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Participation in Regulatory Policymaking**

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Is Satisfaction Success? Evaluating Public Participation in Regulatory Policymaking

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Dispute resolution seeks to find satisfactory solutions to conflicts, and researchers who evaluate dispute resolution procedures understandably want to consider whether disputants using these procedures are eventually satisfied with the resulting outcomes. A similar emphasis on satisfaction pervades the literature on techniques for resolving disputes and involving the public in regulatory policymaking. These techniques include the broad range of procedures and methods available to government for allowing input, feedback, and dialogue on regulatory policymaking, including comment solicitation, public hearings, workshops, dialogue groups, advisory committees, and negotiated rulemaking processes.

Researchers evaluating these various techniques have often used participant satisfaction as a key evaluative criterion. While this criterion may seem suitable for evaluating private dispute resolution techniques, those who disagree in policy-making processes are not disputants in the same sense that landlords and tenants, creditors and debtors, or tortfeasors and victims are disputants in private life. Disputes in regulatory policymaking arise over *public* policy, not

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over *private* grievances.¹ Yet in recent years, various public participation techniques, such as regulatory negotiation, have been advocated specifically as means of reducing conflict and increasing the acceptance of regulatory policy.² Moreover, policies that satisfy participants in regulatory policymaking are often assumed to be better policies. Numerous studies purport to evaluate the success of public participation by asking individuals what they think of the regulatory processes and outcomes in which they were involved.

Data on participant satisfaction can potentially provide useful feedback to those who facilitate various kinds of policy deliberations, but is satisfaction an appropriate basis for evaluating the overall public value of different participation methods? Even though data can be collected relatively easily by distributing surveys to participants or by interviewing them, researchers need to rely on data that can provide a meaningful basis for evaluating public participation in regulatory policymaking. What may be appropriate for evaluating dispute resolution techniques used to address private grievances is not necessarily appropriate for assessing public participation and dispute resolution in regulatory policymaking, which not only affects those individuals who happen to participate in regulatory proceedings, but also affects the broader public.

This paper raises caution about using participant satisfaction, or other measures based on participants' attitudes and opinions, in evaluating dispute resolution and public participation in regulatory policymaking. I first elaborate on the use of satisfaction as a policy evaluation criterion and illustrate the role it has come to play in research evaluating public participation in regulatory policy making, most particularly in the area of environmental and natural resources policy. I then draw out two conceptual limitations on the use of

¹ Of course, there are also broader, public implications to the handling of private disputes. For a discussion of policy considerations in the context of private dispute resolution, see Owen Fiss, "Against Settlement," *Yale Law Journal* 93 (1984): 1073.

² See, e.g., Philip Harter, "Negotiating Regulations: A Cure for Malaise," *Georgetown Law Journal* 71(1982):1; Lawrence Susskind and Gerard McMahon, "The Theory and Practice of Negotiated Rulemaking," *Yale Journal of Regulation* 3 (1985): 133.

participant satisfaction, namely that (a) satisfaction does not necessarily equate with good public policy, and (b) participant satisfaction is at best an incomplete measure because it excludes those who do not participate. Finally, I detail a series of problems in applying, measuring, and interpreting participant satisfaction that make it a problematic metric for evaluating public participation in regulatory processes. In light of the conceptual and measurement problems with relying on satisfaction, evaluation researchers should resist relying on participant surveys to evaluate public participation techniques, and instead, should focus attention directly on the effectiveness, efficiency, and equity of the decisions that result from different forms of public participation.³

I. Satisfaction as an Evaluative Criterion

Many [evaluations of consensus building] have used surveys or in-depth interviews to assess participants' levels of satisfaction and their perceptions about what was achieved.⁴

It is not surprising that researchers have relied on measures of satisfaction to evaluate different techniques of public participation. Satisfaction is not only relatively easy to measure, but in various guises it is central to policy evaluation and analysis. Welfare economics, for example, focuses on how policies affect individual preferences, and the Pareto optimality criterion explicitly

³ For a related claim that designers of democratic processes should evaluate empirically how well different decision-making procedures reach correct results, see Frederick Schauer, "Talking as Decision Procedure," *The Good Society* 7 (1997): 47-52.

⁴ Judith E. Innes, "Evaluating Consensus Building," in *The Consensus Building Handbook*, ed. Lawrence Susskind et al., (Thousand Oaks, CA: Sage Publications, 1999), 639.

emphasizes that people should be made better off.⁵ Negotiation theory takes a similar approach, seeking win-win opportunities that extend the Pareto frontier and satisfy preferences to the greatest extent possible without making anyone worse off.⁶ According to one common conception of democratic theory, public decision-making is all about the aggregation of—and ultimately the satisfaction of—public preferences.⁷ Public opinion polling has long sought explicitly to measure the general public’s satisfaction with a variety of issues. More recently, public managers and public administration scholars have appropriated private-sector customer satisfaction models and applied them as the standard for assessing government-run services.⁸ Attention to satisfaction and concepts related to satisfaction would therefore appear to have a firm basis in a number of social science and evaluation fields. Indeed, satisfaction appeals to common sense, too. After all, is it not a good thing if a policy satisfies people, rather than causing them to complain?

When evaluating different approaches to public participation, researchers have apparently thought the answer to this question is “yes.” Evaluations of public participation and dispute resolution strategies increasingly rely explicitly on satisfaction, as well as on surveys that measure participant opinions or attitudes.

⁵ For a recent discussion of the fundamentals of welfare economics, see Louis Kaplow and Steven Shavell, “Fairness versus Welfare,” *Harvard Law Review* 114 (2001): 961, 977-998.

⁶ See, e.g., Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Belknap Press, Harvard University Press, 1982); Thomas Schelling, *The Strategy of Conflict* (New York: Oxford University Press, 1960).

⁷ For a concise description of the social choice theory of democracy and its emphasis on the aggregation of preferences, see Jon Elster, “The Market and the Forum: Three Varieties of Political Theory,” in *Foundations of Social Choice Theory*, ed. Jon Elster and Aanund Hylland (New York: Cambridge University Press, 1989), 103-12.

⁸ For an overview of this recent movement toward customer service, see Donald F. Kettl, *Reinventing Government? Appraising the National Performance Review* (Washington, D.C.: Brookings, 1994).

Several recent applications of this evaluation approach illustrate how researchers and government agencies are using satisfaction to study participatory procedures.

Perhaps the starkest example is a recent study that uses a “participant satisfaction scorecard,” a survey instrument that asks participants in participatory processes to rate their satisfaction along a number of dimensions.⁹ Researchers at the Montana Consensus Council (MCC), a state agency that supports dispute resolution efforts, developed the “participant satisfaction scorecard.” MCC researchers surveyed a nonrandom sample of 280 participants in environmental impact assessment proceedings (including government officials) and received responses from about 93 participants (a response rate of about 33 percent). The overwhelming majority of respondents (88 percent) viewed the public participation processes in which they were involved favorably, and 74 percent reported that public participation improved the government project overall. The MCC researchers suggested that the participant satisfaction scorecard results showed that the participatory processes it studied worked well.¹⁰

Another recent study relied on interviews with participants in eight Environmental Protection Agency (EPA) negotiated rulemakings, as well as with individuals who submitted to the agency written comments in six conventional, non-negotiated rulemakings.¹¹ The authors of the study, political scientists Laura Langbein and Neil Kerwin, compiled interview data from 101 participants (including government officials) in negotiated rulemakings and 51 individuals (none of whom were government officials) who filed comments about conventional rulemakings. They found that “participants in reg negs are more satisfied with the

⁹ Matthew McKinney and Will Harmon, “Public Participation in Environmental Decision Making: Is it Working?” (manuscript).

¹⁰ See Will Harmon, “Montana Group Tries Scorecard Approach,” *Consensus* (January 1999).

¹¹ Laura Langbein and Cornelius Kerwin, “Regulatory Negotiation versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence,” *Journal of Public Administration Research and Theory* 10 (2000): 599-632.

overall process than are participants in conventional rulemaking.”¹² In addition, participants in negotiated rulemaking reportedly gave negotiated rules better ratings along a number of dimensions, including economic efficiency, the quality of scientific analysis, and use of appropriate technologies.

In yet another study, political scientist Mark Lubell analyzed results from a survey of participants and other interested parties active in 20 estuaries included in the EPA’s National Estuary Program (NEP), a collaborative program for managing coastal ecosystems where fresh water merges with salt water.¹³ The NEP brought together public and private actors at local, state, and federal levels for collaborative management of estuaries. Lubell compared the results of a survey of NEP participants with those of a comparable set of actors involved in ten estuaries that were not part of the NEP. Lubell’s research showed that, all things being equal, the more collaborative NEP approach to public participation resulted in higher levels of attitudinal support or “general satisfaction.”

Of course, some research shows that participants have been dissatisfied with regulatory processes, even after extensive opportunities for collaboration.¹⁴ For example, in the mid-1990s, the National Marine Fisheries Service (NMFS) convened several negotiation processes to develop plans for reducing the accidental capture of protected marine mammals in fishing nets. Participants in the negotiations included fishermen, conservation groups, researchers, and state and federal regulators. After the final meeting, facilitators surveyed participants to find out how satisfied

¹² Ibid.

¹³ Mark Lubell, “Attitudinal Support for Environmental Governance: Do Institutions Matter?” (Paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C., August 31, 2000).

¹⁴ For example, the evidence on negotiated rulemaking shows that using this procedure has not prevented subsequent litigation over regulations. See Cary Coglianese, “Assessing Consensus: The Promise and Performance of Negotiated Rulemaking,” *Duke Law Journal* 46 (1997): 1255.

they were with the negotiation processes and their outcomes.¹⁵ Strikingly, about 60 percent of the participants reported that they were dissatisfied with the results of the process.¹⁶ The study's authors surmised that the dissatisfaction arose in part because participants thought they would have much more control over the decisions NMFS made than was realistically—and legally—possible.

Although many researchers have relied on participant satisfaction, others have recognized that there are other ways to conceptualize the success of public participation besides relying solely on participant satisfaction. Thomas Beierle, for example, has recently articulated six social values served by various forms of public participation: (1) educating the public, (2) incorporating public values into policymaking, (3) improving the substantive quality of public policy, (4) increasing public trust, (5) reducing conflict, and (6) achieving cost-effective public policy.¹⁷ Nevertheless, even when success has been conceived more broadly, researchers have still surveyed participants to measure these additional dimensions of success. As already noted, the Langbein and Kerwin study asked participants to rate policy outcomes along several dimensions. In another study, researchers identified six attributes of success for evaluating public participation at nine environmental remediation sites in the United States, but then used survey responses from the participants in public outreach and dialogue sessions to measure perceptions about these different attributes.¹⁸

¹⁵ RESOLVE, Inc., *The National Marine Fisheries Service Take Reduction Team Negotiation Process Evaluation* (Washington, D.C.: RESOLVE, Inc., July 19, 1999).

¹⁶ *Ibid.* 11.

¹⁷ Thomas C. Beierle, "Public Participation in Environmental Decisions: An Evaluation Framework Using Social Goals" Discussion Paper 99-06 (Washington, D.C.: Resources of the Future, November 1998).

¹⁸ Sam A. Carnes, Martin Schweitzer, Elizabeth B. Peele, and J.F. Munro, "Performance Measures for Evaluating Public Participation Activities in DOE's Office of Environmental Management," (Oak Ridge, TN: Oak Ridge National

Even when researchers invoke other attributes of success, they have sometimes directly equated participant satisfaction with these other attributes. Participant satisfaction, for example, is often considered an indicator of or proxy for the quality of regulatory policy. In claiming that consensus building produces high-quality decisions, Judith Innes has written that “[t]hese agreements are typically of higher quality than decisions made through majority-rule voting or litigation, *because they satisfy the interests and concerns of all parties* and are based on the knowledge and expertise of those parties.”¹⁹ Similarly, Philip Harter has argued that negotiated rulemaking has resulted in better environmental regulations, citing the Langbein and Kerwin study showing that participants in negotiated rulemakings rated regulations at a higher level of satisfaction.²⁰ Harter has argued that this evidence shows that negotiated rulemaking leads to “the best, most effective, or most efficient way of solving a regulatory controversy.”²¹

These examples illustrate how researchers have used participant satisfaction both as a direct measure of the impact of different public participation techniques and as a proxy for other evaluative measures. Researchers seem to perceive satisfaction as either something that is conceptually appealing or simply something that is easily measurable. For those who evaluate methods of involving the public in the regulatory process, the key question is whether satisfaction is an appropriate standard for evaluating

Laboratory, August 1996). See also Martin Schweitzer, Sam A. Carnes, and Elizabeth B. Peele, “Evaluating Public Participation Efforts,” *Improving the Practice*, 1999.

¹⁹ Judith E. Innes, “Evaluating Consensus Building,” p. 634 (emphasis added).

²⁰ Philip Harter, “Assessing the Assessors: The Actual Performance of Negotiated Rulemaking,” *New York University Environmental Law Journal* 9 (2000): 32.

²¹ *Ibid.*, p. 38. In addition, Charles Fox of EPA has claimed, apparently on the basis of the Kerwin and Langbein study, that negotiated rules at EPA have been “more practical and cost efficient, contained more innovative solutions, were more technically and scientifically current, and had greater legitimacy.” J. Charles Fox, “A Real Public Role,” *Environmental Forum* 15, no.19 (1998): 24.

different techniques of public participation and dispute resolution in the regulatory process.

II. Is Satisfaction an Important Goal of Public Participation?

[I]t is unreasonable to imagine that regulatory and enforcement agencies find their justification in the satisfactions of those whom they compel to contribute to public purposes.²²

Based on the existing literature, it might well seem that satisfaction is an appropriate, even important, criterion to use in evaluating public participation in the regulatory process. But is it? In this part of the paper, I suggest that participant satisfaction is not an important or meaningful goal for two related reasons. First, satisfaction does not equate to high-quality public policy. The mere fact that participants in a regulatory proceeding are satisfied with a policy decision does not mean that the decision is a good one.²³ Second, the participants in any given regulatory proceeding are not the only people the regulatory policy will affect, so their satisfaction is at best a partial representation of overall social welfare. Satisfaction could be a meaningful measure of success in some circumstances if everyone affected by a decision were able to make a well-informed judgment about it, but this is simply not possible with regulatory policymaking, especially in the area of environmental policy.

²² Mark Moore, *Creating Public Value: Strategic Management in Government* (Cambridge: Harvard Univ. Press, 1995), 37.

²³ Correspondingly, dissatisfaction does not necessarily mean that a decision is a bad one. Derek Bok, "Measuring the Performance of Government," in *Why People Don't Trust Government*, ed. Joseph S. Nye, Jr., Philip D. Zelikow, and David C. King (Cambridge: Harvard Univ. Press, 1997), 56.

A. Participant Satisfaction Does Not Necessarily Mean that a Policy is Better

A policy decision may satisfy those who participate in making it, but this does mean it is a good policy decision. Regulatory policies that satisfy everyone involved in the decision-making process may simply be based on the lowest common denominator of the policymaking group, or they may result from the predominance of a “group think” mentality that leads participants to believe the policy is a good one.²⁴ The reality is that any policy may prove to be effective or ineffective, efficient or inefficient, and just or unjust. Policies that greatly satisfy participants can still be prone to error. Consider two examples of policies that were satisfactory to participants when they were created, but later turned out to be significant policy failures.

The first example is from the early 1990s, when the EPA convened a negotiated rulemaking to develop standards for new, reformulated blends of gasoline that would reduce urban smog. The agency selected representatives from the automobile and petroleum industries, as well as from the environmental community, in an effort to agree on standards for the new fuels. According to one commentator, “the entire process met with considerable success[,]” because “[s]atisfaction with the negotiated outcome led all participants to sign a consensus agreement.”²⁵ Despite the participants’ presumed satisfaction, the resulting negotiated regulation has turned out to be one of the most problematic of all of the EPA’s rules in the history of the agency. Following implementation of the rule, the key chemical additive used in reformulated gasoline—MTBE—was discovered to be leaking into groundwater across the country, causing substantial public alarm

²⁴ Cary Coglianese, “Is Consensus an Appropriate Basis for Regulatory Policy?,” in *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States*, ed. Eric Orts and Kurt Deketelaere (New York: Kluwer Academic Publishers, 2001).

²⁵ Edward P. Weber, “Successful Collaboration: Negotiating Effective Regulations,” *Environment* (November 1998): 15.

about drinking water contamination and resulting in legislative and regulatory efforts to ban the use of this fuel additive.²⁶ A few years ago, *Discover* magazine included the reformulated gasoline decision in its list of “Twenty of the Greatest Blunders in Science in the Last Twenty Years.”²⁷

The second example is another recent, enormous policy blunder that was remarkably satisfactory to participants at the time the policy was adopted: the restructuring of California’s electricity markets. State legislators adopted electricity restructuring in California after extensive public participation, structuring the new market in a way that effectively achieved a compromise among the major players.²⁸ Because wholesale rates were low, this compromise, which among other things capped retail rates but allowed wholesale rates to float with the market, was generally satisfactory to the participants when the legislation passed. Indeed, at the outset of the restructuring, there were surprisingly few critics of the plan in California. Only later, under a taxing set of circumstances, did California’s “satisfactory” compromise reveal itself to be seriously flawed, wreaking havoc on Californians and utility companies as wholesale rates and demand for power increased.²⁹

²⁶ See Marla Cone, “EPA to Ban Gas Additive Nationwide,” *Los Angeles Times*, Mar. 21, 2000; Marla Cone, “Elimination of Additive from Gas is Ordered,” *Los Angeles Times*, Dec. 10, 1999.

²⁷ Judith Newman, “Twenty of the Greatest Blunders in Science in the Last Twenty Years,” *Discover* (October 2000): 78-83.

²⁸ Paul Joskow has written, “The ultimate design of the wholesale market institutions [in California] represented a series of compromises made by design committees including interest group representatives. . . . Getting it done fast and in a way that pandered to the many interests involved became more important than getting it right.” Paul L. Joskow, “California’s Electricity Crisis,” NBER Working Paper No. W8442 (Cambridge, MA: National Bureau of Economic Research, August 2001).

²⁹ William W. Hogan, “The California Meltdown,” *Harvard Magazine* (September-October 2001).

In both of these examples, it should be obvious that the resulting policies failed, no matter what the original participants may have thought about the policies when they were adopted. Undoubtedly, many of the participants in these policymaking processes would probably agree with such an assessment now, and are probably no longer satisfied with the policies they helped create. These examples starkly demonstrate that satisfaction at the time a policy is created does not necessarily equate with good public policy. When evaluating the effectiveness of different forms of public participation, researchers must consider the underlying outcomes of policy decisions that result from different participatory processes rather than rely on measures of participant satisfaction.

Of course, participant satisfaction could very well be a relevant consideration to take into account if policies that garnered satisfaction were also—at the margin or on average—higher-quality policies. Yet, how likely is this? Regulation is needed to solve problems of externalities, information asymmetries, and monopoly, problems that arise in situations where private interests are not well-aligned with overall social interest.³⁰ The goal of regulation is to change the behavior of firms and individuals to support improved social welfare. As such, the targets of regulation presumably should not find it very satisfying to be regulated.

As the principal target of regulation, business firms are usually well-organized and participate regularly and intensively, and in greater numbers, in public policymaking.³¹ If these targets of regulation come away satisfied with a policymaking process, it may well be that the resulting policy decision has not been as effective as it needs to be. For this reason, participant satisfaction in many cases

³⁰ For an analysis of the rationales for regulation, see W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington, *Economics of Regulation and Antitrust* (Cambridge: MIT Press, 2000).

³¹ It is generally accepted that business interests are better represented in the policy process, even though they are not always victorious. In my own research, I have found that business groups vastly outnumber environmental groups in the rulemaking process at the EPA. Cary Coglianese, “Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process,” *Law & Society Review* 30 (1996): 735-765.

could actually indicate that a policy is of a lesser quality, not greater.

B. To Be Meaningful, Satisfaction Measures Require Full Representation

Satisfaction could be a meaningful measure of policy success, at least conceptually, if all the people affected by a policy were able to make well-informed judgments about how the policy affected them. Yet studies that measure participants' satisfaction only survey a fraction of the entire population a regulatory policy affects.³² Even when those involved in a process of public participation are satisfied, the broader public—especially underrepresented segments of the broader public—may not be well served by a policy.

In some cases, as noted in the previous section, participant satisfaction could even indicate that the policy badly serves the public. Participants in policymaking at regulatory agencies that have been “captured” by a subsegment of the market or society are, by definition, quite satisfied.³³ Yet situations of regulatory capture are properly deplored because the satisfaction of a select group of interests in the regulatory context typically comes at the expense of the interests of the broader public. As Judith Innes has noted, when “a group produces outcomes that harm the larger community, this

³² Moreover, some studies even include government officials' satisfaction in their participant surveys. See Langbein and Kerwin, “Regulatory Negotiation versus Conventional Rule Making;” Lubell, “Attitudinal Support for Environmental Governance: Do Institutions Matter?” It is far from conceptually clear why government agency officials' satisfaction should count alongside satisfaction of those who are representing public constituencies and will be affected by the regulation the agency adopts.

³³ Regulatory capture arises when an interest group comes to dominate the outcomes of an agency so as to yield private benefits to the group. For an economic analysis of interest group rent-seeking behavior, see George J. Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economic and Management Science* 2 (1971): 3.

would not be a positive result even if the stakeholders at the table are satisfied.”³⁴

Innes has described a regional mass transit planning process in California that did not include representation of poor, inner-city residents, and as a result, cut some of the bus service to these communities.³⁵ Even if this planning process had been one that participants rated highly, it was clearly not a good policy for those who were not represented in the process. To be sure, lack of adequate representation is generally considered a problem of pluralist policymaking,³⁶ but it is also something that is particularly acute in processes that demand an intensive level of public time and resources, such as collaborative decision-making processes. A recent study by researchers at Resources for the Future, for example, examined 30 case studies of public environmental planning committees in the Great Lakes region and found that “[f]or the most part, participants did not appear to be representative of the wider public.”³⁷ These findings are not uncommon. As Dan Fiorino has observed about negotiated rulemaking, “negotiation is biased toward organized, influential interests in society. The most well-balanced committee is not competent institutionally to represent unorganized or uninfluential groups or broad conceptions of the public interest.”³⁸

³⁴ Innes, “Evaluating Consensus Building,” 653.

³⁵ *Ibid.*, 641.

³⁶ E.E. Shattschneider, *The Semi-Sovereign People: A Realist’s View of Democracy in America* (New York: Holt, Rinehart, and Winston, 1960).

³⁷ Thomas C. Beierle and David M. Konisky, “Public Participation in Environmental Planning in the Great Lakes Region,” *Resources for the Future Discussion Paper 99-50* (Washington, D.C.: Resources for the Future, September 1999), 23-24. For further discussion of the “representation problem” in dispute resolution and public participation processes, see J. Clarence Davies, “Environmental ADR and Public Participation,” *Valparaiso University Law Review* 34 (2000): 389, 396-97.

³⁸ Dan Fiorino, “Regulatory Negotiation as a Policy Process,” *Public Administration Review* 48(1988): 764.

It may be that intensive collaborative enterprises can help participants find creative solutions to problems that expand their Pareto frontier, making everyone around the table better off than they would have been had the agency pursued less intensive techniques of policymaking and public participation. Yet even in the rare cases where this might be so, this does not necessarily mean that the broader public will be better off. From society's standpoint, it is far from clear that increased satisfaction from *represented* interests should be the aim of public policymaking. It might very well be best to secure a level of satisfaction that is simply "good enough" among these participants, or even in many cases to create outright dissatisfaction on the part of some or most of those who participate in a regulatory process. Regulatory officials may well be correct to believe that if they displease both sides of a policy dispute, then "we must have done the right thing."³⁹

A full social welfare analysis must also consider whether any relative gains a collaborative or participatory process might achieve would outweigh the costs of using an intensive public participation process, including the opportunity costs associated with the additional time demanded of everyone.⁴⁰ Does attempting to increase the satisfaction of those represented in a policy process justify spending the additional investment in time and resources demanded of intensive collaborative processes that seek to satisfy those who participate in the policy process? When public officials devote more of their time to trying to expand the pie on certain policy issues, they have less time available to devote to other issues.

If we could be assured that the issues for which public officials invest the additional time demanded of intensive public collaboration are indeed the ones over which there is the most to be gained from this additional investment, then perhaps we need not worry as much. But collaboration on the most important issues

³⁹ Coglianese, "Litigating within Relationships," 747.

⁴⁰ It is well understood that collaborative processes tend to take more time and demand more resources. For a discussion of the literature on this point, see Cary Coglianese, "Assessing the Advocacy of Negotiated Rulemaking," *New York University Environmental Law Journal* 9 (2001): 386, 415.

seldom occurs. Agency experience with negotiated rulemaking indicates that agencies have tended to address “second tier” kinds of issues that probably yield fewer social gains from the greater resource and time demands necessitated by negotiation.⁴¹ Indeed, if policymakers aim first and foremost to satisfy those involved in the policy process, they can easily begin to focus on the most tractable policy issues—those that are more likely to please everyone—rather than on the issues that are most important to society overall.⁴²

In the end, even if everyone “at the table” could be made better off by certain forms of public participation, this does not mean that society overall would be better off. Moreover, if the intensity of a participatory process means that participants are not representative of the public at large, then collaborative processes aimed at satisfying participants could actually serve the broader public rather poorly, even if they succeed in satisfying participants greatly. Finally, the kinds of regulatory actions that are necessary to improve overall social welfare will sometimes make participants in the regulatory process decidedly *dissatisfied*. Imposing costly new controls on an industry is not likely to satisfy the regulated firms, even though in some cases, this is exactly what is needed to improve the overall welfare of society.

⁴¹ Coglianese, “Assessing Consensus,” 1317-21.

⁴² See Coglianese, “Is Consensus Appropriate?”

III. Problems with Satisfaction in Public Participation Evaluation

[U]sing subjective perceptions like happiness and satisfaction as an index of the efficiency of negotiated outcomes is problematic.⁴³

I have argued that using participant satisfaction as an evaluative measure is misguided as a conceptual matter because such a measure does not necessarily equate to good public policy and tends to exclude consideration of the broader public who did not participate in the policy process. In addition, reliance on individuals' reported satisfaction or opinions raises a number of measurement problems. In this section of the paper, I highlight four methodological or measurement concerns associated with using satisfaction in evaluation research. Even if researchers were to conclude that participant satisfaction could be an appropriate performance measure for dispute resolution and public participation, they would nevertheless face significant challenges in interpreting their results.

Surveys Tend to Truncate Extreme Satisfaction and Dissatisfaction

A policy that moderately satisfies most of those who participate in a regulatory proceeding but causes extreme dissatisfaction to one (or a few) of the participants can still appear to fare well in terms of an average level of participant satisfaction, as reflected in survey research. This is a general problem of survey research methods, but it is a something that especially needs to be

⁴³ Leigh L. Thompson and Richard Gonzalez, "Environmental Disputes: Competition for Scarce Resources and Clashing of Values," in *Environment, Ethics and Behavior*, ed. Max Bazerman et al. (San Francisco: New Lexington Press, 1997).

borne in mind whenever participant surveys form the basis of public participation evaluation.

In poorly designed surveys, it can be virtually impossible to assess the relative level of participants' satisfaction or dissatisfaction. For example, in the study of the National Marine Fisheries Service processes noted earlier, participants were simply asked whether they were "satisfied" or "dissatisfied" with the policy outcome.⁴⁴ It is difficult to interpret the fact that 60 percent of the participants indicated that they were "dissatisfied," since this survey instrument does not reveal whether they were mildly or extremely dissatisfied and whether the remaining 40 percent were mildly or extremely satisfied.

Survey instruments can be designed to capture at least some indication of the intensity of participants' satisfaction. Many researchers ask participants to array their preferences along a scale, from extremely dissatisfied to extremely satisfied. The Langbein and Kerwin study, for example, used an 11-point scale (from -5 to +5) to assess participants' levels of satisfaction and their perceptions of the policy outcomes.⁴⁵ While such an approach is clearly superior to the binary measures used in the NMFS study, it too can be rather limited. Those participants who experience extreme levels of net benefits or costs from a rule are unlikely to have the fullness of their satisfaction or dissatisfaction reflected in a survey. One need only consider a policy decision that imposes highly disproportionate burdens on a minority group, especially one that was ill represented in a policy process. For example, even if a regional mass transit planning process like the one described by Innes had included a representative from an inner-city community, the impact of any resulting decision to cut bus services to this community—such as devastating residents' ability to commute to work—might not be well reflected on a Likert scale. If many more people involved in the planning process were not affected by these cuts and were overall moderately satisfied with the process, the process could look

⁴⁴ RESOLVE, Inc., NMFS Program Evaluation.

⁴⁵ Langbein and Kerwin, "Regulatory Negotiation versus Conventional Rule Making."

much more successful than it would if the overall social costs and benefits were analyzed. In this way, surveys that ask participants to rank satisfaction on a fixed scale tend to truncate the views of outliers.

B. Perceptions Are Often Erroneous

Asking participants to assess what was accomplished in a policy process is an imperfect measure of what was really accomplished. Such survey results are, at best, evidence of participants' *perceptions*, not evidence of the underlying qualities of the public policy. Participants' perceptions often do not match reality.

To illustrate the unreliability of participant perceptions, consider Langbein and Kerwin's findings on how well negotiated rule-making prevented litigation. Langbein and Kerwin asked their respondents to rate the likelihood that the rulemakings in which they were involved would resist legal challenge. The average rating for negotiated rules (3.3) was significantly higher (that is, more resistant) than the average rating for conventional rules (1.9).⁴⁶ Does this mean that negotiated rules are really more resistant to legal challenge? Actually, the record is quite the opposite. Data collected from court filings show that negotiated rules are challenged at a higher rate than conventional rules.⁴⁷ Along other dimensions, such as the average number of petitions filed and the rate of settlement, negotiated rulemaking exhibits no greater degree of resistance to litigation.⁴⁸ It is precisely this type of data, not data on participants' perceptions that is needed to make judgments about

⁴⁶ Laura Langbein and Cornelius Kerwin, "Regulatory Negotiation versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence," p. 604 (Exhibit 1). These ratings are on an 11-point scale, with a "5" indicating that the respondent believed the rule had the most possible resistance to legal challenge, and a "-5" indicating a belief that the rule had the least possible resistance.

⁴⁷ Coglianese, "Assessing Consensus."

⁴⁸ Coglianese, "Assessing the Advocacy of Negotiated Rulemaking."

the actual resistance of negotiated rules to legal challenge. Similarly, to assess other qualities of policy decisions, it is better to seek direct evidence of those qualities rather than to rely on participants' perceptions of them.

C. Satisfaction Can Be Affected by Irrelevant Factors

Evaluations of participant satisfaction can be difficult to interpret because satisfaction and perception can be affected by numerous factors that are not relevant to evaluators. Perceptions and feelings of satisfaction can be highly contextual: As Leigh Thompson and Richard Gonzalez have noted, “[t]he same objective outcome may be viewed quite differently, as a function of arbitrary aspects of the context. For example, people report greater life satisfaction on days when the weather is sunny than when the weather is cloudy.”⁴⁹ For this reason, evaluation researchers should be extremely careful in interpreting survey results. As Judith Innes has cautioned, participant surveys “will probably not provide a meaningful assessment [because] participants responding to a survey could say that they were satisfied with a process when they were actually manipulated and misled, or they could say they were dissatisfied when they actually accomplished a great deal but had unrealistic expectations.”⁵⁰

From what we understand about cognitive dissonance, we might expect respondents to give higher ratings to forms of public participation that are more time- and resource-intensive. For many years, social psychologists have told us that individuals adjust their views to avoid dissonance because the existence of incompatible or dissonant cognitions is psychologically uncomfortable.⁵¹ One paradigmatic case of cognitive dissonance occurs when individuals respond to the effects of effort, the so-called “effort-justification

⁴⁹ Thompson and Gonzalez, “Environmental Disputes,” 83-84.

⁵⁰ Innes, “Evaluating Consensus Building,” 642.

⁵¹ Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford, CA: Stanford University Press, 1957).

paradigm.”⁵² The more effort an individual must expend at some task, and the more unpleasant that effort, the more dissonance that individual experiences. Individuals who find themselves in such situations can reduce dissonance “by exaggerating the desirability of the outcome.”⁵³ In the classic study demonstrating this effect, women were asked to undertake either a severe or a mild rite of “initiation” to join a discussion group.⁵⁴ In either case, the discussion group turned out to be an equally boring one, but the women who were assigned to undertake the more intensive initiation evaluated the group more favorably than did the women who went through the mild initiation.⁵⁵ As Eliot Aronson has explained, “going through hell and high water to gain admission to a boring discussion group was dissonant with one’s self-concept as a smart and reasonable person, who makes smart and reasonable decisions.”⁵⁶

Collaborative forms of public participation, such as dialogue groups and negotiated rulemaking, tend to be quite effort-intensive. When participants expend more, we can expect that they will reduce their dissonance by viewing the outcome of these intensive processes more favorably. This appears to explain well the findings in the study of negotiated rulemaking by Langbein and Kerwin, where participants in negotiated rulemakings rated the resulting policy decisions more favorably than participants in ordinary rulemaking proceedings. Despite the significantly higher costs of

⁵² Eddie Harmon-Jones and Judson Mills, “An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory,” in *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology*, ed. Eddie Harmon-Jones and Judson Mills (Washington, D.C.: American Psychological Association, 1999), 3, 7-8.

⁵³ *Ibid.*, 7.

⁵⁴ Eliot Aronson and J. Mills, “The Effect of Severity of Initiation on Liking for a Group,” *Journal of Abnormal & Social Psychology* 59 (1959): 177.

⁵⁵ *Ibid.*

⁵⁶ Eliot Aronson, “Dissonance, Hypocrisy, and the Self-Concept,” pp. 103, 112.

participating in negotiated rulemaking, Langbein and Kerwin's respondents from both negotiated and conventional rulemakings reported no statistically significant differences in terms of their perceived net benefits from participating in the rulemaking process.⁵⁷ The overwhelming majority of respondents in both samples said that the benefits they realized from their participation equaled or exceeded the costs.⁵⁸ Since the costs of participating in negotiated rulemaking were so much higher, individuals could be expected to exaggerate the desirable qualities of the rulemaking process's outcome, thus holding their net satisfaction level constant and avoiding cognitive dissonance. The higher levels of satisfaction reported by participants in negotiated rulemakings may simply be an artifact of cognitive dissonance, an internal psychological adjustment participants make to justify for themselves their heavier commitment of time and energy to these rulemakings.

D. Modes of Public Participation Can Select on the Dependent Variable

Participants in policy processes are not randomly selected from the overall population. As a result, the sample of participants in specific policy processes is likely to be biased. This can become a problem when different modes of public participation attract different kinds of participants, and as a result, create biases that are correlated with the dependent variable, such as satisfaction.⁵⁹

For example, suppose researchers compared two methods by which a company's managers could involve workers in management efforts to design a safer, more productive work environment. One

⁵⁷ Cornelius Kerwin and Laura Langbein, *An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase II A Comparison of Conventional and Negotiated Rulemaking* (draft report to the U.S. Environmental Protection Agency) (August 1997) 26.

⁵⁸ *Ibid.*

⁵⁹ See Gary King, Robert Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, N.J.: Princeton University Press, 1994).

method would be to solicit complaints, such as by installing a suggestion box and instructing workers to submit their ideas to management by using this box. Another method would be for management to identify a select group of workers from throughout the firm who could serve on a worker advisory committee that would engage in ongoing dialogue with management on workplace conditions. Participation is not randomly determined in either process. Who would likely submit comments in the suggestion box? Presumably those workers who are most dissatisfied and most inclined to complain would disproportionately represent themselves in the suggestion box process. Who would likely participate on the worker advisory committee? It is likely that management would avoid selecting the most unreasonable, pessimistic, or rebellious workers to participate in a workplace committee, but instead would disproportionately select cooperative workers and those tending to be more satisfied at the outset.

Of course, the bias does not need to occur in both groups for any resulting comparison of participants' satisfaction to be biased. Even if those invited to serve on the committee were selected randomly, for example, the likelihood that a suggestion box would attract disproportionately more disgruntled employees would continue to bias the comparison. Nevertheless, it seems unlikely that a firm would simply pick workers at random to participate on an internal advisory committee. As a result, the two worker-management processes would likely attract participants with different preexisting propensities for satisfaction.

An evaluator could try to control for these differences by administering a pretest designed to measure participants' prior attitudes about the workplace or their attitudes more generally.⁶⁰ In the absence of such a control, however, any resulting comparison of participants' satisfaction with the process would be affected not only by whatever effects the process had, but also by the different kinds of people who participated in the two processes, the selection of which is also an effect of the process. It would be impossible to determine whether any resulting differences in the two groups'

⁶⁰ For a discussion of the use of pretests, see Lawrence Mohr, *Impact Analysis for Program Evaluation*, 2nd ed. (Thousand Oaks, CA: Sage Publications, 1995).

reported satisfaction arose from the differences in the processes used or from the ways in which the two processes selected different participants.

This example is not entirely hypothetical. Langbein and Kerwin's study of negotiated rulemaking encounters precisely this challenge.⁶¹ Recall that the researchers compared the satisfaction of people who filed comments in the normal rulemaking process with the satisfaction of people who sat on agency-created negotiated rulemaking committees.⁶² We could reasonably expect that the individuals who file comments in administrative rulemakings are more likely to be motivated by perceived problems with proposed regulations and are individuals who, at the outset, would tend to be less satisfied with the agency overall. The individuals the agency selects to participate in negotiated rulemaking are those who the agency presumably believes will be willing to negotiate in good faith and for whom the agency believes there is a likelihood of reaching a consensus.⁶³ To minimize the problem of procedure-induced selection bias in a study of this kind, it would be better either to compare the satisfaction of commentators in both rules or those with whom the agency held extensive discussions in both rulemaking. For the latter approach, researchers would probably get a less-biased measure if they compared the satisfaction of those on negotiated rulemaking committees with those whom the agency held

⁶¹ Langbein and Kerwin, "Regulatory Negotiation versus Conventional Rule Making."

⁶² The Langbein and Kerwin study is further confounded due to the fact that their two samples had substantially different percentages of government officials. About 36 percent of the participants in their negotiated rulemaking sample came from federal and state agencies, whereas only about 6 percent of their conventional rulemaking sample came from government. (About 11 percent of the "participants" in the negotiated rulemaking sample were EPA officials, while none of those in their conventional rulemaking sample were.) It should be hardly surprising that a sample so disproportionately comprised of government officials would tend to rate government regulations more favorably.

⁶³ Indeed, the Negotiated Rulemaking Act specifically directs the EPA and other agencies to use the procedure only when there is a "reasonable likelihood that a committee will reach a consensus" and a willingness by the participants "to negotiate in good faith." 5 U.S.C. § 563(a).

repeated ex parte discussions during a conventional rulemaking process, the latter who are usually noted in the administrative records or could be identified through interviews with agency rule drafters.

Conclusion

For both conceptual and methodological reasons, researchers who evaluate methods of public participation in regulatory policymaking should not be very satisfied with using participant satisfaction as an evaluative criterion. Participant satisfaction is at best a relatively unimportant criterion, since it does not equate with the quality or effectiveness of regulatory policy, and because focusing on participants' opinions can easily lead one to overlook the broader public's interests. Satisfaction is also a problematic measure because participants' perceptions can be wrong or influenced by irrelevant factors, and because certain kinds of procedures can sort out individuals according to preexisting propensities to being satisfied.

The chief lesson to be learned from the foregoing examination of participant satisfaction is that other, more reliable measures of policy success should be employed when evaluating public participation techniques. Particularly in the absence of good methods of evaluating public participation based on satisfaction, researchers should employ alternative strategies for evaluating policy outcomes, for government ought surely be more concerned about achieving results than achieving the satisfaction of participants in the processes by which government establishes policies. Evaluators should seek to compare systematically the policies that result from different participatory processes. They should test whether processes yield the kind of results they are intended to achieve. For those procedures intended to prevent litigation, researchers should seek to learn whether litigation was in fact reduced. For those procedures designed to provide agencies with more information to make better policy decisions, researchers should seek to identify whether decisions really are improved.

The evaluation community needs to ask not whether participants are satisfied, but whether the public's collective interests would likely be more satisfied with the results of a given

procedure than with the results that would have emerged from alternative procedures. Although researchers will undoubtedly find this task much more challenging than simply surveying the specified set of individuals who participated in a policy process, researchers will only be able to conclude with any confidence that particular processes yield improvements over their alternatives if they compare the different processes' results.