“Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking”

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- Information technology will undoubtedly transform the rulemaking process
- The movement toward electronic government also has the potential to transform the way in which we study and understand rulemaking
Emergency Medical Equipment on Passenger Flights

- Conventional rulemaking under the APA...
- Notice of Proposed Rulemaking
- 370 public comments
- Final Rule
Power Braking Systems for Freight Trains

- Notice of Proposed Rulemaking
- Otherwise, anything but conventional...
- Advance Notice of Proposed Rulemaking
- Series of public hearings
- Railroad Safety Advisory Committee
- ...Deferral, abandonment, more proceedings, and a partial Final Rule
Studying Public Involvement in Rulemaking

- **Two pivotal questions:**
  
  - *In what ways are forms of participation connected to procedural and substantive outcomes?*
  
  - *What factors account for the specific forms of participation that are, or are not, used in particular rulemakings?*

  Is there a disconnect between the practice and study of rulemaking?
A Research Perspective on eRulemaking

- **Ultimate aim?** Study the use and efficacy of public participation, however it occurs, for a large number of agencies and rulemakings.

- **Protocol?** Utilize online docket management systems and other Internet resources to collect necessary data.

- **Initial application?** 584 actions reported as completed by DOT agencies in 2001, 2002, and 2003.

- **The future?**
## Basic Patterns in Participation

<table>
<thead>
<tr>
<th></th>
<th>Final Action</th>
<th>Terminated/Withdrawn</th>
<th>Merged/Transferred Into Another Rulemaking</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Participation at All</td>
<td>50 (24%)</td>
<td>② 74 (36%)</td>
<td>① 81 (29%)</td>
<td>3 (1%)</td>
<td>208</td>
</tr>
<tr>
<td>Some Form of Participation</td>
<td>③ 293 (78%)</td>
<td>③ 74 (20%)</td>
<td>③ 9 (2%)</td>
<td>① 0 (0%)</td>
<td>① 376</td>
</tr>
<tr>
<td>Commenting on a Notice of Proposed Rulemaking</td>
<td>④ 195 (81%)</td>
<td>④ 42 (17%)</td>
<td>④ 5 (2%)</td>
<td>④ 0 (0%)</td>
<td>④ 242</td>
</tr>
<tr>
<td>Other Forms of Commenting</td>
<td>⑤ 112 (77%)</td>
<td>⑤ 30 (21%)</td>
<td>⑤ 4 (3%)</td>
<td>⑤ 0 (0%)</td>
<td>⑤ 146</td>
</tr>
<tr>
<td>Participation Beyond Commenting</td>
<td>⑥ 135 (78%)</td>
<td>⑥ 34 (20%)</td>
<td>⑥ 4 (2%)</td>
<td>⑥ 0 (0%)</td>
<td>⑥ 173</td>
</tr>
</tbody>
</table>
Common Participatory Regimes in DOT Rulemakings

- **Regime 1: No Public Involvement of Any Sort**
  - A Baseline of Participation

- **Regime 2: Conventional Notice and Comment Rulemaking**
  - Substituting for the Baseline

- **Regime 3: Commenting on Final Actions**
  - Complementing the Baseline

- **Regime 4: Multiple Forms of Public Involvement**