

## Rulemaking through Social Media – Stimulating or Corrupting Public Comment?

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### I. INTRODUCTION

“E-topians” believe that technological developments will usher in a brighter future in many domains, not least in how democracies function. New technologies will, it is claimed, enable a robust, meaningfully participatory self-governance, in which an engaged and informed citizenry partners with government officials in a deliberative process and barriers between the governed and the governors are obliterated.

Notice-and-comment rulemaking is the *pre-digital* government process that most approached the e-topian vision of public participation in deliberative governance. K.C. Davis called notice-and-comment rulemaking the “most democratic of procedures” because all may participate.<sup>1</sup> Regulators are required to accept comments from any interested person and consider and respond to them before making a final decision. Direct public engagement has been seen as an antidote to the democracy deficit that plagues policymaking by unelected bureaucrats.<sup>2</sup> In reality, however, rulemaking historically has been an insiders’ game, played by knowledgeable, deep-pocketed, and well-represented interests with a lot at stake. But because the mechanism is already in place, and all that is necessary is to make it more effectively open to ordinary citizens, notice and comment rulemaking would seem to be the place where the Internet really could produce a democratic transformation.<sup>3</sup>

In the last two decades, the notice-and-comment process for federal agency rulemaking has changed from a paper process to an electronic one. That may have many consequences, large and small, and I will explore them below. But the most (potentially) significant change is that it has opened up the process to the lay public. What had been a challenging and largely invisible process is now an accessible and visible one; the barriers to participation are massively reduced. So if electronic rulemaking will work a revolution it will be by making the rulemaking process more democratic in a quite literal sense – by engaging the participation of the demos.

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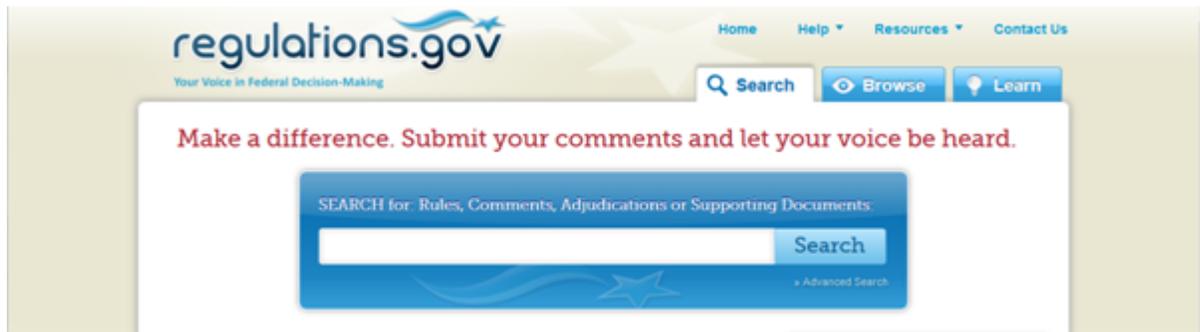
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<sup>1</sup> KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 66 (1969).

<sup>2</sup> See, e.g., Cass R. Sunstein, *Democratizing Regulation, Digitally*, 34 DEMOCRACY: A JOURNAL OF IDEAS (Fall 2014) (“During the New Deal and since, some observers have expressed concern that regulators are not directly accountable to the people, and have contended that they may suffer from some kind of ‘democracy deficit.’ For such critics, notice-and-comment rule-making is an important way to legitimate the administrative process, by increasing accountability and responsiveness. Democratic participation is built into the very idea of notice-and-comment rule-making.”).

<sup>3</sup> Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395 (2011) [hereinafter *Rulemaking 2.0*] (“[In the rulemaking setting,] ‘a formal legal structure for transparency, participation, and collaboration already exists. Seemingly, nothing fundamental about the process must change before new information and communications technologies could realize rulemaking’s latent open-government potential for broader public understanding and participation.’”).

The official narrative underlying on-line rulemaking mightily invokes these democratic aspirations. The federal government's e-rulemaking site, regulations.gov, welcomes visitors thus:<sup>4</sup>



The promise is explicit; this is the mechanism through which you, and every other American, can “make a difference” and “let your voice be heard”; the site is “your voice in federal decisionmaking.”<sup>5</sup> A separate fact sheet assures visitors that “public comments make a difference” and “lend democratic legitimacy” to agency regulations.<sup>6</sup>

This democratic narrative is consistent with a familiar portrayal. As John de Figueiredo wrote a decade ago, one basic

goal of e-rulemaking is to increase the level of participatory democracy. This is also called the mobilization hypothesis, where electronic rulemaking so lowers the cost of participation, that it opens up the administrative process to individual citizens. This goal is founded in literature that argues that participation enhances the democratic process in rulemaking which, in turn, increases bureaucratic legitimacy and federal government credibility, strengthens individual autonomy and rights of self-governance, increases public understanding of rulemaking, and enhances the accountability of administrative agencies to other branches of government. Underlying these goals is the objective to increase the quantity of comments and general participation levels of individuals in the rulemaking process.<sup>7</sup>

That objective is modest compared to what some writers suggest. Beth Noveck is perhaps the most ambitious visionary of the e-government future.

Imagine if parliaments or presidents, when considering a pending bill on farm subsidies, had the ability to target questions and receive manageable, relevant

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<sup>4</sup> <http://www.regulations.gov/#!home>.

<sup>5</sup> The “Your Voice in Federal Decision-Making” tag line is part of the banner and thus appears on literally every page of the site.

<sup>6</sup> Regulations.gov, *Public Comments Make a Difference*, [http://www.regulations.gov/docs/FactSheet\\_Public\\_Comments\\_Make\\_a\\_Difference.pdf](http://www.regulations.gov/docs/FactSheet_Public_Comments_Make_a_Difference.pdf).

<sup>7</sup> John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 *Duke L.J.* 969 (2006).

responses from agronomists, economists, farmers and others with expertise and experience. Instead of having to rely exclusively on a select group of professionals who sit in Washington or Brussels, people with every imaginable skill and passion could augment their intelligence.

. . . Imagine if the White House or Elysée Palace websites offered a simple graphic illustrating each step involved in the process of writing a policy memo for the President’s consideration or drafting a rule for a ministry or signing up to offer to implement a solution to a problem. We’d be opening up a window and shining light on the otherwise opaque and mysterious governing process, nudging people to contribute relevant information and opinions, and inviting them to play a role in decision making.<sup>8</sup>

On these accounts, electronic rulemaking sure looks like a cure to whatever democratic deficit may plague agency decisionmaking. Expectations for the switch from a paper to an on-line process were high; many anticipated a “revolution”<sup>9</sup> that would make rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic. In the event, the move online has not produced a fundamental shift in the nature of notice-and-comment rulemaking. The process remains quite recognizable.

In the meantime, the online world in general has come to be increasingly characterized by participatory and dialogic activities, with a move from static, text-based websites to dynamic, multi-media platforms with large amounts of user-generated content. At the heart of this move to “Web 2.0” have been social media: blogs, Twitter, Facebook, YouTube, IdeaScale, wikis, Flickr, Tumblr, and the like. *Outside* the rulemaking setting, federal, state, and local governments have enthusiastically jumped on the social media bandwagon.

If the move online has not produced the hoped-for gains in public participation, democratic legitimacy, and quality, perhaps the problem is not that those goals are unattainable but rather just that agencies have not been using the right technologies. Observers have labeled the existing version of e-rulemaking “Rulemaking 1.0,” as opposed to a possible “Rulemaking 2.0.”<sup>10</sup> Rulemaking 2.0 would share the characteristics commonly associated with “Web 2.0”: interaction, collaboration, non-static web sites, use of social media, and creation of user-generated content.<sup>11</sup> For those in the thick of these technological shifts, it seems self-evident that

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<sup>8</sup> Beth Simone Noveck, *Evolving Democracy for the 21<sup>st</sup> Century* 6-7 (paper prepared for the Club de Madrid 2011 Annual Conference, Nov. 8-9, 2011, New York City).

<sup>9</sup> See Beth S. Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433 (2004); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet*, 50 ADMIN. L. REV. 277 (1998).

<sup>10</sup> See, e.g., Farina et al., *Rulemaking 2.0*; Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011) [hereinafter *Rulemaking in 140 Characters*]; Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0 and a Vision for Broader, More Informed and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77 (2013).

<sup>11</sup> See, e.g., Beth Noveck, *Turning Rule Writers Into Problem Solvers: Creating a 21st Century Government That’s Open and Competent by Improving Regulation and Regulatory Review*, Cairns Blog (Jan. 26, 2011), <http://cairns.typepad.com/blog/2011/01/turning-rule-writers-into-problem-solvers-creating-a-21st-century-government-thats-open-and-competen.html>; BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER (2009).

“[i]mproving public input today can’t be done without thinking of the existence and impact of social media.”<sup>12</sup>

Yet agencies have struggled to integrate social media into the rulemaking process. The Administrative Conference of the United States has encouraged them to make the attempt, though cautiously and without any sense that doing so will be easy or magical.<sup>13</sup> And some agency efforts have been controversial at best and illegal at worst. In particular, the Environmental Protection Agency’s use of social media in connection with its Waters of the United States rulemaking<sup>14</sup> has produced unflattering newspaper coverage,<sup>15</sup> deep (though partisan) hostility from Congress,<sup>16</sup> and a finding of illegality from the Government Accountability Office.<sup>17</sup> Why? Ostensibly because the agency fell afoul of prohibitions on “covert propaganda” and lobbying by agencies. But the unease runs deeper, and the fundamental questions concern whether a rulemaking agency should be a passive recipient of “data, views, and argument”<sup>18</sup> or an active participant in a civic republican dialogue.

This paper considers how new technologies, particularly social media platforms, might or might not be used to construct a better rulemaking process, whether better means “more democratic,” and what democracy entails in this setting.

## II. ASSESSING E-RULEMAKING

### A. High Hopes

Notice-and-comment rulemaking has often been held out as the best example of participatory democracy in actual American governance. However, the traditional paper-based rulemaking process, with notice via a hard-copy *Federal Register* and comments stored in a docket room in Washington, DC, always and necessarily fell far short of the ideal. Barriers to participation reduced the likelihood of “diverse public comment,” limited the opportunity for participation by *all* affected parties, and meant that some useful information was not reaching the agencies.<sup>19</sup>

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<sup>12</sup> Clay Johnson, *A More Social Open Government*, Expert Labs Blog (Aug. 12, 2011), <http://expertlabs.org/2011/08/expert-labs-recommendations-for-open-gov.html>.

<sup>13</sup> ACUS Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

<sup>14</sup> Definition of “Waters of the United States”, 80 Fed. Reg. 37053 (2015).

<sup>15</sup> Eric Lipton & Coral Davenport, *Critics Hear EPA’s Voice in “Public Comments”*, N.Y. TIMES, A1 (May 18, 2015).

<sup>16</sup> For example, Senators Sasse and Inhofe have formally requested the Department of Justice to conduct a criminal investigation and consider prosecution of EPA employees for their use of social media in connection with the rulemaking. See Letter from Sens. Ben Sasse & James Inhofe to Attorney General Loretta Lynch (Jan. 21, 2016).

<sup>17</sup> U.S. Gov’t Accountability Office, Environmental Protection Agency-Application of Publicity or Propaganda and Anti-Lobbying Provisions, B-326944 (Dec. 14, 2015).

<sup>18</sup> The Administrative Procedure Act requires agencies engaged in notice-and-comment rulemaking to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” 5 U.S.C. § 553(c).

<sup>19</sup> See, e.g., Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 245-67 (1998); Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 WIS. L. REV. 671, 681-89 (detailing costs of participation in administrative processes).

Perhaps more important, the basic structure—a one-shot opportunity to submit comments—prevented any real “*exchange . . . between interested persons and the agency.*” And note what the D.C. Circuit does not even mention, *viz.* the possibility of “an exchange of

Electronic rulemaking was widely anticipated to mitigate these shortcomings. The expectation was that it would produce two basic changes in the way agencies write regulations and, by extension, the substance of the regulations ultimately adopted. First, the Internet massively reduces barriers to public participation in rulemaking. E-rulemaking was thus expected to open to all what had been a largely invisible insiders’ game limited to sophisticated players blessed with access, funds, a Washington, DC presence, and good lawyers. Second, e-rulemaking promised to make the process more *dialogic*. Instead of a spoked wheel, with the agency at the hub and numerous isolated commenters sending their comments in to the center, all independent of one another, the online process seemed to invite reply periods,<sup>20</sup> comments on comments, exchanges through different media, collaborative drafting—in short, a conversation, with genuine give and take.<sup>21</sup>

The expectation was that these two changes would in turn have three significant benefits. First, and most prosaically, it would be more efficient. Agencies would have less paper to manage, and centralizing the process would bring economies of scale.

Second, and most grandly, by bringing in a wider range of participants, the process would be more “democratic.” This assertion is often offered as self-evident; the more people participating in a process, the more democratic it is. But this claim requires some unpacking. Broad participation is not actually an end in itself, although agency staffers and commentators often treat it as one. Rather, the democratic value would seem to consist in (at least) three subsidiary values. (a) To the extent that agency rules reflect judgments about values or preferences rather than technical problems with right and wrong answers, they are arguably more legitimate if they reflect popular input. An agency decision that reflects what the public as a whole would do (or, perhaps, what the public as a whole would do if it were fully informed and thought about the problem conscientiously) is “democratic,”<sup>22</sup> and fuller participation is necessary, if not sufficient, for the agency to know what that is. (b) Broader popular participation will produce a more informed citizenry, which in turn will be able to hold political actors accountable through mechanisms *other than* participation in rulemaking. (c) Broader participation will produce greater buy-in regarding the resulting regulations, which in turn will lead to fuller and less costly compliance.

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<sup>20</sup> See, e.g., Neil Eisner, “Policy Direction & Management” (Center for the Study of Rulemaking, Mar. 16, 2005), available at [http://www.american.edu/rulemaking/panel3\\_05.pdf](http://www.american.edu/rulemaking/panel3_05.pdf) (Department of Transportation official endorsing reply periods and anticipating that they “will be tremendously increased as more agencies have electronic, internet-accessible dockets”).

<sup>21</sup> Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1429-30, 1462-71 (2002); David Schlosberg et al., *Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation*, 4 J. INFO. TECH. & POL. 37, 49-51 (2007).

<sup>22</sup> See John M. de Figueiredo & Edward D. Stiglitz, *Democratic Rulemaking*, in THE OXFORD HANDBOOK OF LAW AND ECONOMICS (forthcoming) (suggesting two possible benchmarks against which to measure how “democratic” rulemaking is: “legislative matching” (i.e. how closely the rule matches what Congress would have done) and “electorate matching” (i.e. how closely the rule matches what the median voter would have done)).

The third anticipated value of broader and more dialogic participation was that it would, simply, produce better rules. This might happen for several reasons. For one thing, rulemakers would have access to more and better information. As Cary Coglianese wrote: “[T]he local sanitation engineer for the City of Milwaukee . . . will probably have useful insights about how new EPA drinking water standards should be implemented that might not be apparent to the American Water Works Association representatives in Washington, DC.”<sup>23</sup> Here e-rulemaking optimists invoke, expressly or otherwise, a good deal of contemporary writing about “dispersed knowledge” and “the wisdom of crowds.”<sup>24</sup> Second, e-rulemaking might produce better rules because the process would allow for a fuller vetting of public submissions. Having comments online and readily accessible could result in comments on comments, reply periods, or other exchanges that would test and refine public submissions in a way that does not occur when everyone submits directly, at the last minute, without the opportunity to see what others have submitted.<sup>25</sup>

## **B. Modest Improvements**

E-Rulemaking is indisputably an improvement over the paper-based process it replaced. First, it is easier to submit a comment. This is a plus; it is hardly a transformation. Printing out and mailing a document is not that hard either.

Much more important is the ready availability of materials contained in the rulemaking docket. Having that material available online improves the ability of commenters to review and respond to it more effectively, and this can only be a good thing. The point is not just that the new regime is more efficient, though it is that.<sup>26</sup> It also makes for higher quality comments. No

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<sup>23</sup> Cary Coglianese, *Weak Democracy, Strong Information: The Role of Information Technology in the Rulemaking Process*, in GOVERNANCE AND INFORMATION TECHNOLOGY: FROM ELECTRONIC GOVERNMENT TO INFORMATION GOVERNMENT 101, 117 (Viktor Mayer-Schonberger & David Laze eds., 2007).

<sup>24</sup> As President Obama put it on his first day in office:

Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking, and to provide their Government with the benefits of their collective expertise and information.

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

<sup>25</sup> Other enumerations of expected benefits of more open and inclusive policymaking are possible. Consider this overlapping but slightly different list:

- Greater trust in government.
- Better outcomes at less cost.
- Higher compliance.
- Ensuring equity of access to public policy making and services.
- Leveraging knowledge and resources.
- Production of more innovative solutions.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR PUBLIC GOVERNANCE AND TERRITORIAL DEVELOPMENT, FOCUS ON CITIZENS: PUBLIC ENGAGEMENT FOR BETTER POLICY AND SERVICES 23-24 (2009).

<sup>26</sup> The Federal Docket Management System reportedly saved the government \$30 million over five years when compared to paper-based docketing. Office of Mgmt. & Budget, Exec. Office of the President, Report to Congress

one has *proved* this, but it is supported by a survey of agency staff by Jeffrey Lubbers<sup>27</sup> and informal conversations, and it is what one would expect.

Widely available rulemaking dockets are of use to others besides commenters. Rulemaking dockets contain a lot of good stuff. One of the things that regulations.gov has made steady and impressive progress on over the years is making it easier to find material on its site. One major breakthrough was full-text searching. In 2012 the site introduced a set of Application Programming Interfaces (APIs) to enable third parties to search and retrieve material on the regulations.gov site. The enhanced availability of rulemaking materials is not an aspect of notice-and-comment rulemaking per se, and for present purposes it suffices just to note the expansive literature on the utility of making government-held information widely available.<sup>28</sup>

In addition, an online docket makes it easier for the agency staff to do *its* job. No one has to worry that something has been checked out, more than one person can use a document at a time, people stay out of each other's way.<sup>29</sup> And the docket is available to agency staff who do not work at headquarters.<sup>30</sup>

### C. No Transformation

While the *mechanics* of notice-and-comment rulemaking have changed, and very much for the better, the *nature* of the rulemaking process remains essentially what it was before the move online. E-rulemaking's grander anticipated benefits have not yet come to pass.<sup>31</sup> With isolated exceptions, there has not been a huge outpouring of lay comments.<sup>32</sup> Moreover, though the

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on the Benefits of the E-Government Initiatives 10 (2010), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/egov\\_docs/FY10\\_E-Gov\\_Benefits\\_Report.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/FY10_E-Gov_Benefits_Report.pdf).

<sup>27</sup> See Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451 (2010). Lubbers asked agency staff about sixteen activities that e-Rulemaking might have made easier or harder a compared to a paper-based process. Strikingly, respondents reported that *each* of the sixteen tasks had become easier. The second highest of the sixteen was: "disseminate information relevant to the agency's proposed rulemaking (e.g., studies, economic analyses, legal analyses), so as to generate more informed commenters." *Id.* at 461.

<sup>28</sup> See, e.g., Jerry Brito, *Hack, Mash, and Peer: Crowdsourcing Government Transparency*, 9 COLUM. SCI. TECH. L. REV. 119 (2008); David Robinson et al., *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160 (2009); Richard Thaler, *This Data Isn't Dull. It Improves Lives*, N.Y. TIMES, March 13, 2011, at B5.

<sup>29</sup> Indeed, the task that scored highest in the Lubbers survey—i.e., the task for which there was the highest level of agreement that it had been made easier by the move on-line—was: "Coordinate the rulemaking internally by allowing many people to look at the same rulemaking docket without getting in each others' way." Lubbers, *supra* note 27, at 461.

<sup>30</sup> A Department of Transportation staffer reports that in the bad old days "one DOT organization found it necessary to fly a staff member from Boston to Washington, D.C., several days each week just to locate and review docketed material housed throughout the nine separate docket offices." Christine Meers, *Taking Government to the People* (unpublished manuscript), quoted in Thomas C. Bierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation* 14 (April 2003) (Resources for the Future Discussion Paper 03-22), available at <http://ageconsearch.umn.edu/bitstream/10681/1/dp030022.pdf>.

<sup>31</sup> Useful overviews include Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENVTL. & ADMIN. L. 1 (2012) [hereinafter *Coglianese Report*]; *Rulemaking 2.0*, *supra* note 10, at 417-19.

<sup>32</sup> Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 952-58 (2006).

matter is disputed, lay comments have by and large not been especially helpful or influential. Few people are aware of the opportunity; of those who are, few bother to participate; and few of those who participate manage to submit something useful or persuasive. Some simply assert a bottom line.<sup>33</sup> Some reflect engagement and sincerity, but do not actually say anything.<sup>34</sup> Some are informed and intelligent, but just do not tell the agency anything it does not already know.<sup>35</sup> Some urge the agency to take an alternative approach that is not within its authority.<sup>36</sup> And, of course, as one would predict based on reading other on-line comments sections, many are really, really angry and abusive.<sup>37</sup> What lay comments generally *fail* to do is provide agency staff what

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<sup>33</sup> For example, these two comments, reprinted here in their entirety (as are those in the following footnotes). “Please DO NOT allow smoking of electronic cigarettes on aircraft.” DOT-OST-2011-0044-0335. “regulate”. FSO-2010-0002-1094 (regarding the Volcker rule) (capitalization and punctuation, or lack thereof, in the original).

<sup>34</sup> “I am very sure that the effects will pronounced more on both sides but i guess it is debatable. It will be interesting to see what others’ view point is on the electronic reporting effects on the public and the government.” <http://www.regulations.gov/exchange/node/509> (regarding the effects on state and local governments of requiring mandatory electronic reporting as part of water pollution permits). “Technology is a dual edged sword and could work to our advantage or disadvantage depending on the level of responsibility that we have when we use it.”, <http://www.regulations.gov/exchange/node/65> (same, in response to a quite focused question about what specific technologies governments would need in order to received electronically reported information).

<sup>35</sup> “The rocky mountain wolf is still recovering across a broader range, I think delisting in distinct places (e.g., Wyoming) will limit if not derail this process.” FWS-R6-ES-2011-0039-1316 (delisting wolf under Endangered Species Act). “I urge you to make the interim ban on texting by drivers of commercial trucks and buses permanent. It’s bad enough that cell phone usage is allowed. Texting has to be outlawed permanently. Control of large vehicles cannot be maintained if the driver does not keep his/her eyes on the road all the time.” FMCSA-2010-0029-0005 (regarding proposed ban on texting while driving a commercial vehicle).

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Dear EPA,

I support the proposed new rules that would increase national fuel economy standards to 54.5 miles per gallon by the year 2025 and I commend the Obama administration for continuing to pursue strong, clean vehicle standards that will reduce our dangerous dependence on oil and cut global warming pollution, while creating much-needed jobs and saving drivers money at the pump. Additionally, these landmark standards remind us of the valuable role that the federal government can play in strengthening the economy and protecting the planet. We cannot afford to delay in confronting the threats of climate change and our dangerous oil dependence. I urge you to finalize the strongest possible standards free of harmful loopholes.

In addition, Mr. President, I ask you to take steps or measures to get the ball rolling on alternate sources of energy, such as solar power. The United States has always been a leader in research and development of new technologies, and there is no reason why our country should or even consider relinquishing that leadership. You have said that it will create new jobs, and I think that it makes all the sense in the world. The Chinese must not eat our breakfast, lunch, dinner, much less pie and coffee.

Thank you, Mr. President.

EPA-HQ-OAR-2010-0799-2422 (regarding automobile fuel economy standards)

<sup>37</sup> MORONS, MORONS - PLEASE PAY ATTENTION - KILLING 90% OF THE WOLVE POPULATION DISRUPTS THE ECO SYSTEM AS WE KNOW IT. JUST LIKE FRACKING IS CAUSING EARTHQUAKES AND GLOBAL WARMING, SO IS KILLING NATURES PREDATORS. FOR ALL THE MORONS IN GOVERNMENT - THIS IS NOT THE ONLY SOLUTION - GET YOUR HEADS OUT OF YOUR ASSES AND COME UP WITH AN INTELLIGENT SOLUTION. STUPID! STUPID! STUPID!!!! VIRTUALLY EVERY ONE IN

they most need: concrete examples, specific alternatives to the proposal, an awareness of statutory limitations, hard data or actual experience, and direct responses to specific questions the agency has asked.<sup>38</sup>

Finally, in those rulemakings that have generated extensive lay participation (a distinct minority) the comments have been dominated by duplicative submissions resulting from organized “astroturf” campaigns. Tens or hundreds of thousands of near-identical submissions are a testament to the costlessness of submitting a comment. But such “click-through democracy,” in Stuart Shulman’s phrase, may be a “harbinger[] of a slide into a technological arms race predicated on plebiscite-style governance.”<sup>39</sup> Even e-rulemaking’s greatest enthusiasts acknowledge that “the digitization of citizen participation practices has not worked well. . . . Online participation has thus evolved into ‘notice and spam’ rather than notice and comment.”<sup>40</sup>

Not surprisingly, then, almost all observers have concluded that lay comments generally and mass comments in particular have not been influential. Agencies “occasionally acknowledge the number of lay comments and the sentiments they express [but] they very rarely appear to give them any significant weight.”<sup>41</sup> Rulewriters do not value such submissions and may resent and deride them.<sup>42</sup>

In short, lay participation has shown isolated increases in quantity. But that increase has been haphazard, manipulated, uninformed, and largely unhelpful to rulewriters. As for the traditional, sophisticated participants, they are doing what they have always done. Their

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GOVERNMENT IS PLAIN STUPID WITH NO COMMON SENSE TO FIX OUR NATIONS’ PROBLEMS.

FWS-R6-ES-2011-0039-2221.

<sup>38</sup> See, e.g., Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 443 (2005) (noting that “individual commenters came across as being angry and exasperated,” “failed to understand the distinction between the regulation and the statute,” and rarely offered “anything remotely resembling a concrete proposal”). Cuellar identified five criteria for what makes rulewriters take comments seriously:

(a) Did the commenter distinguish the regulation from the statutory requirements?; (b) Did the commenter include at least a paragraph of text providing a particular interpretation of, and indicating an understanding of, the statutory requirement?; (c) Did the commenter propose an explicit change in the regulation provided in the notice of proposed rulemaking (NPRM)?; (d) Did the commenter provide at least one example or discrete logical argument for why the commenter’s concern should be addressed?; and (e) Did the commenter provide any legal, policy, or empirical background information to place the suggestions in context?

*Id.* at 431. Not surprisingly, lay commenters generally compare poorly with ones with professional training on these criteria. For a study of an individual rulemaking reaching similar conclusions, see Kimberly D. Krawiec, *Don’t Screw Joe the Plummer’: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53 (2013).

<sup>39</sup> Stuart W. Shulman, *Click-Through Democracy*, 20 USA SERVS. INTERGOVERNMENTAL NEWSLETTER 42, 42 (2007).

<sup>40</sup> NOVECK, *supra* note 11, at 138.

<sup>41</sup> Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343, 1346, 1363-64 (2011).

<sup>42</sup> David Schlosberg et al., *Deliberation in E-Rulemaking? The Problem of Mass Participation*, in ONLINE DELIBERATION: DESIGN, RESEARCH, AND PRACTICE 133, 143 (Todd Davies & Seeta Peña Gangadharan eds., 2009); Mendelson, *supra* note 41, at 1363.

comments are lengthy, well-researched, often prepared by counsel, and generally submitted right at the close of the comment period. (The last-minute submission is generally seen as being in part just a function of human nature, but also the result of the desire to avoid subjecting one's comments to review and critique by other commenters.<sup>43</sup>) The fact that the comments are posted on-line or attached to an email is no real change at all.

In addition, e-rulemaking has not proven more dialogic or collaborative than the traditional paper process. The FCC makes use of reply or rebuttal comment periods as a matter of course.<sup>44</sup> But the FCC largely stands alone. Use of reply periods remains quite rare and, strikingly, has not significantly increased with the move of rulemaking on-line.<sup>45</sup> Commenters still write their comments in isolation and most submit them right before the deadline; the agency still responds only in the preamble to the final rule. Instead of providing a shared venue for collaboration and discussion, electronic rulemaking, in Peter Shane's incisive description, "resembles a global suggestion box, appended to an electronic library."<sup>46</sup>

### III. THE PROMISE OF WEB 2.0

The experience with e-rulemaking to date invites an obvious question: might the promise of e-Rulemaking be more fully realized through use of other technologies? In particular, could agencies use social media to improve the rulemaking process? Since e-rulemaking began in earnest, the Internet has been transformed by so-called "Web 2.0" technologies. That term means different things to different people, but the core concept is that while Web 1.0 consisted of static websites and repositories from which users could retrieve information, Web 2.0 involves interaction, collaboration, the uploading of user-created content. In short, Web 2.0 is characterized by just the sort of activity that e-rulemaking was anticipated to produce but generally has not.

The essential features of social media (or, what are generally seen as essentially synonyms, "social technologies" or "social networking") are usually understood to include:

- the ability to support two-way social interactions in real time;
- the ability to allow creation and exchange of user-generated content ("UGC"); and
- easy and low-cost accessibility by large numbers of people without specialized skills or training.

The best-known social media platform is Facebook, familiar to just about everyone. Facebook has roughly 165 million users (about 130 million daily active users) in the United

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<sup>43</sup> Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current practices and Recommendations to the Administrative Conference of the United States* 30-33 (March 15, 2011), available at <http://www.acus.gov/sites/default/files/COR-Balla-Report-Circulated.pdf>.

<sup>44</sup> FCC Rules of Practice, 47 C.F.R. § 1.415(c) ("A reasonable time will be provided for filing comments in reply to the original comments, and the time provided will be specified in the notice of proposed rulemaking.").

<sup>45</sup> Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States* 9-10 (2011).

<sup>46</sup> Peter M. Shane, *Turning GOLD into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy*, in *ONLINE DELIBERATION: DESIGN, RESEARCH, AND PRACTICE* 149, 154 (Todd Davies and Seeta Peña Gangadharan eds. 2009).

States and over 1.5 billion users worldwide. Users go to the site to communicate with friends, sharing photos, information, and links to websites of interest. Everything of interest on the site is there because a user put it there—the content is user-generated—and the experience is defined by its interactive, communicative nature. Other examples include similar social networking sites, such as Google+; blogs; microblogs, of which Twitter is the dominant example; file or photosharing sites, such as Flickr or Instagram; wikis, which allow unlimited number of individuals to contribute to or edit text; and mechanisms for voting or ranking specific items, such as IdeaScale or Reddit.

### **A. The Appeal of Social Media for Rulemaking**

Recall the ways in which e-Rulemaking has fallen short of its original vision: barriers to effective participation remain high because members of the public remain largely unaware and uninformed about the process and particular rulemakings and do not know how to make useful contributions, there is no back-and-forth among commenters or between commenters and the agency, and the process remains largely sealed off from the public at large. Social media tools seem, at least on the surface, to offer a solution to exactly those problems.

First, quite simply, social media sites are the places in the virtual world where the most people can be found. As one leading academic researcher and social media enthusiast writes:

So how do you [i.e. government] expand th[e] pool of participation? How do you collect input from those who may feel marginalized or are simply too busy to invest the time needed to attend a council meeting or other forum? . . . Traditional websites are not the answer . . . [R]elying on an online survey on your agency’s own website is like putting a shining billboard on a backcountry road. It’s pointless! You need to move the message and the debate to a forum where the people are. Enter Government 2.0.<sup>47</sup>

Second, social media allows interaction and dialogue. In contrast to the “one-to-many” nature of traditional media, and the “many-to-one” nature of traditional avenues of public comment and input, social media holds the promise of collaborative discussion among the many.<sup>48</sup>

Third, a defining characteristic of social media is that the users create most or all of the content. If the goal is seriously to hear, and learn, from public submissions, then agencies need to use tools that fully enable and encourage submissions, with low barriers to participation and an openness to varying types and formats.

Given these characteristics, social media has obvious potential value as a way of increasing effective public participation in rulemaking. In principle, social media platforms should be the best available tools for outreach and informing potential commenters about the existence and nature of agency rulemakings. They could also be an avenue by which the agencies “give interested persons an opportunity to participate in the rulemaking through submission of written

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<sup>47</sup> INES MERGEL & BILL GREEVES, SOCIAL MEDIA IN THE PUBLIC SECTOR FIELD GUIDE: DESIGNING AND IMPLEMENTING STRATEGIES AND POLICIES 14-15 (2013).

<sup>48</sup> *Id.* at 4.

data, views, or arguments,”<sup>49</sup> i.e. accept comments on a proposed rule. In addition, agencies are in search of input both in the rule development stage and in the post-promulgation stage.

One could imagine, then, a brave new world of rulemaking. In this new world, made possible by social media platforms, extensive discussions would take place among stakeholders and between the agency and interested persons. Agencies might make open-ended calls for suggestions and ideas (prior to an NPRM and during the comment period), which are then ranked by the multitudes, with the best rising to the top. Comments, too, would be sorted by quality through “likes” and “dislikes.” Factfinding could be crowdsourced; the dispersed knowledge of the people gathered in a broad public process. The drafting of comments – indeed, the drafting of regulations themselves! – would be done collaboratively by wiki. And, of course, other innovations no one has thought of yet.

## **B. Federal Agencies’ Embrace of Social Media**

As the public has gravitated toward social media, government agencies at the local, state, and federal level have not been far behind, embracing social media with remarkable enthusiasm in non-rulemaking settings.<sup>50</sup> Indeed, the enthusiasm and extent of this activity belies agencies’ reputation as risk-averse, slow to change, and nervous about transparency.

The turn to social media has been given a strong push by the Obama Administration’s emphasis on transparency and openness. Clearly drawing on recent interest in “crowdsourcing,” officials from the President down have expressed a desire to tap into the “dispersed knowledge of the American people.” This aspiration is at the heart of President Obama’s much-invoked Open Government Memorandum, issued on the first day of his presidency:

**Government should be participatory.** Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.<sup>51</sup>

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<sup>49</sup> 5 U.S.C. § 553(c).

<sup>50</sup> For a very general overview, see John T. Snead, *Social Media Use in the U.S. Executive Branch*, 30 GOV’T INFO. Q. 56 (2013) (reporting that most federal agencies do use social media).

<sup>51</sup> Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009), available at <https://www.federalregister.gov/articles/2009/01/26/E9-1777/transparency-and-open-government>. OMB Director Peter Orszag’s Open Government Directive, issued in December 2009 pursuant to the Memorandum, sounded the same theme: “Participation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society.” Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive (Dec. 8, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf). See also Open Gov. Partnership, National Action Plan for the United States of America 1, 9 (Sep. 20, 2011).

The memorandum does not mention rulemaking as such, but it is one of the most obvious settings in which agencies can offer citizen “opportunities to participate in policymaking.”

There are currently an estimated 6,000 federal government social media accounts across dozens of different platforms.<sup>52</sup> Twitter and Facebook dwarf all others; followed by YouTube and Flickr; followed by much smaller numbers of a dozen or so other platforms. GSA has negotiated federal terms of service with 88 different social media platforms.<sup>53</sup> A “Social Media Community of Practice,” which dates to June 2012, brings together more almost 1000 federal social media managers at more than 160 different agencies.<sup>54</sup> A 2010 GAO report found that 22 of 24 “major” federal agencies had a presence on YouTube, Facebook, and/or Twitter<sup>55</sup>; a year later, the number was up to 23<sup>56</sup>; it is now 24 out of 24.<sup>57</sup> Blogs, Flickr pages, and other undertakings are also common.<sup>58</sup> So, for example, the Environmental Protection Agency maintains

- 24 Twitter feeds from agency headquarters;
- 13 Twitter feeds from regional offices;
- 15 Facebook pages from headquarters;
- 16 Facebook pages from regional offices;
- 10 blogs;
- An Instagram account;
- A YouTube channel;
- A Flickr photostream;
- A page on Google+;

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<sup>52</sup> Mark Boyd, How Devs Benefit from the new U.S. Government-Wide Digital Registry API, <http://www.programmableweb.com/news/how-devs-benefit-new-u.s.-government-wide-digital-registry-api/how-to/2016/02/01> (Feb. 1., 2016). GSA maintains a registry of official federal government social media accounts. The registry is now only open to federal employees and contractors so it is not easy to find out how many accounts it now contains. <https://www.digitalgov.gov/services/u-s-digital-registry/>. See generally Justin Herman, New U.S. Digital Registry Authenticates Official Public Service Accounts (Feb. 3, 2016), [http://www.digitalgov.gov/2016/02/03/new-u-s-digital-registry-authenticates-official-public-service-accounts/?utm\\_medium=email&utm\\_source=govdelivery](http://www.digitalgov.gov/2016/02/03/new-u-s-digital-registry-authenticates-official-public-service-accounts/?utm_medium=email&utm_source=govdelivery).

<sup>53</sup> <http://www.digitalgov.gov/resources/negotiated-terms-of-service-agreements/>

<sup>54</sup> <http://www.digitalgov.gov/communities/social-media/>

<sup>55</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-872T, CHALLENGES IN FEDERAL AGENCIES' USE OF WEB 2.0 TECHNOLOGIES (2010). A contemporaneous but less thorough report from the National Archives and Records Administration also describes extensive social media by six agencies. NARA, Nat'l Records Mgmt. Program, *A Report on Federal Web 2.0 Use and Record Value* (2010).

<sup>56</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-605, FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS AND DISSEMINATE (2011). The outlier was the Nuclear Regulatory Commission.

<sup>57</sup> The NRC still does not have a Facebook page; it does, however, maintain a Twitter feed, a blog, and a YouTube channel.

<sup>58</sup> Cary Coglianese's December 2011 report to the Administrative Conference, *Federal Agency Use of Electronic Media in the Rulemaking Process*, found that of the 90 agency websites reviewed, 55 had an RSS feed option, 43 linked to YouTube, 24 to Flickr, 39 to Facebook, and 14 to other social media applications. See *Coglianese Report*, *supra* note 31, at 30-31. Those numbers have surely risen significantly in the past two years.

- An Administrator’s account on Medium;
- A page on Foursquare;
- A presence on Pinterest (as of this writing, 33 boards and 468 Pins);
- A (rarely used) page on Storify;
- A page on the government-wide challenge.gov website, which collects all open and recent federal government prize competitions;
- A wiki that gathers information about watershed management;
- An RSS feed for its news releases; and
- A collection of podcasts on environmental topics.<sup>59</sup>

The EPA is a large agency with a tradition of being relatively open to new technologies. Most agencies do not have quite this array of social media sites. But some do, and many come close.

How are agencies making use of their extensive social media presence? Primarily to push information out from the agency to the public, rather than to gather information flowing in the other direction. Agency YouTube channels (many of them combined in the USA.gov channel) and Twitter feeds, for example, are primarily ways of *reaching* the public rather than ways of *interacting* with the public. They provide general information, “tell the agency’s story,” or let people know about available services, benefits, or employment opportunities.

The Coast Guard’s description of its social media efforts captures this reality.

Our social media program will complement our media relations efforts as part of a comprehensive communications plan to educate and engage our publics. . . . As public affairs professionals, we rely on three basic mediums to tell the Coast Guard story: words, pictures, and video. . . . The Coast Guard will centralize and focus our use of social media tools to complement our media relations program and maximize our impact with unique audiences.<sup>60</sup>

Many agencies have posted videos on YouTube and/or the agency’s own website. These vary enormously in subject matter. For example, EPA’s 499 videos range from interviews with gay, lesbian, and transgendered EPA employees discussing the struggles they faced growing up<sup>61</sup> through a video touting the benefits of hydraulic hybrid vehicles<sup>62</sup> to an endorsement of e-waste recycling<sup>63</sup> and discussion of mercury emissions from small-scale gold processing.<sup>64</sup> TSA’s 89 videos are focused on the particulars of airport screening.

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<sup>59</sup> All of these are linked from the agency’s social media web page, <http://www.epa.gov/home/social-media-epa>. EPA also has hosted several ideation sites that are not included on its list. *See, e.g.,* <http://epaconversations.IdeaScale.com/> (“EPA Conversations” site, which solicited suggestions regarding environmental challenges and was shut down at the end of 2013).

<sup>60</sup> U.S. Coast Guard, *Social Media and the U.S. Coast Guard: Right Tool ... Right Level ... Right Audience* 1 (2011).

<sup>61</sup> *See* <http://www.YouTube.com/watch?v=2DWzmYO0D8Y>.

<sup>62</sup> *See* <http://www.YouTube.com/watch?v=sRkvGEN7ySE>.

<sup>63</sup> *See* <http://www.YouTube.com/watch?v=p4KFhJQ0M0U>.

<sup>64</sup> *See* [http://www.YouTube.com/watch?v=r3YKO8gkyws&list=UUIUC\\_8c\\_F3aBmwME-dNfvKg](http://www.YouTube.com/watch?v=r3YKO8gkyws&list=UUIUC_8c_F3aBmwME-dNfvKg).

Agency twitter feeds by definition simply alert followers to information available somewhere else. So, for example, the Centers for Disease Control (642,000 followers) sent out a tweet pointing followers to a YouTube video regarding HIV and African-Americans and promising (over-promising, frankly) that the video will reveal “how you can help stop HIV in your community”).<sup>65</sup> A tweet is an alert or a perhaps a (very modest) thought; if the former, it directs the reader somewhere else. It is not a technique for information gathering.<sup>66</sup>

Agency Facebook pages provide news about agency initiatives, information about underlying substantive issues, and “tips” of various sorts relevant to the substantive issues with which the agency is dealing, generally aimed at promoting healthier, safer, or more environmentally sound lifestyles. They also encourage cross-media pollination, so to speak, urging viewers to subscribe to the agency’s twitter feed, visit its website, go to its Flickr page and YouTube channel, and so on.

Agency blogs are ubiquitous, and some are widely read. For example, Dipnote, the State Department’s blog, has over 5 million views annually and over time has received over 25,000 comments.<sup>67</sup> Another very active blog is the TSA’s. In its first five years of existence it received approximately 75,000 comments (of which over 20,000 were deleted as inconsistent with the blog’s comment policy).<sup>68</sup> The blogs are valuable sources of information about the agency and serve an educational purpose.

In short, federal agencies are deeply engaged and familiar with social media platforms. Most of the technical, bureaucratic, and legal challenges involved in government use of these platforms have been overcome; they are in place and could be put to work in the rulemaking setting.

### C. Realistic Expectations

Given the broad enthusiasm for social media and the profound opportunities it creates for public input and participation, one might think that use of these tools in rulemaking is inevitable; indeed, the question might be why it is not already happening. For it has not already happened.

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<sup>65</sup> [https://twitter.com/CDC\\_eHealth/status/298883507609034752](https://twitter.com/CDC_eHealth/status/298883507609034752).

<sup>66</sup> Thus, a GSA presentation on government uses of social media identifies the following uses of microblogging:

- Emergency updates (fires, earthquakes, floods...)
- Status updates (office status...)
- News updates/breaking news alerts
- Security situations
- Weather information
- General website updates
- Local government – fires, crime watches, fugitive alerts, Amber Alerts, utilities interruptions, traffic, road construction
- Reminders (file your taxes, Medicare application deadlines, other government benefit deadlines)
- Event invitations

Ben Godwin et al., *Open Government, Transparency, and Social Media*, slide 80 (GSA Office of the General Counsel, 2009 Annual Conference) (power point presentation).

<sup>67</sup> Dep’t of State, Open Government Plan 14 (Summer 2014), *available at* <http://www.state.gov/open/230791.htm>.

<sup>68</sup> These figures used to appear on the blog’s “comment policy” page but no longer do. <http://blog.tsa.gov/2008/01/comment-policy.html>.

At a 2010 congressional hearing on agency use of Web 2.0 technologies, the word “rulemaking” was not uttered a single time.<sup>69</sup> Agencies’ Open Government Plans are for the most part silent with regard to even prospective uses of social media in rulemaking (while waxing poetic about other uses of social media), focusing more on transparency than on participation.<sup>70</sup> And agencies have only very rarely relied on social media as a tool for obtaining public input on proposed rules.

Indeed, in general agency use of social media has fallen short of the participatory democratic ideal. First, existing uses are built around the government’s role as a provider of services and information; what is sometimes called a “managerial” model of online state/citizen interaction,<sup>71</sup> or “e-government” as opposed to “e-governance”<sup>72</sup> (though those terms are slippery). Second, in general, levels of public participation have been disappointingly low. Third, where agencies have sought to gather input or prompt discussion through social media, the quality of participation has been haphazard, with a sizable portion of public contributions consisting of off-topic and unconstructive attacks on the agency or other posters. Fourth, in practice there has been little interchange or dialogue, either among commenters or between the agency and commenters. In other words, so far, social media platforms have shared many of the characteristics of e-rulemaking.

This section reviews certain features of social media that will stand as an obstacle to its achieving the “revolution” that electronic rulemaking has not.

### *1. Built-In Mismatches*

In part, the managerial focus of agency web use reflects realities discussed in Part II above. Most people relate to government as customers rather than citizen and are conceived as customers by their government. Similarly, the Internet is not fundamentally about politics or policy. And most individuals simply are not sufficiently concerned, informed, or, simply, *interested* to end up devoting their social media time to regulatory policy.

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<sup>69</sup> *Government 2.0, Part I: Federal Agency Use of Web 2.0 Technologies: Hearing Bef. the Subcomm. On Information Policy, Census, and National Archives of the House Comm. on Oversight and Government Reform*, 111th Cong. (July 22, 2010).

<sup>70</sup> See, e.g., Carolyn J. Lukensmeyer, Joe Goldman, David Stern, *Assessing Public Participation in an Open Government Era: A Review of Federal Agency Plans 12* (2011), available at <http://americaspeaks.org/wp-content/uploads/2010/05/Assessing-Public-Participation-in-an-Open-Government-Era.pdf> (“A significant focus has been placed on improving online public input to the rulemaking process. Nonetheless, the primary emphasis and implementation of the Open Government Directive have been on transparency and the most significant institutional changes have correspondingly occurred in this area.”); Harlan Yu & David G. Robinson, *The New Ambiguity of “Open Government”*, 59 *UCLA L. REV. DISCOURSE* 178 (2012) (observing that open government policies have largely focused on information disclosures rather than participatory or collaborative measures).

<sup>71</sup> The term “managerial” is from Andrew Chadwick and Christopher May, *Interaction Between States and Citizens in the Age of Internet: “e-Government” in the United States, Britain, and the European Union*, 16 *GOVERNANCE* 271 (2003). The authors distinguish “managerial,” “consultative,” and “participatory” approaches to online interactions between the state and its citizens. See *id.*

<sup>72</sup> See Accenture Institute for Health and Public Service Value, *From e-Government to e-Governance: Using new technologies to strengthen relationships with citizens* (2009).

Alex Howard, one the most knowledgeable and perceptive open-government journalists, and not someone one would expect to give up on the possibility of using new technologies to reinvigorate public participation in rulemaking, seems to have done just that:

Rulemaking and regulatory review are, virtually by their nature, wonky and involve esoteric processes that rely upon knowledge of existing laws and regulations.

While the Internet could involve many more people in the process, improved outcomes will depend upon a digitally literate populace that's willing to spend some of its civic surplus on public participation.

To put it another way, getting to "Regulations 2.0" will require "Citizen 2.0" — and we'll need the combined efforts of all our schools, universities, libraries, non-profits and open government advocates to have a hope of successfully making that upgrade.<sup>73</sup>

There are two points here. One is simple: it is unlikely that large swaths of the citizenry will get caught up in rulemaking, regardless of the technology used. The second is more complex: it is unclear that broad participation by the general public is valuable in rulemaking. Drawing on their work with Regulation Room, the most sophisticated and promising use of Web 2.0 in rulemaking, Farina and Newhart have distinguished four types of potential commenters. The groups and their characteristics are set out in the table on the following page.<sup>74</sup> Sophisticated stakeholders are effectively engaged already and always have been; in theory social media might improve the value of their participation, but it is not needed to bring them in to the process. The other three groups are un- or underrepresented at present. These are missing stakeholders, such as small businesses or individual consumers, who are generally unaware of rulemakings and not equipped to participate effectively; unaffiliated experts, such as academics, who have historically not been focused on agency rulemaking but who have the capacity to make useful contributions without much help; and members of the general public who are "interested" in a loose sense but generally lack both specialized knowledge and the ability to understand and effectively participate in rulemakings. Farina and Newhart are skeptical about what members of group four have to contribute.

Second, citizen participation in e-rulemaking, IdeaScale, agency YouTube video watching, and the like follows what is the standard distribution curve on the Internet: the power law. A "power law distribution"—in contrast to a "normal distribution," which shows up as a bell curve—is characterized by a very small number of data points of with high values and a very large number of data points with lower values.<sup>75</sup> Whether it is blog readership, website hits,

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<sup>73</sup> Alex Howard, *Regulations.gov relaunched with APIs, integrates social media, hopes for public participation*, gov20.govfresh (Feb. 21, 2012), <http://gov20.govfresh.com/regulations-gov-relaunched-with-apis-integrates-social-media-hopes-for-public-participation/>.

<sup>74</sup> The table is taken from Cynthia R. Farina & Mary J. Newhart, *Rulemaking 2.0: Understanding and Getting Better Public Participation* 14 (IBM Center for The Business of Government 2013) [hereinafter *CERI 2013 Report*]. It can also be found in Professor Farina's power point presentation from the September 17 social media workshop, which is available at <http://www.acus.gov/meetings-and-events/event/social-media-workshop>.

<sup>75</sup> Strictly speaking, a power law distribution is present if frequency—for example, how often a particular event occurs—varies as a power of some attribute of that event—for example, its size.

products sold by online retailers, YouTube video viewings in general, or anything else, the Internet produces a handful of hugely popular winners and then a “long tail” of almost completely ignored content.<sup>76</sup> Most online rulemakings have only a few public comments for the same reason that most blogs have only a few readers. There are only so many interested citizens to go around, and rulemaking simply does not involve the sort of content that goes viral (which is also always partly a matter of happenstance).

Third, “commenting” on the Internet more often than not devolves into snarky ad hominem, with like-minded folks reinforcing each other’s views<sup>77</sup> and “discussion” consisting of little more than polarized and polarizing name-calling. Anyone who has spent time reading comments on popular blogs should be a little nervous about replicating that experience in agency rulemaking. The TSA has disabled comments for all the videos on its YouTube channel, and it is not hard to guess why, especially if one reads the comments that do appear on its blog. The *Huffington Post* deletes 75% of the comments it receives; in the words of its Managing Editor, this is “either because they are flat-out spam or because they contain unpublishable levels of vitriol.”<sup>78</sup> *Popular Science* magazine eliminated comments altogether because they were *bad for science*.<sup>79</sup> Moreover, private sites can ban an individual commenter, period. That is probably not absolutely impossible for the government can do (an analogy would be the occasional court order prohibiting a repeat, abusive litigant from further filings), but the standard is surely quite high.

Fourth, the essential thing the Internet does is make it easier to *distribute* content. It does not make it easier to *produce* content (except in that, because it takes content, or information, to produce content, the ready availability of more material will make the task of producing more material easier.) One of the reasons for the continued concentration of news sources in the electronic age is that even when distribution is essentially free—with no need to buy paper, use printing presses, hire drivers, etc.—there remain economies of scale in producing the content.<sup>80</sup> In submitting rulemaking comments, the hard thing is writing good comments. Distribution was never the problem, since the comment is only sent to a single reader. Obtaining information was *part* of the problem, and the move online has significantly ameliorated that part. But it was only part of the problem.

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<sup>76</sup> See generally CLAY SHIRKEY, *HERE COMES EVERYBODY* 122-30 (2009).

<sup>77</sup> See generally CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* (2009).

<sup>78</sup> Andrew Beaujon, *Huffington Post deletes 75 percent of incoming comments*, POYNTER, <http://www.poynter.org/latest-news/mediawire/222059/huffington-post-deletes-75-percent-of-incoming-comments/> (Aug. 27, 2013).

<sup>79</sup> Suzanne LaBarre, *Why We’re Shutting Off Our Comments* (Sep. 24, 2013), <http://www.popsci.com/science/article/2013-09/why-were-shutting-our-comments>. The post explains:

A politically motivated, decades-long war on expertise has eroded the popular consensus on a wide variety of scientifically validated topics. Everything, from evolution to the origins of climate change, is mistakenly up for grabs again. Scientific certainty is just another thing for two people to “debate” on television. And because comments sections tend to be a grotesque reflection of the media culture surrounding them, the cynical work of undermining bedrock scientific doctrine is now being done beneath our own stories, within a website devoted to championing science.

*Id.*

<sup>80</sup> HINDMAN, *supra* note \_\_, at 133.

Fifth, notice-and-comment rulemaking is often a poor fit with Web 2.0 approaches and assumptions because of the obvious but sometimes overlooked fact that commenting involves *words* (which also means it involves *reading*). In contrast, one of the defining characteristics of social media is that it is multi-media and therefore allows communication other than through words. That is breathtaking and wonderful and valuable in many settings. But writing regulations just is not one of them. The Web 2.0 emphasis on photos, videos, mashups, etc. does not have much to offer the rulemaking process. In a presentation to agency staffers, Adam Conner of Facebook offered ten tips for government use of Facebook.<sup>81</sup> Number six on his list was a reminder that most rulewriters would not have thought necessary: “Words can have power too” (not *do*, just *can*).<sup>82</sup> So, admonished Conner, “not everything has to be a picture; not everything has to be a video.” It is interesting that the Facebookers are so taken with visual content that it feels like an insight and a valuable reminder to be told that words “can have power too.” That alone implies that much of what Web 2.0 has to offer may be a poor fit for rulemaking.

In addition, words must be read. Part of what can be demoralizing and overwhelming about comment sites, even ones with well-behaved, moderate, informed participants, is that there are just so many comments.

One of the main problems of user-contributed content on big media sites is often not even that it’s low quality, but that it’s too abundant. The Huffington Post is another such sufferer of the comment-overload affliction. Take a look at its lead story right now: already it has way over 2,000 comments. Who’s supposed to read all those? There may be a few worthwhile comments in there, but how the hell do you find them?<sup>83</sup>

*The Huffington Post* gets 200,000 comments a day, more than 70 million a year.<sup>84</sup> There are only two ways this volume can be handled. It can be ignored, or it can be read by a computer. *HuffPo* tried both methods. It then adopted a platform called “Conversations” through which the computer reads all the comments and picks the “best.” This option is not legally or practically available to agencies who can be overwhelmed by large volumes of comments. At least until advances in natural language processing research yield nuanced and reliable methods of automated topic categorization, summarization, and content analysis of comments, ‘more’ per se cannot sensibly be the goal of participation system designers.”<sup>85</sup>

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<sup>81</sup> See Adam Conner, Ten Quick Tips for Using Facebook, available at <http://www.YouTube.com/watch?v=14JqhIK8OhY>.

<sup>82</sup> *Id.* at 6:30.

<sup>83</sup> Hamish McKenzie, *The Verge and the Huffington Post Attempt the Impossible: Making Comments Smarter*, Pandodaily (Feb. 1, 2013), <http://pandodaily.com/2013/02/01/the-verge-and-the-huffington-post-attempt-the-impossible-making-comments-smarter/>.

<sup>84</sup> Jeff Sonderman, *How the Huffington Post handles 70+ million comments a year*, POYNTER, <http://www.poynter.org/latest-news/top-stories/190492/how-the-huffington-post-handles-70-million-comments-a-year/> (Oct. 23, 2012).

<sup>85</sup> Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 146-47 (2012).

Indeed, in recent years, increasing numbers of sites with large numbers of commenters have just given up, shifting comments to Facebook rather than managing them themselves. *The Huffington Post* did so in 2014.<sup>86</sup> One gets the sense that these sites have just been worn down by the volume and acrimony of comments.<sup>87</sup>

Sixth, social media culture is quite at odds with fundamental characteristics of notice-and-comment rulemaking. Producing useful comments is hard; it requires time, thought, study of the agency proposal and rationale, articulating reasons rather than stating preferences, and constructive engagement.<sup>88</sup> In contrast, submitting a blog comment, “liking” a page or photo, rating a movie or book or restaurant, and similar online activities involve virtually effortless, subjective, minimalist, off-the-top-of-one’s-head assertions of a bottom line. Web pages are designed to minimize thought and effort. Farina et al. note that web users tend to scan pages, click on the first available option, and spurn instructions; “usability experts study these behaviors in *order to design for them, not to change them.*”<sup>89</sup> To the extent that on-line culture includes political engagement and efforts to influence public officials, “the current electronic activism is so easy and involves such a low-time-investment that it has been given the derogatory labels of ‘slacktivism’ or ‘clicktivism.’”<sup>90</sup> That is not the sort participation that will meaningfully inform a rulemaking agency.

Seventh, and related, a significant piece of social media involves voting of one sort or another. As many have pointed out, rulemaking is not supposed to be a referendum. Indeed, it is rather remarkable how firmly entrenched that understanding of rulemaking is. When e-Rulemaking got underway, a number of people speculated that one consequence would be that rulemaking would become more of a plebiscite, that the technology would push our understanding of the nature of the process. That simply has not happened. That is partly because the deluge of “votes” largely has not occurred, but it also reflects a very firm consensus about the nature of rulemaking. Thus, what social media do best is what rulemaking needs least.

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<sup>86</sup> Otto Toth, Moving the Conversation to Where You Want to Have It, Huff Post Blog

<sup>87</sup> See, e.g., Ed Morrissey, *Hot Air to move to Facebook comment system*, <http://hotair.com/archives/2016/02/15/hot-air-to-move-to-facebook-comment-system/> (Feb. 15, 2016) (“This [i.e. abandoning the proprietary system and switching to Facebook] will also allow Hot Air’s editors to put aside policing the comment sections. We get steady, and lately increasing, demands for interventions in quarrels between commenters that often requires much time and effort to unwind.”).

<sup>88</sup> See generally ELIZABETH D. MULLIN, *THE ART OF COMMENTING* (2000); RICHARD D. STOLL, *EFFECTIVE EPA ADVOCACY: ADVANCING AND PROTECTING YOUR CLIENT’S INTERESTS IN THE DECISION MAKING PROCESS* 117-29 (2010).

<sup>89</sup> *CERI 2013 Report*, *supra* note 74, at 35 (emphasis original). As they observe, the disconnect between web culture and rulemaking aspirations is captured by the title of the leading text on web-site design, first published in 2000 and now in its third edition: *Don’t Make Me Think*. See STEVE KRUG, *DON’T MAKE ME THINK, REVISITED: A COMMON SENSE APPROACH TO WEB USABILITY* (3d ed. 2014).

<sup>90</sup> K.K. Duvivier, *E-Legislating*, 92 OR. L. REV. 9, 55 (2013), citing Evgeny Morozov, *The Brave New World of Slacktivism*, NET.EFFECT (May 19, 2009), [http://neteffect.foreignpolicy.com/posts/2009/05/19/the\\_brave\\_new\\_world\\_of\\_slacktivism](http://neteffect.foreignpolicy.com/posts/2009/05/19/the_brave_new_world_of_slacktivism). See also Micah White, *Clicktivism is ruining leftist activism*, *The Guardian* (Aug. 12, 2010), <http://www.theguardian.com/commentisfree/2010/aug/12/clicktivism-ruining-leftist-activism> (objecting that by “[r]educing activism to online petitions, this breed of marketeering technocrats damage every political movement they touch”).

Finally, it is not at all clear that the government can produce content that can successfully compete for attention with what talented and unconstrained private individuals are producing. Consider one outreach effort that had decidedly mixed results. In 2010, the White House held a competition to produce a short video about rulemaking. The idea was to educate the public about rulemaking generally (i.e., to respond to the first of the problems identified by the Cornell team). This effort, called “Rulemaking Matters!,” was a classic example of contemporary principles: (a) using a competition, which is a form of crowdsourcing, (b) to produce a video rather than a text, (c) which would be made available through multiple on-line platforms, in order to (d) make government more transparent and participatory.<sup>91</sup> EPA’s own video announcing the contest is extraordinarily lackluster and unimpressive. As for the resulting submissions, several, including the winning video,<sup>92</sup> can be found on YouTube. It is difficult to quantify the value of such an undertaking. However, as of February 2016, the winning video has a mere 299 views on YouTube and does not seem to be up on regulations.gov at all (though it is posted to the regulations.gov YouTube channel and on HSS’s, and perhaps other agencies’, website). Other entrants also have YouTube views in the hundreds. It is debatable that any of them deserve even that many. The messages are broad, abstract, and unfocused; the basic pitch of all of them is that regulations are really important and that regulations.gov provides a channel for public input. None is especially helpful or impressive. Between their so-so quality and their low viewership, these cannot be considered a particular success.

Interestingly, ReasonTV, a conservative YouTube channel with a virulent anti-regulatory stance, has posted two modified versions of EPA’s video announcing the contest. One includes subtitles which criticize and subvert the ostensible message of EPA’s video<sup>93</sup>; the other changes the speaker’s voice into that of a robot and adds dystopian effects.<sup>94</sup> Each of the ReasonTV’s versions has been viewed tens of thousands of times. These attack videos are in fact classic Web

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<sup>91</sup> Here is EPA’s press release about the competition:

The U.S. Environmental Protection Agency (EPA) and the eRulemaking program have partnered to sponsor the Rulemaking Matters! video contest. The contest will highlight the significance of federal regulations and help the public understand the rulemaking process.

Federal agencies develop and issue hundreds of rules and regulations every year to implement statutes written by Congress. Almost every aspect of an individual’s life is touched by federal regulations, but many do not understand how rules are made or how they can get involved in the process.

This video contest is an opportunity for everyone to learn more and participate in an open government. With a short 60 to 90 second video, citizens should capture public imagination and use creativity, artistic expression and innovation to explain why regulations are important to everyone, and motivate others to participate in the rulemaking process.

Individuals and groups of all ages may participate. Entries must be received by May17, 2010. The winner will be awarded \$2,500, and their video posted on the Regulations.gov and EPA Web sites.

Press Release, EPA Announces Video Contest on Rulemaking (April 15, 2010), <http://yosemite.epa.gov/opa/admpress.nsf/2010+press+releases/990dbf2beeaa5d688525770600535b59?opendocument>.

<sup>92</sup> The Rulemaking Matters! Mosaic, <http://www.YouTube.com/watch?v=hRXFcurpE7U>.

<sup>93</sup> <http://www.YouTube.com/watch?v=TxXmDaqNueU>.

<sup>94</sup> <http://www.YouTube.com/watch?v=QobIdeHBcos>.

2.0 projects, involving creative adaptation or appropriation, citizen initiative, and user-produced content. These particular efforts do not, of course, advance the rulemaking project; to the contrary, they undermine it. But they actually stand as an example of the possibility that engaged and creative individuals might build on the agency's own efforts to highlight or publicize a rulemaking—and as a reminder that when that happens, the agency no longer controls the message.

The gap between the popularity of the Rulemaking Matters! submissions and the ReasonTV videos illustrates one other important point regarding outreach. Highly visible content becomes highly visible because it goes viral—that is, individuals who see it *share it with others* and so total views grow exponentially. Simply being available to be found online, or mentioned in one Twitter feed that has a few thousand followers, is a necessary but not sufficient step to reach a large number of people. Material only really becomes visible when it develops a following and is widely shared. For something to catch someone's eye in the first place, and then generate a sufficiently enthusiastic response to prompt numerous viewers to share it, it has to be really interesting, funny, or edgy.<sup>95</sup> Unfortunately, material that is “official” and produced by the government, and/or material pertaining to agency rulemaking, will almost certainly lack some or all of those features. It is, by definition, the opposite of subversive. Thus, it is very hard for the government to compete for attention with privately produced material.<sup>96</sup>

## 2. Costs

Efforts to engage the public through social media are not costless. First, as just discussed, there are direct costs in equipment and personnel. Handling large volumes of comments over regulations.gov is hard enough. As Bridget Dooling has explained, trying to read every comment

in mass comment scenarios forces agencies to sink considerable staff resources into reading or at least skimming comments that are word-for-word identical. For example, if an agency takes this approach with a docket that contains 250,000 comments from an organized mail campaign, even if it takes less than ten seconds to identify and skim each comment, that effort still accounts for almost 700 staff hours or \$21,000. This excludes any time needed to summarize the comments for use internally or for the preamble of the final rule. The voluminous influx of

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<sup>95</sup> See Kevin Allocca, *Why videos go viral* (TED Talk, Nov. 2011), [http://www.ted.com/talks/kevin\\_allocca\\_why\\_videos\\_go\\_viral.html](http://www.ted.com/talks/kevin_allocca_why_videos_go_viral.html) (identifying three factors that result in a YouTube video going viral: endorsement by “tastemakers” who share with a large community, chance for others to participate by doing parodies or different versions, and content or presentation that is unique and unexpected and humorous).

<sup>96</sup> Another example: as of February 2016, the TSA has 90 videos on YouTube; for the most part, these explain and justify its airport screening procedures. See <http://www.YouTube.com/user/TSAHQpublicaffairs/videos>. As government videos go, these have an enormous number of views; six have been seen more than 100,000 times; 28 more than 10,000 times. But these numbers are dwarfed by all the anti-TSA videos posted by news outlets or individuals who are furious at the agency. These are more numerous by orders of magnitude, and many have orders of magnitude more views. Inescapably, more people will watch “Another TSA Video To Make Your Blood Boil” (4.8 million), “TSA Agent Touches my Vagina at San Diego International Airport” (over a million views), “100% foolproof solution to stop TSA from stealing your valuables out of your carry-on bag” (over 1 million views), or “TSA Agent Found With ABC iPad” (almost 2 million), than will watch “Why Shoes on the Belt?” (27,000) or “TSA-Choose Your Lane” (14,000).

comments can drive some agencies to turn to contractors, either to help organize and save public comments in the docket, or to actually review and summarize those comments.<sup>97</sup>

Those costs will only rise if through social media (a) participation increases and (b) the agency is to engage in actual dialogue, or if it is to moderate or facilitate public postings.

In general, the greatest enthusiasm for using electronic tools in rulemaking has come from academics, followed by public interest or good government organizations, then the White House; the agencies themselves seem most dubious. There are individual counterexamples, of course. But there reside significant doubts about the enterprise among agency staff. Jeff Lubbers' e-Rulemaking survey revealed this, indicating that agency employees tended to think that the benefits of e-rulemaking flowed to commenters and the burdens fell on them.<sup>98</sup> And part of the reason that agencies have flocked to social media for PR and communications and *not* for rulemaking is that the same people answering the Lubbers survey are nervous that social media will just put them in a deeper hole. They are skeptical about the value of lay comments, and they are very nervous about the extra work involved in reading, moderating, screening, responding to submissions, and they fear the whole thing will be chaotic, off-topic, repetitive, and go way beyond the point of diminishing returns.

A second category of potential costs should not be overlooked. That is the potential backlash resulting from disappointed expectations when promises about the meaningfulness of participation are disappointed. It is not wholly accurate, for example, for regulations.gov to bill itself as "Your Voice in Federal Decision-Making." While it is impossible to know whether that enticement has led to disappointment, one can see such annoyance, for example, on the White House "We the People" site. This is an open-ended call for suggestions; echoing regulations.gov, its tag line is "Your Voice in Our Government." Any petition with more than 100,000 signatures (originally 5,000, then 25,000) by a specific deadline will get an official response. As of February 2016, there were 102 pending petitions; 215 petitions had generated responses (it's not possible to determine how many expired petitions fell short of the signature threshold). Periodically, someone files a petition that says something like this one: "Actually take these petitions seriously instead of just using them as an excuse to pretend you are listening."<sup>99</sup> Or: "admit that these petitions are just going to be ignored."<sup>100</sup>

The White House is working hard to assure people that their individual voices truly are heard and influential. On its "engage and connect" page, for example, one used to be able to find a video entitled "Your Voice Matters."<sup>101</sup> The video shows White House staff, the First Lady, and

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<sup>97</sup> Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 901 (2011).

<sup>98</sup> See Lubbers, *supra* note , at 473.

<sup>99</sup> <https://petitions.whitehouse.gov/response/were-listening-seriously>. This one gained 37,586 signatures and triggered a response. *Id.*

<sup>100</sup> The full text reads: "We petition the President of the United States to finally admit what we all know; That this platform is utterly useless, and that the responses the President provide are only given to trick people into making them think that the President actually cares about them in any way." <https://petitions.whitehouse.gov/petition/admit-these-petitions-are-just-going-be-ignored/VNNZ0JBs>.

<sup>101</sup> As of this writing, the video described is no longer up. There is instead a similar sort of effort, entitled "Why Your Voice Matters," with brief statements from individuals who were invited to the White House after they had

the President himself speaking on the phone to, and even visiting in the homes of, ordinary folks who expressed an opinion. This is followed by a series of individual testimonials: “I really feel that I’m being heard”; “It has been very heartening for me to see how effective I can be”; “It’s clear that your story will be read and will be considered and can have a big impact on the White House and the President and people who are making decisions. It’s worth it.” The final tag line is “Everyone has a part to play.” This particular video’s implicit promises about access and influence are so astounding and unrealistic as to make it a work of fiction and it is hard to believe anyone would take them at face value. However, the general point remains; overpromising can lead to disappointment, backlash, and disengagement.

Finally, a third cost is in the possible shift that extensive reliance on social media and broad lay participation might cause regarding the nature of the rulemaking process. An on-line process with mass participation can make the notice-and-comment process seem – to the participants, observers, the press, the agency, the courts – more like a vote or referendum than an information-gathering process. This tendency is particularly evident at present in the efforts by organizations to get their members to comment. These generally take the stance that there is power in numbers and that more is better. Hence, for example, the striking phenomenon of a group called American Commitment, which is opposed to FCC regulation of the Internet and organized almost a million mass comments as part of the FCC’s 2014 open Internet rulemaking, bragging that it “won the FCC comment period.”<sup>102</sup> Similarly, in encouraging its members to comment on a proposed rule from the Surface Transportation Board, the National Association of Rail Passengers asserted: “[R]egulators will be watching the total number of comments, so it’s important that the regulators hear individually from all NARP members and interested rail passengers right away.”<sup>103</sup> Or one more example: the Sierra Club telling its members that “for us to succeed [in the fight against climate change], the Clean Power Plan must live up to its potential as a climate game changer. With continued attacks from climate deniers and big polluters, the EPA needs to hear from you now to make this happen.”<sup>104</sup> This begs the question: *why* does EPA “need to hear from you”? It is not because “you” have anything to say that EPA

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submitted statements in response to an invitation to describe what losing \$40 per paycheck would mean to them. The statements all emphasize just how influential an individual can be. The video is also available on Youtube at <https://www.youtube.com/watch?v=IyI22mih47s>.

<sup>102</sup> Sunlight Foundation Confirms that American Commitment Won FCC Comment Period with "Do Not Regulate the Internet" Campaign (Dec. 16, 2014), available at <http://www.prnewswire.com/news-releases/sunlight-foundation-confirms-that-american-commitment-won-fcc-comment-period-with-do-not-regulate-the-internet-campaign-300010769.html>.

<sup>103</sup> Email from NARP to Members, YOU can stop train delays by February 8th! (Feb. 4, 2016). In fairness, the organization did qualify this statement by saying, confusingly, that “this is one of the extremely rare times” in which regulatory will be tracking total comments. *Id.* See also NARP, Important Action Alert: Make Your Voice Heard by February 8!, <http://www.narprail.org/our-issues/stb-otp/>.

<sup>104</sup> Beyond Paris: Support a Strong and Just Clean Power Plan!, [http://sierra.force.com/actions/National?actionId=AR0030595&\\_ga=1.215298962.467097179.1454619006](http://sierra.force.com/actions/National?actionId=AR0030595&_ga=1.215298962.467097179.1454619006). Notably, rulemaking that members are encouraged to comment on is about a rather technical subissue arising under the Clean Power Plan. The comment does speak to this topic, though in very vague and general terms. But the nominal commenter is not informed about it; rather, he or she just gets a general admonition to stand up for the Clean Power Plan, and learns absolutely nothing at all about the particulars of the proposed rule (except what they may be able to pick up by reading their “own” comment). The model here just has nothing to do with providing the agency with information that the commenter has but the agency lacks.

has not heard or does not know. It can only be because the Sierra Club thinks EPA is counting heads, that it is registering the quantity of support its proposal has. This is explicit in a member email from the Environmental Defense Fund urging members to submit comments on another EPA rule: “[T]oday is the LAST DAY to stand in support of it, before the comment period closes. . . . [T]ell the EPA you support protecting our communities from dangerous pollution.”<sup>105</sup> It is all about a show of *support*.<sup>106</sup>

All this is quite inconsistent with the historic understanding that public comments are a tool to ensure that the agency is fully informed, that it has all the facts and information it needs and has heard all relevant arguments. To turn notice and comment into a referendum would be a fundamental shift from the historic understanding. And it would be a deeply problematic one for several obvious reasons. First, the concerns about the representativeness of the “voters” would be profound. Second, it would be highly subject to manipulation, repeat voting, and technical chicanery. Third, it would create a bad set of incentives for participants, away from thoughtfulness and constructive observation and toward knee-jerk reactions and drive-by comments. Finally, it is probably illegal under the Administrative Procedure Act and agencies’ organic acts.

#### IV. CONCLUSION – TARGETED USES

Where does the foregoing leave us? Social media do not provide a cure-all for the democracy defects of agency rulemaking. Rather, these are tools that are helpful for specific tasks in specific settings. An essential assumption should be made explicit here, namely, that increased public participation is desirable. In much of the discussion about rulemaking, it is taken as a given that more participation is better. If that is the case, then *of course* use of social media makes sense. If, on the other hand, participation is not an end in itself but rather a means to other ends (including informed rulewriters, better rules, greater public acceptance of rules, or enhanced compliance), then agencies must be more nuanced about when and how they use social media tools.

In particular, social media can be effectively used in rulemaking in three key ways.

First, social media platforms can be helpful in outreach to members of the public who would otherwise be unaware of rulemaking. This potential is easy to overstate; rulemaking outreach will in general be drowned out by the tsunami of other material flowing through the Internet. But it still holds some promise.

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<sup>105</sup> Email from Heather Shelby to EDF Members Re. DEADLINE TODAY: Help Cut Dangerous Air Pollution (Feb. 1, 2016).

<sup>106</sup> In addition to the foregoing, other examples include: Elisabeth MacNamara, League of Women Voters, Take Action: Support the EPA’s Methane Pollution Regulation (Sep. 10, 2015), <http://lwv.org/blog/take-action-support-epas-methane-pollution-regulation> (“Tell the EPA’s administrator, Gina McCarthy, you support the regulation to mitigate climate change and protect the air we breathe by cutting methane emissions.”); NRDC, Demand Limits to Carbon Pollution, <https://secure.nrdconline.org/site/Advocacy?cmd=display&page=UserAction&id=3629> (“The Environmental Protection Agency is working to limit carbon pollution from existing power plants. Tell EPA Administrator Gina McCarthy you support these first-ever limits on carbon pollution!”).

Second, social media discussions may be valuable in helping agencies with agenda-setting. Rather than getting answers, on-line discussions can help identify the questions.

Third, it is hoped that platforms will be developed to enable lay persons with useful knowledge to participate effectively in the rulemaking process. The goal here is not more comments but better ones. The “general public” will have little to offer in most rulemakings, and it is important to hold fast to the long-standing principle that a rulemaking is not a vote. But in many rulemakings laypersons will have important on-the-ground knowledge about how existing regulations operate in practice, or how possible regulations might operate—knowledge that is not necessarily in the possession of the agency of sophisticated, deep-pocketed, well-represented stakeholders.<sup>107</sup>

If government really wants to engage the masses, and it should, it needs to engage us in something other than writing comments. That means either some sort of aggregating mechanism that involves millions (voting for representatives comes to mind) or it means a dialogic, deliberative process involving a much smaller, but representative group (Fishkin’s deliberative polling comes to mind). Notice-and-comment rulemaking is an awkward in-between; as long as it is really about commenting, the lay public will not provide useful information and the democratic impulse will always be frustrated.

There are other avenues for revitalizing democracy, and they can be assisted by the new technologies. Notice-and-comment rulemaking should, and probably must, remain a technocratic undertaking that aims for fully informed, rational, coherent decisions within statutory bounds and reflecting the agency’s informed discretion. Internet or no Internet.

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<sup>107</sup> Leading the way in this effort is the “Regulation Room” project at Cornell Law School. See [www.regulationroom.org](http://www.regulationroom.org).