

4-23-2019

Negotiated Rulemaking for U.S. Higher Education Regulatory Policy: A Process of Deliberative Democracy?

Rebecca Natow

Hofstra University, rebecca.s.natow@hofstra.edu

Follow this and additional works at: <https://www.publicdeliberation.net/jpd>

Part of the [Education Policy Commons](#), [Higher Education Commons](#), and the [Public Policy Commons](#)

Recommended Citation

Natow, Rebecca (2019) "Negotiated Rulemaking for U.S. Higher Education Regulatory Policy: A Process of Deliberative Democracy?," *Journal of Public Deliberation*: Vol. 15 : Iss. 1 , Article 9.

Available at: <https://www.publicdeliberation.net/jpd/vol15/iss1/art9>

This Article is brought to you for free and open access by Public Deliberation. It has been accepted for inclusion in Journal of Public Deliberation by an authorized editor of Public Deliberation.

Negotiated Rulemaking for U.S. Higher Education Regulatory Policy: A Process of Deliberative Democracy?

Abstract

The rulemaking process through which higher education regulatory policy is created in the U.S. Department of Education has received critical attention in recent years. One concern is that this important policymaking process takes place in an agency of unelected officials, sometimes with the help of select interest groups. How, then, does this process maintain its democratic legitimacy? An important aspect of the process – known as negotiated rulemaking – may help to promote democratic legitimacy through open deliberations and broad stakeholder participation. Through the lens of deliberative democratic theory, this article draws on dozens of interviews and documentary data regarding a number of higher education regulations to analyze the ways in which negotiated rulemaking for U.S. higher education regulatory policy reflects (and does not reflect) aspects of deliberative democracy.

Author Biography

Rebecca S. Natow is an assistant professor of educational leadership and policy at Hofstra University.

Keywords

higher education, negotiated rulemaking, regulatory policy, education policy, deliberative democracy

Acknowledgements

The author thanks Karen Miksh for comments provided on a previous version of this work. The author also thanks Kevin Dougherty and Jeffrey Henig for their insights and feedback on the design of the larger study from which the data for this work was drawn.

Recently, increased attention has been drawn to federal rulemaking for higher education in the United States. This refers to the process of creating regulations that implement and administer broader policies created through the Higher Education Act and its amendments (Hillman, Tandberg, & Sponsler, 2015). In recent years, policymakers, higher education institutions, and well-organized interest groups have spent a great deal of time, energy, and resources trying to influence the outcomes of higher education rulemaking (e.g., Mettler, 2014; Natow, 2017; Zemsky, 2013). Because the rulemaking process allows for policy creation by unelected officials within a government agency, it is particularly important to ensure that final regulations are viewed as the outcome of a democratic process in order to maintain legitimacy in the eyes of the public (Golden, 1998; Kerwin & Furlong, 2011).

The Administrative Procedure Act (APA) has built mechanisms for public participation into the rulemaking process. For example, the APA provides for a public notice-and-comment period in the creation of many regulations, during which proposed rules are published and stakeholders are invited to write recommendations, objections, and other comments to the issuing agency (Administrative Procedure Act, 2012; Golden, 1998; Kerwin & Furlong, 2011). Nevertheless, some still believe that rulemaking involves little more than decision making by unelected agency officials with the help of powerful special interest groups (see example discussed in Zheng, 2015; see also Beierle, 2003). Rulemaking has been called an “obscure and inaccessible” process for which “few people have been aware of its existence, much less of the very direct role they might play in it” (Carlitz & Gunn, 2005, p. 1). It is therefore important to scrutinize the rulemaking process to determine the democratic legitimacy of final rules, which are as binding on the populace as enacted legislation, executive orders, and judicial decisions (Kerwin & Furlong, 2011). This is particularly true in the case of the higher education rulemaking process, which has specifically been criticized for “a lack of transparency” (Camera, 2017).

One phase of the rulemaking process—known as negotiated rulemaking—allows stakeholders to participate directly in the creation of the regulations themselves (Harter, 1982, 2004; Pelesh, 1994; Susskind & McMahon, 1985). This is done at a relatively early stage of the rulemaking procedure, during the development of the proposed language for the rule. Congress has specifically required that the U.S. Department of Education (hereinafter the “Department of Education” or the “Department”) use negotiated rulemaking when creating many of the regulations affecting federal student financial aid programs (Higher Education Act, 2012, §

1098a). The Department of Education selects participants, known as negotiators,¹ to serve on a negotiated rulemaking committee, and then holds meetings during which negotiators and the Department attempt to develop proposed regulatory language together. If all members of the negotiating committee (including the Department's representative) agree on the content and language of a proposed rule, then the Department adopts the consensus-based language in its Notice of Proposed Rulemaking. However, if unanimous consensus does not occur, the Department develops proposed regulatory language on its own (Lubbers, 1998; Natow, 2017; Pelesh, 1994). Participation in negotiated rulemaking is a strategy that numerous interest groups have employed to influence higher education regulatory policymaking (Natow, 2017). But without sufficient stakeholder involvement in negotiated rulemaking, the final rules that result from the process may lack democratic legitimacy (Rose-Ackerman, 1994).

One method for bestowing legitimacy on public laws is through a democratic process that involves open and well-informed dialogue between policymakers and the persons who will be impacted by policy decisions—a process known as deliberative democracy (Cohen, 1997; Gutmann & Thompson, 2004; Hartz-Karp, 2005; Menkel-Meadow, 2004; Michelman, 1997). The outcome of a policymaking process may be viewed as democratically legitimate when it results from “a free and reasoned agreement among equals” (Cohen, 1997, p. 73). Negotiated rulemaking, with its diverse set of participants and its open deliberations, provides an opportunity for legitimation through deliberative democracy. There is no evidence that Congress, through the Negotiated Rulemaking Act,² intended to bring deliberative democracy into the process of creating regulatory policy.³ Indeed, some observers have called for increased citizen participation and collaboration in the creation of administrative law, noting that existing procedures for developing these laws do not sufficiently include such participation (Bingham, 2010; Working Group on Legal Frameworks for Public Participation, 2013). But negotiated rulemaking has the potential to be more deliberatively democratic than other functions of regulatory policy development. For example, Hicks (2002) stated that negotiated rulemaking is a “more collaborative process of public involvement” than traditional notice-and-comment rulemaking, and that negotiated rulemaking

¹ Although the Negotiated Rulemaking Act and Higher Education Act do not use the term “negotiator,” this term appears frequently in the literature (e.g., Pelesh, 1994; Susskind & McMahon, 1985) and in the *Federal Register* (e.g., Federal Perkins Loan Program, 2007) to refer to negotiated rulemaking participants, and the term was used repeatedly by this study's interviewees who had participated in negotiated rulemaking in the Department of Education (see also Natow, 2017).

² First authorized as a temporary policy in 1990, the Negotiated Rulemaking Act was permanently enacted in 1996 (Lubbers, 2014).

³ I thank an anonymous reviewer for drawing attention to this point.

provides “concerned citizens and coalitions a seat at the table during the initial stages of deliberation where problems are defined and agendas set” (p. 234).

To what extent, then, does higher education negotiated rulemaking exemplify a deliberative democratic process? The purpose of this article is to analyze higher education negotiated rulemaking—through the lens of deliberative democratic theory—to determine how the process embodies aspects of deliberative democracy. This analysis can help to determine whether final rules resulting from the higher education rulemaking process are likely to be viewed as democratically legitimate.

Federal Higher Education Rulemaking Law and Procedure

The federal rulemaking process is governed by a number of federal laws, including the APA, the Negotiated Rulemaking Act, Executive Order 12866, the Congressional Review Act, and others (Kerwin & Furlong, 2011; Lubbers, 1998; Natow, 2017). There are both “formal” and “informal” rulemaking procedures. “Formal rulemaking” refers to rulemaking that resembles a judicial hearing and involves “hearing officers, pretrial conferences, burdens, proposed findings, and cross-examination” (Neilson, 2014, p. 239). The Administrative Procedure Act (2012) states that such procedures shall be used “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing” (§553[c]; see also Lubbers, 1998; Natow, 2017; Neilson, 2014; O’Connell, 2008). In practice, formal rulemaking is only infrequently used (Neilson, 2014). Instead, most federal regulations are created through “informal,” or “notice-and-comment,” rulemaking (Neilson, 2014, p. 238; see also Lubbers, 1998; Natow, 2017; O’Connell, 2008). Informal rulemaking involves the regulating agency posting a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*, receiving comments from stakeholders regarding the NPRM, and publishing a final rule (with responses to comments received) in the *Federal Register* (Administrative Procedure Act, 2012; Kerwin & Furlong, 2011; Lubbers, 1998; Natow, 2017; Pritzker & Dalton, 1995).

As Coglianesse (2004) notes, “the APA procedures only cover part of the chronology of rulemaking,” and that “[m]uch, if not most, of the work takes place prior to the publication of the NPRM” (p. 358). Negotiated rulemaking is a process that sometimes occurs in informal rulemaking proceedings prior to the development of the NPRM. Governed by the Negotiated Rulemaking Act,⁴ this process involves:

⁴ Although the Negotiated Rulemaking Act is not cited in the text of the Higher Education Act (2012) (see also Pelesh, 1994), documents produced by the Department of Education indicate that the Negotiated Rulemaking Act informs the higher education negotiated rulemaking process (e.g., Bergeron, 2012; United States Department of Education, 2017).

bring[ing] together representatives of the agency and the various interest groups to negotiate the text of a proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them. If they do achieve a consensus, then the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation is diminished. (Pritzker & Dalton, 1995, p. 1)

To commence negotiated rulemaking, the regulating agency posts a notice seeking nominations for the negotiated rulemaking committee and, after receiving nominations and comments on the proposed negotiated rulemaking process, selects up to 25 individuals⁵ to serve on the negotiating committee (Negotiated Rulemaking Act, 2012; Pritzker & Dalton, 1995).

Since its 1992 reauthorization, the Higher Education Act (2012) has required the Department of Education to employ negotiated rulemaking for regulations implementing Title IV federal financial aid programs (see also Lubbers, 2014; Natow, 2017; Pelesh, 1994).⁶ The requirement to use negotiated rulemaking is unique; typically, federal agencies have discretion to choose to include negotiated rulemaking in their regulatory policy development if the agency determines that negotiations are warranted under the circumstances. The Department of Education, however, is mandated to use negotiated rulemaking for regulations implementing Title IV (Lubbers, 2014). Prior to negotiated rulemaking, the Department must “obtain public involvement in the development of proposed regulations” and “provide for a comprehensive discussion and exchange of information concerning the implementation of this title through such mechanisms as regional meetings and electronic exchanges of information” (Higher Education Act, 2012, §492[a]). Public comments may be provided at this preliminary stage, at designated times during negotiated rulemaking, and during the notice-and-comment stage following publication of the NPRM (Higher Education Act, 2012; Natow, 2017; Pelesh, 1994).⁷

⁵ The Negotiated Rulemaking Act (2012) provides that total membership on the committee may exceed 25 if “the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership” (§ 565[b]).

⁶ There are exceptions to this requirement if the secretary of education “determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest” (Higher Education Act, 2012, § 492[b][2]).

⁷ For more details on the Department of Education’s rulemaking procedures, see Rebecca S. Natow, *Higher education rulemaking: The politics of creating regulatory policy*, © 2017, Johns Hopkins University Press.

Theoretical Framework

What is Meant by “Deliberative Democracy”?

In a deliberative democracy, the act of deliberating over a policy decision is highly important; indeed, deliberation itself is what brings acceptability and legitimacy to adopted laws (Abelson et al., 2003; Bohman, 1998; Chambers, 2003; Habermas, 1994; Weeks, 2000). This is in no small part because open deliberations bring transparency to the reasons behind policy decisions and allow stakeholders to assess the fairness of laws that will be imposed on them (Gutmann & Thompson, 2004). There is also an assumption underlying deliberative democratic theory that policies made through a public process of deliberation will be based more on informed decision making and less on irrationality and bias (Christiano, 1997).

Deliberative democracy is not simply acting via interest groups, electing representatives through voting, or bargaining among policy actors (Cohen, 1997; Gutmann & Thompson, 2004; Knight & Johnson, 1997). Indeed, the process of deliberation allows for the discussion of perspectives, values, and priorities in a way that simply voting for one preference or another does not express (Fearon, 1998, as cited in Abelson et al., 2003). Deliberative democracy involves more direct and informed participation by actors who will be affected by the laws that result from the policymaking process. These principles are reflected in various definitions of “deliberative democracy” that appear throughout the scholarly literature. For example, Amy Gutmann and Dennis Thompson (2004) have defined deliberative democracy as:

a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future (p. 7).

In another definition, Joshua Cohen (1997) “roughly” identifies deliberative democracy as “an association whose affairs are governed by the public deliberation of its members,” bringing the “public” nature of the deliberations directly into the definition of the term (p. 67). James Bohman (1997) has said that “[d]eliberation is democratic, to the extent that it is based on a process of reaching reasoned agreement among free and equal citizens” (p. 321). And Frank Michelman (1997) defines it as:

a popularly based system or practice of fundamental lawmaking that meets a threshold standard of overall deliberativeness ... a system or practice whose combined organizational, motivational, discursive, and constitutive attributes are such, we judge, as to qualify its legislative outputs as approvable in the right way by all who stand to be affected ... deliberative democracy is a (broadly speaking) procedural ideal correlative to a bottom-line moral demand for political self-government by the people – where “by the people” is taken to mean “by everyone.” (p. 149).

Key Elements of a Deliberatively Democratic Process

Several key elements of deliberative democracy are reflected in the definitions provided above, as well as in other literature describing these types of processes. Three important aspects, specifically identified by Carson and Hartz-Karp (2005) and Hartz-Karp (2005), are “inclusiveness, deliberation and influence” (Hartz-Karp, 2005, p. 3). Other key aspects of deliberative democracy include egalitarianism (which is related to inclusiveness [Bohman, 1997; Cohen, 1997]), the fact that the deliberations take place in public (Cohen, 1997), and resulting “consensus” based on the deliberations (Cohen, 1997, p. 75; Gaus, 1997). The following subsections provide detailed descriptions of each of these elements of deliberative democracy.

Inclusiveness/Egalitarianism. “Inclusiveness” refers to broad participation that is “representative of the population” (Carson & Hartz-Karp, 2005, p. 122; Hartz-Karp, 2005, p. 3). This aspect of deliberative democracy brings diversity, in terms of “interests and values” as well as “demographics” into the process (Beierle, 2003, p. 9). A key aspect of inclusiveness is to promote egalitarianism by involving many different perspectives and voices in the deliberations (Cohen, 1997). Ideally, all participants in the deliberation would have “equal standing” and “equal voice” in the process, no matter what the power dynamics are between the parties outside of deliberations (Cohen, 1997, p. 74). In other words, participants with greater resources and political connections outside the deliberative process would not be granted more power or status during deliberations (Bohman, 1997; Cohen, 1997).

Deliberation. “Deliberation” involves open discussion and debate that is well-informed, critical, and reasoned (Abelson et al., 2003, p. 241; Beierle, 2003, p. 9; Carson & Hartz-Karp, 2005, p. 122; Hartz-Karp, 2005, p. 4). Deliberation takes divergent perspectives into account and involves multiple parties (Abelson et al., 2003). Optimal deliberation occurs when actors who possess different qualities—such as backgrounds, experiences, ideologies, and areas of expertise—come together as a group to discuss potential policies, and to explain why, from their

viewpoint, a particular policy outcome is preferable (Abelson et al., 2003; see also Beierle, 2003). Moreover, deliberation is a process through which participants begin to understand other actors' perspectives and to make decisions that are good for all, and not just good for one party (Beierle, 2003; Cohen, 1997). Reasoned persuasion—as opposed to the “coercion, manipulation or deception” that often accompanies lawmaking—is the main vehicle through which democratic deliberation is supposed to reach its objectives (Abelson et al., 2003, p. 241; see also Cohen, 1997). This is why bargaining for policy outcomes among actors is viewed as antithetical to deliberative democracy (Bohman, 1998; Cohen, 1997; Gutmann & Thompson, 2004). It is true, though, that reasoned persuasion completely divorced from unequal exertions of power is seen as an unrealistic expectation in policymaking (see literature cited by Abelson et al., 2003, p. 241).

Influence. “Influence” is demonstrated when the deliberation itself has some effect on the ultimate decision (Carson & Hartz-Karp, 2005, p. 122; Hartz-Karp, 2005, pp. 7-8). Thus, if the outcome of a deliberation is to adopt a policy based on what was discussed and learned during the deliberation, it can be said that the deliberation was influential. Deliberations may influence more than just a final, enacted policy; they may also influence the way policy actors see themselves and their own interests, as well as how they view the “common good” (Cohen, 1997, p. 69). In this way, the influence of a deliberatively democratic process involves an individual deliberator affecting the outcome due not only to his or her own vote on that outcome, but also due to the deliberator's influence on the votes of other decision makers (Knight & Johnson, 1997). In a deliberative democracy, participants influence not only final policies, but also the hearts and minds of other participants. Influence occurs when participants present convincing reasoning for the outcomes they seek (Knight & Johnson, 1997).

Public Nature. Deliberations in a deliberative democracy should take place in public (Christiano, 1997; Cohen, 1997). That deliberations occur in public is important because the goal of deliberative democracy is for policies created through this process be made for “the public good” (Cohen, 1997, p. 68). Having public discussions about different viewpoints and rationales for what will become widely applicable law brings transparency to the process and helps to guard against decision making that is based on bartering among special interest groups or other processes that may better serve private interests (Cohen, 1997). Having public discussions about the reasoning behind policy decisions also demonstrates a certain amount of “respect” for the people who will be bound by those decisions, by “seeking out their views and engaging them in discussion on the matter” (Christiano, 1997, p. 252). Moreover, public (as opposed to private or personal)

deliberations allow actors to learn about other actors' viewpoints, which they may not have considered otherwise (Christiano, 1997).

Consensus Among Participants. Finally, a common theme running throughout the various definitions of deliberative democracy is the fact that the process results in consensus among participants about what the final outcome of the deliberations should be (Cohen, 1997; Gaus, 1997; Michelman, 1997). Ideally, consensus would involve the assent of all parties to the deliberation (Cohen, 1997). In fact, this is the definition of "consensus" that has been adopted for federal negotiated rulemaking (Lubbers, 1998; Pelesh, 1994). When unanimous concurrence is not possible, consensus in a deliberative democracy might involve taking a vote and adopting the will of the majority (Cohen, 1997).

Negotiated Rulemaking as a Deliberatively Democratic Process

Negotiated rulemaking has been identified by some scholars as reflecting key aspects of deliberative democracy in action (Harter, 2004; Menkel-Meadow, 2004). For instance, Menkel-Meadow (2004) identifies negotiated rulemaking (along with other alternative dispute resolution processes such as "policy dialogues" and "facilitated problem solving conflict resolution") as an example of "an effort to bring all interested parties, called 'stakeholders,' together to negotiate their own process rules ... for making decisions" (p. 359). She writes that processes such as negotiated rulemaking tend to be sensitive to a variety of different positions on issues, involve a widespread distribution of information, and attempt to "develop more creative and better substantive solutions to problems" (Menkel-Meadow, 2004, p. 359).

However, others have argued that negotiated rulemaking does not create policies based on the "public interest," but rather promotes "privately bargained interests as the source of putative public law" (Funk, 1997, p. 1356). Beierle (2003) has noted that "as traditionally practiced, public involvement in rulemaking is an arcane art, dominated by special interests operating primarily inside the beltway" (p. 1). In addition to the power of special interests over the rulemaking process, rules are ultimately written by unelected public officials, even when negotiated rulemaking takes place and particularly when no consensus is reached (e.g., Kerwin & Furlong, 2011; Pelesh, 1994). This may be viewed as a threat to deliberative democracy. Indeed, there has been discussion in recent years among some in the higher education policy community about how the creation of certain regulations through the rulemaking process has exceeded the Department of Education's administrative authority (Nelson, 2013). This calls into question the democratic legitimacy of final rules. If the higher education negotiated rulemaking process is viewed as reflecting

principles of deliberative democracy, this could go a long way toward ensuring constituents' faith in the higher education rulemaking process as democratic and acceptable.

Methodology

This article examines records of higher education rulemaking, as well as insiders' perceptions about the negotiated rulemaking process, to determine the ways in which negotiated rulemaking for higher education reflects a process of deliberative democracy by asking the following research questions:

- In what ways does the higher education negotiated rulemaking process resemble a practice of deliberative democracy?
- In what ways does this process not resemble a practice of deliberative democracy?

This analysis draws from a dataset based on a larger qualitative study about the politics of the rulemaking process for higher education as it occurs in the Department of Education. The larger dataset contains regulatory documents, news articles, and interview data.⁸ Regulatory documents include the texts of final and proposed rules issued by the Department of Education for 31 regulations, 11 of which involved negotiated rulemaking. The dataset also includes negotiated rulemaking records that have been made available by the Department for the regulations in the dataset that involved negotiated rulemaking and for one attempt at creating a regulation regarding accreditation that received some media attention but did not reach the NPRM stage.⁹ Final and proposed rules were acquired from electronic versions of the *Federal Register*, and available records reflecting negotiated rulemaking proceedings were retrieved from the Department of Education's website.

Additionally, 55 individuals were interviewed for the larger study using a semi-structured protocol. The interview protocol asked a variety of questions about the higher education rulemaking process. Questions about negotiated rulemaking included inquiries about: how negotiated rulemaking participants are selected; how the language of a proposed rule develops through this process; and the interviewee's perceptions about the effectiveness of negotiating rulemaking to resolve disputes, whether there is sufficient representation of putative stakeholders,

⁸ For more information about this larger dataset, see Natow (2017).

⁹ For more information about this unfinished rulemaking, see Natow (2017) and Lowry (2009).

and whether the process tends to benefit particular groups. Interviewees were purposefully sampled based on the experience they had with higher education rulemaking. Respondents included current (as of the interview) or former Department of Education personnel (12 interviewees), representatives of colleges and universities, their administrators, or higher education-focused associations (34 interviewees), negotiation experts (3 interviewees), student and/or consumer advocates (6 interviewees), representatives of the student lending community (6 interviewees), representatives of accrediting organizations or associations (3 interviewees), and congressional staffers (6 interviewees), among other individuals (9 interviewees).¹⁰ During interviews, 43 of the 55 study participants made statements regarding their perspectives of the negotiated rulemaking process as it occurs in the Department of Education's Office of Postsecondary Education. As explained above, unlike most agencies, the Department of Education is required to undergo negotiated rulemaking when creating regulations that implement Title IV financial aid programs under the Higher Education Act. Unlike other agencies' choice to engage in negotiated rulemaking if the agency deems it beneficial to do so, the Office of Postsecondary Education must employ negotiated rulemaking when implementing Title IV rules unless one of the narrow exceptions applies (Higher Education Act, 2012; Lubbers, 2014). Therefore, the data in this study are not subject to selection bias claims to which studies of other agencies' discretionary use of negotiated rulemaking may be subject.¹¹

Data were coded using an original coding scheme that was developed based on the scholarly literature and concepts that emerged during data analysis. Refinement of the coding scheme and initial coding of data involved inter-rater reliability (Armstrong, Gosling, Weinman, & Marteau, 1997), wherein two scholars of higher education independently examined some of the larger qualitative dataset's rulemaking documents and interview transcripts (a total of three documents and six transcripts), and based on this review, discussed coding similarities and differences and arrived at an agreement to identify new codes and revise existing ones. The author then analyzed remaining transcripts and documents individually, keeping in mind the lessons learned from the inter-rater reliability exercise. In the first round of analysis, transcripts and documents were coded individually, using the original coding scheme and qualitative analytic software. In the second round of analysis, the author queried data from across sources that had been coded as relevant to the research questions addressed here. Emergent themes and data patterns were then identified and analyzed further.

¹⁰ These numbers total more than 55 because some interviewees held more than one of these positions since 1991, the first year on which the larger study focused.

¹¹ I thank an anonymous reviewer for noting this important point.

Findings

To understand the extent to which higher education negotiated rulemaking represents a process of deliberative democracy, occurrences and outcomes of the process as well as the experiences and perspectives of those familiar with the process are examined in light of the key features of deliberative democracy identified in the literature, as described above. These features are inclusiveness/egalitarianism, deliberation, influence, the public nature of the process, and consensus among participants.

Inclusiveness/Egalitarianism

By design, higher education negotiated rulemaking involves a diverse array of stakeholders in the process. During the regional meetings that are held prior to negotiated rulemaking, the Higher Education Act (2012) requires that the Department of Education:

obtain the advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs under this title, such as students, legal assistance organizations that represent students, institutions of higher education, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies. (§ 1098a[a][1])

The Act also provides that the Department select participants in negotiated rulemaking from nominees provided by the same types of policy actors listed in the clause above (§ 1098a[b][1]).

Findings from this study indicate that a wide variety of policy actors participates in both regional meetings and, to a lesser extent, negotiated rulemaking. Speakers at regional meetings have included different types of higher education institutions—two-year and four-year, public and private, not-for-profit and for-profit, serving different student populations. Also, among the participants were regional and national accreditors, officials from all levels of government, lending industry organizations, advocacy groups, higher education students, other private citizens, and numerous others. A broad array of policy actors also participates in negotiated rulemaking, although the fact that the process can accommodate only a limited number of negotiators means that the diversity among participants is not as great as it is with regional meetings. Among this study's focal rules, negotiators included students, consumer groups, representatives of state agencies, representatives of a

diverse range of higher education institutions, accreditors, test makers, and lending industry representatives, in addition to the Department's own negotiator.

Noteworthy is the fact that students and consumer representatives are specifically mentioned in the statute as groups that the Department must consult during this process. Thus, while powerful interest groups such as large higher education associations and lending industry personnel are represented at regional hearings and on negotiated rulemaking committees, so are representatives of students and consumer groups. In fact, a Department of Education official interviewed for this study claimed to pay particular attention to what the student representatives had to say in the negotiated rulemaking proceedings. The general public may also attend negotiated rulemaking and make statements to the committee at the end of the sessions.

On the other hand, there are aspects of this process that are not so inclusive or egalitarian. The costs of participating in negotiated rulemaking – in terms of finances as well as time—can effectively prohibit certain individual or groups from being involved. As a former Department of Education official explained, participating in negotiated rulemaking requires several days of travel to Washington, DC, plus reading and other preparation for the meetings. Smaller organizations that do not have a large staff or a lot of financial resources may find the costs of participating in negotiated rulemaking to be too burdensome. The same may be said about regional meetings. Although these meetings take place at different locations across the United States, only a few meetings are held per negotiated rulemaking. If an interested party does not live or work near the location of the meeting, the costs involved in traveling to the meeting and taking time away from other work may prevent a party with few resources from participating (see also Natow, 2017).

Moreover, the negotiators that have been selected for higher education negotiated rulemaking are usually affiliated with some larger organization—whether it be a professional association such as the National Association of Student Financial Aid Administrators or a single higher education institution—as opposed to an unaffiliated individual stakeholder. Selecting organizational representatives as negotiators certainly makes sense in that it allows a member of an organization with widespread membership as well as policy (and perhaps even negotiating) expertise to represent the interests of their constituents in these very important and highly specialized proceedings. But at the same time, this makes the process less inclusive; it reduces the likelihood that the panel will hear the voices or consider the perspectives of outsiders to the policy world who nevertheless live with the everyday consequences of regulatory outcomes.

The limited influence of public remarks during negotiated rulemaking demonstrates another manner in which this process is less than egalitarian. It is true that higher education negotiated rulemaking sessions are open to the public. Anyone who is interested in doing so may attend negotiated rulemaking sessions, observe them, and even provide some remarks at the end of the day to the negotiating panel. But such public statements do not occur frequently or last very long, and ultimately do not have much impact. A review of available minutes from the negotiated rulemaking proceedings of several higher education rules demonstrates that substantive comments made by the public toward the close of negotiating sessions are rare. This observation was supported by the words of one negotiated rulemaking participant, who explained that comments from the public at the end of negotiating sessions are made every so often, but this negotiator was unsure that these statements have any “particular impact” on negotiators, who are often “packing up their bags” and getting ready to leave.

Deliberation

Higher education negotiated rulemaking involves extended periods of discussion and debating proposed regulatory language. Negotiating sessions are day-long events and the Department of Education typically schedules multiple days’ worth of meetings over a period of months before concluding negotiations. Typically, the negotiations occur on at least three days in a row (sometimes more) per month, for at least three months in a row. As such, these sessions are extended dialogues, and not short or abbreviated meetings. A representative of higher education students interviewed for this study said the following about negotiated rulemaking:

There’s interaction, there’s background, people are sharing information. You know many heads are better than one. It may take longer but this is going to be law for many years to come so it’s worth the four months that we put into it for something that may be in law or may be codified for the next five to nine years or beyond.

Higher education negotiated rulemaking committees are facilitated by experienced mediators,¹² whose role it is to keep the dialogue moving and to ensure that all

¹² The Negotiated Rulemaking Act (2012) states that the “agency may nominate either a person from the Federal Government or a person from outside the Federal Government to serve as a facilitator for the negotiations” for the purpose of “impartially assist[ing] the members of the committee in conducting discussions and negotiations” and keeping records of the negotiations (§ 566[c] and [d]). In higher education negotiated rulemaking, this role has traditionally been given to “professional mediators” (Pelesh, 1994, p. 158).

participants' voices are heard. An experienced negotiator described how negotiated rulemaking facilitators are often effective at enhancing the quality of the dialogue:

[S]ometimes the facilitators will be very good, they are the neutral parties that kind of keep things going... they are good at summing things up. If a discussion gets really bogged down and you are just kind of going over and over, they will get you to move on. And they will also try to say, "Well we have heard from you before, could we get somebody else on this," so something they are good at [is] pulling in more opinions.

Although a wide variety of stakeholders may be represented at the negotiating table, the informed dialogue that is key to deliberation will not occur if all participants are not knowledgeable about the matters being discussed (Gutmann & Thompson, 2004). This has not always been the case in higher education negotiated rulemaking, despite the fact that many of the individuals selected to participate in negotiated rulemaking are experts in their fields. A past negotiator provided an example of a participant from one higher education sector that was tasked with deliberating issues that the participant "did not have a clue on." The same interviewee went on to say that the participant "could not have a conversation" about the matter and that "you didn't have that dialogue at the table that I think other people might have learned from."

Also, despite the fact that coalition-building and special-interest group bargaining can be antithetical to deliberative democracy (Bohman, 1998; Gutmann & Thompson, 2004; Menkel-Meadow, 2004), these are regular occurrences in higher education negotiated rulemaking. Indeed, coalition-building was found to be a frequently employed strategy for influencing the higher education rulemaking process. One negotiated rulemaking participant explained:

[P]robably the strategy that I have seen the most and probably you would see the most overall is just the coalition-building strategy... side discussions in terms of getting as many people as you can on the same page with you and speaking with one voice at the table.

Likewise, bargaining is not an uncommon occurrence during higher education negotiated rulemaking. One negotiated rulemaking participant explained that negotiators often bargain with each other—one will concede a trade-off in one aspect of the regulatory language in exchange for another party's concession of a trade-off in a different aspect. A former Department of Education official observed this sort of thing occurring during negotiated rulemaking:

[Y]ou're trying to build consensus so you find different groups aligning themselves to accept one's position on this thing and barter and trade it off for someone else's position on something else. So there was an awful lot of that going on to build a consensus because you had to have a consensus to have the product be reflected in the regs that came out. Otherwise, the Department could do what it wanted.

As these participants' observations and perspectives make clear, coalition-building and bargaining are prominent in this process.

Influence

There is evidence that negotiated rulemaking deliberations influence the language of proposed and final rules. This is frequently the case when the negotiating committee reaches consensus (more about "consensus" and higher education negotiated rulemaking will be discussed in the next section). When consensus has been reached, the regulatory language agreed upon during negotiated rulemaking is what appears in the Notice of Proposed Rulemaking (NPRM). In these cases, the influence that negotiated rulemaking has on regulatory policy is overt and fairly direct.

But importantly, there is also evidence of deliberations influencing regulatory language even when the negotiating committee does not achieve consensus (see also Natow, 2017). For example, in one case where negotiators did not reach consensus, the Department of Education heard from negotiators about how burdensome a particular requirement was going to be, and in light of this, drafted a proposed rule that was not as burdensome (Federal Perkins Loan Program, 2007). This accords with the statement of a negotiated rulemaking participant who said, "Do we always have impact? Not always. But I do think that the Department is trying very hard to listen." A community college representative with experience in negotiated rulemaking shared a similar sentiment:

[I]t's not that you're pulling the levers of power, but you do get the opportunity to influence...you're impacting federal student aid...that someone is working to pay the taxes that provides the program and which in turn goes to someone to hopefully better their lives. It does provide you with an opportunity to influence for good.

Still, others familiar with higher education negotiated rulemaking were less optimistic about the amount of influence the process actually has on policy outcomes. One representative of accreditors who has participated in the process

said of negotiated rulemaking:

Well at the end of the day, you know the government ... gets to make the rules... I think the balance between the negotiated rulemaking which, you know in some ways is a negotiation, but it reminds me of when you were a kid. When you were a little kid and you want to play with the bigger kids and you know if the bigger kids were bored or whatever, they would say, "Come play with us." But the minute you irritated them, you weren't playing with them anymore. So at the end of the day, the government is going to make the rules and whether this is the best way for them to gain broad input and listen to some kind of an organized discussion about the rules that they are going to make, I'm not sure I can come up with one that is hugely better than this.

Public Nature

Higher education negotiated rulemaking sessions are open for public attendance and advertised well in advance in the *Federal Register* and on the Department of Education's website. Also, as explained above, members of the public who observe the negotiated rulemaking sessions are routinely invited to make remarks at the conclusion of the proceedings. The regional meetings that occur across the country prior to negotiated rulemaking are also public meetings, and anyone may comment during these meetings. Written materials from these proceedings—including agendas, draft regulatory language, speaker and panel membership lists, handouts, and (in some cases) transcripts—are also made publicly available on the Department of Education's Internet site.

Yet the public nature of higher education negotiated rulemaking is impeded by some of the same factors that limit the inclusiveness and egalitarian nature of the process. As explained above, negotiated rulemaking participation is expensive. For individuals who do not live within commuting distance to Washington, D.C., it requires travel and overnight stays, as well as time away from other work. The same is true for people who would like to observe the negotiated rulemaking proceedings. For those outside of the D.C. area, such observations may be too expensive to undertake. Not until 2019 did the Department of Education broadcast negotiated rulemaking proceedings in real time over the Internet.¹³ Even the more recently video-streamed proceedings have their drawbacks with regard to public access in

¹³ Although audios and transcripts of recent negotiated rulemaking sessions currently appear on the Department of Education's website, audio files and verbatim transcripts were not available for higher education negotiated rulemakings conducted prior to 2017 and livestreaming was not provided prior to 2019 (see also Natow, 2017).

light of the technology and time needed to view the video streams. All of these factors detract from the public nature of the proceedings: an interested party would have to have knowledge about negotiated rulemaking and also possess the time and resources available to observe or participate in even one full day of negotiations. This leaves out many who may be interested in observing, and many more who hold a stake in the outcomes of negotiated rulemaking.

Consensus Among Participants

Finally, higher education negotiated rulemaking does require a form of consensus in order for proposed rules emerging from negotiated rulemaking to become part of the NPRM. “Consensus” in the negotiated rulemaking process is the lack of disagreement among any negotiators with regard to the proposed language (Kerwin & Furlong, 2011; Pelesh, 1994, p. 156; Pritzker & Dalton, 1995). Defining consensus to mean unanimous agreement of all participants has the effect of demonstrating that, when an NPRM representing negotiated language is published, it has the approval of an extensive range of potential stakeholders.

However, this concept of consensus falls short of the ideal form of consensus envisioned by deliberative democratic theory, and in fact, is not much of a true “consensus” at all. “Consensus” in negotiated rulemaking means that every party to the negotiations consents to the proposed language, which includes the Department of Education’s representative. If anyone dissents, then the NPRM will be drafted by Department of Education staff (Natow, 2017; Pelesh, 1994). This leaves a lot of discretion in the hands of the Department—although all negotiators effectively have “veto power” over proposed regulatory language in that even one dissenter means that no consensus occurs, the Department of Education is the sole negotiator who gets to choose which nonconsensus-based language will go into the NPRM. So, while other negotiators must decide whether the language under consideration is a better alternative than what they think the Department of Education would draft on its own, the Department knows that it always has the choice to dissent and write the NPRM however it wants. One interest group leader interviewed for this study even imagined how the Department of Education could (if it so desired) create a negotiating team that is unlikely to reach consensus, to its own benefit:

[E]ssentially, if you were in the Department and you were mischievous and wanted to make the final rule pretty much what you wanted it to be, you would find a diverse set of negotiators. You would appoint a diverse set, who you knew would not agree on the issue. You’d go through the process of having negotiated rulemaking sessions, and at the end you – knowing

they weren't going to agree – would then apply the rule that, since I didn't get consensus on this, I can follow whatever mandate I, the official in the Department of Ed, wants to follow.

In this respect, the concept of “consensus” as applied in higher education negotiated rulemaking is not a true consensus, because one party—the Department of Education—holds a great deal of power that no other participant in the process has.

Discussion & Conclusion

This article has examined the extent to which the higher education negotiated rulemaking process resembles deliberative democracy. It is perhaps unrealistic to expect that a policymaking process wrought with politics would exemplify an egalitarian process (e.g., Abelson et al., 2003). However, the less the rulemaking process reflects principles of democratic theory, the more difficult it may be for constituents to view the process as democratically legitimate (see similar argument in Golden, 1998). Given the higher levels of attention and controversy that have surrounded higher education rulemaking in recent years (e.g., Mettler, 2014; Natow, 2017; Zemsky, 2013), demonstrating the democratic legitimacy of this process has become crucial for the Department of Education. This study demonstrates that higher education negotiated rulemaking reflects several aspects of deliberative democracy, but in other ways is antithetical to deliberative democracy.

Higher education negotiated rulemaking accords with principles of deliberative democracy in a number of ways. The process brings a diverse array of stakeholders to the negotiating table, including students and consumer groups. The discussions—which are open for public observation—last multiple days at a time over a period of months. Negotiations are facilitated by trained mediators who keep the discussion moving and help to ensure that every voice is heard. Negotiators are frequently well informed about the issues under discussion. Observers attending negotiated rulemaking sessions can make statements to the committee. Unanimous consent to proposed regulatory language is needed if the language is to be used in the NPRM, but even when such consensus does not occur, evidence shows that negotiations have influenced the Department of Education when it has drafted proposed regulations by itself. Documents used during negotiated rulemaking, as well as transcripts of what is said at the regional meetings and, more recently, at negotiated rulemaking, later appear on the Department of Education's website.

However, a number of aspects of higher education negotiated rulemaking do not align as well with principles of deliberative democracy. Although attempts are

made to include several different categories of stakeholders in these negotiations, there are always stakeholders who are left out. Often, these are individuals and groups who do not have enough resources to participate in the process, which can cost a great deal of money and time, particularly for stakeholders who live outside of the Washington, D.C. area. Also, the power distribution within the rulemaking process is not equal. The Department of Education in particular holds most of the power, because while any one negotiator can block consensus, only the Department's negotiator can both obstruct consensus and then write the NPRM by itself. This power of the Department makes the concept of "consensus" in this context less meaningful. While many negotiators are well-informed, this is not always true, and panels with less informed participants are less effective (see also Natow, 2017).

Private individuals may observe negotiated rulemaking in person, but there is evidence that such participation is limited and public statements at the end of the sessions have little influence (see also Natow, 2017). The limited public involvement in higher education negotiated rulemaking, even though the meetings are open to the public, is unsurprising. As Coglianesse (2006) notes, "[p]articipating in a rulemaking requires, at a minimum, understanding that regulatory agencies make important decisions affecting citizens' interests, as well as knowing about specific agencies and the new rules they propose" (p. 965). In finding that the ability of the public to submit comments during the notice-and-comment period via the Internet did not result in a substantial increase in comments being submitted, Coglianesse (2006) observed that technology-enabled commenting was not enough to "overcome the deep motivational, cognitive, and knowledge-based chasms that stand in the way of citizen participation" (p. 967). My study's findings suggest that the same might be said for public commenting during higher education negotiated rulemaking.

In sum, the negotiated rulemaking process represents a "mixed bag" when it comes to deliberative democracy. Several aspects of the process are certainly deliberatively democratic and may therefore bestow some democratic legitimacy on the process. However, there are enough nondemocratic factors that may give rise to skepticism over whose interests are really being represented and protected through this process.

The Department of Education could take some steps to make the process more deliberatively democratic, including continuing the recent practice of video-streaming negotiated rulemaking proceedings in real time, providing financial assistance for under-resourced organizations and individuals to serve as negotiators, holding regional meetings at additional times and locations across the

country, and making a more meaningful attempt to take public input into account during negotiations. Other authors have called for policy change more broadly to bring more collaboration into processes of developing administrative law (Bingham, 2010; Working Group on Legal Frameworks for Public Participation, 2013). For example, Bingham (2010) proposed change through legislation or executive order that would enable government “agencies to use public participation and collaboration much differently, much more, and much earlier in the policy process” (p. 344). Reforms such as these can encourage negotiated rulemaking and other forms of regulatory policymaking to become more deliberatively democratic.

The research reported in this article is important for several reasons. First, it provides greater transparency to higher education negotiated rulemaking, a policymaking process that has serious implications for college access and affordability as well as the financial well-being of higher education institutions. Moreover, in light of the fact that some actors have claimed that the Department of Education may have exceeded its policymaking authority through this process (see Nelson, 2013), this study demonstrates the ways in which the process is (and is not) deliberatively democratic, which may help observers of the process to assess its democratic legitimacy and to determine how the process may be made even more democratic.

Lessons from this study may also be instructive with regard to negotiated rulemaking taking place in related fields, such as in the Department of Education’s Office of Elementary and Secondary Education, as well as in agencies other than the Department of Education that use negotiated rulemaking, including the Environmental Protection Agency (e.g., Chemical Data Reporting, 2017), the Department of Energy (e.g., Appliance Standards and Rulemaking Federal Advisory Committee, 2015), and the Federal Highway Administration (e.g., Tribal Transportation Self-Governance Program, 2017), among others. Although negotiated rulemaking may give the appearance of being deliberatively democratic, it fails to meet the standards of deliberative democracy in a number of ways. With changes to the process that involve increased transparency and attempts to involve additional and more diverse participants, negotiated rulemaking procedures can enhance their democratic legitimacy through approximating a deliberative democratic process.

References

- Abelson, J., Forest, P., Eyles, J., Smith, P., Martin, E., & Gauvin, F. (2003). Deliberations about deliberative methods: Issues in the design and evaluation of public participation processes. *Social Science & Medicine*, 57, 239-251. doi:10.1016/S0277-9536(02)00343-X
- Administrative Procedure Act, 5 United State Code §§ 500 et seq. (2012).
- Appliance Standards and Rulemaking Federal Advisory Committee: Notice of intent to establish the dedicated purpose pool pumps working group to negotiate a Notice of Proposed Rulemaking (NOPR) for energy conservation standards, 80 Fed. Reg. 51483 (2015).
- Armstrong, D., Gosling, A., Weinman, J., & Marteau, T. (1997). The place of inter-rater reliability in qualitative research: An empirical study. *Sociology*, 31, 597-606. doi:10.1177/0038038597031003015
- Beierle, T. C. (2003, April). *Discussing the rules: Electronic rulemaking and democratic deliberation* (Discussion Paper No. 03-22). Washington, DC: Resources for the Future.
- Bergeron, D. (2012, July). *Negotiated rulemaking – What you need to know and how you can participate* [PowerPoint presentation, NASFAA Conference, Chicago, IL]. Retrieved from ifap.ed.gov/presentations/attachments/NASFAA2012NegotiatedRulemakingWhatYouNeedtoKnowandHowYouCanParticipate.ppt
- Bingham, L. B. (2010). The next generation of administrative law: Building the legal infrastructure for collaborative governance. *Wisconsin Law Review*, 2010, 297-356.
- Bohman, J. (1997). Deliberative democracy and effective social freedom: Capabilities, resources, and opportunities. In J. Bohman & W. Rehg (Eds.), *Deliberative democracy: Essays on reason and politics* (pp. 321-348). Cambridge, MA: The MIT Press.
- Bohman, J. (1998). Survey article: The coming of age of deliberative democracy. *The Journal of Political Philosophy*, 6, 400-425. doi:10.1111/1467-9760.00061

- Camera, L. (2017, November 14). Democrats hit DeVos Education Department for lack of transparency. *U.S. News & World Report*. Retrieved from <https://www.usnews.com/news/education-news/articles/2017-11-14/democrats-hit-devos-education-department-for-lack-of-transparency>
- Carlitz, R., & Gunn, R. (2005). E-Rulemaking: A new avenue for public engagement. *Journal of Public Deliberation*, 1(1), 1-7. Retrieved from <https://www.publicdeliberation.net/jpd/vol1/iss1/art7>
- Carson, L., & Hartz-Karp, J. (2005). Adapting and combining deliberative designs: Juries, polls, and forums. In J. Gastil & P. Levine (Eds.), *The deliberative democracy handbook: Strategies for effective civic engagement in the twenty-first century* (pp. 120-138). San Francisco, CA: Jossey-Bass.
- Chambers, S. (2003). Deliberative democratic theory. *Annual Review of Political Science*, 6, 307-326. doi:10.1146/annurev.polisci.6.121901.085538
- Chemical Data Reporting; Requirements for Inorganic Byproduct Chemical Substances; Notice of Establishment of Negotiated Rulemaking Committee; Notice of Public Meetings, 82 Fed. Reg. 25790 (2017).
- Christiano, T. (1997). The significance of public deliberation. In J. Bohman & W. Rehg (Eds.), *Deliberative democracy: Essays on reason and politics* (pp. 243-277). Cambridge, MA: The MIT Press.
- Coglianesse, C. (2004). E-rulemaking: Information technology and the regulatory process. *Administrative Law Review*, 56, 353-402.
- Coglianesse, C. (2006). Citizen participation in rulemaking: Past, present, and future. *Duke Law Journal*, 55, 943-968.
- Cohen, J. (1997). Deliberation and democratic legitimacy. In J. Bohman & W. Rehg (Eds.), *Deliberative democracy: Essays on reason and politics* (pp. 67-91). Cambridge, MA: The MIT Press.
- Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program: Notice of proposed rulemaking, 72 Fed. Reg. 32410 (2007).
- Federal Student Aid Programs: Interim final regulations, request for comments,

71 Fed. Reg. 45666 (2006) (to be codified at 34 C.F.R. pts. 600, 668, 673, 674, 675, 676, 682 and 685).

Funk, W. (1997). Bargaining toward the new millennium: Regulatory negotiation and the subversion of the public interest. *Duke Law Journal*, 46, 1351-1388.

Gaus, G. F. (1997). Reason, justification, and consensus: Why democracy can't have it all. In J. Bohman & W. Rehg (Eds.), *Deliberative democracy: Essays on reason and politics* (pp. 205-242). Cambridge, MA: The MIT Press.

Golden, M. M. (1998). Interest groups in the rule-making process: Who participates? Whose voices get heard? *Journal of Public Administration Research and Theory*, 8, 245-270.
doi:10.1093/oxfordjournals.jpart.a024380

Gutmann, A., & Thompson, D. (2004). *Why deliberative democracy?* Princeton, NJ: Princeton University Press.

Habermas, J. (1994). *The inclusion of the other: Studies in political theory*. Cambridge, MA: The MIT Press.

Harter, P. J. (1982). Negotiating regulations: A cure for malaise. *Georgetown Law Journal*, 71(1), 75-91. doi:10.1016/S0195-9255(82)80028-0

Harter, P. J. (2004). A plumber responds to the philosophers: A comment on Professor Menkel-Meadow's essay on deliberative democracy. *Nevada Law Journal*, 5, 379-388.

Hartz-Karp, J. (2005). A case study in deliberative democracy: A dialogue with the city. *Journal of Public Deliberation*, 1(1), 1-15.

Hicks, D. (2002). The promise(s) of deliberative democracy. *Rhetoric & Public Affairs*, 5, 223-260. doi:10.1353/rap.2002.0030

Higher Education Act, 20 U.S. Code §§ 1001 et seq. (2012).

Hillman, N. W., Tandberg, D. A., & Sponsler, B. A. (2015). Public policies for higher education: Strategies for framing a research agenda. *ASHE Higher Education Report*, 41(2), 1-98.

- Kerwin, C. M., & Furlong, S. R. (2011). *Rulemaking: How government agencies write law and make policy* (4th ed.). Washington, DC: CQ Press.
- Knight, J., & Johnson, J. (1997). What sort of political equality does deliberative democracy require? In J. Bohman & W. Rehg (Eds.), *Deliberative democracy: Essays on reason and politics* (pp. 279-319). Cambridge, MA: The MIT Press.
- Lowry, R. C. (2009). Reauthorization of the federal Higher Education Act and accountability for student learning: The dog that didn't bark. *Publius: The Journal of Federalism*, 39, 506-526.
doi:<https://doi.org/10.1093/publius/pjp010>
- Lubbers, J. S. (1998). *A guide to federal agency rulemaking* (3rd ed.). Chicago, IL: American Bar Association.
- Lubbers, J. S. (2014, December 5). *Enhancing the use of negotiated rulemaking by the U.S. Department of Education*. doi:10.2139/ssrn.2764954
- Menkel-Meadow, C. (2004). The lawyer's role(s) in deliberative democracy. *Nevada Law Journal*, 5, 347-369.
- Mettler, S. (2014). *Degrees of inequality: How the politics of higher education sabotaged the American dream*. New York, NY: Basic Books.
- Michelman, F. I. (1997). How can the people ever make the laws? A critique of deliberative democracy. In J. Bohman & W. Rehg (Eds.), *Deliberative democracy: Essays on reason and politics* (pp. 53-79). Cambridge, MA: The MIT Press. doi:10.4324/9781315251288-2
- Natow, R. S. (2017). *Higher education rulemaking: The politics of creating regulatory policy*. Baltimore, MD: Johns Hopkins University Press.
- Negotiated Rulemaking Act, 5 U.S. Code §§ 561 et seq. (2012).
- Neilson, A. (2014). In defense of formal rulemaking. *Ohio State Law Journal*, 75, 237-292.
- Nelson, L. A. (2013, April 16). Trying again on 'Gainful.' *Inside Higher*

Education. Retrieved from <https://www.insidehighered.com/news/2013/04/16/us-announces-rulemaking-gainful-employment-state-authorization-and-long-term-agenda?width=775&height=500&iframe=true>

- O'Connell, A. J. (2008). Political cycles of rulemaking: An empirical portrait of the modern administrative state. *Virginia Law Review*, 94, 889-986. Retrieved from <https://www.jstor.org/stable/25470575>
- Pelesh, M. L. (1994). Regulations under the Higher Education Amendments of 1992: A case study in negotiated rulemaking. *Law & Contemporary Problems*, 57(4), 151-170. doi:10.2307/1192060
- Pritzker, D. M. & Dalton, D. S. (1995, September). *Negotiated rulemaking sourcebook*. Washington, DC: United States Government Printing Office.
- Rose-Ackerman, S. (1994). Consensus versus incentives: A skeptical look at regulatory negotiation. *Duke Law Journal*, 43, 1206-1220.
- Susskind, L. & McMahon, G. (1985). The theory and practice of negotiated rulemaking. *Yale Journal on Regulation*, 3, 133-165.
- Tribal Transpiration Self-Governance Program: Negotiated rulemaking committee meeting, 82 Fed. Reg. 60571 (2017).
- United States Department of Education. (2017, December 4). *Gainful employment negotiated rulemaking committee 2017-2018: Session 1*. Retrieved from www2.ed.gov/policy/highered/reg/hearulemaking/2017/mondaydecember4transcript.docx
- Weeks, E. C. (2000). The practice of deliberative democracy: Results from four large-scale trials. *Public Administration Review*, 60, 360-372.
- Working Group on Legal Frameworks for Public Participation. (2013, October). *Making public participation legal*. Denver, CO: National Civic League.
- Zemsky, R. (2013). *Checklist for change: Making American higher education a sustainable enterprise*. New Brunswick, NJ: Rutgers University Press.
- Zheng, W. (2015). The revolving door. *Notre Dame Law Review*, 90, 1265-1308.