Dear Rulemaking Committee,

A couple of general comments about the attached draft.

First, it really is a draft. One part (VI.B.1) remains to be written; some of the legal discussion in Part V tails off; there are other spots that are rough. My hope and expectation is that our discussion on March 25 will be an opportunity for you to tell me what's wrong with it, and will also bring out ways in which the report could be revised to be more helpful to you.

Second, I did not prepare a set of draft recommendations, because it seemed too early in the process for that. Instead, in the last section I set out a number of issues that it seemed to me might be logical subjects for recommendations and mention some of the relevant considerations (which, of course, also come up in the body of the report). My thought was that a revised version, circulated in advance of our April meeting, would contain a set of actual draft recommendations reflecting the discussion from our March meeting and any additional work I did in light of that discussion.

I look forward to talking to you on the 25th. (Appropriately, given the topic, I will be doing so remotely, sitting in my office in NYC.)

Warm regards,
Michael

Using Social Media in Rulemaking: Possibilities and Barriers

Michael Herz[*]

CONTENTS

I.   INTRODUCTION

"E-topians" believe that technological developments will usher in a brighter future in many domains, including, importantly, how democracies function. New technologies will, it is suggested, 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.

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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.[1] Regulators are required to accept comments from any interested person and consider and respond to them before making a final decision. The mechanism is already in place, all that is necessary is to make it more effectively open to ordinary citizens. The Internet does that in one easy step. If the Internet is to produce a democratic transformation, this is where one might first expect to see it.

In the last decade, the notice-and-comment process for federal agency rulemaking has changed from a paper process to an electronic one. Expectations for this switch were high; many anticipated a "revolution"[2] 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.

At the same time, the online world in general has come to be increasingly characterized by participatory and dialogic undertakings, 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 efficiency, democratic legitimacy, and quality, the question is whether those goals are unattainable or whether agencies have not been using the right technologies. Perhaps with better tools, those goals might still be achieved. Observers have labeled the current regime "Rulemaking 1.0," as opposed to a possible "Rulemaking 2.0."[3] 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.[4]

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[1] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 66 (1969).

[2] The regulations.gov website trumpets: "Regulations.gov removed the logistical barriers that made it difficult for a citizen to participate in the complex regulatory process, revolutionizing the way the public can participate in and impact Federal rules and regulations." Regulations.gov, "About Us," http://www.regulations.gov/#!about Program. *See also* 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).

[3] *See, e.g.,* Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395 (2011) [hereinafter *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*, __ ADMIN. L. REV. __ (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2152020.

[4] *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, WIKIGOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER (2009).

The eRulemaking Program Management Office, which houses and embodies Rulemaking 1.0, has itself endorsed (though done little to implement) the use of these platforms, urging agencies to:

> [e]xplore the use of the latest technologies, to the extent feasible and permitted by law, to engage the public in improving federal decision-making and help illustrate the impact of emerging Internet technologies on the federal regulatory process. New tools (such as blogs, wikis, user generated feedback and ratings, social bookmarks, videos, and links to share information in social media networks) serve to promote and facilitate transparency, public engagement, and collaboration. When federal agencies use these tools in the regulatory process, stakeholders have the time to take advantage of information sharing and knowledge transfer. This added form of communication is likely to increase formal and informal stakeholder contributions, thus increasing their participation in the federal decision-making and regulatory process.[5]

The Administrative Conference has consistently supported full and effective public participation in rulemaking and the use of new technologies to enhance such participation. For example, a recommendation from the dawn of the e-government era, Recommendation 95-3, *Review of Existing Agency Regulations*,[6] includes the following regarding review of existing rules:

> Agencies should provide adequate opportunity for public involvement in both the priority-setting and review processes. In addition to reliance on requests for comment or other recognized means such as agency ombudsmen and formally established advisory committees, agencies should also consider other means of soliciting public input. These include issuing press releases and public notices, convening roundtable discussions with interested members of the public, *and requesting comments through electronic bulletin boards or other means of electronic communication*.[7]

More recently, in Recommendation 2011-8, *Agency Innovations in e-Rulemaking*,[8] the Conference has endorsed, in general terms, the use of social media in rulemaking:

> Agencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemakings. When an agency sponsors a social media discussion of a rulemaking, it should provide clear notice as to whether and how it will use the discussion in the rulemaking proceeding.[9]

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[5] ERULEMAKING PROGRAM MANAGEMENT OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (2010), *available at* http://exchange.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf.

[6] *See* Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

[7] *Id.* at 43,110 (¶ IV.A) (emphasis added) (footnote omitted).

[8] *See* Adoption of Recommendations, 77 Fed. Reg. 2257, 2264 (Jan. 17, 2012).

[9] *Id.* at 2265 (¶ 3).

The present study reviews how federal agencies have been using social media to date and considers when, how, and whether agencies should use social media in rulemaking, not just to "raise the visibility of rulemakings," but as tools in formulating the content of rules. The Conference's charge is to consider whether and how social media could be used by agencies to improve the rulemaking process and what barriers, especially *legal* barriers, stand in the way.

This report is in seven parts. Part II reviews the changes achieved, and not, by electronic rulemaking. Part III then touches on possible ways in which social media could be employed to move rulemaking more toward the inclusive and dialogic enterprise that e-Rulemaking was expected to be but has not been. Part IV then reviews actual uses of social media by federal agencies, which have been almost entirely outside the rulemaking setting. These tentative initial efforts have neither proved nor disproved the value of social media in rulemaking. Part V considers legal obstacles to the uses of social media in rulemaking. Part VI is a non-visionary call for realism that reviews some inherent challenges to using social media in rulemaking but also suggests some particular settings in which it might be most fruitful. Finally, Part VII offers some thoughts on where the Committee might want to focus in thinking about recommendations regarding the use of social media in rulemaking.

II.   ASSESSING E-RULEMAKING

Electronic rulemaking was widely anticipated to 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, comments on comments, exchanges through different media, collaborative drafting—in short, a conversation, with genuine give and take.

The expectation was that these two changes would in turn have three significant benefits. Most prosaically, it would be more efficient. Agencies would have less paper to manage, and centralizing the process in Regulations.gov 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 that is not much of a justification; broad participation is not an end in itself. 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 involving expertise, they are arguably more legitimate if they reflect popular input. (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 greater, less costly compliance.

The third anticipated value of broader and more dialogic participation was that it would, simply, produce better rules. For one thing, rulemakers would have access to more and better information. Officials from the President down have frequently expressed a desire to tap into the

"dispersed knowledge of the American people." Such an 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.[10]

Or, as Cary Coglianese has written: "[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."[11] In addition, the theory was that having comments online and readily accessible would 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.[12]

E-Rulemaking is in many ways 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. It is easy to send an email or upload a document, but printing out and mailing a document is not that hard either.

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[10] 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 in response 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.

[11] 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).

[12] Other enumerations of expected benefits of more open and inclusive policymaking are possible. For an overlapping but slightly different list, see 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). This volume identifies the following anticipated gains:

- 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. (A rather vague and unexplained notion.)
- Production of more innovative solutions.

Much more important is the ready availability of materials in the rulemaking docket. There is no question that 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.[13] It also makes for higher quality comments. No one has *proved* this, but it is supported by a survey of agency staff by Jeffrey Lubbers[14] and informal conversations, and it is what one would expect.

Widely available rulemaking dockets are surely of use to others besides commenters. There's a lot of good stuff in rulemaking dockets. Their ready availability is only one small aspect of sweeping shift in the easy availability of information held by the government. Their value is not an aspect of notice-and-comment rulemaking per se, and for present purposes it suffices just to nod toward, or incorporate by reference, the expansive literature on the utility of make government-held information widely available.[15]

In addition, an online docket makes it easier for 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.[16] And the docket is available to agency staff who do not work at headquarters.[17]

These are real improvements, but they do not involve meaningful changes in the *nature* of notice-and-comment rulemaking. E-Rulemaking's grander anticipated benefits have not quite come to pass.[18] Exactly the same operation is in place, it is just incrementally improved. With isolated exceptions, there has not been a huge outpouring of lay comments. Moreover, though the matter is disputed, lay comments have by and large not been especially helpful or influential.

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[13] The Federal Docket Management System is reported to have 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 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.

[14] *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 than in a paper-based process. Strikingly, respondents reported that *each* of the sixteen tasks had become easier. The one that scored second highest 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.

[15] *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.

[16] Indeed, the task that scored highest in the Lubbers survey—i.e., generated the highest level of agreement— 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 14, at 461.

[17] 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.

[18] Useful overviews include Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENVTL. & ADMIN. L. 1 (2012); *Rulemaking 2.0*, *supra* note 3, at 417-19.

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. They generally fail to provide the things that agency staff most need: concrete examples, specific alternatives to the proposal, an awareness of statutory limitations, hard data to back up conclusions, and direct responses to any specific questions the agency may have asked.[19] In those rulemakings that have generated extensive lay participation (a distinct minority) the comments have been dominated by duplicative submissions resulting from organized "astro turf" campaigns. 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."[20]

Some have responded to these shortcomings with efforts to tutor lay commentators so as to increase the quality of their submissions. The Department of Transportation, among others, has on its website a description of the rulemaking process that includes a section entitled "How Do I Prepare Effective Comments?," which lays out exactly the sort of things that are helpful to the agency and generally absent from public comments.[21] There is no indication that these have done any good. The most concerted effort to guide, tutor, and steer lay commenters has been Regulation Room. It has had some success in promoting responsive and useful comments. But it has done so through labor-intensive, hands-on facilitation and discussion-leading, *not* by simply creating a forum, listing a few tips, and leaving the public to it.

Analyses of individual rulemakings provide further evidence that e-Rulemaking has yet to deliver on its ambitious promise of more effectively engaging the public and providing a forum in which lay citizens have an effective voice. For example, Kimberly Krawiec read every nonduplicative comment submitted to the agencies jointly responsible for implementing the so-called Volcker rule.[22] In her description, the public comments—some of which are included in

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[19] *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 professional ones on these criteria.

[20] NOVECK, *supra* note 4, at 138.

[21] *See* http://www.dot.gov/regulations/rulemaking-process#How do I prepare effective comments?. Regulations.gov provides a similar guide. *See* Regulations.gov, "Tips for Submitting Effective Comments," *available at* http://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf; *see also* NOAA Fisheries Service, Alaska Regional Office, "Tips for Submitting Effective Public Comments," *available at* http://www.fakr.noaa.gov/prules/effectivecomments.pdf.

[22] *See* Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. ___ (forthcoming 2013), *available at* http://ssrn.com/abstract=1925431. The Volcker rule is a provision of the Dodd-Frank Act that prohibits banks to engage in proprietary trading or to acquire or obtain an interest in a hedge fund or private equity fund. The complex details were left to several agencies, including the

the examples given above—were short, lacked specific suggestions, did not grasp the distinction between the statutory provision and the regulation that would implement it, were poorly written, and overflowed with anger. "[T]he contrast with the meticulously drafted, argued, and researched—though far less numerous—letters from industry and trade groups is stark."[23]

In a variety of other ways, the rulemaking process remains completely recognizable. The FCC remains pretty much the only agency that regularly makes use of reply or rebuttal comment periods; commenters still write their comments in isolation and submit them right before the deadline; the agency still responds in the preamble to the final rule. The *mechanics* of the process have changed, and very much for the better; the *nature* of the process remains essentially what it was before the move online.

These indicators of e-Rulemaking's mixed success to date in achieving its promised transformation of rulemaking are infrequently acknowledged by those responsible for managing FDMS. For example, Regulations.gov trumpets:

> Federal regulations have been available for public comment for many years, but people used to have to visit a government reading room to provide comments. Today, the public can share opinions from anywhere on Regulations.gov.
>
> Regulations.gov removed the logistical barriers that made it difficult for a citizen to participate in the complex regulatory process, revolutionizing the way the public can participate in and impact Federal rules and regulations.[24]

It is the last paragraph that is the tricky one. E-Rulemaking has undeniably "removed the logistical barriers" to citizen participation—at least many of them. And that has "revolutioniz[ed] the way the public *can participate* in" federal rulemaking. But the other claim—that the site has revolutionized the way the public can "*impact* Federal rules and regulations" is more a statement of faith than a statement of fact. This is because (a) the barriers to *effective* public participation are more than just logistical and (b) it is exceedingly difficult to identify, and harder still to measure, the impact of public comments on rules. Another example on Regulations.gov is a one-page document provided on the site identifying "Program Impacts and Achievements."[25] To be sure, the achievements listed are real and documentable—

Department of the Treasury, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System, to work out through rulemaking. In October 2011, the agencies issued a joint Notice of Proposed Rulemaking. *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68,846 (Oct. 11, 2011) (to be codified at 12 C.F.R. pts. 44, 248, 351, and 17 C.F.R. pt. 255). The agencies received over 8,000 comments. *See* Krawiec, *supra* note 22, at 6. Of these, about 6,550 were more or less identical, based on a form letter provided by a consortium of public interest groups to their members. *Id.* at 20. The remaining 1,450 comments were submitted by 1,374 distinct commenters; 1,281 (93%) were private individuals. *Id.* Half of those, in turn, had submitted the same form letter as the other 6,550, with just a sentence or two added or changed. *Id.* at 21. So that left 515 individual comments by private individuals. *Id.* at 22. The remaining comments were from industry trade groups (26), asset management firms (16), academics (14), public interest, research, advocacy, and labor groups (12), insurance companies (10), financial institutions (8), and Congress (7). *Id.* at 33, Table 1.

[23] Krawiec, *supra* note 22, at 6.

[24] *See* http://www.regulations.gov/#!aboutProgram.

[25] http://www.regulations.gov/docs/FactSheet_Program_Impact_and_Achievements.pdf.

numerous awards, undeniable improvements to the site, hundreds of millions of visits, significant cost savings, and the migration of agencies' "legacy data" onto the site. Notwithstanding its heading, however, the document does not actually identify any "impacts." Indeed, it would be surprising if that were possible, in part because the impacts of Regulations.gov are much harder to quantify than are the site's other accomplishments. But it is also because the move online has not transformed rulemaking, which remains quite recognizable as a version of the process that has long existed.[26]

III.   POTENTIAL USES OF SOCIAL MEDIA IN RULEMAKING

In the real world, then, notice and comment falls short of its platonic ideal. As the D.C. Circuit has written, notice and comment is supposed "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[27] In addition, "a chance to comment ... [enables] 'the agency [to] maintain[ ] a flexible and open-minded attitude towards its own rules.'"[28] "To achieve those purposes, 'there must be an exchange of views, information, and criticism between interested persons and the agency.'"[29]

A purely paper-based process, where comments were stored in a single docket room in Washington, DC, always fell short of this idea. The move online has only shifted that reality in part. Web 2.0 tools, which promise fuller participation, transparency, dialogue, and public awareness in and of rulemaking. To some extent, social media would enhance measures that could be—and to some extent are being—implemented with existing technologies, relying on regulations.gov and/or agency websites. But social media could also lead to qualitative changes in the rulemaking process. For example:

- ACUS has suggested that the eRulemaking Project Management Office and/or individual agencies provide guidance on how to write effective comments[30] (as regulations.gov and several individual agencies do[31]). Social media could be particularly helpful in providing guidance on comment writing, perhaps through online workshops, group feedback, using wikis for practice drafting.

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[26] *See generally* Thomas A. Bryer, *Public Participation in Regulatory Decision-Making: Cases from Regulations.gov*, http://works.bepress.com/thomasbryer/2/; Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79 (2012); Cynthia R. Farina, *Achieving the Potential: The Future of Federal E-Rulemaking*, 62 ADMIN. L. REV. 279 (2010) (executive summary of the report of the Committee on the Status and Future of Federal e-Rulemaking).

[27] Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[28] McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1325 (D.C. Cir. 1988).

[29] Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977), *quoted in* Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3d Cir. 2011).

[30] The relevant provision is found in Recommendation 2011-2, *Rulemaking Comments*. *See* Adoption of Recommendations, 76 Fed. Reg. 48,789, 47,791 (¶ 1) (Aug. 9, 2011).

[31] *See supra* note 21.

- It is a best practice for agencies to provide visible and understandable notice of upcoming and pending rulemakings. Social media seem an obvious mechanism for outreach—getting the word out about upcoming rulemakings, publicizing the rulemaking and pointing interested persons toward regulations.gov.
- The APA does not require, and traditionally agencies (with the notable exception of the FCC) have not provided, reply periods in notice-and-comment rulemaking. ACUS has endorsed reply periods "where appropriate."[32] One possible format for reply comments would be to post all comments and with the opportunity for threaded comments on each.
- Agencies could hold online "hearings," akin to the legislative-type hearings that §553 of the APA permits but does not require, through tele- or web-conferencing or live chat-rooms (e.g. NRC hearings on emergency preparedness rule).
- During and/or after the comment period, commenters could view, comment on, and rate (using Ideascale or a similar platform) others' comments.
- Agencies could maintain a blog for each rulemaking, beginning well before publication of an ANPRM or NPRM and continuing past issuance of the final rule, to which agency personnel would post items of interest concerning the rulemaking and the agency's progress on it, on which readers could post comments, and on which agency personnel and other readers could respond to comments.
- Agency personnel or contractors could serve as facilitators during the comment period, reacting to public comments, asking for elaboration, pressing for clarification, referring commenters to related submissions by other commenters.
- Agencies could create wikis through which those outside the agency could collaboratively draft comments.[33]
- For certain types of problems, it may be possible to design sites where the information provided by the public is not actually through *comments* but through their interaction with or activity on the site—as one agency official put, the most successful public input occurs when visitors "annotate with clicks, not with comments."[34]

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[32] ACUS Recommendation 2011-2, *Rulemaking Comments*, Recommendation 6, *available at* http://www.acus.gov/recommendation/rulemaking-comments.

[33] One could go further and have a public wiki for drafting regulatory language. My own view is that any such effort would be doomed. It is almost certain that the process would founder when one side inserted language they particularly liked only to have the other side delete it and insert their own preferred language, which the original drafter would in turn delete and replace, ad infinitim. Wikipedia works partly because the stakes are low and partly because it involves essentially factual material. A Wikipedia entry on "The best music" or "the right religion" would not be stable. Drafting regulations involves contested issues with enough disagreement about first principles, especially on issues that the general public cares about, to make a pure, open wiki unhelpful in most settings. (A wiki internal to the agency, in contrast, seems much more promising.)

[34] CFPB interview, 1/15/13.

IV.   EXISTING AGENCY USES OF SOCIAL MEDIA

A. Defining Social Media

The ACUS Request for Proposals did not define "social media," although its opening paragraph gives a good sense of the project's anticipated scope:

> Social media, including Facebook, Twitter, blogs, and other similar technologies, present new opportunities for agencies to engage the public in rulemaking activities. Such social media tools are uniquely valuable because they facilitate two-way communication. Rather than just pushing information out, social media allows agencies to provide the public with a way to communicate views and information to the agency.[35]

There is no single, established definition of social media; indeed, definitions are abundant and varying.[36] EPA has offered this: "any online tool or application that goes beyond simply providing information, instead allowing collaboration, interaction, and sharing."[37] 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 National Archives and Records Administration offers one useful typology, with examples, of social media:[38]

Web Publishing: Platforms used to create, publish, and reuse content.

Microblogging (Twitter, Plurk)
Blogs (WordPress, Blogger)
Wikis (Wikispaces, PBWiki)
Mashups (Google Maps, popurls)

Social Networking: Platforms used to provide interactions and collaboration.

Social Networking tools (Facebook, LinkedIn)
Social Bookmarks (Delicious, Digg)
Virtual Worlds (Second Life, OpenSim)

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[35] *See* Administrative Conference of the United States, Request for Proposals: Social Media in Rulemaking 1 (June 8, 2012), *available at* http://www.acus.gov/sites/default/files/documents/Approved-Social-Media-RFP-6-8-121.pdf.

[36] A list of 50 different definitions can be found at http://thesocialmediaguide.com/social_media/50-definitions-of-social-media. The list compiler's own definition is: "user-generated content that is shared over the Internet via technologies that promote engagement, sharing and collaboration."

[37] EPA Chief Information Officer, Social Media Policy 5 (June 20, 2011), http://www.epa.gov/irmpoli8/policies/social_media_policy.pdf.

[38] NARA Bulletin 2011-2, Guidance on Managing Records in Web 2.0/Social Media Platforms (Oct. 20, 2010), *available at* http://www.archives.gov/records-mgmt/bulletins/2011/2011-02.html.

Crowdsourcing/Social Voting (IdeaScale, Chaordix)

File Sharing/Storage: Platforms used to share files and host content storage.

Photo Libraries (Flickr, Picasa)
Video Sharing (YouTube, Vimeo)
Storage (Google Docs, Drop.io)
Content Management (SharePoint, Drupal)

B. Background: Websites as a Tool for Customers Rather than Citizens

Before considering the possible application of these new platforms to rulemaking, it is worth considering more generally the uses to which the agency websites have been put. When administrative lawyers consider possible applications of new technologies by government, rulemaking seems the obvious place to start. After all, rulemaking is the one form of government activity that already, by legal mandate, reflects a commitment to openness, participation, and transparency.

But rulemaking is *not* the obvious place to start if one is focused on the most common, day-to-day interactions between individuals and government. E-government has not been focused on engaging citizens in self-government. Just the opposite. Online, citizens are vastly outnumbered by customers.

IT professionals within agencies think in terms of "top tasks," the things that are most important to the greatest number of people. The Federal Web Managers Council identifies its "highest priority" as "improve[ing] the public's ability to complete their top tasks."[39] These include tasks such as finding and applying for benefits (Social Security, Medicare/Medicaid, housing assistance, veterans' benefits, student loans), applying for or renewing a passport, obtaining information, making a reservation to visit a national park, applying for a visa or immigration assistance, applying for a job, filing taxes, and contacting government officials.[40] With the possible exception of the last item on this list, all of these have to do with being a *customer* rather than a *citizen*. Put differently, they concern the government as provider of services rather than as sovereign. Individuals have extensive such interactions, but they are first and foremost as a sort of customer, a user of government services and information through, for example, receipt of benefits (disability, SSI, TANF, veterans) or education or road repair or garbage collection. This customer orientation is only stronger at the local level, where residents look to the government to fix potholes, plow the streets, remove graffiti, provide education and police protection, quiet down noisy neighbors, and so on.

The second primary contact individuals have with the government is when requesting permission to do something. Government grants a whole variety of licenses and permits—to drive, to build something, to practice a profession, to fill wetlands, to sell liquor, etc.

Actually, then, rulemaking falls pretty far down the list of government activities that matter to people in a day-to-day way. This can be seen in real-world phenomena involving e-

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[39] FEDERAL WEB MANAGERS COUNCIL, PUTTING CITIZENS FIRST: TRANSFORMING ONLINE GOVERNMENT, 2010 PROGRESS REPORT 1 (April 2010), *available at* http://www.howto.gov/sites/default/files/documents/2010_FWMC_ AnnualProgressReport.pdf.

[40] *Id.*

government. For example, one of the earliest serious federal efforts to evaluate how electronic innovation might change governance was a 1993 report from the congressional Office of Technology Assessment entitled *Making Government Work: Electronic Delivery of Federal Services*.[41] As the subtitle indicates, the report was preoccupied with how new technologies could improve delivery of services to "customers." The report contains one passing, buried, reference to the notion that "[e]lectronic delivery should provide many opportunities to improve citizen access not only to agency-specific mission-oriented services, but to the processes of government (e.g., hearings and rulemakings)."[42] And that's it. At around the same time, the Clinton administration engaged in a highly visible "reinventing government" effort known as the National Performance Review. New technologies were only one aspect of this project, and not its primary focus. Here, too, however, the whole pitch was about government as a provider of services to customers.[43] Similarly, the second Bush Administration's e-Government strategy set out 25 initiatives, all but one of which involved facilitating interaction between the government and its suppliers and "customers"; indeed the *Strategy*'s subtitle was "Simplified Delivery of Services to Citizens."[44] Primarily, this meant ensuring effective provision of information that someone doing business with or seeking benefits from an agency would want to know, such as how to apply for government benefits or grants or employment, or procurement practices and regulations, or product specifications. The *E-Government Strategy* included an e-Rulemaking initiative, but it was merely one of the 25 undertakings.[45]

Agency web sites reflect these priorities. For the most part, users really have to dig to find anything about e-Rulemaking on an agency site. This is because most agencies quite reasonably make top tasks the most visible, and rulemaking usually isn't one of them.[46] The same priorities are evident in "howto.gov," a how-to-use-the-Internet site for agencies produced by the Federal Web Managers Council, a group of senior web managers from various agencies.[47] The site is

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[41] U.S. Congress, Office of Technology Assessment, Making Government Work: Electronic Delivery of Federal Services, OTA-TCT-578 (Washington, DC: U.S. Government Printing Office, September 1993), *available at* http://www.fas.org/ota/reports/9333.pdf.

[42] *Id.* at 142.

[43] The flavor is captured in this brief excerpt regarding the Department of Housing and Urban Development:

> In *Reinventing HUD*, the Department of Housing and Urban Development illustrates its plans to revitalize and restructure itself with a series of charts. Along with the usual collection of square and rectangular boxes and straight and dotted lines, the reader can't help but notice the contents of one box at the top of every chart. It reads simply "CUSTOMER(S)."

> By itself, that one word captures the sweeping changes that Secretary Henry G. Cisneros is bringing to the much-maligned agency, the site not only of past scandals but of serious management problems. In the true spirit of *From Red Tape to Results*, Cisneros has sought to make better customer service HUD's bottom line. All of its reinventing efforts are geared to that goal.

"Customers on Top," in Creating a Government that Works Better & Costs Less: Status Report (September 1994).

[44] *See* Office of Mgmt. & Budget, Exec. Office of the President, *E-Government Strategy: Simplified Delivery of Services to Citizens* (Feb. 27, 2002), *available at* http://www.usa.gov/Topics/Includes/Reference/egov_strategy.pdf.

[45] *See id.* at 27.

[46] *See* Coglianese, *supra* note 18, at 44.

[47] *See* http://www.howto.gov/web-content.

subtitled "Helping agencies deliver a great customer experience,"[48] stresses a "customer experience model," and sets out a five step model "to 'wow' your customers, cultivate a positive image for your agency, and create an exceptional customer experience."[49] Evidencing similar priorities, President Obama's Executive Order 13571, "Streamlining Service Delivery and Improving Customer Service"[50] notes that "with advances in technology and service delivery systems in other sectors, the public's expectations of the Government have continued to rise."[51] It accordingly directs agencies to develop and monitor "customer service plans" that will "streamline service delivery and improve the experience of its customers."[52] Among other things, the plans must include at least one "signature initiative" that "will use technology to improve the customer experience"[53] and must "identify ways to use innovative technologies."[54]

And actual usage also reflects these priorities. Between a third and a half of all Americans are in contact with the government online. According to comScore, Inc., in July 2011 87.6 million Americans visited a government website, which represents 40.7% of the total U.S. online population.[55] That is a massive level of online engagement. What are they doing online? Some indication is provided by looking at what federal agencies they are visiting. In July 2009, 18 websites for federal government entities had over a million unique visitors. The Department of Commerce topped the list with 7,058,000 visitors, while the White House took last place with 1,138,000 visitors[56] Most of the entities that made the list are not major rulemaking agencies. For example, EPA made the list *only* for its nonrulemaking websites, cars.gov and fueleconomy.gov. The Department of Commerce achieved so many visitors because its online portfolio includes Weather.gov, NOAA.gov, Census.gov, and Time.gov, which people rely on for specific sorts of information.

In the last five years or so, agencies have aggressively moved from simply providing information on static websites to interacting with the public through social media, jumping in with both feet. It is quite remarkable how quickly and completely agencies have embraced social media outside of the rulemaking context. Like other e-government initiatives, however, the focus of this shift has *not* been on engaging citizens, but rather on serving customers. Accordingly, rulemaking is late to the social media party.

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[48] *See* http://www.howto.gov/customer-service/models/customer-experience-model.

[49] *Id.*

[50] 76 Fed. Reg. 24,339 (May 2, 2011).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 24,340.

[55] *See* comScore, Inc., Press Release, Government Sites Reach 40 Percent of Americans but Lag Behind Overall Internet Growth (Sep. 12, 2011). The top five agencies, each of which had over 4 million visitors, were the National Institutes of Health, the Department of Education, the Department of Commerce (which includes Weather.gov and NOAA), the IRS, and the Social Security Administration, in that order.

[56] John T. Snead, *Social media use in the U.S. Executive branch*, 30 GOV. INFO. Q. 56, 57 (2013).

C. Agency Uses of Social Media

Government agencies at the local, state, and federal level[57] have embraced social media with remarkable enthusiasm in non-rulemaking contexts. Indeed, the enthusiasm and extent of this activity belies agencies' reputation as risk-averse, slow to change, and nervous about transparency.

There are currently about 2,000 verified government social media accounts across nearly two dozen different platforms.[58] A "Social Media Community of Practice," which dates to June 2012, brings together more than 200 federal social media managers.[59] A 2010 GAO report found that 22 of 24 "major" federal agencies had a presence on YouTube, Facebook, and/or Twitter[60]; a year later, the number was up to 23[61]; it is now 24 out of 24.[62] Blogs, Flickr pages, and other undertakings are also common. In a study undertaken for the Administrative Conference, Cary Coglianese 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.[63] All those numbers have surely risen since. [64]

This has all happened quite rapidly. The Federal Web Managers Council has assembled a time line indicating when and how different agencies have embraced social media.[65] (The time-line was last updated in July 2011, perhaps itself an indication that it is no longer news when an

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[57] This report is limited to federal agencies, but the adoption of social media by state and local governments has been if anything more robust than its adoption by federal agencies. For an overview, *see* INES MERGEL AND BILL GREEVES, SOCIAL MEDIA IN THE PUBLIC SECTOR FIELD GUIDE: DESIGNING AND IMPLEMENTING STRATEGIES AND POLICIES (2013). This divergence reflects in part considerations of scale. Social media promises that every individual can participate and be heard. Well, there are over 300 million people in the country. The reality is that it would be both an overinvestment of citizen resources and a logistical nightmare for the agencies if all, or a significant portion, were suddenly demanding to engage in a dialogue with federal agencies. There is just no way for a single agency to engage with and listen to each of them that has a beef or a suggestion).

[58] Joseph Marks, *GSA Releases Guidelines to Measure Social Media Impact*, Nextgov (Feb. 19, 2013), http://www.nextgov.com/emerging-tech/2013/02/gsa-releases-guidelines-measure-social-media-impact/61391/.

[59] *See* http://www.howto.gov/communities/federal-web-managers-council/social-media.

[60] 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).

[61] 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.

[62] The NRC still does not have a Facebook page; it does, however, boast a Twitter feed, a blog, and a Youtube channel.

[63] *See* Coglianese, *supra* note 18, at 30.

[64] For overviews, see INES MERGEL, SOCIAL MEDIA IN THE PUBLIC SECTOR 243-63 (2013) (Appendix listing federal agencies' social media accounts and tabulating usage in 2010 and 2011); PARTNERSHIP FOR PUBLIC SERVICE, #CONNECTED.GOV: ENGAGING STAKEHOLDERS IN THE DIGITAL AGE (2013); Soon Ae Chun et al., *Government 2.0: Making Connections Between Citizens, Data and Government*, 15 INFO. POLITY: THE INT'L J. OF GOV'T & DEMOCRACY IN THE INFO. AGE 1 (2010).

[65] *See* http://www.dipity.com/govnewmedia/Gov-Social-Media-Timeline/.

agency turns to social media.) The first item, somewhat pathetic in retrospect, is from April 1, 2002, when the White House Easter Egg hunt was live-streamed. The next item does not appear for another two years, but the pace picks up pretty dramatically starting in 2008, and the timeline is crammed in the ensuing years.

How, and to what ends, are agencies using this massive social media activity? Overwhelmingly, it is 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 ways of *reaching* the public, not 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.[66] It is true that Youtube allows for comments, but the reality is that government Youtube videos tend not to accumulate that many comments and by and large they seem to go unread.

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.[67]

For the most part, agencies use social media in order to inform members of the public about what the agency is up to. The examples are countless, the following are typical.

Many agencies have posted videos on Youtube. These vary enormously in subject matter. EPA's 238 videos range from interviews with gay, lesbian, and transgendered EPA employees discussing the struggles they faced growing up[68] through a video touting the benefits of hydraulic hybrid vehicles[69] to an endorsement of e-waste recycling[70] and discussion of mercury emissions from small-scale gold processing.[71]

Agency twitter feeds by definition simply alert followers to information available somewhere else, such as, for example, the agency's videos on Youtube. So, for example, the Centers for Disease Control (310,000 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").[72]

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[66] The Department of Energy reportedly has established an island in Second Life in order to reach potential employees.

[67] U.S. Coast Guard, *Social Media and the U.S. Coast Guard: Right Tool ... Right Level ... Right Audience* 1 (2011).

[68] *See* http://www.youtube.com/watch?v=2DWzmYO0D8Y.

[69] *See* http://www.youtube.com/watch?v=sRkvGEN7ySE.

[70] *See* http://www.youtube.com/watch?v=p4KFhJQ0M0U.

[71] *See* http://www.youtube.com/watch?v=r3YKO8gkyws&list=UUlUC_8c_F3aBmwME-dNfvKg.

[72] https://twitter.com/CDC_eHealth/status/298883507609034752.

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, "recently passed 15,000,000 page views and 13,000 comments by the public."[73] The blog's RSS feed has more than 2500 subscribers.[74] The CFPB's blog[75] got underway in February 2011; the agency posts on average once every 2 or 3 days. The page states: "The CFPB blog aims to facilitate conversations about our work. We want your comments to drive this conversation." That has not quite come to pass; many of the posts have generated a couple of comments, but it is clear that the comments are not driving anything and that no real "conversations" are taking place.

The TSA authors a very active blog called, unremarkably, TSABlog. In its five years of existence it has received approximately 75,000 comments (of which over 20,000 were deleted as inconsistent with the blog's comment policy).[76] The blogs are valuable sources of information about the agency and serve an educational purpose. It does not seem, however, that they are useful models for the sort of dialogue and input that might be transferable to the rulemaking setting. For example, reading the TSA blog is discouraging. The posts from TSA vary between the quasi-promotional and the informational. All in all, the agency is attempting to: (a) get the public on its side; and (b) make the screening process go more smoothly by providing information about what cannot be brought onto a plane and other travel tips. The comments— and bear in mind, more than a quarter of comments never see the light of day because they violate the TSA comment policy—are primarily furious attacks on the TSA's competence, integrity, and value, leavened by the occasional "atta boy" (which the attackers assume are posted by TSA employees trying to make it look as if there is more support for their efforts than there is). It is hard to believe that anything of value gets communicated *to* the agency through this medium. The official responses from the agency are polite and restrained, but it appears that individual TSA employees occasionally voice their frustration with the attacks in the comments. For example, TSORon wrote on 1/31/13: "Very few actually understand what security is or what it takes to achieve it. And then there are those who don't want to know, and are very happy in

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[73] Dep't of State, Open Government Plan (Version 2.0) 19 (Apr. 9, 2012), *available at* http://www.state.gov/documents/organization/188085.pdf. These numbers are somewhat suspect, in that the 2010 version of the plan and the 2012 version both state that the blog "recently passed 15,000,000 page views."

[74] *Id.*

[75] *See* http://www.consumerfinance.gov/blog/.

[76] These figures appear on the blog's "comment policy" page. http://blog.tsa.gov/2008/01/comment-policy.html.

their ignorance. That alone accounts for the vast majority of the posters here."[77] Which, of course, only prompted aggravated, nonsubstantive responses.[78]

It is striking that these agency uses of social media do not involve the very things that are generally celebrated about web 2.0: dialogue, user-generated content (unless you count the agency as the user), and interactivity. To be sure, agency postings do generate comments. A basic feature of Facebook, for example, is that viewers can comment on anything that is posted. The page owner can turn off comments, but agencies generally have not done so, and the folks at Facebook encourage them not to.[79] Accordingly, almost every post prompts a handful of both "likes" and comments. Facebook does not have a "don't like" option, so the number of "likes" that a post accumulates is only the roughest sort of guide to its actual popularity. Comments are consistently a mixed bag, many are brief expressions of support[80] or derision,[81] some wholly off-topic,[82] some substantive. By and large, however, they are not especially helpful and are ignored by the agency.

What is true of agency Facebook pages is true of the current Administration's open government efforts generally. Although President Obama's 2009 memorandum called for transparency, participation, and collaboration, the real emphasis and successes have been limited to the first of those undertakings.[83] This may be partly a branding problem; "open government" sounds like it is focused on transparency.[84] But it also reflects the fact that increasing participation and collaboration is just a lot harder than becoming more transparent.

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[77] *See* http://blog.tsa.gov/2013/01/tsa-week-in-review-26-loaded-firearms.html.

[78] Anonymous responded: "Why is TSA employee 'TSORon' allowed to insult American citizens on this gov't website?" And frequent poster "Wintermute" wrote: "Ahh... there's the insults we've come to expect. I'll put my knowledge of security up against any TSO's knowledge any day, even though I'd hardly call myself an expert (just a geek with some interesting hobbies)." *Id.*

[79] Adam Connor, Ten Quick Tips for using Facebook, at approx. 4:30, *available at* http://www.youtube.com/watch?v=14JqhIK8OhY, *slides available at* http://www.slideshare.net/GovDeliveryUS/adam-conner-facebook-government.

[80] "Well done!"

[81] "Ban the EPA!" "Let's not appreciate the commie EPA propaganda!" "Another waste of taxpayer money, folks. Pathetic."

[82] "I think I would be an asset to the EPA. I'll be seeking employment soon. I'm graduating with an MPA this spring." (This was posted as a comment to an EPA video about LGBT employees at the agency, which some commenters attacked as itself pretty off topic.) In response to a post about grocers donating unsold food to food banks: "No GMO's. stop fracking now! Leftover food is the least of your worries. Our country is poisoned by Monsanto daily!"

[83] *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) (demonstrating that open government policies have largely focused on information disclosures rather than participatory or collaborative measures).

[84] Beth Simone Noveck, Defining Open Government, CAIRNS BLOG (Apr. 14, 2011, 12:57 PM), http://cairns.typepad.com/blog/2011/04/whats-in-a-name-open-gov-we-gov-gov-20-collaborativegovernment.html.

D. Gathering Public Input through Social Media Outside the Rulemaking Setting

Outside the rulemaking setting, agencies have made some attempts to gather public input regarding policy questions through social media.[85]

1. Ideation Sites

The most prominent examples of this kind of social media usage involve "ideation" sites using Ideascale or similar software. Such platforms generally involve open calls for suggestions on a particular topic. Anyone can submit an idea or suggestion, the submissions are visible to all other visitors to the site, and other visitors can give the submitted ideas a thumbs up or a thumbs down. Visitors can also leave comments. The principle is that the most popular ideas, defined as those with the highest net number of thumbs up votes, will percolate to the top, while the least popular ideas will sink to the bottom of the user-generated list. GSA has promoted these tools as mechanisms "that make it possible for agencies to engage with many more people and help analyze, absorb, and use the public's ideas and suggestions."[86] GSA has also negotiated Terms of Service agreements that make agency adoption of Ideascale quite straightforward.

Most major agencies have tried Ideascale, at least with regard to seeking suggestions for their Open Government Plans and sometimes in other settings as well. The results have been disappointing. A few examples follow.

"EPA Conversations," the most popular of EPA's several Ideascale sites, began in mid-2012 and generally invites ideas about environmental protection. Its tagline is "Look beneath the surface, Address the Issues, Expand the Conversation."[87] A Youtube video (with very high production values and 72,000 views) sends viewers to the site. As of early February 2013, it has 411 users who have come up with 130 ideas. The most popular idea boasts 121 votes, while the least popular has garnered a net vote total of -14. (This least-popular idea was: "Global warming is NOT happening.") Most of the ideas are constructive, but none of them convey information that would be news to environmental professionals. The number one idea, for example, is to ban single-use plastic bags. This approach has been part of the solid waste conversation for decades, with various jurisdictions having adopted such measures and others having explicitly rejected them. Novel ideas might be valuable; old ideas that showed massive support might be valuable. But 121 "votes" in favor of banning plastic bags does not advance the conversation. To date, EPA itself has not been a visible presence on the site; it has not responded to or acted on any of the posts.

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[85] I limit this section to input about policy because that is what rulemaking involves. Social media can also be useful in gathering other sorts of information from the public. Most obviously, it is a mechanism for citizens seeking assistance to alert government officials to something requiring attention. There are numerous examples at the state and local level. For example, many municipalities have had success with "clickfix," a platform that allows residents to alert local officials of conditions such as potholes, uncollected garbage, nonworking traffic lights, stray wildlife, etc. *See, e.g.,* http://seeclickfix.com/burlington_2 (Burlington, Vermont clickfix site); *see generally* http://seeclickfix.com/ (clickfix home page, with general information and links to city-specific sites).

[86] Gov't Servs. Admin., *OpenGov Citizen Engagement Tool: Frequently Asked Questions for Federal Agencies*, No. 2.a, http://www.howto.gov/web-content/requirements-and-best-practices/open/tool-faqs.

[87] *See* http://epaconversations.ideascale.com/.

The FCC has a wide variety of ideation sites.[88] Among the most interesting and highly touted is the site it hosted in developing its national broadband plan.[89] The plan is not a regulation, so its development was not required to proceed through rulemaking. The FCC nonetheless elected to solicit public input during the plan development process. In particular, the FCC established a docket and took public comments, in addition to holding a number of legislative-type public hearings. The FCC's approach thus provides an example of the use of a separate Ideascale site to supplement an otherwise standard notice-and-comment process. During the two years or so the Ideascale site was open, it drew 279 ideas, 536 comments, and 4,685 votes from 934 registered users. Ideascale touts this project as a success in its own promotional efforts.[90] As with EPA Conversations, the suggestions the site generated were fairly vague and generic. The two most popular were "Bring the United States mobile broadband pricing in line with the rest of the world" (131 votes) and "Net Neutrality is Vitally needed, even in Cities" (117 votes).[91] As with the EPA site, these propositions may be true, but they are neither novel nor helpful, and the fact that 100+ people signed on to them does not really mean much.

Interestingly, the Commission treated the Ideascale site and a dedicated blog as of equal status with its "official" Electronic Comment Filing System (ECFS). It took all the ideas and comments and placed them in the official docket for the broadband plan proceeding.[92] That does not mean that the ideas actually affected the substance of the plan. The "Civic Engagement" section of the plan (Chapter 15) does mention the existence of the Ideascale site and notes that many citizens had given ideas, votes, and comments. It does *not* indicate that those ideas, votes, and comments were incorporated into the plan and does not specifically discuss any of them.[93] Similarly, Ideascale boasts about the FCC site in its promotional materials, asserting that "those who participated in the public dialogue directly affected changes that were implemented by the FCC in the National Broadband Plan." But it gives no concrete examples to back up this assertion.[94]

2. Blogs

As mentioned above, agency blogs, while ubiquitous, are used primarily to distribute information about the agency. However, agencies have sometimes used blogs to solicit comments and reactions with regard to specific proposals or problems. For example, along with the National Broadband Plan Ideascale site, the FCC established a dedicated blog, The

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[88] Links are collected at the commission's "discuss" page. http://www.fcc.gov/discuss. Note that the agency has shifted from using Ideascale to a similar ideation platform, Uservoice. *See, e.g.,* http://fccdotgov.uservoice.com/forums/105541-a-new-fcc-gov-feedback (general feedback on and suggestions for the FCC web site).

[89] *See* http://broadband.ideascale.com/.

[90] *See* http://ideascale.com/resources/fcc-case-study.html.

[91] *See* http://broadband.ideascale.com/.

[92] FCC, FCC Explains Relationship of Ideascale Postings to the Record in the National Broadband Plan Proceeding, DA 10-42 (Jan. 11, 2010), *available at* http://www.fcc.gov/document/fcc-explains-relationship-ideascale-postings-record-national-broadband-plan-proceeding.

[93] *See* http://www.broadband.gov/plan/15-civic-engagement/#_edn61.

[94] Ideascale, FCC: National Broadband Plan Government Case Study (2011). The study also asserts that the Broadband Ideascale site logged 60,000 responses from the public, a number that appears to be just wildly off.

Broadband Blog, also known as "Blogband."[95] Like the Ideascale site, the blog was designated an official part of the record for the proceeding.[96] The Commission issued an official statement making that designation and admonishing that "interested persons are advised to review not only ECFS, but also Blogband to ensure that they are aware of all relevant views expressed to the Commission concerning the National Broadband Plan."[97] Despite some fanfare, comments were neither especially numerous nor especially substantive.

3. Invitations to ask questions

The Department of State for a time invited the public to send text messages to Secretary Clinton to "interact with the Secretary of State when she is traveling, or during special events."[98] The "Text the Secretary" program invited submissions from anyone, either by text message or on the Department's web page, promising that answers to representative questions would be posted on the website. Between February 2009 and July 2010, texts and responses regarding ten separate trips taken by the Secretary were posted. Since then, the program appears to be moribund, though the Department's 2012 Open Government Plan discusses it in the present tense.[99]

4. Twitter Solicitations and other Open Invitations

It is not uncommon for agencies to tweet general requests for the public to submit ideas. To pick a random example, on February 1, 2013, EPA tweeted: "It's time for #EPAtips again! What are some unexpected ways you've found to save energy this winter?" Responses could be tweeted or posted on Facebook. The same day, it tried again: "Tell us some unexpected ways you've found to save energy this winter. Use hashtag #EPAtips. We'll retweet our favorites." The next day: "Last chance to share your #EPAtips with us! What are some unexpected ways you've found to save energy this winter?" And then two days later: "Thanks to everyone who shared their #EPAtips with us!" The exuberant (or desperate) exclamation marks notwithstanding, it appears that not a single "unexpected way to save energy" was submitted.

A similar effort is the general discussion page on the FCC's web site,[100] which hosts ongoing discussions on various topics. This promising idea is undermined, as is so often the case, by a lack of participation, and particularly informed participation. For example, the FCC asks: "How can we improve our APIs?" The top-ranked comment in response is "what is API?" It is one of only two comments, and it has received only ten votes (plus one comment, which answers the question). Similarly, the FCC asks: "How can the FCC better engage the public on rulemakings?" (a question of great interest to this writer, at least).[101] That question has produced 25 suggestions, of which the most popular has 17 votes. Of the 25, only five are actually about the rulemaking process as opposed to this or that substantive concern. These five suggestions

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[95] *See* http://www.broadband.gov/.

[96] FCC, *FCC Explains Relationship of Blogband to the Record in the National Broadband Plan Proceeding*, 29 FCC Rcd. 11999 (Sep. 22, 2009).

[97] *Id.*

[98] *See* http://www.state.gov/r/pa/ei/ask/index.htm.

[99] *See* Dep't of State, Open Government Plan (Version 2.0) 21 (Apr. 9, 2012), *available at* http://www.state.gov/documents/organization/188085.pdf.

[100] *See* http://www.fcc.gov/discuss.

[101] *See* http://fccdotgov.uservoice.com/forums/105561-rulemaking?filter=top&page=1.

endorse Regulation Room, endorse the use of social media (the entirety of this comments says, "use social media outlet"), urge the FCC to create an index of rulemakings, and suggest alerting the world to possible regulations via social media before they have been proposed. None of those are foolish suggestions, but neither are they helpful or novel.

Many agencies now have general pages where members of the public can submit ideas or suggestions and vote on those submitted by others. These tend to be quite open-ended. Examples include the FCC's "reboot" site,[102] HUD's "Ideas in Action" site,[103] and the CFPB's "tell your story" page[104] and now-completed "Open for Suggestions" campaign,[105] which also solicited public input through multiple outlets, including Twitter, e-mail, and YouTube videos. The CFPB received hundreds of suggestions and posted video responses to many on its YouTube channel.[106] The Bureau also launched a blog and social media outposts on Twitter, Facebook, Flickr, and YouTube. These channels have been providing a steady stream of information from the public about problems with consumer financial products and suggestions for how to address those problems. The Bureau asserts that it is analyzing this information so that it can inform its priorities and policymaking,[107] though concrete affects or results are hard to identify.

5. Crowdsourcing and Wikis

Crowdsourcing involves distributing production and problem-solving, capitalizing on dispersed knowledge and the ancient principle that "many hands make light the work." A big project can be broken into a large number of discrete, manageable tasks that are distributed to a large number of participants, often but not necessarily volunteers. Prominent examples have involved the development of the open-source software Linux and Wikipedia. There are two basic sorts of crowdsourcing, In one, exemplified by Linux, large numbers of people perform discrete *tasks* as part of a larger project; in the other, exemplified by Wikipedia, large numbers of people provide small bits of *information* that add up to a usefully comprehensive body of knowledge. Neither is a new idea—law enforcement has crowdsourced surveillance forever, hence anonymous phone tips lines and "if you see something, say something" campaigns—but the capacity for crowdsourcing is hugely enhanced by the Internet.

Some agency information collection activities have effectively drawn on dispersed knowledge. The best-known example is the Peer to Patent (P2P) project developed by Beth Noveck.[108] P2P allows patent examiners to access general knowledge with regard to whether a supposedly new (and therefore patentable) invention in fact is such. Other instances have been less successful. For example, the FTC put out a call for innovative solutions to the scourge of

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[102] *See* http://reboot.fcc.gov/.

[103] *See* http://hudideasinaction.uservoice.com/forums/95655-public-forum.

[104] *See* https://help.consumerfinance.gov/app/tellyourstory.

[105] *See* http://www.consumerfinance.gov/open-for-suggestions/ (archived page).

[106] *See* http://www.youtube.com/user/cfpbvideo.

[107] *See* Leonard J. Kennedy, Patricia A. McCoy, and Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1158-59 (2012).

[108] *See* NOVECK, *supra* note 4, at 12-14, 48-49; http://www.peertopatent.org.

robo-calls, with an award of $50,000 to the best idea. The effort does not appear to have produced any valuable suggestions.[109]

A promising crowdsourcing effort is the Consumer Product Safety Commission's new site for reporting unsafe products, saferproducts.gov. This online database allows consumers to register concerns or complaints about safety issues with purchased products. Complaints are not published directly to the database upon receipt. Instead, manufacturers are first given the opportunity to respond and dispute the complaint. The CSPC posts the complaint only if it is satisfied of its genuineness.[110] The National Highway Traffic Safety Administration has a similar site, safercar.gov, which allows individuals to submit complaints about their vehicles and search others' submissions.[111] In unusual circumstances, agencies may be able to crowdsource direct, voluntary participation in the agency's activities. For example, the National Archives and Records Administration (NARA) recruited volunteers through Wikisource to transcribe scanned images of materials in NARA's collection. Over the course of a year, volunteers transcribed and verified over 400 documents. Similarly, NARA has uploaded over 13,000 images to Wikimedia commons and asked volunteers to edit the "tags" (i.e., the key word(s) associated with an image through which searchers can find it). This is only a small fraction of NARA's overall digitization effort, almost all of which is done in house. However, it at least serves as a "proof of concept."[112]

E. Social Media Within or Parallel to Rulemaking

Agencies have been tentative in using of social media in the rulemaking context, particularly during the formal comment period. At a 2010 congressional hearing on agency use of Web 2.0 technologies, the word "rulemaking" was not uttered a single time.[113] For several agencies, initial enthusiasm for using social media in conjunction with rulemaking activities dimmed when confronted with real world barriers.[114] And 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). For the most part, social media are used to get the word out about a rulemaking, but not as a mechanism through which the rulemaking is actually conducted. Agency blogs and twitter feeds, for example, will alert readers to a rulemaking, but are not used as a forum for discussion of the rulemaking. Similarly, EPA's "Rulemaking

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[109] Adrianne Jeffries, *Who can stop robocalls? FTC tries to crowdsource a solution but falls flat*, The Verge (Jan. 28, 2013), http://www.theverge.com/2013/1/28/3924544/who-can-stop-robocalls-ftcs-attempt-to-crowdsource-a-solution-falls.

[110] *See generally* 16 C.F.R. pt. 1102 (establishing the rules governing the CPSC's publicly available consumer product safety information database).

[111] *See* http://www.safercar.gov/.

[112] These efforts are reported on in Partnership for Public Service, #Connected.gov: Engaging Stakeholders in the Digital Age 16-17 (2013).

[113] *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).

[114] For example, the Coast Guard was initially quite enthusiastic about the possibility of using social media in rulemaking.

Gateway"[115] is only a place to learn about agency rulemakings, but it is not a location for discussing those rulemakings.[116]

I am aware of only one instance to date in which a federal agency has directly relied on social media as a mechanism for commenting in a §553 rulemaking. This was the FCC's Open Internet proceeding, which is discussed in detail immediately below. With that exception, submitting an official comment in a rulemaking continues to require submission via regulations.gov or the agency website (or, in rarer cases, in person or by U.S. mail). Nonetheless, there are some interesting examples of agencies using social media to do a little more than simply spread the word about a rulemaking. The following is a representative rather than an exhaustive sampling.

1. The FCC's Open Internet Rulemaking

In November 2009, the FCC issued a Notice of Proposed Rulemaking concerning Preserving the Open Internet.[117] Strikingly, it identified seven different methods for submitting comments: through regulations.gov, on the FCC web site, by email, by U.S. mail, in person, through special arrangements for those with disabilities, and . . . by posting comments on either the blog[118] or the Ideascale site[119] dedicated to the rulemaking. The blog seems not to have attracted any comments. The Ideascale site drew just over 5,000 users, who submitted 422 ideas, 2,387 comments on those ideas, and 37,000 votes. The most popular idea had 467 net "agree" votes; the least popular 132 net "disagree" votes. As is typical of Ideascale ideas and comments, all of these were quite brief, generally not more than a few sentences in length. I have not read all the comments, but it would seem that Commission staff did not themselves participate on the Ideascale site. The Commission then transferred all of the Ideascale posts into the official docket. Total filings in the docket exceeded 100,000.[120]

In the Report and Order (R&O) issuing the final rule, the FCC did not discuss this unusual procedure or discuss the Ideascale comments as such. The R&O does list "major commenters," which include those whose submissions are discussed in the R&O. It further acknowledges that "[t]he Commission also received tens of thousands of brief comments in this proceeding, which are not listed here but which were considered."[121] Presumably, the Ideascale submissions were

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[115] *See* http://yosemite.epa.gov/opei/RuleGate.nsf/.

[116] As then Associate Administrator Lisa Heinzerling put it in a blog post (expressing her own views and not those of the agency, as all EPA posters do on the Greenversations blog) when the gateway first went up, "This is a new web site that makes EPA's rulemaking process more transparent and easier to follow. It gives you the tools to understand how you can get involved in EPA's priority rulemakings, how a rulemaking might affect you, and where each rule falls in our rulemaking process." *See* http://blog.epa.gov/blog/2010/02/the-rulemaking-gateway-a-new-tool-to-learn-about-our-rules-and-watch-their-progress/. Heinzerling's post mentions a discussion forum on the Gateway; that seems no longer to exist. (It would be worth finding out what happened and why.)

[117] Preserving the Open Internet, Broadband Industry Practices, 74 Fed. Reg. 62,638 (Nov. 30, 2009) (to be codified at 47 C.F.R. pt. 8).

[118] *See* http://blog.openinternet.gov.

[119] *See* http://openinternet.ideascale.com.

[120] Preserving the Open Internet, 76 Fed. Reg. 59,192, 59,192 (Sep. 23, 2011) (to be codified at 47 C.F.R. pts. 0 & 8).

[121] In the Matter of Preserving the Open Internet, Broadband Industry Practices, FCC 10-201, Report And Order, 25 FCC Rcd. 17905, 18001 n. 501 (rel. Dec. 23, 2010).

among these "brief" comments, and the Commission read but did not directly responded to them. Indeed, almost every comment actually referenced in the preamble was filed by a sophisticated corporate, industry, or NGO stakeholder.

The rulemaking is striking in that it is one of the few, and perhaps the only, example of a rulemaking proceeding in which an agency provided for commenting via social media. It is worth noting that, on the one hand, the process seems to have gone entirely smoothly, but, on the other hand, it seems to have added little, if anything, to the primary mechanism, which was submitting comments through the agency's docket management system.

2. Forest Service Planning Rule

A similar though less dramatic undertaking involves a Forest Service rulemaking. From 2009 to 2012, the U.S. Forest Service developed a new rule establishing an overall planning process governing the management of national forests. The process was standard in many respects, beginning with a Notice of Intent (NOI),[122] which produced a set of comments, followed by a Notice of Proposed Rulemaking,[123] which produced another set of comments, leading to a final rule.[124] The Forest Service, however, said that the rule "was developed through the most collaborative rulemaking effort in Agency history."[125] After issuing the NOI, the Forest Service held two-dozen "regional roundtables" to discuss the rule.[126] During the comment period, the Forest Service held some 75 public forums, spread through all the forest service regions.[127] Although the number of public meetings was unusually high, these aspects of the process are not unusual. More unique was that the Forest Service established at the outset a blog dedicated to the rulemaking, the Planning Rule Blog.[128] The blog began in 2009 with release of the NOI and concluded in 2012 with publication of the final rule. It was modestly active, with just a few dozen posts. These posts produced approximately 300 comments from readers, most of which did not generate responses from other commenters or the Forest Service. Note that the actual rulemaking produced 300,000 comments, a thousand times more than the blog. Thus, the blog can hardly be seen as a central aspect of the overall process.

Notably, the Forest Service kept the blog and its comments carefully separate from the official notice-and-comment process. At the top of the blog home page there appears this notice: "Welcome to the Planning Rule blog! While we hope you will engage with us on the Planning Rule Blog, please remember these are not official comments." The message is repeated and expanded at the bottom of the page: "NOTE: Blog posts do not constitute formal comments. Comments submitted to this blog do not constitute formal comments such as those submitted

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[122] *See* National Forest System Land Management Planning, 74 Fed. Reg. 67,165 (Dec. 18, 2009).

[123] *See* National Forest System Land Management Planning, 76 Fed. Reg. 8480 (Feb. 14, 2011) (to be codified at 36 C.F.R. pt. 219).

[124] *See* National Forest System Land Management Planning, 77 Fed. Reg. 21,162 (Apr. 9, 2012) (to be codified at 36 C.F.R. pt. 219).

[125] *See* http://www.fs.usda.gov/main/planningrule/home.

[126] *See* http://www.fs.usda.gov/detail/planningrule/collaboration/?cid=stelprdb5136336.

[127] *See* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5346477.pdf (schedule of 2011 public meetings on the planning rule).

[128] *See* http://planningrule.blogs.usda.gov/.

during Federal Register comment periods. Official formal comments must be submitted during formal comment periods."[129] This approach is consistent with ACUS Recommendation 2011-8, *Agency Innovations in e-Rulemaking*: "When an agency sponsors a social media discussion of a rulemaking, it should provide clear notice as to whether and how it will use the discussion in the rulemaking proceeding."[130]

Similarly, the Department of Education has used its blog, "Homeroom," to encourage public comment on an NPRM. It has not permitted web site users to post comments by commenting on the blog entry. Rather, it disabled the commenting function for the post relevant to the rulemaking and instructed the public to comment via regulations.gov or go the traditional off-line route.[131]

3. Regulation Room

Regulation Room, housed at the Cornell E-Rulemaking Initiative and led by Professor Cynthia Farina of the Cornell Law School, is a website that uses Web 2.0 approaches and tools to facilitate public discussion and feedback in connection with federal agency rulemakings.[132] The site is conceived and operated by researchers from computing and information science, communications, conflict resolution, law, and psychology. Its basic goals are to improve the amount and quality of public participation in rulemaking.

The Regulation Room team has identified three key factors that stand in the way of fuller public participation.[133] The first is ignorance. Citizens know very little about agencies and next to nothing about the role, nature, or importance of rulemaking. Second, unawareness—even individuals who have a more sophisticated understanding of rulemaking will often just not know about a particular rulemaking even though it is of direct relevance to them. Third is information overload from the sheer mass and technical complexity of the materials found in rulemaking dockets and the preambles to proposed rules.[134] "To participate effectively--that is, to do more than simply express support or opposition in general terms--participants must master lengthy, intricate proposals embedded in a mass of linguistically, technically and legally sophisticated material. This intimidates and overwhelms most people, even those who have some relevant working knowledge of, or experience with, the substantive issues being addressed."[135]

The project has made heroic efforts to overcome these obstacles. The first two are addressed through extensive outreach, primarily but not exclusively through Twitter, Facebook, and other social media, and by providing materials about the rulemaking process and the nature of comments. To address the third barrier, information overload, a group of students and faculty disaggregates, "translates," and summarizes the material in the agency preamble, presenting a

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[129] *See* http://planningrule.blogs.usda.gov/.

[130] Adoption of Recommendations, 77 Fed. Reg. 2257, 2265 (¶ 3) (Jan. 17, 2012).

[131] *See* http://www.ed.gov/blog/2009/10/investing-in-innovation-webinar/.

[132] The project's useful self-description is available at http://regulationroom.org/about/. *See also Rulemaking in 140 Characters, supra* note 3, at 388-93.

[133] *Rulemaking 2.0*, *supra* note 3, at 417-18.

[134] *Id.* at 417-19.

[135] *Id.* at 418.

series of more bite-sized "issue posts" and specific aspects of the proposal. Commenters can address their comments to specific items within an issue post,[136] and the comments are threaded. In addition, trained facilitators actively moderate the discussion. "The moderators police inappropriate content and help with site use questions but, far more important, they help lower the barriers of both information overload and ignorance of the rulemaking process by mentoring effective commenting. They point users to relevant information, prompt them to provide more details, and encourage them to react to different positions."[137] Finally, the Regulation Room team reviews the discussion and posts a draft summary on the web site for comment before producing a final Summary of Discussion. Only the final summary is submitted to the official rulemaking docket.

To date, Regulation Room has participated in five rulemakings—four with the Department of Transportation and one with the Consumer Financial Protection Bureau. In each instance, most of the participants (and in two cases virtually all of the participants) had no prior experience with rulemaking. The number of comments has ranged from 32 to 931 per rulemaking; the number of registered users from 53 to 1189 per rulemaking.

Regulation Room has been the most sustained and self-reflective effort to move notice-and-comment rulemaking in the Web 2.0 direction. The Regulation Room team is large, talented, and hard-working and boasts a wide range of expertise. It is thus striking that the site has struggled to achieve its original vision of engaged citizen participation in a dialogic, collaborative process that produced information and insight. Professor Farina and her colleagues have produced several extremely valuable articles that review the experience and describe lessons learned.[138]

4. Consumer Financial Protection Bureau "Know Before You Owe" Rulemaking

The Consumer Financial Protection Bureau is arguably the federal agency currently most committed to and engaged in the use of social media and other cutting edge technologies. Its most significant use of innovative approaches has been in its rulemaking concerning mortgage disclosures, for which the NPRM appeared in August 2012.[139] The proposed regulation would impose new disclosure requirements in connection with consumer mortgages. Central to the rulemaking was designing a mandatory form that lenders would use to provide information about a loan to a prospective borrower. The Bureau developed two prototypes for a Loan Estimate form, and each went through several iterations. It obtained feedback on the forms in two ways. One was in a series of "qualitative testing" in which individuals reviewed the forms, attempted to use them, and gave their reactions and suggestions. Over time, the Bureau performed qualitative

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[136] Regulation Room is built on WordPress 3+, an open-source blogging tool. The ability to attach comments to specific sections of a post or document results from adding Digress.it, which the site builders consider "the most important" of the open-source plugins they have added to WordPress. *Rulemaking 2.0, supra* note 3, at 412.

[137] *Id.* at 391.

[138] In addition to the articles cited in the previous footnotes, see Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, WAKE FOREST L. REV. (forthcoming 2013); Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts,* 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012) [hereinafter *Rulemaking vs. Democracy*].

[139] Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 77 Fed. Reg. 51,116 (2012) (to be codified at 12 C.F.R. pts. 1024 & 1026).

testing with 114 persons, of whom 92 were consumers and 22 were members of the loan industry.[140]

Separately and in addition, beginning in May 2011, the Bureau sought feedback from the general public by: (a) posting two versions of the proposed Loan Estimate form to its blog, from which visitors could email feedback to the Bureau; and (b) posting the forms to its web site, where visitors could use an interactive tool to review and give feedback. Announcements of the availability of the prototype forms were made on the Bureau website and through its Twitter feed. Over the following ten months, it received 27,000 comments. It would seem that the old-fashioned, in-person qualitative testing proved to be the critical basis for changes to the forms through this process. However, the general public feedback through the online interactive tool also had some influence, particularly in identifying problem areas.[141] It is worth noting, too, that this is a setting in which simply asking individuals what they prefer—in essence, inviting them to cast a vote—could be valuable. In general, agencies and commentators have been appropriately wary of turning rulemaking into a referendum. But sometimes the ultimate question really is simply "what do people prefer," and, if a broad segment of the population can be reached, and interactive tool can provide helpful information about that question.

Interestingly, part of the information gleaned by the Bureau did not come from direct comments or reactions, but rather from the Bureau's observing the behavior of web site visitors. For example, staff aggregated the results into "heat maps" that indicated which parts of the forms people paid attention to most.[142] The Bureau insists that it found this useful.[143] It is not clear,

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[140] The whole process and its results are detailed in an exhaustive report from the outside consultant who assisted the Bureau. *See* Kleimann Communication Group, Inc., *Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures* (July 9, 2012), *available at* http://files.consumerfinance.gov/f/201207_cfpb_report_tila-respa-testing.pdf.

[141] CFPB Interview, 1/15/13.

[142] An image of such a heat map can be seen at http://www.consumerfinance.gov/blog/mortgage-disclosure-is-heating-up/.

[143] Mortgage Disclosure is Heating Up, CFPB Blog (June 24, 2011), http://www.consumerfinance.gov/blog/mortgage-disclosure-is-heating-up/. The post observes:

> Our feedback tool recorded where users clicked as they reviewed the draft disclosures. A heatmap is a way of displaying those clicks as a graphic that shows which areas were clicked on most. Simply put, it's a way for us to see, at a glance, what areas of our draft disclosures attracted the most and least attention. . . .
>
> So, what can this image tell us? Here are a few highlights:
>
> • Respondents were interested in the bottom line. The full loan amount at the top of the page, the projected payments section at the bottom of the page, and the estimated closing payment on the second page all received a lot of clicks.
>
> • People had a great deal to say about the "Key Loan Terms" and "Cautions" sections.
>
> • People commented on the first page of the draft form much more than on the second. This is a pretty common occurrence, and on its own, it serves as helpful advice for our designers about where to put certain important information. But the information on the second page (like closing costs, for example) is also an essential part of mortgage disclosure. That's why the next round of testing will focus on the second page.

however, exactly what useful information the heat maps convey. Still, this is a hint of something potentially quite important. The information provided through citizen use of social media may be indirect, or meta. The agency may learn something not from what is directly communicated to it, but what is indirectly revealed by what members of the public do online and in interacting with the agency.

5. *Regulations.gov Exchange*

Regulations.gov maintains an open discussion site—officially a "partner site," distinct from regulations.gov itself—called Exchange.[144] The idea behind Exchange is to establish a general discussion forum for feedback either about regulations.gov itself or about particular agency initiatives. Agencies are invited to seek public input on a planned rulemaking before it begins. Very few have done so. EPA has sought feedback regarding two changes to the Toxic Release Inventory[145] and with regard to a planned rulemaking to require electronic reporting of discharge monitoring results from holders of water pollution permits.[146] And that's about it.

With regard to the handful of instances in which agencies have attempted to use Exchange, the results have been disappointing. For example, with regard to the NPDES rulemaking, EPA asked seven specific questions.[147] Most of these had about 3,000 views; one, regarding Internet access, had 25,000. The Internet question prompted 15 comments, all very general expressions of enthusiasm for the Internet; the rest received from zero to two, none of any real value.[148] There is no dialogue among commenters and no response from the agency. Not surprisingly, this effort was seen as a failure within the agency.[149]

F. Summary

A decade into the flowering of e-Rulemaking, four years since the Open Government Memorandum, in the thick of the web 2.0 explosion, the role(s) of social media in rulemaking remains uncertain. There has yet to be a truly successful demonstration of how social media will or might meaningfully enhance the notice-and-comment process. To date, participation levels have been low and dialogue virtually nonexistent. Sophisticated participants have shunned social media, sticking to traditional notice-and-comment. The quality of contributions from lay participants has not been high, and the impact of their contributions difficult to perceive. On the other hand, the theory is enticing, and the possibility that new technologies could engage

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[144] *See* http://exchange.regulations.gov/exchange/.

[145] *See* http://exchange.regulations.gov/topic/trichemical (noting that the agency was considering adding two chemicals to the TRI list; no comments as to either).

[146] *See* http://exchange.regulations.gov/topic/npdes/agencyintro/npdes-exchange.

[147] *See* http://exchange.regulations.gov/topic/npdes/.

[148] These include the following, which is the sort of thing that might bring an agency official to tears and highlights just how badly this sort of thing can work. EPA asked: "If EPA published a rule requiring mandated electronic reporting, what effect would this have on your state or local government, on the public or on the federal government?" That question received one response: "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://exchange.regulations.gov/exchange/node/509.

[149] EPA Interview, 1/9/13.

stakeholders who have heretofore been on the sidelines, tap into the dispersed knowledge of the public, bring new voices to the table, and democratize the process remains worth pursuing.

V.   LEGAL OBSTACLES

A. The Administrative Procedure Act

The conventional wisdom is that the Administrative Procedure Act stands as a barrier to the use of social media in rulemaking. In 2008, the Federal Web Managers Council (FWMC) produced a document entitled *Social Media and the Federal Government: Perceived and Real Barriers and Potential Solutions*.[150] It identified ten barriers to greater use of social media by government agencies and possible ways to overcome them. Number ten on the list was the "hesitation and confusion as to how to incorporate [social media] during the rulemaking process," given that the APA was not written with these tools in mind.[151]

The FWMC suggested that "[t]he National CTO or OMB should issue guidance to help agencies use collaborative social media tools to enhance the rulemaking process, while still complying with the APA."[152] Such guidance has not been forthcoming, and discussions with lawyers and others within agencies indicates a continued concern about how it would be possible to engage in the sort of fluid, dialogic give and take that characterizes social media while still complying with the APA.[153]

As described above, to date agencies have been careful to separate any social media discussion from "official" comments as part of a rulemaking proceeding. Agencies have been quicker to gather input from ideation sites and blogs, for example, when the ultimate agency product is a report, or a policy document, or a strategy—i.e. something other than a regulation subject to APA procedures. Where such sites were tied to an actual rulemaking, such as the Forest Service's blog on its planning rule,[154] the agency has made clear that blog comments are *not* rulemaking comments. Similarly, the FCC's general comment policy, which covers all "thoughts, ideas, and feedback you submit to the FCC online,"[155] includes the following in a section headed "Relation to Proceedings":

> Unless explicitly stated otherwise, commenting on these platforms is not a
> substitute for submitting a formal comment in the record of a specific
> Commission proceeding. The Commission will not rely on anonymous comments,
> or comments posted elsewhere due to the difficulty of verifying the accuracy of

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[150] Federal Web Managers Council, *Social Media and the Federal Government: Perceived and Real Barriers and Potential Solutions* (Dec. 2008), *available at* http://www.howto.gov/sites/default/files/documents/SocialMedia Fed%20Govt_BarriersPotentialSolutions.pdf [hereinafter FWMC].

[151] *Id.* at 4. *See also* Ethan Klapper, *Social Media in Rulemaking is a No-No Because of 1946 Law*, http://www.socialgovernment.com/2009/02/23/social-media-in-rulemaking-is-a-no-no-because-of-1946-law/ (Feb. 23, 2009) (blog post).

[152] FWMC, *supra* note 150, at 4.

[153] Eisner interview; EPA interview; HUD interview; Coast Guard interview.

[154] *See supra* notes 128-129 and accompanying text.

[155] FCC, Comment Policy, http://www.fcc.gov/comment-policy.

information. Accordingly, any persons interested in examining the record should review the traditional Electronic Comment Filing System.[156]

The careful separation of social media interactions from official commenting rests primarily on concerns that public comments on a blog would be deemed to be rulemaking comments which the agency would then have to docket and respond to, and which the agency therefore ignores, or reasonably overlooks, at its peril.

The essential features of notice-and-comment rulemaking are embodied in the term itself: adequate public notice, a meaningful opportunity to comment, agency consideration and response to those comments, and (to a somewhat uncertain extent) inclusion of all relevant background materials and all public submissions in a docket, available to all (including a reviewing court). A large body of caselaw fleshes out these requirements.

Section 553 requires that an agency give all "interested persons"—in short, everyone—"an opportunity to participate in the rulemaking through submission of written data, views, or arguments."[157] It is implicit in the statute, and courts have consistently held, that this "opportunity to participate" must be *meaningful.* Accordingly, the notice of proposed rulemaking must indicate what the agency proposes to do, why, and on the basis of what studies or information.[158] More important for present purposes, the agency must take the comments seriously and not ignore them.[159] This is explicit in §553, which provides that the agency shall issue a final rule only "[a]fter consideration of the relevant matter presented."[160] Irrelevant submissions can be ignored, but "relevant matter presented" must be considered.

This requirement of consideration is enforced by and reflected in a requirement, which is not explicit in the text of the APA, to discuss and respond to significant comments. This requirement has three sources. First, the APA requires the agency to include in a final rule "a concise general statement of [the rule's] basis and purpose."[161] As a practical matter, this means the agency must discuss relevant, significant comments. It is tied, textually, to the reference to "consideration" of the comments,[162] which implies actual discussion of the comments. Indeed, as elaborated by the courts of appeals, this requirement has become much more burdensome than its text suggests; as many have said, the required statement is neither concise nor general and

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[156] *Id.* The CFPB comment policy is similar, stating that for "Public comment periods for proposed regulatory actions [visitors should] Use our Notice and Comment page. Blog comments will help drive our conversation, but they cannot be considered formal public comments on proposed actions." http://www.consumerfinance.gov/comment-policy/.

[157] 5 U.S.C. § 553(c).

[158] *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); RICHARD J. PIERCE, SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 333-38 (5th ed. 2008).

[159] *See, e.g.*, Alabama Power Co. v. Costle, 636 F.2d 323, 384 (1979) ("[T]he opportunity to comment is meaningless unless the agency responds to specific points raised by the public.").

[160] 5 U.S.C. § 553(c).

[161] *Id.*

[162] *Id.*

must go beyond simply laying out the rule's basis and purpose.[163] Two decades ago, in Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, ACUS recommended amending §553 to bring its text in line with the judicial gloss thereon by eliminating the words "concise" and "general" and "codifying existing doctrine that a rule must be supported by a 'reasoned statement,' and that such statement respond to the significant issues raised in public comments."[164] The key early decision was *Automotive Parts & Accessories Ass'n v. Boyd*, which stated that while "[w]e do not expect the agency to discuss every item or opinion included in the submissions made to it[,] . . . [w]e do expect that . . . [it] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."[165] That idea has hardened into a firm requirement to respond to significant comments. The D.C. Circuit has noted that the "purpose [of the statement of basis and purpose] is, at least in part, to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule."[166]

This does not mean that the agency must respond to every comment, no matter how off-topic or wrong-headed. "The APA requirement of agency responsiveness to comments is subject to the common-sense rule that a response be necessary."[167] Accordingly, "comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern."[168] Courts have generally been sympathetic to agencies faced with a large volume of comments, not requiring individualized responses to every submission.[169] Individual commenters are *not* entitled to a response. Rather, the courts' key concern is that agencies consider all relevant *issues*. [170] "'The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors.'"[171] Moreover, it can safely ignore comments that are

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[163] David L. Franklin, *Two Cheers for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 111, 122 (2012)

[164] Adoption of Recommendations, 59 Fed. Reg. (¶ IV.D) (Feb. 1, 1994), *available at* http://www.acus.gov/recommendation/improving-environment-agency-rulemaking.

[165] 407 F.2d 330, 338 (D.C. Cir. 1968).

[166] Indep. U. S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 919 (D.C. Cir. 1982).

[167] NRDC v. U.S. EPA, 859 F.2d 156, 188 (D.C.Cir.1988) (per curiam).

[168] *Portland Cement*, 486 F.2d at 394; *see, e.g.,* Interstate Natural Gas Ass'n of Am. v. FERC, 494 F.3d 1092 (D.C. Cir. 2007) (dismissing petition claiming that agency had failed adequately to consider petitioner's comments).

[169] *See, e.g.,* Citizens for Health v. Leavitt, 428 F.3d 167, 186-87 (3d Cir. 2005) (rejecting argument that agency failed adequately to respond to comments, finding that the agency's overall explanation was adequate and noting, though in passing, "the large volume of public comments").

[170] *See* City of Waukesha v. EPA, 320 F.3d 228, 257-58 (D.C. Cir. 2003).

[171] Thompson v. Clark, 741 F.2d 401, 409 (D.C. Cir. 1984), *quoted in* Texas Mun. Power Agency v. EPA, 89 F.3d 858, 876 (D.C. Cir. 1996); *accord* City of Waukesha v. EPA, 320 F.3d 228 (D.C. Cir. 2003); Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 1005 (D.C. Cir. 1997) (finding comment response sufficient if it "demonstrates that the agency at least considered whether it should adopt [an alternative] model").

trivial, duplicative, or irrelevant. A standard formulation is that it must address all comments that are "relevant and significant."[172]

Consistent with this principle, agencies are permitted to respond minimally to comments that are conclusory, setting out a bottom line supported by little or no documentation or argument. For example, in *Brown v. Secretary of HHS*,[173] the agency had issued regulations that limited to $1,500 the equity value of an automobile that would be ignored in considering a family's resources for purposes of determining eligibility for certain welfare benefits. The proposed rule had included the $1,500 figure, and a dozen or so comments objected that it was too low. The agency's response was minimal: "We stand by our original position. The choice of $1,500 as the maximum equity value for an automobile was based on the data from a Spring 1979 survey of food stamp recipients. We regard the limit of $1,500 equity value in an automobile as reasonable and supportable." But this satisfied the court:

> Only a dozen comments were submitted on the automobile resource exemption, of which ten took issue with the $1,500 amount. Each of these comments was fairly brief, criticizing the figure as generally too low. Only one of them suggested an alternative to the $1,500 figure. None of them suggested any alternative data upon which to base the figure. Given the nature of the comments, we do not find the Secretary's brief response so inadequate as to violate [the duty to respond].[174]

The second root of the requirement to respond to comments is judicial review under the arbitrary and capricious test. The courts require "reasoned decisionmaking," consideration of all relevant factors, review of available alternatives. Agencies cannot show that they have met these requirements without discussing significant issues raised by commentators. Indeed, some courts have grounded the obligation to respond *solely* on these requirements,[175] though the better view is that they stem from §553 as well. Some scholars have argued that much of this caselaw is invalid under the Supreme Court's *Vermont Yankee* decision, which rejected judicial expansion

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[172] Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 468 (D.C. Cir. 1998). Of course, every comment must be read, if only to determine which ones are "relevant and significant." In a rulemaking with thousands or tens of thousands of comments, this is not a trivial burden. Agencies have appropriately relied on software to screen comments, at least to separate out repeats from unique submissions. In Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, the Administrative Conference endorsed use of reliable comment analysis software. *See* Adoption of Recommendations, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). As Bridget Dooling's report to the conference explained:

> Software that uses natural language processing is one promising technology, because it could help staff identify duplicate comments, providing confidence that all unique comments and personalized portions of partially duplicative comments are considered efficiently. This time-saving approach does not diminish agency consideration because it would still give agencies access to the number and content of all comments received.

Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 902 (2011).

[173] 46 F.3d 102 (1st Cir. 1995).

[174] *Id.* at 110.

[175] *See, e.g.,* Thompson v. Clark, 741 F.2d 401, 409 (D.C. Cir. 1984) ("The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors.").

of agency procedures.[176] Whether or not that critique is correct, the scholars who make it do not take issue with the proposition that agencies must consider and respond to all relevant and significant comments. The requirement seems firmly entrenched.

Finally, some individual agency statutes contain express requirements to consider and respond to comments. For example, the Clean Air Act requires that EPA accompany any final rule issued thereunder with "a response to each of the significant comments, criticism, and new data submitted in written or oral presentations during the comment period."[177] The Regulatory Flexibility Act requires the final regulatory flexibility analysis (RFA) to review public comments on the draft RFA and highlight changes made in light of those comments.[178] Under the Unfunded Mandates Reform Act, an agency issuing a "significant" regulation must prepare a written statement that summarizes its "evaluation of . . . comments and concerns" presented by State, local, or tribal governments regarding the proposed rule.[179]

Requiring agencies to consider and respond to comments rests on three assumptions about how notice and comment operates. First, the agency will be able to tell that a particular submission is a "comment" relevant to a specific NPRM. Second, each "comment" will be a stand-alone submission that could be considered in isolation. Third, the overall burden of comments will be manageable. These assumptions underlie the caselaw in this area, and are also reflected in agency regulations related to the commenting process. Consider, for example, regulations of the Department of Transportation that impose the following requirements for written comments:

> Your comments must be in English and must contain the following:
>
> (a) The docket number of the rulemaking document you are commenting on, clearly set out at the beginning of your comments.
>
> (b) Information, views, or arguments that follow the instructions for participation that appear in the rulemaking document on which you are commenting.
>
> (c) All material that is relevant to any statement of fact in your comments.
>
> (d) The document title and page number of any material that you reference in your comments.[180]

Requirements such as these are designed to separate "comments" from general background chatter, so that the agency and any reviewing court will know what is in the record, what the agency must consider, and what it must respond to. It also ensures that the agency does not overlook any submission that was intended to be a comment. The legality of such requirements has never been in question. But these requirements are not easily translated to informal,

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[176] The leading example is Jack M. Beermann and Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856 (2007).

[177] 42 U.S.C. §7607(d)(6)(B).

[178] 5 U.S.C. §604(a)(2).

[179] 2 U.S.C. § 1532(a)(5)(C).

[180] 49 C.F.R. §106.65.

ongoing, multi-forum discussions on social media. In this new setting, material that belongs in the rulemaking docket blends into the general background chatter. Indeed, that is exactly the point.

Given current premises regarding the rulemaking record and judicial review, agencies cannot rely on input outside the record through online discussions. Ironically, they could have at the time the APA was adopted, when informal rulemaking bore no resemblance to on-the-record decisionmaking.[181] The process has moved increasingly toward the on-the-record model, however. As a result, agencies have to clearly identify what is in the record, have to be inclusive in making those decisions, and have to base their decision on such material.

One approach to adapting existing rulemaking requirements to the use of social media would be to throw *everything* into the record. The FCC took this approach in its Open Internet rulemaking, and there seems to be little question about its legality. Indeed, it would reflect lawyerly caution; no one can complain that they were excluded. The problem is that at some point the "record" comes to more less overlap with "the Internet." That is, of course, an exaggeration, but in an era of limitless information, the value of rulemaking is not only in *gathering up* useful information, but also in *winnowing out* distracting, unhelpful, or duplicative material.[182] Conceivably, we have reached or will soon reach a point where the technology renders obsolete the idea of a docket that contains all relevant material. There is too much relevant material, and it can all be added to the docket with a click of the mouse. (For example, regulations.gov is working on an API that would transfer comments posted on the web site or blog of an NGO to go straight into rulemaking dockets.) It is possible that the time has come to reconceptualize the rulemaking docket as something more akin to the Joint Appendix in an appeal; a winnowed down subset of the whole, limited to the stuff that really matters. That would, of course, be a huge shift, and probably outside the scope of this project.

The alternative is to update requirements such as those from DOT to take into account the fact that a good deal of discussion of a proposed rule might take place on social media. The essential idea would be to do exactly what the Forest Service did with its Planning Rule blog. The agency hosts, facilitates, and participates in a discussion through social media, but makes clear that nothing said in that discussion is actually a "comment," and, accordingly, does not require an agency response and will not be included in the rulemaking record. Any such restriction should include instructions on how to submit a comment and a link to regulations.gov or the agency web site to do so. This approach raises more serious legal questions. After all,

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[181] The 1947 Attorney General's Manual on the APA explained:

> Each agency is affirmatively required to consider "all relevant matter presented" in the proceeding; it is recommended that all rules issued after such informal proceedings be accompanied by an express recital that such material has been considered. It is entirely clear, however, that section [553(c)] does not require the formulation of rules upon the exclusive basis of any "record" made in informal rule making proceedings. Senate Hearings (1941) p. 444. Accordingly, . . . an agency is free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making proceedings.

[182] Integration of rulemaking with the web and social media might ultimately blow apart the model of the all-inclusive record that has dominated since *Portland Cement* and *Nova Scotia*. That is still some time away, but it seems conceivable.

there have to be some limits on the agency's ability to define what a "comment" is. Arbitrary or impossibly onerous requirements (font size, indicating the RIN on each page, only filing between 3:00 and 5:00 p.m. on Thursdays, having the comments signed by a member of the bar) would violate §553's requirement that the agency "give interested persons an opportunity to participate in the rulemaking through submission of" comments.[183] However, the sort of limitations just mentioned seem appropriate and legally permissible. They are not more onerous or restrictive than the limitations currently in place. The agency's obligation is to give "an opportunity." It is not legally obligated to give every opportunity or to actively round up comments.[184] And its obligation is to permit "submission[s]." That term implies an active, self-conscious decision on the part of the "interested person" to provide the agency with relevant material.

Finally, to state the obvious: whatever constraints the APA imposes on the use of social media in rulemaking apply only *after* the agency has issued a notice of proposed rulemaking, *before* issuance of the final rule, and in rulemakings that are not exempt from the requirements of §553. Accordingly, opportunities for experimentation, free of concerns about the APA, exist in the early stages of a rulemaking (for example in developing or gathering reaction to an ANPR), in undertaking retrospective review of regulations, in developing interpretive rules and statements of policy, and when issuing direct final or interim final rules.

B. Paperwork Reduction Act

The Paperwork Reduction Act requires agencies and OMB to scrutinize any planned information collection requests (ICRs). Concerns that requests for feedback might qualify as an ICR and trigger PRA requirements have blocked or discouraged agency reliance on social media. Fortunately, OIRA has clarified that the PRA does *not* apply to most agency requests for public feedback, although some additional clarity might be helpful.

1. The PRA Process

The PRA has the noble though largely unrealized goal of eliminating unnecessary paperwork imposed by the federal government. It is aimed in particular at government agency collections of information from the public. Such collections can take many forms, a reality evident in the statute's broad definition of "information collection":

> the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of format, calling for either answers to identical questions posed to or identical reporting or record keeping requirements on ten or more persons, other than agencies, instrumentalities, or employees of the United States.[185]

The definition contained in OMB's regulations is even broader:

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[183] 5 U.S.C. § 553(c).

[184] *See* Dooling, *supra* note 172, at 924-25.

[185] 4 U.S.C. § 3502(3)(A). This language reflects the 1995 amendments. Originally, the Act definition might have been read to refer literally to *paper*work: "the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods." By replacing the specific examples with the phrase "regardless of format," the 1995 amendment broadened, or clarified the breadth of, the definition, which inescapably applies to electronic information collections.

the use of report forms; application forms; schedules; questionnaires; surveys; reporting or recordkeeping requirements; contracts; agreements; policy statements; plans; rules or regulations; planning requirements; circulars; directives; instructions; bulletins; requests for proposal or other procurement requirements; interview guides; oral communications; posting, notification, labeling, or similar disclosure requirements; telegraphic or telephonic requests; automated, electronic, mechanical, or other technological collection techniques; standard questionnaires used to monitor compliance with agency requirements; or any other techniques or technological methods used to monitor compliance with agency requirements. A "collection of information" may implicitly or explicitly include related collection of information requirements.[186]

Operating somewhat at cross-purposes, the PRA establishes an extensive process of pre-clearance for new Collections of Information (CIs) or extension of existing CIs. Agencies must establish an internal review process, and must consult with the public and affected agencies, seeking comments on the need for the information, its practical utility, the accuracy of the agency's burden estimate, and ways to minimize that burden. The PRA requires the agency to publish a notice in the *Federal Register* and open a 60-day comment period. *After* all that, the agency must submit a clearance package—an Information Collection Request (ICR)—for approval by OIRA, during which review another 30-day comment period is opened.[187]

The ICR must include a supporting record, including anything submitted in response to the *Federal Register* notice, and a formal certification that the proposed CI is needed, not necessarily duplicative, reduces the burden on respondents, uses "unambiguous terminology," is consistent with the existing record-keeping practices of respondents, and indicates how long respondents must keep relevant documents.[188]

Agency submission of an ICR to OMB entails another *Federal Register* notice. In this notice, the agency must summarize and describe the need for the proposed CI, describe likely respondents, estimate the annual burden, and give notice that the comments may be submitted to OMB and the agency. OIRA has sixty days to review the submission; with notice to the agency it can extend that period by another 30 days.[189] OIRA may not approve the CI for a period of longer than three years. If OIRA fails to act within the sixty-day period, the CI is deemed approved, though only for one year. Executive agencies are bound by an OIRA disapproval; independent agencies can override OIRA's disapproval.[190]

2. PRA Compliance as an Impediment to Use of Social Media

Submitting ICRs to OIRA is not an impossible nightmare, but it is a significant burden and involves a lengthy delay. The whole process significantly, and understandably, discourages agencies from pursuing actions that might trigger that obligation.

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[186] 5 C.F.R. § 1320.3(c)(1).

[187] *See* 44 U.S.C. § 3506(c)(2)(A).

[188] *See* 44 U.S.C. § 3506 (c)(3).

[189] 44 U.S.C. § 3507(b).

[190] 44 U.S.C. § 3507(c).

The implications for agency use of social media are evident. The whole point of using social media in rulemaking is to gather feedback, input, and information. Thus, a request for input or feedback in a social media forum might be deemed a "collection" (see the definitions above) of "information," i.e. "*any* statement or estimate of fact or opinion, *regardless of form or format*, whether in numerical, graphic, or narrative form and whether oral or maintained on paper, electronic or other media."[191] And pretty much by definition it will be aimed at more than ten people. But almost no agency will be willing to go through the whole preclearance process in order to solicit feedback via social media. In recent years, these concerns seem to have been a meaningful constraint on agency use of social media. PRA concerns have discouraged agencies from sending out surveys in conjunction with retrospective review of existing regulations,[192] prompted the CFPB to forgo some solicitation of feedback in formulating its Know Before You Owe proposed rule,[193] have led agencies to forgo use of blogs,[194] and lurk as a general disincentive to use of web 2.0 materials that involve soliciting feedback.[195]

For these reasons, at a minimum it would be useful to clarify when soliciting information through the web constitutes a collection of information to which the PRA applies. And if the goal is to encourage use of web 2.0 technologies, the reach of the PRA should be defined narrowly. The FCC[196] and others have urged OIRA and Congress to make clear that the PRA does not apply when agencies seek feedback or input from the general public about the services they provide or the regulations they are considering.

OIRA has been sensitive to these concerns. In 2009, as part of a general request for comments on improving the administration of the PRA,[197] it asked: "What practices could OMB implement under the PRA to facilitate the use of new technologies, such as social media, as well as future technologies, while supporting the Federal Government's responsibilities for Information Resource Management?"[198] The following year, OIRA Administrator Cass Sunstein

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[191] 5 C.F.R. § 1320.3(h).

[192] Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 152 (1996).

[193] *See* Panel at ABA Annual Meeting, August 2012.

[194] *Rulemaking 2.0*, *supra* note 3, at 397 & n.10.

[195] Vivek Kundra & Michael Fitzpatrick, Enhancing Online Citizen Participation through Policy, Open Gov't Blog, June 16, 2009, http://www.whitehouse.gov/blog/Enhancing-Online-Citizen-Participation-Through-Policy (quoting a federal employee as observing: ""[The Paperwork Reduction Act] imposes a burden to obtain any user-generated input … The result is that we often don't go to the trouble."). *See also* OMB Watch Comments on PRA request for comments at 3; Sternstein, *Government Seeks to Update Paperwork Rule*, *available at* http://www. nextgov.com/nextgov/ng_20091026_1611.php.

[196] *See* Federal Communications Commission, National Broadband Plan, Rec. 14.19 (2009) ("The Executive Branch's review of the Paperwork Reduction Act should aim to enable government to solicit input to improve government services.").

[197] Office of Management and Budget, Improving Implementation of the Paperwork Reduction Act, 74 Fed. Reg. 55269 (Oct. 27, 2009).

[198] *Id.* at 55272. Few of the resulting comments addressed this question. One that did came from OMB Watch, which urged OMB to take a strong and clear position that "blogs, wikis, and other web-based social media tools agencies use to gather voluntary public comment will not be considered information collection requests in need of OIRA review and approval." OMB Watch comments at 3.

released a memorandum, discussed in detail below, that clarified the scope of the PRA and read it *not* to apply to a wide range of social media activity.[199] The following month Sunstein issued a memorandum on generic clearances, reminding agencies, and clarifying, that certain web-based activities, such as getting feedback on the agency's website, could be approved through a generic clearance, meaning that the agency would not have to obtain approval each time it undertook the request.[200]

The OIRA memos significantly reduced the concern and uncertainty about the PRA and social media, but did not eliminate them. The following section addresses key legal issues.

3. Legal Issues

The PRA applies to requests for information "regardless of form or format"[201] and OMB regulations are sweeping and include "automated, electronic, mechanical, or other technological collection techniques."[202] Accordingly, there is not tidy, blanket exemption for requests made via social media. However, the Act does not define the term "information." The key question regarding the PRA's scope is what counts as "information." OIRA has defined the term with care in light of the overall purposes of the Act. As the Social Media Memorandum explains, three sorts of submissions relevant to social media in rulemaking, while undoubtedly "information" under the lay or dictionary definition, are not "information" within the meaning of the PRA:

> **General Solicitations**. 5 C.F.R. 1320.3(h)(4) excludes "facts or opinions submitted in response to general solicitations of comments from the public, published in the Federal Register or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition of the agency's full consideration of the comment."
> **Public Meetings**. 5 C.F.R. 1320.3(h)(8) excludes certain "facts or opinions obtained or solicited at or in connection with public hearings or meetings."
> **Like Items**. 5 C.F.R. 1320.3(h)(10) reserves general authority for OMB to identify other "like items" that are not "information."

Of course, if we assume that the PRA serves a valuable function, cutting back on it comes at a cost. But there is something peculiar about seeing web 2.0 discussions as involving paperwork "burdens." First, they are voluntary (though this in itself does not take a CI out from under the PRA ambit.) One could take the strong position that all voluntary CIs should fall outside the PRA. However, that position is not supported by law or policy. First, the statutory text is not

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[199] Memorandum from Cass R. Sunstein, OIRA Administrator, to the Heads of Executive Departments and Agencies and Independent Regulatory Agencies regarding Social Media, Web-based Interactive Technologies, and the Paperwork Reduction Act (April 7, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf (hereinafter cited as *Sunstein Social Media Memorandum*).

[200] Memorandum from Cass R. Sunstein, OIRA Administrator, to the Heads of Executive Departments and Agencies and Independent Regulatory Agencies regarding Paperwork Reduction Act—General Clearances (May 28, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf.

[201] 44 U.S.C. §3502(3)(A).

[202] 5 C.F.R. § 1320.8(a)(5).

limited to mandatory reporting. A collection is "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions." While "obtaining" could possibly be stretched to imply compelled disclosure of some sort, "soliciting" just cannot. If there was any doubt, it is removed by the provisions regarding what notice must be provided to private parties responding to information requests. That notice must, among other things, indicate "whether responses . . . are voluntary, required to obtain a benefit, or mandatory."[203] Accordingly, the application of the PRA to voluntary disclosures is settled.[204] Second, the line between "voluntary" and "mandatory" collections is not easy to draw. Just like offers can be too good to refuse, requests for information, though nominally voluntary, might amount to de facto requirements.[205] In short, a flat rule that voluntary CIs are not covered would be both a mistake and inconsistent with the existing statute.

However, *some* voluntary CIs seem outside any relevant PRA concerns. Few would argue that agency interaction with members of the public via social media involves the sort of thing that should require PRA clearance. Participation is truly voluntary, nonparticipants can free-ride, and the requests are identical in nature to the notices that have always been understood to fall outside the PRA.

To provide additional clarity, OIRA should amend its "general solicitations" definition to eliminate or expand the reference to "the Federal Register or other publications." After all, given the (sensible) 2010 Guidance, many general solicitations that fall within the exemption are not found in "publications." While the guidance is helpful, some uncertainty remains.

C. The First Amendment

Almost any use of social media to solicit comments and conduct discussion of rulemaking proposals would involve some limitations on public submissions. For example, most agencies using social media at present have comment policies, as does regulations.gov. Agencies typically use these policies to prohibit, or at least reserve the right not to post, submissions that:

- contain obscene, indecent, or profane language;
- contain threats, or defamatory statements;
- contain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion, or disability;
- reveal your own or others' sensitive/personal information (e.g., Social Security numbers);
- contain information posted in violation of law, including libel, condoning or encouraging illegal activity, and revealing classified information, or posts that might affect the outcome of ongoing legal proceedings; or

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[203] 44 U.S.C. § 3506(c)(1)(B)(IV).

[204] *See, e.g.,* Lubbers, *supra* note 14, at 119 ("Purely voluntary surveys, even if used to determine whether regulated parties have problems with existing regulations, are covered, as are focus groups used to determine whether a regulation is clear or is burdensome, if more than ten persons are involved in the group.").

[205] *See generally* Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277 (2004).

- promote or endorse services or products, including links to external commercial sites.[206]

Not surprisingly, agencies also require that comments be on topic, though they often still post off-topic submissions, albeit in a separate space often labeled "off-topic."[207] Similarly, one could imagine an agency barring a particularly obstreperous or problematic participant from its Facebook page or an uncooperative participant from a wiki, etc.

Such limitations are indispensable to the effective functioning of rulemaking discussions. However, they raise nontrivial concerns under the First Amendment. Obviously, the government cannot impose a general restriction on speech that it finds "offensive . . . or otherwise objectionable," as the DHS comment policy does. And in general First Amendment protections on the Internet are robust; it is not a forum such as broadcast television or radio where the inherent characteristics of the medium justify greater government regulation.[208] The question is whether such restrictions are permissible in these particular settings.

No court has yet specifically considered the constitutionality of such restrictions, although litigation is pending in federal district court challenging the Honolulu Police Department's banning one problematic commenter from its Facebook page.[209] Two bodies of doctrine might apply in this setting.

First, a good deal of government space on the Internet is devoted primarily if not exclusively to government speech. Agency web sites, for example, are almost entirely a forum for agency speech. Similarly, a Twitter feed is, by definition, simply government speech. When the government is *speaking* it is not bound by the rules of viewpoint neutrality that apply when it is *regulating private speech*. Government speakers can take sides; they can present a single perspective; they can be one-sided.[210] When the government is "engaging in [its] own expressive conduct, . . . the Free Speech Clause has no application."[211] This "government speech

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[206] EPA Comment Policy for Exchange. Or consider the Department of Homeland Security's Facebook Comment Policy, which reads in part:

> DHS reserves the right to review all comments and remove any that contain profanity, personal attacks of any kind, spam, refer to Federal Civil Service employees by name, contain offensive terms that target specific ethnic or racial groups, promote commercial products, are geared toward the success or failure of a partisan political party, group, or candidate, incite hate, or are subject to a claim of infringement or deemed to be an infringement of intellectual property, or that is otherwise objectionable.

Dep't of Homeland Security, Facebook Comment Policy, http://www.facebook.com/homelandsecurity/app_139229522811253.

[207] *E.g.*, TSABlog. Or EPA: "We encourage you to share your thoughts as they relate to the topic being discussed." http://www.epa.gov/epahome/commentpolicy.html.

[208] *See generally* Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[209] *See* Hawaii Def. Found. v. City & Cnty. of Honolulu, No. CV 12-00469-JSM-RLP (D. Hawaii).

[210] Summum v. Pleasant Grove City, Utah, 129 S. Ct. 1125 (2009) (holding that town, having erected a monument of the Ten Commandments, was not obligated to erect a monument of the "Seven Aphorisms" of the Summum religion in the same park).

doctrine" would seem to relieve agencies of any obligation to provide a forum for opposing views on their own web sites, and several lower courts have so held.[212]

Tidy though the government speech approach is, it is not very helpful as applied to social media. Social media platforms of any value to rulemaking cannot be portrayed as instances of government speech. The whole point is that rather than simply being an instance of the agency pushing out information, the site is a space for dialogue, exchange, and the receipt of public input. Social media applications in rulemaking have to involve government listening, not just government speaking. So they present the much harder question of whether an agency, having opened up a space for public debate and exchange—a space whose very purpose is to allow such debate and exchange—can then shut out certain voices. The answer to that question turns on the niceties of public forum doctrine.

Public forum doctrine governs what principles apply to government limitations of private speech on public property. Traditional public forums include parks and sidewalks, the sorts of public spaces that have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[213] In traditional public fora, First Amendment principles apply with full force: the government can regulate the content of speech only insofar as is necessary to achieve a compelling governmental interest; reasonable time, place, and manner restrictions are permissible if they serve significant interests and leave open ample alternative channels.[214]

Under prevailing caselaw, social media sites do not qualify as traditional public fora. Given the Supreme Court's reluctance to analogize new kinds of public spaces such as airports to streets, sidewalks, and parks,[215] the Internet seems too recent and unfamiliar for any of its spaces to receive that designation. Several lower courts have rejected arguments that government websites are public fora[216] (though, again, what holds for a web site does not necessarily hold for a blog, Facebook page, or other more collaborative online space).

The government has no choice but to treat traditional public fora as such. In contrast, a "designated public forum" "consists of public property which the state has opened for use by the public as a place for expressive activity."[217] Typical examples include theaters, stadiums,

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[211] *Id.* at 113; *see also* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."); *see generally* David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 B.Y.U. L. Rᴇᴠ. 1981, 2010-29 (2010).

[212] Sutliffe v. Epping Sch. Dist., 584 F.3d 314 (1st Cir. 2009); Page v. Lexington Cnty. Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008).

[213] Hague v. CIO, 307 U.S. 496, 515 (1939).

[214] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[215] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (finding that airport terminal is not a traditional public forum).

[216] *See* Hogan v. Twp. of Haddon, 278 Fed. Appx. 98 (3rd Cir. 2008) (holding that township website was not a public forum or limited public forum, and local resident "had no constitutional right to . . . post on the Township's website"); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 842-45 (6th Cir. 2000); Vargas v. City of Salinas, 205 P.3d 207 (Cal. 2009) (holding that city website was a non-public forum).

[217] *Perry Educ. Ass'n*, 460 U.S. at 45.

university meeting spaces, and other government property that has been opened up for expressive activities. Government limitations of speech in designated public fora are subject to all the same constraints as in traditional public fora, with the major and important exception that because the forum has been voluntarily created by the government, the government is free to shut it down.[218]

So far so good. It is possible that an agency-sponsored social media site could be found to be a designated public forum. But for that to occur the agency would have had to have opened it up to all comers, to write on all subjects. Agencies would be ill-advised to do that, since it could end up significantly tying their hands. And indeed, as we have seen, few if any have taken that approach. Comment policies limit submissions to items that are on a particular topic, consistent with certain standards of decorum, and consistent with concerns and legal constraints regarding privacy, defamation, and other considerations. In an example of a peculiarity of public forum doctrine, restraints on speech are self-justifying; that is, by restricting permissible speech, the agency ensures that it is creating, if anything, only a "limited public forum." And within a limited public forum, content-based (though not viewpoint-based) restrictions are permissible.[219]

The "limited" public forum is a subspecies of the designated public forum that is set up "for a limited purpose such as use by certain groups, . . . or for the discussion of certain subjects."[220] Accordingly, in a limited public forum the state has a much freer hand in limiting speech. The black-letter rule is that restrictions need only be reasonable in light of the purposes served by the forum and viewpoint (as opposed to content) neutral.[221] Thus, a school district can limit a public forum to the discussion of a particular topic, such as school board business,[222] and a school or university can limit a public forum it establishes to use by student groups, but cannot pick and choose among student groups based on the viewpoint they espouse.[223]

Finally, some governmental controlled spaces where private speech may occur are not public fora of any sort. A public forum, even if limited, sure sounds like something very different from a nonpublic forum. However, as one commentator has written, the "line between the designated 'limited' public forum and the nonpublic forum is maddeningly slippery, and some would even say non-existent, notwithstanding their linguistically opposed labels."[224] This is true along two axes. First, because the whole question of first amendment restrictions would not arise if there were not some private speech taking place, "nonpublic forums" tend to be government spaces with some though limited opportunities for private speech, just like limited public forums. Second, even in a nonpublic forum the government cannot restrict speech as it sees fit; the

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[218] *Id.* at 46.

[219] *See* Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 931 (2000) (lamenting that "within a limited public forum it is impossible for one to differentiate between a presumptively invalid content-based restriction on speech and a legitimate adjustment of the content parameters that define the forum").

[220] *Perry Educ. Ass'n*, 460 U.S. at 46 n.7.

[221] *Pleasant Grove City*, 555 U.S. at 470; Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001).

[222] *Id.* (citing Widmar v. Vincent, 454 U.S. 263, 276 (1981) and City of Madison Joint Sch. Dist. v. Wis. Pub. Employee Relations Comm'n, 429 U.S. 167, 175 n.8 (1976)).

[223] *Good News Club*, 533 U.S. 98 (setting aside school's policy of not allowing a children's Christian club from meeting after at the school after the school-day was finished when it did provide meeting space for secular groups).

[224] Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1990 (2011).

limitations are essentially those that apply in a limited public forum: restrictions must be reasonable and cannot be based on disagreement with the viewpoint expressed.[225]

In determining whether an area is a limited public forum or a non-public forum, the two critical factors are historical practice and government intent.

Professor Robert Post has suggested that an important distinction, normatively and descriptively, is between management and governance. The state's authority over a resource is a matter of management where the resource is internal to the governmental organization and used for institutional ends: an agency conference room, its internal email system, a court-room, a legislative hearing. The state's authority over a resource is a matter of governance when the resource is external and used by individuals of varying roles and statuses for public discussion and exchange.[226] Post's fancy theorizing has not been explicitly adopted by the courts, but it is grounded on certain intuitions that judges seem to have and can help explain the cases. It also recalls the discussion above about the distinction between citizens and customers. To the extent social media are used as part of the rulemaking process, they are an aspect of governance, not management. As such, they are venues where First Amendment values are very much in play. In addition, precisely because the whole point of these sites (in contrast to a standard agency web site, with its clear and tightly controlled message) is to hear voices *other than* the agency's, the government speech doctrine is inapplicable.

The handful of commentators who have investigated this question have concluded that agency social media sites would be classified as limited public forums.[227] They are areas that the government has opened up for discussion, allowing—indeed, inviting—all comers to participate and share information and views. These venues are not, however, wholly open-ended; they are set up to discuss specific and limited topics. Accordingly, agencies can restrict the topics, can impose reasonable limits of decorum, decency, and mutual respect, and can shut the whole thing down if they wish. But they cannot deny access to participants because of the particular message or viewpoint they express. Once the forum is created, participation is not a matter of grace.

D. Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA)[228] governs the formation and operation of advisory committees by federal agencies. The overall goal is to avoid over-reliance on such committees, block special interest influence via advisory committees, and ensure that committees are balanced, expert, and transparent.[229] Agencies can create new advisory committees only after

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[225] *Perry Educ. Ass'n*, 460 U.S. at 46.

[226] Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

[227] Patricia E. Salkin and Julie A. Tappendorf, Social Media and Local Governments: Navigating the New Public Square 52-53 (2013) (though suggesting that social media might be either a designated or a limited public forum, depending largely on the privacy and sharing settings established by the user); Ardia, *supra* note 211, at 1998-99; Lidsky, *supra* note 224, at 1998-99.

[228] Pub. L. No. 92-463, codified at 5 U.S.C. App. 2.

[229] Reeve T. Bull, *The Federal Advisory Committee Act: Issues and Proposed Reforms* 37 (Sept. 12, 2011), *available at* http://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf.

public notice and a determination that doing so is in the public interest. Any advisory committee must have a "clearly defined purpose" and a balanced membership and open its meetings to public observation.

Some agency staff have expressed concern that online discussion or consultation with a (self-appointed) group might amount to the use of an advisory committee in violation of the Act.[230] The Act defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group" established by statute, "established or utilized by the President," or "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government."[231] Read broadly, this definition could conceivably reach social media consultees, who are a "group" that is "utilized" by an agency in order to obtain "advice or recommendations." (Note that this concern is present in all social media contexts in which public input is sought, not just rulemaking.) The concern seems misplaced, however, for at least three reasons.

First, notice-and-comment rulemaking has never been understood to produce an "advisory committee." Presumptively, receiving input from a number of individuals not simply in the form of written comments but in the form of electronic submissions and with some general discussion should not change the fundamental nature of the process. It is a stretch to say that commenters become an advisory committee simply because there is more back and forth and there may be some collaboration over time. This is particularly the case because consultation through social media involves input from a shifting, informal, ad hoc group that is quite different from the cohesive group with a defined purpose at which the Act is aimed. Outside the social media context courts have frequently held that amorphous, ad hoc assemblages are not advisory committees.[232] Reeve Bull's study on FACA makes this point, concluding that

> agencies can likely exploit many of the recent advances in social media with little concern of running afoul of FACA. For instance, an agency's receiving comments on its Facebook page or posing a question to the general public via Twitter or a blog and receiving responses thereto is unlikely to trigger FACA, since the agency has not established any formal committee from which it is seeking group advice but instead is simply receiving individual inputs from an amorphous, unorganized assemblage of individuals.[233]

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[230] *See* ACUS Staff, *Ongoing Web Forum Meetings of Federal Advisory Committees: A Proposed Use of "New Media" under the Federal Advisory Committee Act* 2 (Mar. 17, 2011), available at http://www.acus.gov/sites/default/files/documents/FACA-Web-Forum-Memo-3-17-2011-_2_.pdf.

[231] FACA § 3(2).

[232] *See, e.g.,* Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 913 (D.C. Cir. 1993) ("The point, it seems to us, is that a group is a FACA advisory committee when it is asked to render advice or recommendations, *as a group*, and not as a collection of individuals." (emphasis in original); Citizens for Responsibility and Ethics in Washington v. Leavitt, 577 F. Supp. 2d 427 (D.D.C. 2008) (groups not covered by FACA because they had no formal organizational structure, met only twice, and involved participants conveying their opinions regarding their individual areas of expertise with no attempt to achieve consensus); Grigsby Brandford & Co., Inc. v. U.S., 869 F. Supp. 984 (D.D.C. 1994) (FACA did not apply to single briefing by unstructured, ad hoc group); Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975).

[233] Bull, *supra* note 229, at 37.

Second, FACA kicks in only if the advisory committee is either "established" or "utilized" by an agency. To "establish" a committee, the agency must select its members.[234] But when an agency participates in a social media discussion, it is not selecting the members (to the contrary, it is inviting all comers and engaging with a self-selected group), funding the group, or limiting its participants. In an ordinary-meaning sense, the agency would be "utilizing" the committee (if it is a committee), but, rightly or wrongly, the Supreme Court has rejected this "literal," "straightforward," "dictionary" reading of the term.[235] Instead, an agency "utilizes" a committee it has not created only where "a group [is] organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amendable to 'strict management by agency officials.'"[236] Plainly, voluntary participants in a Web 2.0 forum are not under the agency's "strict management."

Third, one of the two basic purposes of FACA was to "ensure that committees operated objectively and were not improperly captured by special interests."[237] Combatting differential access and ensuring a voice for the public is exactly what Web 2.0 platforms do. The do not do it perfectly, of course, but it would be at least ironic, and arguably perverse, if using these tools triggered application of FACA when traditional notice and comment does not.

All of this is not to say that it would be impossible for an agency to create an advisory committee through the use of social media in a rulemaking. But doing so would require steps going far beyond participating in the ordinary discussions that take place in these settings.

E. Ex Parte Contact Policies

Suppose an agency official is reading a blog—it could be her own agency's blog or something wholly unrelated—on which there is discussion relevant to an ongoing rulemaking. Is that an impermissible ex part contact? Should it be?

The general rule as a matter of the APA and other statutory constraints is that there are restrictions on ex parte contacts in a notice-and-comment rulemaking. The APA's ex parte provision applies only in formal proceedings.[238] The D.C. Circuit flirted with imposing such limitations in the 1970s in the *Home Box Office* decision.[239] However, that case was quickly limited largely to its facts[240] and no more recent decision has imposed such limits. However, agencies have adopted their own ex parte contact policies, some of which are quite restrictive. An example is the Department of Transportation's "Policies for Public Contacts in Rulemaking,"

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[234] Judicial Watch, Inc. v. United States Dep't of Commerce, 736 F. Supp. 2d 24, 33 (D.D.C. 2010); People for Ethical Treatment of Animals, Inc. v. Barshefsky, 925 F.Supp. 844, 847-48 (D.D.C.1996).

[235] Public Citizen v. Dep't of Justice, 491 U.S. 440, 453 & n.8, 454 (1989).

[236] Food Chemical News v. Young, 900 F.2d 328, 332-33 (D.C.Cir.1990) (quoting *Public Citizen,* 491 U.S. 440), cert. denied, 498 U.S. 846 (1990).

[237] Bull, *supra* note 229, at 3.

[238] 5 U.S.C. 557(d).

[239] Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829, reh'g denied, 434 U.S. 988 (1977).

[240] *See* Iowa State Commerce Comm'n v. Office of Federal Inspector, 730 F.2d 1566 (D.C. Cir. 1984); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (holding that bars on ex parte contacts in rulemaking apply only "where the rulemaking proceedings involve 'competing claims to a valuable privilege'").

adopted in 1970. In brief, significant influential contacts occurring before issuance of an NPRM should be noted in the NPRM or in a memorandum in the docket; any contacts occurring during the comment period should be noted in the docket (i.e. a summary of the discussion or a copy of anything in writing); and later contacts that might influence the agency must be noted in the docket and, if the comment is significant, the docket may have to reopened to permit a reply. It would seem that these rules would prohibit our hypothetical blog-reader from engaging in such activities.

DOT's policy can be contrasted with that of the CFPB,[241] which is more accepting of some contacts. The CFPB also requires that oral contacts be summarized and included in the docket and written contacts be directly placed in the docket. However, the prohibition kicks in only *after* the NPRM is published. Second, covered communications are defined as "any written or oral communication by any person outside the CFPB that imparts information or argument directed to the merits or outcome of a rulemaking proceeding."[242] Some contacts might involve something other than "information or argument" or not go to the merits and so not be covered. Third, the policy expressly excludes "[s]tatements by any person made in a public meeting, hearing, conference, or similar event, or public medium such as a newspaper, magazine, or *blog*."[243]

Development of social media resources for rulemakings would involve agencies in an ongoing conversation, or at least the monitoring of ongoing private conversations, that would seem to violate the DOT policy but be permitted by the CFPB policy.

VI. INCORPORATION SOCIAL MEDIA IN RULEMAKING

A. Realistic Expectations

Agency use of social media (and indeed, the government move online generally) thus has fallen far short of the participatory democratic ideal. First, it is 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,[244] or "e-government" as opposed to "e-governance"[245] (though those terms are slippery). Second, in general, levels of participation have been disappointingly low. Third, 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 very little interchange or dialogue, either among commenters or between the agency and commenters.

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[241] CFPB Bulletin 11-3, "Policy on Ex Parte Presentations in Rulemaking Proceedings" (Aug. 16, 2011), available at http://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemaking Proceedings.pdf.

[242] *Id.*

[243] *Id.* § B(1)(b)(i) (emphasis added).

[244] 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.*

[245] *See* Accenture Institute for Health and Public Service Value, From e-Government to e-Governance: Using new technologies to strengthen relationships with citizens (2009).

Steps can be taken to address each of these shortcomings, as the admirable efforts of Regulation Room project have shown. But even the enormous sophistication and manpower behind Regulation Room has produced only marginal or arithmetic, rather than transformative and exponential, gains. These shortcomings should not be a surprise and none can be wholly eliminated.

1. Built-In Mismatches

In part, the managerial focus of agency web use reflects a reality about modern government, namely, it does a lot of things besides govern. As noted, most people's contacts with the government involve the provision of services, not the imposition of rules and regulations. Moreover, surely this reflects the existence of a perpetual campaign. Politicians want—indeed, need—to be seen as providing direct, tangible benefits to constituents. There's more payoff in announcing that it will provide services more effectively and efficiently than there is in announcing that it will regulate more effectively and efficiently.

But more is at work here. It is striking that e-government so closely resembles e-everything else. Many theorists of the Internet have envisioned it as a tool for unprecedented political engagement and deliberation, a forum where a thousand, or a million, citizen voices will bloom, a "networked public sphere" to which all have equal access and in which all voices can be heard As Matthew Hindman points out in *The Myth of Digital Democracy*,[246] that just has not happened. Politics is not what the Internet is about. Web users go online to shop, socialize, be entertained, look at pornography, and find information (usually not about politics). "Given the magnitude of traffic flowing to other categories of online content, traffic to political sites is small enough to be a rounding error."[247] The governmental equivalent is that users go to government web sites for services and information that is useful in their daily lives; they do not go online to participate in a great national debate.

Why is this? Presumably the answer lies partly in the nature of the Internet and partly in the nature of the citizenry. The government's web presence both responds to but also reinforces the non-policy interests of users. And the features of Google and other search engines that Hindman discusses in some detail apply to some extent to government web sites like any other. In addition, most people most of the time just are not that interested. In the words of two political scientists who have staked out the extreme position regarding Americans' antipathy to political engagement: "The last thing people want is to be more involved in political decision making."[248] Whether they could be, or should be, or could be made to be *through* e-government,[249] are not questions I am going to try to resolve, but they underlie the debate over much in the way of current open government efforts.

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[246] MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY (2009).

[247] *Id.* at 63. *See also id.* at 81 ("Only about three of every hundred site visits is to a news and media Web site. Slightly more than one site visits in a thousand is to a political Web site. Pornographic content is two orders of magnitude more popular than political content.")

[248] JOHN R. HIBBING AND ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK (2002) (Kindle Location 83).

[249] *See* Peter Muhlberger, *Should E-Government Design for Citizen Participation? Stealth Democracy and Deliberation*, Proceedings of the 2006 international conference on Digital government research (arguing that online deliberation will itself stimulate citizen engagement and "ameliorate" "stealth democracy beliefs").

Second, citizen participation in e-Rulemaking, Ideascale, agency Youtube video watching, and the like is following 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.[250] Whether it is blog readership, website hits, 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.[251] 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 which content goes viral involves happenstance. Likewise, "commenting" on the net more often than not devolves into snarky ad hominems, with like-minded folks reinforcing each other's views[252] and "discussion" largely consisting of polarized and polarizing name-calling. Indeed, one of the hopeful things about the undertakings discussed above is that relatively speaking they involve comments that are more serious, constructive, and respectful than the Internet norm.

Third, 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.[253] 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.

Fourth, notice-and-comment rulemaking is often a bad 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 identifying and spectacular things about social media is its multi-media potential and the opportunity to communicate other than through words. That is breathtaking and wonderful and valuable in many settings of human existence. 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 Connor of Facebook offered ten tips for government use of Facebook.[254] 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*).[255] So, admonished Connor, "not everything has to be a picture; not everything has to be a video." It is interesting that the Facebookers are so

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[250] 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.

[251] *See generally* CLAY SHIRKEY, HERE COMES EVERYBODY 122-30 (2009).

[252] *See generally* CASS R. SUNSTEIN, REPUBLIC.COM 2.0 (2009).

[253] HINDMAN, *supra* note 246, at 133.

[254] *See* Connor, *supra* note 79.

[255] *Id.* at 6:30.

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?[256]

The Huffington Post gets 100,000 comments a day. It has received 225 million total comments during its existence. There are only two ways this volume can be handled. It can be ignored, or it can be read by a computer. *HuffPo* has tried both methods. It recently rolled out a new platform, "Conversations," through which the computer reads all the comments and picks the "best." This option is not legally or practically available to agencies. As the Regulation Room team has written, "orthodox federal Participation 2.0 thinking" holds that more participation is always better precisely because only a tiny percentage of submissions have value, so the only way to get a meaningful number of useful submissions is to have a huge number of total submissions. But "[a] rulemaking agency . . . cannot routinely plan to read 100,000 comments to find 100 that offer some value to the rulemaking. 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."[257]

Fifth, 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.[258] 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:

> Significantly, usability experts study these behaviors in *order to design for them, not to change them*. The cardinal rule of Web design is "Make it easy"—a principle memorably captured by usability expert Steve Krug in the title of his popular book, *Don't Make Me Think: A Common Sense Approach to Web*

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[256] 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/.

[257] *Rulemaking vs. Democracy*, *supra* note 138, at 146-47.

[258] *See generally* ELIZABETH D. MULLIN, THE ART OF COMMENTING (2000).

Usability. Hence, Internet users are now accustomed to websites designed specifically to allow them to engage rapidly and with little effort—the antithesis of the kind of engagement needed for effective rulemaking participation.[259]

Sixth, 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 is also a statement about a very firm consensus about the nature of rulemaking. Thus, what social media do best is what rulemaking needs least.

There are some possible social media applications that are somewhere between the traditional model of rulemaking and the model of a referendum. For example, what about using Ideascale to rank comments? The agency would in no way be bound by the most popular comments; indeed it would remain legally obligated to read all the comments, not just the most popular ones. But being able to "like" a comment has the advantage of saving the "liker" the burden of writing her own comment (and the agency the burden of reading it), and arguably gives the agency some sort of useful information. Even this superficially appealing idea has drawbacks, however. For one, as experience has shown, participation is likely to be exceedingly modest. In addition, someone might heartily approve of one part of a comment and dislike another (though that is a problem with a technological solution, allowing voting on the whole comment or just parts). Most problematic is the potential for orchestrated campaigns. Suppose an NGO submits a comment and then urges all its members to go online and vote for it. Now the most popular comment has 200,000 more votes than the second most popular. At that point, we have not really avoided the referendum problem and the purpose of ranking comments has been defeated. Moreover, there is nothing the agency can do to prevent it—any bar on such orchestrated endorsements would likely violate the First Amendment and would in any event be unenforceable.

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 explained in her report on e-Rulemaking, 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 comments can drive some agencies to turn to contractors, either to help organize

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[259] Farina et al., IBM report, at 35.

and save public comments in the docket, or to actually review and summarize those comments.[260]

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 e-Rulemaking, and for social media in government, has come from academics first and foremost, secondly public interest or good government organizations, third from the White House, and last from the agencies themselves. 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.[261] 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, and responding to submissions. They fear the whole thing will be chaotic, off-topic, repetitive, and go way beyond the point of diminishing returns.

There is a second category of potential costs that should not be overlooked. That is the backlash resulting from disappointed expectations when promises about the meaningfulness of participation are disappointed. This can be seen, for example, on the White House "We the People" site. This is an open-ended call for suggestions, with the promise that 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 2013, there were 282 pending petitions; 98 petitions had generated responses (it's not possible to determine how many expired petitions fell short of the signature threshold). In the fall of 2011, the most popular petition was: "Actually take these petitions seriously instead of just using them as an excuse to pretend you are listening." A more recent petition in the same vein requests the White House to "admit that these petitions are just going to be ignored."[262]

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 can find a video entitled "Your Voice Matters." The video shows White House staff, the First Lady, and even the President 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." The video's implicit promises about access and influence are so

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[260] Dooling, *supra* note 172, at 901.

[261] *See* Lubbers, *supra* note 14, at 473.

[262] 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.

astounding and so unrealistic as to make it a work of fiction. But one cannot but worry that the some will take it at face value and they can only be gravely disappointed.

The public needs to know the agency is listening. Ideascale works poorly when the agency is invisible, just sitting there, isolated and removed. What engages people is the idea that they are actually reaching the agency. Similarly, if the agency reads but ignores the comments, as thus far has largely been the case, the result can only be to alienate and annoy public participants.

B. Using Social Media

It would be surprising if all rulemakings lent themselves equally to the use of social media. Again, negotiated rulemaking provides an analogy. ACUS's recommendations, all commentators, and the Negotiated Rulemaking Act itself all rest on the assumption that the negotiated rulemaking process is only appropriate for certain rulemakings. So, too, with Web 2.0. This Section offers some preliminary thoughts on what settings may lend themselves more or less to the use of social media.

1. The "What"

[This Section remains to be written, but will touch on the sorts of issues that lend themselves to social media. In large measure, this will draw from the Regulation Room work, the criteria by which they have chosen the five rulemakings they have, and their conclusions about "situated knowledge." In general, easy appeals to the wisdom of crowds and "dispersed knowledge" are not well-founded, but there may be particular instances in which the general public does have relevant, useful information. Most rulemakings do not fit the Peer to Patent model, but some do.

In addition, rulemaking and specific issues within rulemakings that turn more on "values" than on technical or scientific questions lend themselves more to (a) lay participation and (b) dialogue and deliberation.

Third, there will be particular rulemakings where an agency might benefit, in a crowd-sourced, Mechanical Turk sort of way, in getting a whole bunch of volunteers to *try* things. The CFPB Know Before You Owe process is sort of an example, where folks were asked to compare to different versions of a disclosure form. One could also imagine, for example, giving different groups different versions of, say, a warning label, letting each look at it and then take a little test about what they noticed/retained/understood.

Finally, I will try to develop the idea of social media as what might be called a "primary source." That is, traditional notice-and-comment, and most of the discussion of social media, proceeds on the assumption that what participants have to offer are comments in the traditional sense—the agency needs to learn something about the world, and the commenters have some relevant knowledge to pass on. But it may also be that social media users reveal important things indirectly through their online activities. My discussions with folks at the CFPB included some tantalizing, but pretty abstract, references to this idea. Similarly, a recent article mentioned that "some agencies have turned to social media analytics to glean their constituents' attitudes toward specific policies and decisions." I have been trading emails with the private-sector person quoted in this regard. So I don't know quite where this will lead, but I think there's something there.]

2. The "When"

In considering the value and legality of incorporating social media into notice-and-comment rulemaking, one should bear in mind that "rulemaking" involves much more than "notice and comment." Social media have the most to offer not during the actual comment period, but *prior* to issuance of the NPRM and *after* promulgation of the final rule.

Pre-NPRM

The obvious analogy here is to negotiated rulemaking. Under the Negotiated Rulemaking Act, the entire reg neg process is a mechanism for developing a proposed rule. The proposed rule is then published in the *Federal Register* and the ordinary notice-and-comment process takes place. Use of social media differs from regulatory negotiation in important respects. There are, ideally, many more participants and the idea is not all to reach a mutually acceptable compromise. But the two share important elements. Both open up the traditional rulemaking process, create a more dialogic exchange, and have a slightly awkward fit with the traditional process. Just as Congress resolved that awkwardness for reg neg by having the whole process take place before the NPRM, so agencies would be free to gather input via social media prior to the NPRM.

Furthermore, social media might be especially useful and appropriate in this setting. Social media provide an avenue for lay participation in the process (and, again, that is not the sole point). As a generalization, it is probably fair to say that the lay public is better at identifying problems than at identifying solutions. Such input is especially relevant at the early stages of the rulemaking process, when the agency needs to understand the existing state of affairs, what's working and what isn't, where improvements must be made, and so on: in short, what's the problem? Furthermore, for *all* interested persons, a looser, more dialogic exchange may be especially useful in at an early, problem-identifying stage.

Retrospective Review

Since 1978, every U.S. president has directed agencies to evaluate or reconsider existing regulations. Most recently, President Obama's Executive Order 13563, "Improving Regulations and Regulatory Review," issued in January 2011, instructs agencies to consider how best to promote retrospective reviews of regulations that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.[263] A variety of statutory requirements also require retrospective review of particular sorts of regulations. Most significantly, the Regulatory Flexibility Act requires that agencies review, every ten years, existing regulations that have a significant economic impact upon a substantial number of small entities.[264] The CFPB's statute requires that it undertake a subsequent review of every "significant" rule or order within at least five years of its issuance.[265]

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[263] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); *see also* Exec. Order No. 12,866; Exec. Order No. 12,044, § 4; Exec. Order No. 12,291.

[264] 5 U.S.C. § 610.

[265] 12 U.S.C. § 5512(d).

Wholly apart from these legal requirements, there is general consensus that retrospective review is, simply, a good idea and something agencies should do whether required to or not.[266]

Despite this paper commitment and general consensus, retrospective reviews have not amounted to much. Current undertakings seem to be more rigorous and to reflect a greater commitment than their predecessors, but the jury remains out on their ultimate success. Surely one reason for these tepid results has been a lack of commitment on the part of the agencies themselves. The satisfaction, political payoff, and sense of progress from eliminating an old regulation will generally be less than for the adoption of a new one. And regulators are not going to be quick to conclude that existing regulations require amendment or repeal. Furthermore, agencies simply have not had the resources to devote to retrospective review.[267] But many observers have concluded that one significant reason for the general failure of retrospective review has be a lack of meaningful public participation.[268] In 2007, GAO reported:

> Agencies stated that despite extensive outreach efforts to solicit public input, they receive very little participation from the public in the review process, which hinders the quality of the reviews. Almost all of the agencies in our review reported actively soliciting public input into their formal and informal review processes. They reported using public forums and industry meetings, among other things for soliciting input into their discretionary reviews, and primarily using the *Federal Register* and Unified Agenda for soliciting public input for their mandatory reviews. For example, USDA officials reported conducting referenda of growers to establish or amend AMS marketing orders, and CPSC officials reported regularly meeting with standard-setting consensus bodies, consumer groups, and regulated entities to obtain feedback on their regulations. Other agencies reported holding regular conferences, a forum, or other public meetings. However, most agencies reported primarily using the Unified Agenda and *Federal Register* to solicit public comments on mandatory reviews, such as Section 610 reviews. Despite these efforts, agency officials reported receiving very little public input on their mandatory reviews.[269]

GAO spoke to observers outside the agencies who were less impressed by the intensity of agencies' outreach, but there was general consensus that: (a) there had been little public input; and (b) more public input would have been useful.

The value and extent of public input will depend hugely on the way in which it is sought. This is common sense. It is also borne out by experience. For example, in the early years of the Bush Administration, OMB solicited nominations of regulations that could or should be modified in order to increase net benefits to the public. In 2001, OMB made its solicitation in the draft of its annual report to Congress on the costs and benefits of federal regulations. It

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[266] Eisner & Kaleta, *supra* note 192, at 147-48.

[267] *Id.* at 148, 155.

[268] *Id.* at 149, 157; U.S. Gov't Accountability Office, GAO-07-791, Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews 44-45 (2007).

[269] *Id.*

received suggestions for modifying a grand total of 71 regulations. The following year, its process was "much more ambitious" and it received almost 1700 nominations.[270]

The retrospective review process is a particularly promising opportunity for the use of social media. First, retrospective review does not trigger the APA; the rulemaking that produced the rule is complete, and the rulemaking to modify or withdraw the rule being reviewed, if any, has not yet begun. Second, regulated entities and the general public are in a particularly good position to provide the information the agency needs, which involves how a regulation is actually operating in practice. Third, as noted, members of the public, as a generalization, are better at identifying problems than solutions. Fourth, the goal of the process is to learn about actual experiences under the regulation; it is more likely that laypersons will have relevant "situated knowledge" in these settings. Finally, the opportunities social media provide for multiple participants to ask questions of each other, compare notes, and engage will be especially useful when the inquiry concerns actual experience under a particular regulatory requirement.

In the current round of retrospective review, agencies are not taking full advantage of these opportunities. Executive Order 13563 requires executive agencies to prepare plans setting out the steps and timetable for their retrospective review. The plans reveal only the most modest steps toward use of social media. For example, EPA plans to seek nominations of regulations in need of review from the public, other agencies, and EPA staff. It will do so "via the Semiannual Regulatory Agenda, a press release, and related outreach tools."[271] The "related outreach tools" are unidentified but if they are "related" to the semiannual agenda and press releases they are not exactly at the technological cutting edge. In fact, in early 2011 EPA did solicit comments not just by press release, but also on its open government website, Twitter feed, and Facebook page. The actual comments, however, are to be submitted to regulations.gov.

Direct Final Rulemaking

Direct Final Rulemaking, endorsed by the Administrative Conference of the United States in 1995,[272] is a technique for bypassing the notice and comment process for uncontroversial legislative rules. Under this procedure, the agency skips notice and comment and simply publishes a final rule and a statement of its basis and purpose. The notice also indicates that the agency expects the rule to be noncontroversial and provides that the rule will be effective within a relatively short time, such as 60 or 90 days, unless significant adverse comments are received. If no one objects, the rule stands; some agencies publish a "confirmation notice" to indicate that there has been no significant adverse comment. If adverse comments are received, the agency withdraws the rule; it may then reissue it as a proposed rule, thus commencing full-fledged notice-and-comment procedures. [273]

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[270] Office of Mgmt. & Budget, Exec. Office of The President, 2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 89 (2006), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2006_cb/2006_cb_final_report.pdf. The report does not indicate exactly what steps went into this "more ambitious" outreach.

[271] EPA Open Government Plan at 52.

[272] Administrative Conference of the United States, Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking ¶ I(A) (1995).

[273] *See, e.g.,* 14 C.F.R. § 11.31 (FAA DFRM procedures). *See generally* Ronald M. Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1 (1995).

DFRM is a standard tool for many agencies, led by EPA and the Department of Transportation. Over one four-year period, federal agencies issued over 1000 direct final rules, of which 62 elicited significant adverse comment.[274] In 2005, 27% of the rules EPA published in the Federal Register were direct final rules.[275] However, it has its detractors and leaves many uneasy, suspicious that notice and comment is forgone inappropriately.[276]

Social media could play an important role in ensuring that DFRM is not abused. Actually could be especially useful in that agency needs to know, quickly, whether there is meaningful objection. Good way to do that is by getting word out through social media and having a forum for preliminary discussion.

VII.   SCOPE AND TOPICS OF POSSIBLE RECOMMENDATIONS

At this stage of the project, I do not have a set of proposed recommendations. Rather, it seems more useful to suggest some general issues for consideration and the sort of factors that might affect the Committee's deliberations.

First, it seems clear that the jury is very much out on whether social media can make important contributions to the rulemaking process. Thus, the Committee's recommendations likely should be aimed at better understanding the potentials and pitfalls. We simply do not know enough to be able to say either "Oh, forget it" or "Let's jump in with both feet." It would be appropriate and important for agencies to experiment, and the tenor of the recommendations should be along those lines

Second, the Committee may wish to endorse experimentation with any or all of the particular social media uses touched on in Part III.

Third, some rulemakings will lend themselves more to the use of social media than others. (Cf. reg neg.) The process should not be one size fits all.

Fourth, the Committee may wish to (a) take a strong stand against any ranking/voting/liking as part of rulemaking, (b) try to identify some instances in which it might be appropriate, or (c) avoid the issue altogether.

Fifth, as discussed in Section VI.B, "rulemaking" should not be considered to be simply the process of submitting comments after the NPRM is issued. In the real world, those 60 days are a small piece of a much larger process. And social media will be especially valuable *before* and *after* the comment period. The other advantage of relying on social media during these phases is that *nothing* is an official comment, so the difficult line-drawing and the burdens of figuring out what goes in the docket and what doesn't are avoided.

Sixth, there is general consensus that the various "tips for effective commenting" are rather ineffective. Agencies could use social media for comment-writing training. The agency could

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[274] Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 410 (1999).

[275] Stephen Johnson, *Ossification's Demise? An Empirical Study of EPA Rulemaking from 2001-2005*, 38 ENVTL. L. 767 (2008).

[276] *See, e.g.,* Michael Kolber, *Rulemaking Without Rules: An Empirical Study of Direct Final Rulemaking*, 72 ALB. L. REV. 79 (2009) (finding that in a ten-year period the FDA withdrew fully forty percent of its direct final rules when they generated significant adverse comments).

do the actual training itself or contract it out; alternatively the e-Rulemaking program or GSA could take this on.

Seventh, and related, the Regulation Room approach of using a facilitator to maximize the value of lay comments merits serious consideration. The obvious down-side is time and expense, but the Regulation Room experience suggests that it is important, perhaps even necessary, to extracting valuable input. Cary Coglianese's report for this Committee made such a recommendation.[277] The committee did not pursue it at the time, but this is an appropriate place to revisit it.

Eighth, there are a set of tricky legal questions concerning online discussions relevant to pending rulemakings *during the comment period*. The Committee will have to consider (a) what sort of agency participation in or attention to online discussions are permissible under ex parte principles and (b) what steps agencies can, should, or must take to separate out the general discussions from "comments" that must be included in the docket and be responded to. But the basic approach should that agencies can and should clearly distinguish "comments" that go into the docket from background chatter. As long as agencies clearly indicate which is which, there seems no legal barrier to insisting that commentators continue to meet existing requirements for submitting official comments.

 Ninth, while the PRA issues have been largely resolved, it may make sense to further cut back on or clarify the statutory and/or regulatory text—for example by eliminating the reference to "the Federal Register or other publications" in the definition of exempt general solicitations, since social media do not fit that easily into the category of "publications."

Tenth, the Committee may wish to consider a recommendation regarding whether, under what circumstances, or how agency officials should respond to public input regarding rulemaking *other* than in the preamble to the final rule. It is notable how little response agencies have offered in the social media examples discussed above. It is also understandable in light of limited resources, the need for low-level staffers to obtain approval from their higher-ups for public statements, and agencies' risk aversion regarding public statements. But it can only discourage public participation and seems an opportunity foregone.

Eleventh, while at present this report does not discuss this, a number of agency staffers report real success with certain social media applications *within* the agency. A wiki limited to a small group of staffers who are drafting a preamble, or an Ideascale site for employee suggestions,[278] may be more effective than the same tools offered to the public at large.

Twelfth, social media are a moving target. This report has generally taken the approach of not tying the discussion to specific software or platforms, because we don't know what will they be replaced by. But one question to consider is whether the Conference should recommend that the government take some steps to promote development of new platforms that would be especially helpful for rulemaking.[279]

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[277] *See* Coglianese, *supra* note 18, at 52-53.

[278] *See* http://www.howto.gov/social-media/ideation.

[279] For example, a recent report on Open Government from the IBM Center for the Business of Government contains this recommendation:

Twelfth, the committee might wish to consider suggestions regarding the marketing of public participation in rulemaking. On the one hand, participants need to think that their participation actually matters; on the other hand, they should not be lied to, since that will almost certainly backfire in the end.

The GSA should encourage software developers to create new online and mobile applications that would enable agencies to solicit meaningful input from the public on policy. One tactic to achieve this would be to launch an application development contest ("Apps for Participation") in which the winners are invited to present the tools they develop to the Federal Web Managers Council and/or the White House Open Government Working Group. One approach might be to use Challenge.gov as the platform for this initiative.

Lukensmeyer, Goldman, & Stern, *supra* note 83, at 46.