engage at times and in ways that are more comfortable for them than formal public processes. However, human effort is still needed: to craft outreach messages that explain why citizens should bother to participate; to translate policy materials into a form that laypeople can and will engage with; and to facilitate effective comments and productive discussion. No clever democratic deliberation “app” will be able to technologically obliterate the barriers that have historically kept missing stakeholders from meaningful participation. Getting broader, better citizen engagement in government decision making will be effortful for government as well as for citizens.

Some of this effort (supplied, in our projects, by university faculty and students) could possibly come from civil society organizations, who might assist in outreach and preparation of informational materials.¹³⁷ Perhaps, if a regular practice of informed public engagement were to develop, individual participant volunteers with the experience or expertise to undertake the role of, for example, policy translator or participation mentor would emerge.¹³⁸ In at least one respect, however, a commitment of effort by government officials

137. For an innovative experiment in using a deliberative “mini-public” group to create explanatory materials for broader citizen participation (here, issue referenda elections in the state of Oregon), see John Gastil et al., *Vicarious Deliberation: How the Oregon Citizens’ Initiative Review Influenced Deliberation in Mass Elections*, 8 INT’L J. COMM. 62 (2014).

138. Such role differentiation has occurred in some online contexts, most notably Wikipedia, in which a cadre of experienced users mentor newcomers and manage conflict over proposed edits. See, e.g., Andrea Forte & Amy Bruckman, *Scaling Consensus: Increasing Decentralization in Wikipedia Governance*, in PROCEEDINGS OF THE 41ST ANNUAL HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES 157 (2008); Piotr Konieczny, *Governance, Organization, and Democracy on the Internet: The Iron Law and the Evolution of Wikipedia*, 24 SOC. F. 162 (2009). However, this occurs within a complex and continually evolving policy structure, and Wikipedia is much studied precisely because its success is so unusual.

themselves is indispensable. The contributions of new participants and other laypeople will not come in the neatly formatted package of a formal presentation or professionally written submission. Even with the supports provided by careful process design and facilitative moderation, the situated knowledge and other value in these contributions will often need to be extracted from a mass of discursive, often emotional, sometimes seemingly irrelevant comments. This requires sympathetic and reflective consideration, rather than the cursory review that might satisfy the government's legal obligations. For this reason, the success of efforts to recast public participation processes in the democratic deliberative mode will, to some extent, be a self-fulfilling prophecy: policymakers who believe in the value of public participation are likely to gain insight and guidance from the addition of historically silent voices; those who do not expect to learn much from broader citizen involvement probably will not.