

## VIEWS OR VOTES: THE CHALLENGE OF MASS COMMENTS IN RULEMAKING

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### INTRODUCTION

“I’m calling upon all of you—the internet’s time wasters and trouble-makers—to join me once more in just five to ten minutes of minor effort,”<sup>1</sup> is how comedian John Oliver renewed his call for viewers to go to the Federal Communications Commission’s website to submit a comment on the newest proposed rule regarding net neutrality.<sup>2</sup> With just a few “minutes of minor effort,” viewers of his show could share their thoughts on one of the most contested administrative agency rules in recent memory. But they were also contributing to a pressing problem in federal agencies: how to manage a rulemaking process with millions of participants. When Congress passed the Administrative Procedure Act (“APA”) in 1946, it created a system where interested parties could weigh in on proposed regulations, which gave new procedural protections to the “hundreds of thousands of Americans” affected by agency regulations.<sup>3</sup> That new system of notice and comment required agencies to post a proposed rule, give the public an opportunity to comment, and promulgate the final rule with a reasoned basis for its decision.<sup>4</sup> Courts have given teeth to those requirements over the years, but agencies are still not truly responsive to comments submitted by members of the public who wish to weigh in with their preferences.<sup>5</sup>

Mr. Oliver’s crusade demonstrates how far the public commenting process has evolved in the more than seventy years since the Administrative

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<sup>1</sup> LastWeekTonight, *Net Neutrality II: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (May 7, 2017), <https://www.youtube.com/watch?v=92vuuZt7wak&t=977s>.

<sup>2</sup> The term “net neutrality rulemaking” in this Comment refers to the Federal Communications Commission’s (“FCC”) 2017 “Restoring Internet Freedom” rulemaking, which reversed a previous rule that had classified internet service providers as public utilities. Restoring Internet Freedom, 33 FCC Rcd. 311 (2018). The substance of the rule is irrelevant; the controversy simply presented issues common among modern rulemakings. The final rule has been published in the Code of Federal Regulations, 47 C.F.R. § 8.1 (2018).

<sup>3</sup> 92 CONG. REC. 2149–50 (1946) (statement of Sen. McCarran).

<sup>4</sup> Administrative Procedure Act, 5 U.S.C. § 553(b)–(d) (2012).

<sup>5</sup> See Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1356, 1359 (2011).

Procedure Act reformed agency rulemaking. The accessibility of the internet has allowed people more power than ever to weigh in on issues that affect their lives, adding a flavor of democracy that was not there before. But the internet has also brought new challenges to the commenting process.<sup>6</sup> When millions of people weigh in on a rule, the volume of public input is often negatively proportional to its value as agencies have little legal incentive to engage with the public's preferences based on current rules.

This Comment maintains that though the judicial consensus is correct that under the APA, support from a majority of comments cannot compel an agency to adopt the favored result, a flood of mass comments can create legal liabilities that could threaten an embattled rule. It also takes a truism of administrative law—that the “votes” of the comments do not matter—and shows that the sentiment aligns with each model for describing the legitimacy of the administrative state except for the interest representation model, which relies on democratic ideals and would consider vote comments more strongly.

Part I of this Comment traces the role of comments in the rulemaking<sup>7</sup> process under the APA, the expansion of the statement of basis and purpose, and how courts have enforced the statutory requirements as technology has impacted commenting. Part II lays out a framework for considering comments, separating sophisticated comments from those that express bare preferences. Part II also examines the legal claims that could arise when a rule garners millions of comments, such as challenges that the agency did not process all comments or had an unalterably closed mind. Part III provides relevant background for the models of legitimacy of the administrative state in legal scholarship. Part IV considers the quandary of the irrelevance of mass comments in light of the models of legitimacy.

## I. BACKGROUND

The APA places comments at the heart of the rulemaking process.<sup>8</sup> All agencies follow the same basic process of proposing a rule, receiving public comments, and publishing the final rule with a statement of the basis

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<sup>6</sup> See Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 896–97 (2011).

<sup>7</sup> The term “rulemaking” in this Comment refers to the process of promulgating a legislative rule. 5 U.S.C. § 551(5). That includes the processes of agencies like the FCC that call their rules “orders” but does not include the processes of agencies like the National Labor Relations Board that make their policy decisions through adjudications. See *United States v. Am. Tel. & Tel. Co.*, 498 F. Supp. 353, 361 (D.D.C. 1980); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 590, 592 (1970).

<sup>8</sup> 5 U.S.C. § 553(c).

underlying the rule.<sup>9</sup> If an agency follows these three steps, then the final result is a “legislative” rule with the full force of law.<sup>10</sup> The character of the comments has changed as the rulemaking process has gone online, with rules garnering more comments with little substance.<sup>11</sup> Agencies respond to the concerns raised in the comments by publishing their responses in the statement of basis, which becomes the record of the process for judicial review.<sup>12</sup> Judicial decisions make clear that mass comments reflecting little more than the writer’s preferences do not warrant extensive agency attention.<sup>13</sup>

#### A. *Comments*

Agencies must accept comments on their proposals, but the character of comments has changed with technology. The APA states, “[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”<sup>14</sup> The purpose of the commenting process as agencies come to decisions is to “refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.”<sup>15</sup>

The commenting process has changed with technology. When the APA mandated consideration of public comments in 1946, comments were submitted on paper and mailed to the agency.<sup>16</sup> In the 1980s and early 1990s, even significant rules garnered an average of only twenty-five comments.<sup>17</sup> Citizen comments were few, and when the public did participate, there was a stark contrast between the hundreds of pages of polished argumentation submitted by industry groups and simple, handwritten, or even flippant comments from the general public.<sup>18</sup> From 1999 to 2004, technology evolved, and the public submissions migrated from paper comments to online comments, but the number of comments was generally consistent.<sup>19</sup>

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<sup>9</sup> *Id.* § 553(b)–(c).

<sup>10</sup> See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1314–15 (1992) (stating the requirements for a rule to qualify as “legislative”).

<sup>11</sup> See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 964 (2006).

<sup>12</sup> See *Reyblatt v. U.S. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997).

<sup>13</sup> See, e.g., *id.*

<sup>14</sup> 5 U.S.C. § 553(c).

<sup>15</sup> *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003).

<sup>16</sup> Coglianese, *supra* note 11, at 949.

<sup>17</sup> *Id.* at 950.

<sup>18</sup> *Id.* at 951.

<sup>19</sup> See John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 985–87 (2006).

In 2001, public controversy and news coverage surrounding a Forest Service regulation known as the “Roadless Rule” brought in 1.6 million comments, which was a true outlier and high watermark of volume of public participation in the early era of internet commenting.<sup>20</sup> The mid-2000s brought the rise of interest groups using form letters from members to flood agencies to get their points across.<sup>21</sup> In one instance in the early period of internet commenting, an advocacy group flooded an agency with enough comments to shut down the servers.<sup>22</sup>

Currently, all agencies accept comments online, and most are submitted through the regulations.gov portal.<sup>23</sup> Members of the public can use a keyword search to find proposed rules and view all supporting documents.<sup>24</sup> To weigh in, people can simply open a text box on the page of the proposed rule, type their comments, and submit; the process often ends with the commenters’ being asked to provide personal identification information, but not all agencies require that.<sup>25</sup>

The sources of and procedure for comments varies with the rule. For an average rule, most comments come from industry groups that represent regulated parties.<sup>26</sup> These commenters are sophisticated, and they use their own data and make legal arguments. For controversial rules, interest groups will often prompt the public to send identical comments, usually with text the group has provided, which causes responses to sometimes tally into the millions.<sup>27</sup> When comments come into an agency, they are sometimes processed by an outside contractor that assembles a report with statistics and subcategories of the comments.<sup>28</sup> Other times the same agency staff who wrote the rules reads the comments.<sup>29</sup> Parties that disfavor a rule can use the agency’s failure to adequately respond to comments as a basis to seek judicial review of the rule.

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<sup>20</sup> *Timeline of the Roadless Rule*, EARTHJUSTICE, <https://earthjustice.org/features/timeline-of-the-roadless-rule> (last updated Aug. 2, 2018).

<sup>21</sup> Coglianese, *supra* note 11, at 952–53.

<sup>22</sup> de Figueiredo, *supra* note 19, at 988–89.

<sup>23</sup> See Gregory D. Jones, *Electronic Rulemaking in the New Age of Openness: Proposing a Voluntary Two-Tier Registration System for Regulations.gov*, 62 ADMIN. L. REV. 1261, 1269 (2010).

<sup>24</sup> *Id.* at 1270.

<sup>25</sup> *Id.*

<sup>26</sup> See Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006).

<sup>27</sup> *Public Notice and Comment Rulemaking (United States)*, OECD, <https://www.oecd.org/gov/regulatory-policy/USA-Public-Notice-and-Comment.pdf> (last visited Nov. 3, 2018).

<sup>28</sup> Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 442–43 (2004).

<sup>29</sup> See *id.*

### B. *Statement of Basis and Purpose*

Section 553 of the APA requires agencies to “incorporate in the rules adopted a concise general statement of their basis and purpose.”<sup>30</sup> Though this simple language appears to set low requirements, the legislative history hints that Congress intended more than what it wrote. The Senate Report from the time of passage states, “The agency must analyze and consider all relevant matter presented. The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule.”<sup>31</sup> The legislative history goes on to say that the basis and purpose statement “should be fully explanatory of the complete factual and legal basis” of the rule.<sup>32</sup>

Despite the bare statutory language, courts have tended to read into the legislative history a more robust requirement<sup>33</sup> and have specifically stated that the reality of rulemaking dictates that agencies not take literally the terms “concise” and “general.”<sup>34</sup> Statements of basis and purpose tend to be several hundred pages long where agencies lay out the full data, the reasoning, the expected effects, and an explanation of why they rejected alternatives.<sup>35</sup> Courts use the reasoning of this document to judge whether the agency’s process was fully reasoned, including whether it responded fully to comments from the public.<sup>36</sup>

### C. *How Judicial Review Enforces the Statement of Basis and Purpose*

Frequently, outside parties challenge the validity of a rule by claiming that the agency failed to meet APA requirements. A rule can be challenged on many grounds, such as claims that the agency made an arbitrary policy choice or that the rule does not conform to the statute that authorizes the agency to act.<sup>37</sup> Claims about an agency’s failure to consider comments properly are based on a failure to follow proper procedure.<sup>38</sup> When a court

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<sup>30</sup> Administrative Procedure Act, 5 U.S.C. § 553(c) (2012).

<sup>31</sup> COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 79-752, at 15 (1945).

<sup>32</sup> 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 20 (1946) [hereinafter APA LEGISLATIVE HISTORY].

<sup>33</sup> RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE 592–93 (5th ed. 2010).

<sup>34</sup> Auto. Parts & Accessories Ass’n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

<sup>35</sup> See PIERCE, *supra* note 33, at 593.

<sup>36</sup> See *id.* at 594.

<sup>37</sup> *Challenging Regulatory Actions*, JUSTIA, <https://www.justia.com/administrative-law/challenging-regulatory-actions> (last visited Nov. 3, 2018).

<sup>38</sup> KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW 489–90 (2d ed. 2014).

finds that the process was defective, it remands the rule back to the agency to conduct notice and comment again, and often the rule is not enforceable during the remand period.<sup>39</sup>

“[F]ailure to respond to comments is grounds for reversal” if the failure reveals that the agency was arbitrary because it did not account for all the relevant factors.<sup>40</sup> The key case on this point states that an agency must respond to comments that are “relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule.”<sup>41</sup> The judiciary has interpreted that to mean an agency must respond to “relevant and significant” public comments.<sup>42</sup> To warrant response, the comment must step over a threshold requirement of materiality, and courts use a commonsense approach to judge this.<sup>43</sup> Concerns “mentioned in . . . general . . . terms” do not require a response.<sup>44</sup> Agencies are not required to respond to comments on issues the agency did not invite comment on, such as the underlying statute or policy that authorizes the rule.<sup>45</sup> An agency should respond to comments challenging its jurisdiction or authority to make a particular rule.<sup>46</sup>

Agencies have the highest responsibility when considering a comment that offers a reasonable alternative.<sup>47</sup> The agency must not only acknowledge the suggested alternative but also thoroughly engage with the comment.<sup>48</sup> However, the suggested alternative must be thoroughly reasoned. For example, an agency did not err when it did not respond to comments suggesting a *de minimis* exception to a rule, because those comments did not explain the merits of the proposal or compare it to other thresholds.<sup>49</sup> It is possible a judge may hold an agency to a higher standard when the ignored comment favors his preferred policy position, or when the rule is a controversial one, such as an environmental deregulation.<sup>50</sup>

Courts expect the agency’s response to the comments to show that the issues are fully “ventilated.”<sup>51</sup> Agencies must give a direct response and

<sup>39</sup> See Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 611–12 (2004) (discussing the default that a rule is vacated for procedural defects but discussing the alternative of remand without vacatur).

<sup>40</sup> *Am. Mining Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992).

<sup>41</sup> *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).

<sup>42</sup> *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007).

<sup>43</sup> *Interstate Nat. Gas Ass’n of Am. v. FERC*, 494 F.3d 1092, 1096 (D.C. Cir. 2007).

<sup>44</sup> *Reyblatt v. U.S. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722–23 (D.C. Cir. 1997).

<sup>45</sup> See *Sherley v. Sebelius*, 776 F. Supp. 2d 1, 22 (D.D.C. 2011), *aff’d*, 689 F.3d 776 (D.C. Cir. 2012).

<sup>46</sup> *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003).

<sup>47</sup> See JAMES T. O’REILLY, *ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING, AND DEFENDING FEDERAL AGENCY REGULATIONS* 282 (2018).

<sup>48</sup> See *Horne v. U.S. Dep’t of Agric.*, 494 F. App’x 774, 777 (9th Cir. 2012).

<sup>49</sup> *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 365 (D.C. Cir. 2014).

<sup>50</sup> See O’REILLY, *supra* note 47, at 290.

<sup>51</sup> *1000 Friends of Md. v. Browner*, 265 F.3d 216, 238 (4th Cir. 2001).

rebuttal to comments, not blithely discuss the issues raised.<sup>52</sup> However, when the court is confident that the issues in the rulemaking were ventilated, it may be more lenient. In *Hawaii Helicopter Operators Ass'n v. FAA*,<sup>53</sup> the agency admitted that it had “overlooked” the comments of four groups, but the court held the omission was harmless because the comments raised issues the agency had previously addressed.<sup>54</sup> Importantly, if an agency receives, for example, 270 comments about a particular facet of the problem and says “almost nothing” about them in the final rule, then that is cause for reversal.<sup>55</sup>

Courts value substance over volume when weighing what comments the agency must respond to. Circuits have stated, “[W]e consider the substance of the comments, not the number for or against the project,”<sup>56</sup> and “The number and length of comments, without more, is not germane to a court’s . . . inquiry.”<sup>57</sup> As a bright-line rule, courts assess only whether an agency adequately responded to the arguments in the comments without regard to the volume,<sup>58</sup> and the number of comments is inapplicable to the inquiry.<sup>59</sup>

The closest a court has come to considering the volume and “votes” of comments was in *Kootenai Tribe of Idaho v. Veneman*,<sup>60</sup> where the court considered a request for an injunction against a rule and found that a challenge to the agency’s procedure would not succeed on the merits.<sup>61</sup> In that case, the Montana Attorney General submitted an amicus brief arguing that an injunction against a rule should be lifted because 67 percent of Montanans and 96 percent of all public commenters supported the rule.<sup>62</sup> The Ninth Circuit cited that reasoning in its opinion for the premise that the public was involved in the deliberation process.<sup>63</sup> However, the *position* of the commenters (in addition to the number) also has no legal effect, as the D.C. Circuit has noted that an agency “has no obligation to take the approach advocated by the largest number of commenters; indeed, the [agency] may adopt a course endorsed by no commenter.”<sup>64</sup>

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<sup>52</sup> See O’REILLY, *supra* note 47, at 289–90.

<sup>53</sup> 51 F.3d 212 (9th Cir. 1995).

<sup>54</sup> *Id.* at 214–16.

<sup>55</sup> See *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003).

<sup>56</sup> *Hillsdale Env’tl. Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, 702 F.3d 1156, 1181 (10th Cir. 2012).

<sup>57</sup> *Nat. Res. Def. Council v. EPA*, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987).

<sup>58</sup> See *Hillsdale*, 702 F.3d at 1181.

<sup>59</sup> *Nat. Res. Def. Council*, 822 F.2d at 122 n.17.

<sup>60</sup> 313 F.3d 1094 (9th Cir. 2002).

<sup>61</sup> *Id.* at 1117.

<sup>62</sup> *Id.* at 1116 n.19.

<sup>63</sup> *Id.*

<sup>64</sup> *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 87 (D.C. Cir. 2001) (citation omitted).

In effect, these rules from the courts about how the agency must respond to comments in the basis statement give substance to the APA's command that the agencies "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"<sup>65</sup> because the value of the comments is in how the agency is influenced by them.<sup>66</sup> Though there is a presumption of administrative regularity, in the aggregate, courts are ensuring that the process has the opportunity to persuade the agency. An administrator that cannot at all be persuaded by the comments may be disqualified from the rulemaking for having an unalterably closed mind.<sup>67</sup> However, the Supreme Court held in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*<sup>68</sup> that the APA was the extent of the agency's obligations, and courts could go no further to require additional process.<sup>69</sup>

## II. ANALYSIS

The submission of millions of public comments opens an agency's rulemaking process to potential liabilities beyond the basic claim that the majority of "votes" should have dictated the result. Differentiating the comments based on their source and content into insider, high-context, and mass comments shows that mass comments present unique problems for agencies. Those problems include processing millions of comments through software, ensuring adequate response in the statement of basis and purpose, and docketing them appropriately. Ultimately, agencies can address these problems so that the practices are lawful and defensible.

### A. *A Framework for Considering Comments*

This Comment assumes three types of public comments: the insider comments written by sophisticated parties; the high-context comments written by affected people who provide anecdotal information about the impact of a rule; and the mass comments written by bots, interest groups, or people with limited information that communicate bare preferences, similar to votes.

Many agency rules will garner mostly professional comments from law firms and interest groups.<sup>70</sup> However, a more controversial issue will

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<sup>65</sup> 5 U.S.C. § 553(c) (2012).

<sup>66</sup> See Ronald F. Wright, *It's the Reply, Not the Comment: Observations About the Bierschbach and Bibas Proposal*, 97 MINN. L. REV. 2272, 2273–74 (2013).

<sup>67</sup> *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

<sup>68</sup> 435 U.S. 519 (1978).

<sup>69</sup> *Id.* at 535.

<sup>70</sup> See Wright, *supra* note 66, at 2275.

receive comments from both those parties and the general public. Professor Ronald Wright refers to this dichotomy as insiders and outsiders.<sup>71</sup> In his framework, insiders are regulated parties or those with an interest, mostly financial, in the outcome of the rule.<sup>72</sup> They are repeat players who hire attorneys to draft comments that offer technical analysis, discussion of the rule's relation to the statute, and potential alternatives.<sup>73</sup> In contrast are outsiders who register preferences more broadly.<sup>74</sup> He casts citizen interest groups such as the Sierra Club in this outsider category,<sup>75</sup> as well as presumably individual citizens.

Professor Cynthia Farina uses a similar concept to organize the groups differently.<sup>76</sup> She says there are parties who participate in commenting frequently enough that they become immersed and change themselves to become part of the framework that the agencies are familiar with.<sup>77</sup> This is compared with people who are unfamiliar with the process and seek to participate as private citizens and novices.<sup>78</sup> Farina sees the dichotomy not as insider versus outsider in terms of financial interest, but in terms of the content of a comment—the ability to speak the agency's language.<sup>79</sup> Therefore, in her analysis, the Sierra Club would be an inside party because it is familiar with the process and knows how to represent environmental data and alternative arguments effectively. She sees an outsider as someone who presents his comment in story form or with highly contextualized information about how a proposed rule will affect his life, as opposed to using data or legal arguments.<sup>80</sup> The use of the anecdote separates them.

However, submissions are more accurately categorized by their format, rather than the position of the writer. These categories are insider comments, high-context comments, and mass comments.

### 1. Insider Comments

The category most familiar to agency staff is comments from insiders. Farina captures this best by referring to people who know the system.<sup>81</sup>

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<sup>71</sup> *Id.* at 2272.

<sup>72</sup> *Id.* at 2274.

<sup>73</sup> *Id.* at 2274–75.

<sup>74</sup> *Id.* at 2275.

<sup>75</sup> *Id.*

<sup>76</sup> Cynthia R. Farina et al., *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1187 (2012).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

They can be the regulated parties, associated interests such as insurance companies, or interest groups that purport to represent citizen interests such as an environmental group or a disability rights group, provided that the commenter is familiar with and forms the comment around the norms of rulemaking.<sup>82</sup> This means insider comments are those that use legal reasoning, technical data, and potential alternatives, and they generally take an objective or professional approach.<sup>83</sup>

Insider comments are central to the current rulemaking process. They have a specific form that conforms to a shared language between the agency staff and the commenters on how to justify, comment on, or attack a rule.<sup>84</sup> The shared language encompasses both form—the rhetoric and the way arguments are structured into legal formats—and substance in “the types of evidence and kinds of reasoning that are valued.”<sup>85</sup>

In a study of how agency staff value comments, the main criteria, which insiders typically met, included engagement with the underlying statute, submission of specific textual changes to the proposed rule, and provision of legal, policy, or technical evidence to support the comment.<sup>86</sup> The common thread is the sophistication of the rhetoric required to be valuable to an agency. It is plausible that the relationship between courts’ emphasis on sophisticated comments and agencies’ valuation of them have been mutually reinforcing, but the important point is that insider comments are the most highly valued in the agencies and during review.

## 2. High-Context Comments

The comments in the next category, high-context comments, contribute less value to the rulemaking process. These comments are personally written by interested members of the public and give genuine but highly contextual information, like an anecdote or speculation based on the writers’ experiences with the regulated issue. These comments go a step beyond just communicating support or disdain; they give reasons and anecdotes and raise possible unintended consequences the commenter foresees in his everyday life. However, they do not use “objective” data or propose fully formed alternatives, so they fall short of what the case law directs agencies to consider.<sup>87</sup> These comments can be less useful because they are not verifiable or generalizable to the experiences of others in similar positions.

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<sup>82</sup> See Farina et al., *supra* note 76, at 1187.

<sup>83</sup> Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 430 (2005).

<sup>84</sup> Farina et al., *supra* note 76, at 1192.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1193.

<sup>87</sup> See, e.g., Nat’l Ass’n of Manufacturers v. SEC, 748 F.3d 359, 366 (D.C. Cir. 2014).

The case law is scant on the treatment of these comments because many issues raised in high-context comments are addressed in insider comments. Therefore, the concern is likely to be addressed in the statement of basis and purpose, even if only generally. Farina has examined rules where the agency and other insiders supported one idea, but high-context comments took another position.<sup>88</sup> For example, the Department of Transportation and disability rights groups supported making kiosks in airports accessible to the blind, but blind travelers who used airports commented that the proposal would lead to the unintended consequence of fewer desk agents available for assistance.<sup>89</sup> If, hypothetically, the agency were to fail to respond to such a comment in the statement of basis and purpose, the party that would normally sue the agency (the disability rights group) would not oppose the rule, so it would have no reason to challenge the oversight. As a result, it is unclear whether a party can sue based on a comment it did not submit.

### 3. Mass Comments

Mass comments can come from citizens, interest groups, or bots.<sup>90</sup> Though these comments serve a purpose in communicating general sentiment, their usefulness is limited. Most commonly, mass comments come from interest groups that author a comment and then distribute it to their membership in hopes that the members will send the comment to the agency under their own names.<sup>91</sup> This leads to many duplicates of the same comment submitted by individual people.<sup>92</sup> Additionally, a member of the public may learn of a rule but have little knowledge of the issue, so she sends a comment to the agency with a general sentiment of support or scorn. These comments amount to little more than a vote on the rule.

Mass comments that are submitted by humans but not personally written have their drawbacks. Before rulemaking moved online, a written comment had some opportunity costs—drafting the comment required time, effort, and money for a stamp. But now, someone can receive a model comment in an email from an interest group and submit it to the agency with a few clicks. Therefore, the comment is low value because there was

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<sup>88</sup> Farina et al., *supra* note 76, at 1204–05.

<sup>89</sup> *Id.*

<sup>90</sup> “Bots” refers to software that performs a function, like a robot. See Adrienne LaFrance, *The Internet Is Mostly Bots*, THE ATLANTIC (Jan. 31, 2017), <https://www.theatlantic.com/technology/archive/2017/01/bots-bots-bots/515043>.

<sup>91</sup> See Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 416 (2011).

<sup>92</sup> *Id.*

no opportunity cost to express it, so the person likely does not feel strongly.<sup>93</sup> With social networking and the internet generally, public participation is amplified but amounts to “little more than a bare expression of preferences.”<sup>94</sup> It is predictable that these comments amount to little more than votes, given how people are used to communicating preferences to the government through votes and to private parties through opinion polls. Expressing simple sentiment is efficient, which people are comfortable with and respond to,<sup>95</sup> but it does not fit the purpose of commenting on rules, which is to inform the agency.

Though there is limited information in mass comments, agencies should continue to accept mass comments sent by people because political signals can be useful to agency decision-making.<sup>96</sup> These comments likely track the sentiments of the people who authorized them<sup>97</sup> and thus add value and legitimacy by democratizing the regulatory process. If the agency disregards what is in some format the will of the people, then the commenting process becomes “window dressing,” and people lose faith that the agencies use commenting as a genuine opportunity to gather information.<sup>98</sup>

Despite the limited utility and legal weight of the voting-style comments, the federal government appears to encourage them. The regulations.gov website that hosts the online commenting platform states, “Public participation matters.”<sup>99</sup> It continues, “A comment can express simple support or dissent for a regulatory action.”<sup>100</sup> With these instructions, the government purports to value a simple yes or no vote on a rule.

Mass commenting is useful when the outcry captured in the comments signals political controversy.<sup>101</sup> If an agency promulgates a rule and receives (perhaps unanticipated) public pushback, the agency may back down from its rule. In that instance, the “preferences” comments have served a democratic purpose by giving the agency additional information. Interest groups are useful in this process because they can reduce the barriers to

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<sup>93</sup> Cf. Coglianese, *supra* note 11, at 966 (describing how the internet decreases opportunity costs for commenters).

<sup>94</sup> Farina et al., *supra* note 91, at 432.

<sup>95</sup> *See id.*

<sup>96</sup> *Contra* Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL’Y & INTERNET 23, 25–26 (2009) (arguing that mass comments harm meaningful participation and are detrimental to rulemakings).

<sup>97</sup> *See* Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENVTL. & ADMIN. L. 173, 177 (2012).

<sup>98</sup> *Id.* at 175–76 (quoting Mendelson, *supra* note 5, at 1380).

<sup>99</sup> *Frequently Asked Questions*, REGULATIONS.GOV, <https://www.regulations.gov/faqs> (last visited Oct. 11, 2018).

<sup>100</sup> *Tips for Submitting Effective Comments*, REGULATIONS.GOV, [https://www.regulations.gov/docs/Tips\\_For\\_Submitting\\_Effective\\_Comments.pdf](https://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf) (last visited Oct. 11, 2018).

<sup>101</sup> O’REILLY, *supra* note 47, at 187.

commenting by informing their members of agency actions of interest.<sup>102</sup> Agencies change their rules in response to comments, even mass comments, both because the comments bring new information and “because they . . . signal[] to . . . political overseers that changes are necessary.”<sup>103</sup> Agency attention to the sentiments of public participation also safeguards the agency from capitulating to private interests.<sup>104</sup> However, simply *issuing* a proposed rule is the product of long deliberation and a certain employee’s “winning” by having his idea chosen, so one should not overstate how much impact comments can have because much has gone into forming a rule before it is proposed.<sup>105</sup>

In contrast to comments authored by a group and submitted by an individual, bot comments are only harmful, and agencies should take technological steps to prevent their submission. A bot comment is submitted when an entity writes a software program to submit comments to an agency, much like a spam email message, with fabricated authoring information.<sup>106</sup> And so, the comment reflects only the views of the entity that wrote the computer program, with no actual person involved in the submission.

Though corporations have previously used funding to encourage interest groups to submit comments they otherwise would not,<sup>107</sup> true bot comments gained public attention in the net neutrality rulemakings.<sup>108</sup> Journalists have accused foreign sources of submitting fabricated comments to the FCC.<sup>109</sup> Some comments were signed with names and street addresses of people who claim their information was stolen.<sup>110</sup> Interest groups have attempted to influence the commenting process by flooding the agency with

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<sup>102</sup> Mendelson, *supra* note 97, at 178.

<sup>103</sup> Stuart Shapiro, *Why Do Agencies Change Their Proposed Rules?* (2007), <https://ssrn.com/abstract=1026066>.

<sup>104</sup> APA LEGISLATIVE HISTORY, *supra* note 32, at 20.

<sup>105</sup> O'REILLY, *supra* note 47, at 181.

<sup>106</sup> See Peter Flaherty, *When 'Bots' Outnumber Humans Public Comment Process Is Meaningless*, THE HILL (June 11, 2017, 4:00 PM), <http://thehill.com/blogs/pundits-blog/technology/337337-how-bots-have-made-the-public-comment-process-meaningless> (critiquing the role of bots in commenting).

<sup>107</sup> See Victoria Peng, *Astroturf Campaigns: Transparency in Telecom Merger Review*, 49 U. MICH. J.L. REFORM 521, 536 (2016).

<sup>108</sup> See Ryan Grenoble, *Thousands of Comments on Government Proposals Use Stolen Identities*: WSJ Analysis, HUFFINGTON POST (Dec. 12, 2017, 8:03 PM), [https://www.huffingtonpost.com/entry/stolen-identities-net-neutrality-comments\\_us\\_5a302a5be4b01bdd7657d4b6](https://www.huffingtonpost.com/entry/stolen-identities-net-neutrality-comments_us_5a302a5be4b01bdd7657d4b6) (describing speculation that bots are on the rise and have been used in rulemakings besides net neutrality).

<sup>109</sup> See, e.g., Peter Flaherty, *Analysis: 1.3 Million More Pro-Net Neutrality FCC Public Comments Came from Russia, Other Foreign Countries*, NAT'L LEGAL & POL'Y CTR. (July 17, 2017), <http://nlpc.org/2017/07/17/analysis-1-3-million-pro-net-neutrality-fcc-public-comments-came-russia-foreign-countries>.

<sup>110</sup> Kevin Collier, *FCC Is Honoring Fake Anti-Net Neutrality Rants Left by Bots*, VOCATIV (May 18, 2017, 3:42 PM), <http://www.vocativ.com/431065/fcc-ajit-pai-net-neutrality-bots>.

comments not authorized by people, and it is possible that a vast majority of comments came from bot submissions.<sup>111</sup>

Bot comments do not serve any democratic purpose, since they are not expressing the thoughts of actual citizens, but instead purely serve the interest of the group that is attempting to flood the agency. Therefore, all agencies should implement technology like CAPTCHA<sup>112</sup> to prevent bots from submitting comments to regulations.gov and agency-specific commenting platforms.

## B. *Potential Liabilities from Mass Comments*

When an agency receives millions of mass comments, the rulemaking is vulnerable not only to prosaic claims that the agency ignored the sentiment of the comments, but also to more sophisticated allegations of what ignoring the flood of comments may indicate. Challengers may claim closemindedness, a failure to process and docket the comments fairly, or a cursory response to the values in the comments that fails to meet the legal standard. The contention here is that, beyond the maxim that a rulemaking is a not a popularity contest, no matter how skewed the results, the reception of mass comments can create more subtle problems if agencies do not take mass comments seriously throughout the notice-and-comment procedure.

### 1. A Rulemaking Is Not a Plebiscite

#### a. *Case Law Consensus*

The case law is clear: an agency is not compelled to take the position supported by a majority of commenters, even if the comments are nearly unanimous.<sup>113</sup> Though surprising to lay observers, that outcome is a

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<sup>111</sup> See Lorenzo Franceschi-Bicchierai, *More Than 80% of All Net Neutrality Comments Were Sent by Bots, Researchers Say*, MOTHERBOARD (Oct. 3, 2017, 4:24 PM), [https://motherboard.vice.com/en\\_us/article/43a5kg/80-percent-net-neutrality-comments-bots-astroturfing](https://motherboard.vice.com/en_us/article/43a5kg/80-percent-net-neutrality-comments-bots-astroturfing).

<sup>112</sup> A tool to prove that the user of a website is human. *CAPTCHA: Telling Humans and Computers Apart Automatically*, <http://www.captcha.net> (last visited Oct. 15, 2018). However, CAPTCHA has been criticized for its insufficient security and lack of disability access. See *Inaccessibility of CAPTCHA*, W3C (July 3, 2018), <https://www.w3.org/TR/turingtest>.

<sup>113</sup> See e.g., *Hillsdale Env'tl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012); *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003) (“The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced before the proceeding begins, but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.”); *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 87

reflection of the judiciary's view that notice and comment is an opportunity to refine the rule by ventilating the issues, not a forum to politically influence the agency toward an outcome.<sup>114</sup>

The sole case where a court has positively noted the volume and preferences of the comments was in *Kootenai Tribe of Idaho v. Veneman*, where the court considered an injunction against the Forest Service's Roadless Rule on the claim that the rule's process was deficient because it lacked public involvement.<sup>115</sup> The Montana Attorney General submitted an amicus brief in that case arguing that an injunction against the rule should be lifted because sixty-seven percent of Montanans and ninety-six percent of all public commenters supported the rule.<sup>116</sup> The Ninth Circuit cited that fact in its opinion to support its conclusion that the public was involved in the deliberation process.<sup>117</sup> It is notable that even the closest a court has come to accepting the position of the comments was just in allowing a preliminary injunction, and the court was really looking at public participation, not sentiment.<sup>118</sup> Any party challenging a future rule based on disagreement with comments would have no precedent to rely on.

The scholarship on the topic is nearly as equally settled as the case law.<sup>119</sup> Professor Bridget Dooling captured the state of the literature when she wrote that accepting that mass comments convey useful information “does not imply that rulemaking is a plebiscite. That point is settled.”<sup>120</sup> One of the most vocal scholars on the value of vote comments, Professor Nina Mendelson, still agrees that agencies should not “tally up the total number of comments for or against a particular issue and have that serve as a referendum or a dispositive vote of some sort on the policy issue at hand. The judicial opinions saying agencies need not do this are clearly correct.”<sup>121</sup>

#### b. *Unalterably Closed Mind Standard*

A party challenging a rule could ostensibly bring a modified version of the claim that agency officials should be persuaded by the preferences of

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(D.C. Cir. 2001) (“[T]he [agency] has no obligation to take the approach advocated by the largest number of commenters; indeed, the [agency] may adopt a course endorsed by no commenter.”).

<sup>114</sup> See *1000 Friends of Md. v. Browner*, 265 F.3d 216, 238 (4th Cir. 2001).

<sup>115</sup> *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1116 (9th Cir. 2002).

<sup>116</sup> *Id.* at 1116 n.19.

<sup>117</sup> See *id.* at 1116.

<sup>118</sup> See *id.* at 1104.

<sup>119</sup> See Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 131 (2012) (noting that many acknowledge that vote comments do not rule the day, and “[t]he standard administrative law response to these observations is applause”).

<sup>120</sup> Dooling, *supra* note 6, at 901 n.31.

<sup>121</sup> Mendelson, *supra* note 5, at 1374.

the comments by alleging that the officials had unalterably closed minds. In *Association of National Advertisers v. FTC*,<sup>122</sup> the D.C. Circuit held that it was possible for an administrator to be disqualified from a rulemaking if he had an “unalterably closed mind” that prevented him from participating fairly in the proceedings.<sup>123</sup> The court discussed that in an adjudication, where an administrator acts akin to a judge, he could be disqualified from the proceeding if he had “in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”<sup>124</sup>

However, when an administrator moves forward with a rulemaking, he is acting more like a legislator than a judge, and the standard for inappropriate prejudice is higher.<sup>125</sup> To get an administrator removed from a rulemaking proceeding, a party challenging the rule must show by clear and convincing evidence that the administrator had an “unalterably closed mind on matters critical to the disposition of the proceeding.”<sup>126</sup> A challenger to an already-promulgated rule could claim that the rule is invalid because an administrator should have been disqualified, and because he was not, the procedure was deficient.

Claiming a rulemaking was procedurally flawed because an administrator had an unalterably closed mind is a precarious claim.<sup>127</sup> First, the standard has been cited only in the D.C. Circuit and the Ninth Circuit.<sup>128</sup> In the Ninth Circuit, only one case discusses it, and it rejects the claim.<sup>129</sup> No court has held that an administrator is disqualified from a rulemaking for policy-based bias.<sup>130</sup> Second, the majority in *Association of National Advertisers*, debating with a concurrence that calls for greater impartiality, discusses how administrators or commissioners who make rules are not required to be neutral.<sup>131</sup> The APA does not require an administrator to be

<sup>122</sup> 627 F.2d 1151 (D.C. Cir. 1979).

<sup>123</sup> *Id.* at 1154.

<sup>124</sup> *Id.* at 1158 (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

<sup>125</sup> *Id.* at 1165, 1168.

<sup>126</sup> *Id.* at 1170.

<sup>127</sup> See CHARLES H. KOCH, JR. & RICHARD MURPHY, 2 ADMINISTRATIVE LAW AND PRACTICE § 6:10 (3d ed. 2018).

<sup>128</sup> The Seventh Circuit cited the standard to discuss an administrator in an adjudication, not a rulemaking. *Windy City Meat Co. v. U.S. Dep’t of Agric.*, 926 F.2d 672, 679 (7th Cir. 1991).

<sup>129</sup> *Alaska Factory Trawler Ass’n v. Baldrige*, 831 F.2d 1456, 1459–60, 1467 (9th Cir. 1987). Two additional cases cite the standard, *Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622, 624 (9th Cir. 1985) (dismissing for lack of jurisdiction), and another that is no longer good law, *United Farm Workers of America, AFL-CIO v. Arizona Agricultural Employment Relations Board*, No. 80-5777, 1983 WL 21393, at \*5 (9th Cir. Jan. 17, 1983), *rev’d on reh’g*, 727 F.2d 1475 (9th Cir. 1984), *aff’d* 733 F.2d 78 (mem.) (en banc).

<sup>130</sup> HICKMAN & PIERCE, *supra* note 38, at 522.

<sup>131</sup> *Ass’n of Nat’l Advertisers*, 627 F.2d at 1170; *id.* at 1181, 1187–88 (MacKinnon, J., concurring in part and dissenting in part).

neutral in a rulemaking (though the Constitution does for adjudications).<sup>132</sup> Therefore, for a court to hold that an administrator is required to show some level of neutrality might violate the principle of *Vermont Yankee* that the APA be the ceiling on agency requirements. Finally, a challenger would need concrete evidence, such as thoroughly damning public statements from the administrator, to show that a closed mind was the reason for ignoring the comments.<sup>133</sup> If not, the claim would simply amount to another version of the incorrect contention that votes must sway an administrator. As the D.C. Circuit has specifically said, “an agency’s failure to make [the change advocated by the comments] does not mean its mind is closed.”<sup>134</sup>

## 2. The Legal and Practical Pitfalls of Millions of Comments

The submission of millions of comments can raise issues beyond whether the preferences of the commenters were followed. The agency has a responsibility to process the comments, read them, respond to them in the basis statement, and create a record for review. Receiving millions of comments makes these tasks harder, but not insurmountable. Dooling wrote a thorough article on the technical issues of rulemaking in 2011 that tended to favor lower requirements in the name of agency efficiency, and her recommendations are addressed with a focus on mass comments.<sup>135</sup>

### a. *Processing the Comments*

The APA states that an agency may promulgate a final rule “[a]fter consideration of the relevant matter presented” during the notice-and-comment process.<sup>136</sup> When an agency receives millions of comments, it is reasonable for it to want to take advantage of the efficiencies of technology to speed up the process of consideration. However, using software to process comments raises questions as to whether an agency truly considered a comment.

Agency staff can read the comments for most rules. For rules that trigger millions of mass comments, agencies sometimes use outside contractors to process the comments.<sup>137</sup> Some agencies have experimented with using

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<sup>132</sup> HICKMAN & PIERCE, *supra* note 38, at 513.

<sup>133</sup> See *Ass’n of Nat’l Advertisers*, 627 F.2d at 1195–97 (MacKinnon, J., concurring in part and dissenting in part); *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164–65 (D.C. Cir. 1995).

<sup>134</sup> *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994).

<sup>135</sup> See Dooling, *supra* note 6, at 901.

<sup>136</sup> 5 U.S.C. § 553(c) (2012).

<sup>137</sup> Noveck, *supra* note 28, at 442–43.

software to process comments.<sup>138</sup> They do so because even if one person spent five minutes per comment, to read four million comments would take him more than three years.<sup>139</sup> So processing, for example, the upwards of 22 million comments received in the net neutrality rulemaking,<sup>140</sup> could not feasibly be done by humans, thus inviting the use of software. At an absolute minimum, agencies should be able to use software to detect duplicates, such as those received from a coordinated campaign.<sup>141</sup> The software should be able to collect the duplicates into one batch, and one letter from the batch should be responded to in the basis statement.<sup>142</sup>

The more difficult question is whether it should be legal to use natural language software to scan a letter to try to detect whether the person is for or against the rule and then put them in more generalized pro and con categories. The ability to detect content is what differentiates natural language software from a program that simply uses a keyword search to find duplicates.<sup>143</sup> Dooling argues that duplicate-seeking software raises absolutely no APA issues.<sup>144</sup> Similarly, the Administrative Conference of the United States (“ACUS”), which issues guidance on how agencies should operate, has stated, “While 5 U.S.C. § 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.”<sup>145</sup> But natural language software does not simply find words; rather, it “reads” the

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<sup>138</sup> See, e.g., CARY COGLIANESE, E-RULEMAKING: INFORMATION TECHNOLOGY AND REGULATORY POLICY 14 (2004); *Rulemaking Process*, U.S. DEP’T TRANSP., <https://www.transportation.gov/regulations/rulemaking-process> (last visited Aug. 19, 2018); *Web-Based Software for Public Comments and Outreach Campaigns*, SMARTCOMMENT SOFTWARE, <https://www.smartcomment.com> (last visited Aug. 19, 2018).

<sup>139</sup> See Fernando Hurtado, *Did You Submit a Gov’t Complaint Recently? It Likely Wasn’t Read*, CIRCA (Mar. 3, 2017, 11:10 AM), <http://circa.com/politics/government/it-would-take-years-for-the-govt-to-read-all-your-comments-on-govt-policies-until-now> [<http://perma.cc/YX5C-NGN2>].

<sup>140</sup> Steven Balla, *Fake Comments Flooded in when the FCC Repealed Net Neutrality. They May Count Less Than You Think.*, WASH. POST (Dec. 14, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/14/there-was-a-flood-of-fake-comments-on-the-fccs-repeal-of-net-neutrality-they-may-count-less-than-you-think/?utm\\_term=.4ae9e3eb7d8e](https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/14/there-was-a-flood-of-fake-comments-on-the-fccs-repeal-of-net-neutrality-they-may-count-less-than-you-think/?utm_term=.4ae9e3eb7d8e) (repeating the commonly cited “22 million public comments” statistic).

<sup>141</sup> See Dooling, *supra* note 6, at 932.

<sup>142</sup> Hurtado, *supra* note 139 (quoting John Davis, Founder of Regendus, a regulatory analytics platform that “pars[es] through public comments”); REGENDUS, <http://www.regendus.com> [<http://perma.cc/M3TY-DFFM>] (last visited Jan. 2, 2018) (highlighting “analy[zing] sentiment” as a way to determine issue-specific public preference and showing a screenshot of a public comment analyzed using natural language processing in which software underlined “pro” language in green and “con” language in red).

<sup>143</sup> Melissa Mortazavi, *Rulemaking Ex Machina*, 117 COLUM. L. REV. ONLINE 202, 210 (2017).

<sup>144</sup> See Dooling, *supra* note 6, at 901–02.

<sup>145</sup> ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-1: LEGAL CONSIDERATIONS IN E-RULEMAKING 4 (2011).

comments to gain meaning based on what it has been taught, making its own judgments about the content.<sup>146</sup> This process is more legally risky than a purely mechanical process of finding certain words.<sup>147</sup>

One of the reasons the use of natural language software is more questionable is because the APA imagined the agency considering the public's views.<sup>148</sup> It is all but a farce to say that an agency considered a view if a software "read" the comment, made its own judgment about the meaning, and then placed it in a batch with hundreds of thousands of others that share its general sentiment, if not its specific point. Natural language software does not appear to be in use yet, but the increasing volume of comments may incentivize some agencies to experiment.<sup>149</sup> One can imagine a situation in which software is used to batch comments, resulting in agency staff missing a comment that brings up a novel issue or proposes a fully formed solution.<sup>150</sup> If an outside group were to find this comment that the agency ignored and thus failed to rebut, it is possible that the comment would become the basis for litigation. Agencies should be cautious in delegating too much authority to software beyond mechanical keyword searching.

Use of any software has advantages and pitfalls. Software is a good idea because in terms of costs and benefits, people submitting a "vote" for or against a rule put little effort into the exercise, so it is reasonable for the agency to reciprocally seek to keep its processing costs down.<sup>151</sup> Software is ideal for the "mass commenting" category because it removes the useless volume and extracts messages that the agency can respond to. The concern is that technical comments from the "insider" category discussed above will still be read by agency staff who will assess the technical data and specific concerns, but allowing mass and high-context comments to be processed by software downplays the public's role and treats reporting concerns to the agency as a mere "pro versus con" statistic.<sup>152</sup> Therefore, the use of software

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<sup>146</sup> Mortazavi, *supra* note 143, at 202.

<sup>147</sup> *See id.* at 210–11.

<sup>148</sup> *See* 5 U.S.C. § 553(c) (2012) (requiring the agency provide its statement of basis and purpose after "consider[ing] . . . the relevant matter presented" by "interested persons").

<sup>149</sup> *See* Mortazavi, *supra* note 143, at 202, 207; Elise Hu, *1 Million Net Neutrality Comments Filed, but Will They Matter?*, NPR (July 21, 2014, 4:54 PM), <http://www.npr.org/sections/alltechconsidered/2014/07/21/332678802/one-million-net-neutrality-comments-filed-but-will-they-matter> (discussing how comments are processed).

<sup>150</sup> Recall that an alternative solution is one of the most highly valued comments in the case law. *See* *Horne v. Dep't of Agric.*, 494 F. App'x 774, 777 (9th Cir. 2012).

<sup>151</sup> Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 915, 939 (2006).

<sup>152</sup> *Increasing Efficiency in Rule Making with Natural Language Processing*, IDEALAB, <https://www.hhs.gov/cto/projects/increasing-efficiency-in-rule-making-with-natural-language-processing/index.html> (last visited Jan. 2, 2018).

encourages agencies to treat insider and outsider comments differently,<sup>153</sup> furthering the disparity between those who hire lobbying firms and those who do not.

Courts have consistently molded the 1940s text of the APA to bring it in line with modern circumstances,<sup>154</sup> so one can predict that courts will reject claims that a rulemaking was procedurally defective because it did not thoroughly process tens of millions of comments if a good-faith effort to do so had been made. Allowing that claim would incentivize groups to send in even more mass comments or to manipulate the process with bots if all it took to kill a rule was to send in more comments than the agency could reasonably handle. However, high judicial standards would encourage agencies to move more quickly toward technology like CAPTCHA to prevent bot manipulation of comment submissions.

#### b. *Responding to the Comments*

Agencies have used the volume of comments as a reason to ignore comments, which stretches the bounds of the APA.<sup>155</sup> In a smaller rulemaking, it is obvious when an agency ignores comments, and that is cause for remanding the rule back to the agency for further consideration.<sup>156</sup> However, in larger rulemakings, agencies have been lax about responding to the issues raised in mass comments, though in many instances the question has not been litigated to clarify to what extent agencies can ignore issues raised in mass comments.<sup>157</sup> For example, in a 2002 National Park Service rule regarding the use of jet skis in a federally owned bay, the agency received 7600 comments, with 2 percent supporting the proposed rule.<sup>158</sup> The agency engaged with the technical issues raised in some comments such as safety, but it did not at all engage with the general sentiment of the comments, which valued keeping the bay free of unnecessary vehicles.<sup>159</sup> Nina Mendelson has collected statements of basis from several rulemakings with mass comments and concluded that agencies routinely acknowledge the receipt

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<sup>153</sup> Cf. Gregory D. Jones, *Electronic Rulemaking in the New Age of Openness: Proposing a Voluntary Two-Tier Registration System for Regulations.gov*, 62 ADMIN. L. REV. 1261, 1265–66 (2010) (discussing the possibility of specialized features for interest groups in e-rulemaking); Daniel E. Rauch, *Two-Track E-Commenting*, 33 YALE J. ON REG. 303, 304 (2016) (advocating for separate “tracks” of comments for those with substantive versus vote-style input).

<sup>154</sup> See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 908, 955, 958, 975 (2017).

<sup>155</sup> Mendelson, *supra* note 5, at 1364–65.

<sup>156</sup> See *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1078–80 (D.C. Cir. 2003).

<sup>157</sup> Mendelson, *supra* note 5, at 1363–65.

<sup>158</sup> *Id.* at 1364.

<sup>159</sup> *Id.*

of mass comments but fail to give even a cursory response to the preferences or values expressed in the comments.<sup>160</sup>

The courts have incentivized agencies to give short shrift to these comments, to the point that even a rulemaking process that blatantly ignored value-based mass comments would be sustained during judicial review. Mendelson notes,

Public comments might, for example, advocate that an agency action be relatively protective of health, the environment, or personal privacy, that the agency should refrain from paternalism, or that the agency should weight resource conservation more heavily than resource use. With respect to the agency's obligation to respond to these sorts of comments, research has not yet uncovered an opinion in which an agency decision has been vacated because the agency failed to consider value preferences in public comments.<sup>161</sup>

Despite the lack of enforcement in the case law, the APA requires the agency to consider "views" from the public,<sup>162</sup> though an agency need not be swayed by the points.<sup>163</sup> Outright ignoring so many comments stretches the bounds of the APA's commands.

The reliance on value preferences in mass comments appears to separate them into a category where courts are less likely to hold agencies accountable for responding to the comments. In *Louisiana Land Bank Ass'n v. Farm Credit Administration*,<sup>164</sup> the D.C. Circuit reversed the district court's upholding of a rule because the rule's statement of basis and purpose gave only a cursory response to an issue raised in 270 of the comments.<sup>165</sup> In the rulemakings Mendelson cites, many more than 270 comments were ignored.<sup>166</sup> However, in *Land Bank*, the comments at issue dealt with the agency's statutory authority to implement the rule and made legal arguments comparable to insiders,<sup>167</sup> whereas in the mass comments, the agency was ignoring preferences, not legal arguments. Whether or not it is acceptable under the APA for an agency to ignore comments that are simply views while engaging with technical comments, the distinction between arguments and views appears to be a deciding factor in whether a court will require the agency to respond.

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<sup>160</sup> Farina et al., *supra* note 119, at 131 (discussing Mendelson's research); Mendelson, *supra* note 5, at 1364–65; *see also* Jason Koebler, *The FCC Cited Zero of the 22 Million Consumer Comments in Its 218-Page Net Neutrality Repeal*, MOTHERBOARD (Jan 4, 2018, 7:32 PM), [https://motherboard.vice.com/en\\_us/article/ev5b3k/net-neutrality-fcc-zero-consumer-comments-cited](https://motherboard.vice.com/en_us/article/ev5b3k/net-neutrality-fcc-zero-consumer-comments-cited) (criticizing the FCC for not engaging with public comments).

<sup>161</sup> Mendelson, *supra* note 5, at 1370.

<sup>162</sup> 5 U.S.C. § 553(c) (2012).

<sup>163</sup> *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003).

<sup>164</sup> 336 F.3d 1075 (D.C. Cir. 2003).

<sup>165</sup> *Id.* at 1080.

<sup>166</sup> Mendelson, *supra* note 5, at 1365.

<sup>167</sup> *La. Fed. Land Bank Ass'n*, 336 F.3d at 1079, 1084.

c. *Docketing the Comments*

The volume of mass comments can pose problems for the administrative record upon review. The APA requires that “the court shall review the whole record or those parts of it cited by a party” without specifying the record’s contents.<sup>168</sup> An early comment-challenge case reasoned that courts require agencies to respond to comments *for the purpose* of having a full record of the government’s reasoning to determine whether the decision process was correct.<sup>169</sup> Because of the underlying presumption of regularity in government actions, courts generally do not accept arguments that the record should have been more inclusive.<sup>170</sup> Currently, when a rule is challenged, the agency puts together an administrative record that includes a database listing all comments, but not the content of the comments.<sup>171</sup> The text of comments is introduced before the court only when it is at issue in the litigation.<sup>172</sup>

The Administrative Conference of the United States has recommended that agencies include in the administrative record “comments and other materials submitted to the agency related to the rulemaking.”<sup>173</sup> That formulation is not so illuminating. Dooling has argued that when an agency receives large batches of identical paper submissions, it should be able to scan one for the docket and note how many identical submissions were received to save resources instead of scanning duplicative comments.<sup>174</sup> However, her recommendation is incomplete. The agency should be required to submit not only the usual database of comments, but also materials before the agency that acted as a proxy for comments. As discussed above, in large proceedings, agencies do not read all comments but instead sometimes rely on reports and analyses of the comments.<sup>175</sup> Therefore, a report prepared by a contractor of what the comments say is the “material” that was truly before an agency in its decision-making. If courts are willing to bend the assumption that the agency actually assessed the comments for the sake of practicality, they should force the agency to be honest about that and reveal the documentation that it *did* assess as the basis for its decision.

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<sup>168</sup> 5 U.S.C. § 706(2) (2012) (providing for judicial review).

<sup>169</sup> *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 247, 252 (2d Cir. 1977).

<sup>170</sup> *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).

<sup>171</sup> *Id.*

<sup>172</sup> *Compare* *Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1173 (D.C. Cir. 1979) (withholding the text of the comments from the court when they were not at issue), *with* *Voigt v. Coyote Creek Mining Co.*, No. 1:15-cv-00109, 2016 WL 3920045, at \*27 (D.N.D. July 15, 2016) (introducing the text of the comments when they were at issue before the court).

<sup>173</sup> ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2013-4: THE ADMINISTRATIVE RECORD IN INFORMAL RULEMAKING 8 (2013).

<sup>174</sup> Dooling, *supra* note 6, at 923.

<sup>175</sup> Noveck, *supra* note 28, 442–43.

### III. MODELS OF LEGITIMACY

Though legal challenges to a rule based on ignoring the submission of many comments will likely fail, the result is counterintuitive for the public: comments are central to the rulemaking process, but their message may have no impact on the resulting rule. It is an uncomfortable position for an agency when the realities of commenting are laid bare for the public like they were in the net neutrality rulemaking. In that instance, the agency was required to solicit views, and millions of people formed an overwhelming majority rejecting the agency's decision,<sup>176</sup> but three commissioners had the final say in creating a broad-reaching rule, which became law.<sup>177</sup> Therefore, the legitimacy of a rule must come from a source other than public approval.<sup>178</sup> This Part of the Comment examines several models that attempt to explain how the administrative state is a legitimate use of power over the people: the technical expertise model, the implementing model, the presidential control model, and the interest representation model. The succeeding Part assesses the justification for the current practice of dismissing mass comments in each legitimacy model.

#### A. *Technical Expertise Model*

The leading model of early scholarship on the then-emerging administrative state—the technical expertise model—posits that agency staffers should make decisions for the country because they have the knowledge and expertise to manage the government and economy toward an objectively optimal result.<sup>179</sup> This model took hold during the New Deal expansion of agency power and was spurred by James Landis's conception of the economy and country as a system to be administered and managed, where an agency's legitimacy comes from its ability to solve national problems.<sup>180</sup>

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<sup>176</sup> Jon Brodtkin, *98.5% of Unique Net Neutrality Comments Oppose Ajit Pai's Anti-Title II Plan*, ARS TECHNICA (Aug. 30, 2017, 12:17 PM), <https://arstechnica.com/tech-policy/2017/08/isp-funded-study-finds-huge-support-for-keeping-current-net-neutrality-rules>.

<sup>177</sup> Irina Ivanova & Alain Sherter, *Why 2 FCC Commissioners Voted Against Killing Net Neutrality*, CBS NEWS (Dec. 14, 2017, 3:06 PM), <https://www.cbsnews.com/news/fcc-net-neutrality-vote-today-why-2-commissioners-voted-against-killing-it>.

<sup>178</sup> See JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 261–62 (1978) (describing how every era of administrative law scholarship has created its own crisis over the legitimacy of regulatory agencies); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) (“Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.”).

<sup>179</sup> Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 411–12 (1984).

<sup>180</sup> See *id.*; JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1–5, 87–88 (1938).

This assumes that agencies are not politically motivated and that agencies base their decisions solely on their expertise in the facts of an issue to be regulated.<sup>181</sup> This model as a source of legitimacy was short-lived, but the concept of regulators as technical experts has retained its place in the academic literature.<sup>182</sup> In environmental law cases, for example, the judiciary has accepted that agency staffers have special expertise in chemistry, statistical predictions, etc., which specially qualifies them to make rules.<sup>183</sup> A vision of agencies driven by data and objective results has also driven the ubiquity of the cost-benefit analysis.<sup>184</sup>

The criticism of the technical expertise model is twofold. First, few policy decisions are ever purely factual.<sup>185</sup> Even if an agency staff member were uniquely qualified to regulate a chemical that harms the environment, she is not equally qualified to weigh the social values involved, such as whether the environmental harm outweighs the higher cost for essential products made with that chemical. This leads to the second criticism: regulations attempt to benefit the public, but if only individual expertise is involved, then the public has little role in legitimating the chosen rule.<sup>186</sup>

### B. *Implementing Model*

The implementing or formalist model assumes that administrative decisions “adhere to the dictates of public laws laid down in advance by the sovereign legislature.”<sup>187</sup> Because substantive lawmaking power is located exclusively within the legislature,<sup>188</sup> the sole purpose of agencies is to implement clear directives from the legislature.<sup>189</sup> Therefore, according to this model, agencies should have little discretion.<sup>190</sup> To achieve that ideal, this model relies on enforcing the nondelegation doctrine, which limits Congress’s ability to give its lawmaking functions to administrative agencies.<sup>191</sup> Because the nondelegation doctrine is so anemic given courts’ broad

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<sup>181</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1678 (1975).

<sup>182</sup> David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 616 (2012).

<sup>183</sup> James D. Fine & Dave Owen, *Technocracy and Democracy: Conflicts Between Models and Participation in Environmental Law and Planning*, 56 HASTINGS L.J. 901, 911–12 (2005).

<sup>184</sup> Arkush, *supra* note 182, at 616.

<sup>185</sup> *Id.* at 618.

<sup>186</sup> *Id.*

<sup>187</sup> Sargentich, *supra* note 179, at 397.

<sup>188</sup> *Id.*

<sup>189</sup> Stewart, *supra* note 181, at 1673.

<sup>190</sup> *See id.* at 1675.

<sup>191</sup> Arkush, *supra* note 182, at 614.

interpretation of the “intelligible principle” standard,<sup>192</sup> Congress has handed agencies broad power and statutory text that specifically asks them to make policy decisions.<sup>193</sup> As a result, the implementing model has little connection to the current legal landscape and has been discredited in favor of other models.<sup>194</sup>

In recent years, however, a form of the implementing model has sprung up in the judiciary. In an opinion during his time as a Court of Appeals judge, Justice Neil Gorsuch made a strident case against allowing agencies broad discretion to “*make the law*” beyond what Congress laid out in the statute.<sup>195</sup> He also called for agency legitimacy to be based on implementing clear guidance from Congress;<sup>196</sup> thus he presumably would agree with the implementing model. Justice Clarence Thomas has similarly called for administrative agencies to be closely guided by the legislature to bring administrative law in line with the constitutional principle of the separation of powers among the branches of government.<sup>197</sup>

### C. *Presidential Control Model*

Under the presidential control model, the agencies use rules to enact the President’s agenda while he manages their work.<sup>198</sup> Because the President is involved in the decision-making, the agencies receive their political accountability from his accountability to the electorate.<sup>199</sup> Because he is answerable to the entire electorate, this model assumes the President directs the agencies to act in the best interest of the country as a whole.<sup>200</sup> The model “attempts to legitimate administrative policy decisions, through presidential politics, on the ground that they are responsive to public preferences.”<sup>201</sup> Presuming presidential control also gives the administrative state constitutional legitimacy by fitting agencies neatly in the executive branch.<sup>202</sup> In a practical sense, presidential control describes the typical communication between agencies and the White House when a

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<sup>192</sup> See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409–11 (1928).

<sup>193</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

<sup>194</sup> Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 471 (2003).

<sup>195</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016).

<sup>196</sup> *Id.* at 1154.

<sup>197</sup> *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1254 (2015) (Thomas, J., concurring in the judgment).

<sup>198</sup> Bressman, *supra* note 194, at 466.

<sup>199</sup> *Id.* at 491.

<sup>200</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001).

<sup>201</sup> Bressman, *supra* note 194, at 490.

<sup>202</sup> *Id.* at 488–89.

controversial rule is proposed that will affect domestic affairs.<sup>203</sup> The Supreme Court has implicitly endorsed this model, commenting in the seminal administrative law case *Chevron USA, Inc. v. Natural Resources Defense Council*<sup>204</sup> that agencies under the executive branch could “properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”<sup>205</sup>

The drawback to the presidential control model is that it allows agencies to rely on the preferences of the executive to justify a rule, all but authorizing agencies not to engage in reasoned deliberation that would account for more factors than simply the majority’s political tastes.<sup>206</sup> Some scholars also worry that the President may encourage a rule that is not best for a majority of the country as the model assumes, but that instead benefits a group important to his next election.<sup>207</sup>

#### D. *Interest Representation Model*

The interest representation model imagines administrative law as a political *process*.<sup>208</sup> The other models use sources outside the rulemaking process to limit agency discretion and create legitimacy: facts in the technical expertise model; the statute in the implementing model; and the executive in the presidential control model.<sup>209</sup> In the interest representation model, the source of the legitimacy and the limit on the agency’s discretion is the public’s participation in the process.<sup>210</sup> The source is endogenous to the process in the same way that a piece of legislation is legitimate because it was the product of the legislative process.<sup>211</sup> In reality, the public only guides the discretion.<sup>212</sup> However, in its ideal form, a regulation would not be the objective right answer (as imagined in the technical expertise model), but the product of balancing the preferences of affected parties.<sup>213</sup>

The interest representation model relies on advocacy groups’ presenting their interests to the agency through the commenting process, with the

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<sup>203</sup> See Richard J. Pierce, Jr., *Presidential Control Is Better than the Alternatives*, 88 TEX. L. REV. 113, 121–124 (2009) (discussing how a rule spurs communication across the government).

<sup>204</sup> 467 U.S. 837 (1984).

<sup>205</sup> *Id.* at 865.

<sup>206</sup> Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 851 (2012).

<sup>207</sup> Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 Tex. L. Rev. 441, 447 (2010); Staszewski, *supra* note 206, at 870.

<sup>208</sup> Bressman, *supra* note 194, at 475.

<sup>209</sup> Arkush, *supra* note 182, at 614, 616, 626.

<sup>210</sup> *Id.*

<sup>211</sup> Bressman, *supra* note 194, at 475; Stewart, *supra* note 181, at 1712.

<sup>212</sup> Arkush, *supra* note 182, at 627.

<sup>213</sup> Bressman *supra* note 194, at 475.

interests that are at odds with each other left to the agency to resolve.<sup>214</sup> It accepts the Madisonian notion of factions counteracting each other but is also skeptical of it because “some factions have advantages over others.”<sup>215</sup>

One problem with this model is that not all groups are adequately represented, so private interests become more heavily represented than the diffused interests of the public.<sup>216</sup> Another concern is that in the same way that rules are not strictly based on facts (which undermined the technical expertise model), rules also are not strictly based on values. Agencies should bring their experience and knowledge of the problem to their work. Therefore, it is a challenge to balance expertise with the less-informed preferences citizens express when they participate.<sup>217</sup> The final problem with the interest representation model is that when courts accept this model, they implement it by raising the procedural requirements of how much an agency must consider the views of the comments, which ossifies<sup>218</sup> the rulemaking process.<sup>219</sup>

#### IV. HOW DISMISSAL OF PREFERENCES IN COMMENTS ALIGNS WITH MODELS OF LEGITIMACY

Under the technical expertise, implementing, and presidential control models, an agency ignoring the preferences of the comments does not impact the legitimacy of the rule. Of all the models, however, the interest representation model is the most likely to explain how a rule’s legitimacy may be undermined when an agency ignores comments, because the interest representation model has a democratic ideal.

##### A. *Acceptable to Technical Expertise Model*

Dismissal of the sentiment of public comments is acceptable under the technical expertise model because a rule’s legitimacy comes from the knowledge inside the agency.<sup>220</sup> Therefore, legitimacy does not rely on

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<sup>214</sup> Arkush, *supra* note 182, at 627.

<sup>215</sup> Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 154 (2012).

<sup>216</sup> Arkush, *supra* note 182, at 627.

<sup>217</sup> *Id.* at 628.

<sup>218</sup> Ossification is an academic concern that the more elaborate the procedural requirements on rulemaking, the less likely agencies are to issue rules, instead turning to informal mechanisms with fewer procedural safeguards. Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209, 1214–17 (2018).

<sup>219</sup> Sidney Shapiro, *Pragmatic Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, 2005, at 10.

<sup>220</sup> See Sargentich, *supra* note 179, at 410.

views from outside the agency.<sup>221</sup> Though technical data from regulated parties furnished by insider comments may be useful, mass comments that communicate views are not necessary to consider because they convey subjective values, whereas this model sees rules as based on objective results. In other words, knowing the public values is not necessary when a rule can be issued strictly based on statistical models and scientific knowledge.

### B. *Acceptable to Implementing Model*

This model allows for the dismissal of the sentiment of the comments because the legitimacy of the agencies comes from implementing the dictates of Congress.<sup>222</sup> Therefore, if Congress, as a representative body of the electorate, directed the agency to implement a policy, that is appropriate and sufficient accountability to the public such that listening to the preferences of a subset of the public that participated in the commenting would be less democratic. However, the implementing model would still question the legitimacy of rules that purport to implement statutes with vague directions to the agency, such as to regulate for “public interest, convenience, and necessity” because these rules are not really implementing much at all.<sup>223</sup> Additionally, the model’s focus on Congress as the only seat of legislative power calls attention to the impact of agency rules that make law on important topics without approval of the legislature. If millions of citizens write to an agency to express their concerns about a policy, that is likely an indication that the policy should have been debated and passed by the people’s representatives. In this sense mass comments delegitimize a rule under this model because they point to the legislature’s abdication of an area of broad public concern, which is far from implementing the details of a statute as this model imagines an agency doing.

### C. *Acceptable to Presidential Control Model*

Disregarding public views is acceptable under the presidential control model because the President’s preferences take the place of the public’s views since his preferences were favored in a national election.<sup>224</sup> This model could not function if the President ordered an agency to issue a rule, but the agency chose not to do so due to resistance in the comments. However, not aligning with the desires of the White House is not a problem

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<sup>221</sup> *See id.*

<sup>222</sup> Bressman, *supra* note 194, at 470.

<sup>223</sup> *See* Communications Act of 1934, 47 U.S.C. § 309(a) (2012) (FCC’s enabling statute containing numerous references to “the public interest, convenience, and necessity”).

<sup>224</sup> Bressman, *supra* note 194, at 489.

for rules issued by independent agencies, which are intended to be shielded from political control by the executive.<sup>225</sup>

Recall that one of the criticisms of this model was that the President may support rules that benefit favored interest groups and not the national public.<sup>226</sup> That is also the problem with basing the democratic legitimacy of a rule on the President and not on the public participants of the rulemaking. For example, if an agency received millions of comments in favor of preserving a national forest, but the President supported a rule allowing more timber harvesting, it would strain credulity to say that the President represented public opinion and public benefit more accurately than the commenters.<sup>227</sup> A more difficult case might be a rule supported by the President that removes environmental protection in favor of business interests that triggers millions of comments in opposition, if the President was elected on a deregulatory platform. In that case, it is unclear whether the true desires of the public at large are reflected in the comments or the President's preferences.

#### D. *Partially Undermines Interest Representation Model*

Discounting preference comments comes closest to undermining the legitimacy of a rule under the interest representation model, because this model depends on balancing the views of all parties. So, not accounting for a large subset of interests because of the form of the comments would run counter to the premise of the model. Put simply, “[t]he relative lack of response to [value-laden comments from the public] is in significant tension with a view of rulemaking as facilitating democratic responsiveness.”<sup>228</sup> When a rule depends not on technical expertise but on balancing values and benefits—such as raising energy costs to achieve environmental reforms or intervening in people's lives when they may prefer more autonomy—the rule needs some democratic validity. And so, when the public sees a flood of nearly unanimous comments ignored by the agency, people lose confidence in the government's accountability and responsiveness. Though the case law and most scholarship are unified in concluding that the votes from the public cannot dictate agency action, the interest representation model is the best vehicle to dig into that assumption.<sup>229</sup>

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<sup>225</sup> Kagan, *supra* note 200, at 2376.

<sup>226</sup> Staszewski, *supra* note 206, at 870.

<sup>227</sup> This hypothetical is the opposite of the Roadless Rule discussed in the background section and litigated in *Kootenai Tribe*, where the President and the commenters agreed to preserve the forest. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1104 (9th Cir. 2002).

<sup>228</sup> Mendelson, *supra* note 5, at 1371.

<sup>229</sup> Then-professor Antonin Scalia wrote that agencies “may make some decisions in rulemaking not because they are the best or the most intelligent, but because they are what the people seem to

Because the legitimacy of this model requires that decisions be the product of varied public input, it is troubling that agencies can weigh input differently based on its format and author. As discussed *supra* Section II.A, different parties tend to submit different types of comments—sophisticated parties submit insider comments that give scientific information and data to speak the agency’s language, whereas the public tends to submit either high-context comments or mass comments that communicate preferences and values.<sup>230</sup> The democratic ideal of the interest representation model breaks down when the agency gives little attention to mass comments but instead gives serious consideration to insider comments from well-funded interest groups. It is unsurprising that agencies are resistant to value-based comments<sup>231</sup> given the rules from the courts that mandate response to well-developed and sophisticated comments, but the disparity still creates moral questions if not legal ones.<sup>232</sup>

The counter to this point is that the APA was always about the process for requiring and organizing public input, not about requiring the agency to follow the public’s partialities.<sup>233</sup> Similarly, for challenges raised about the commenting process under the APA, judges can only enforce procedural requirements, not delve into the substance of what the agency decided.<sup>234</sup> There is no requirement that the process of commenting actually influence the decision.<sup>235</sup> In fact, to require agencies to value mass comments more highly may be a violation of the *Vermont Yankee* principle that courts should not require any more of agencies than the APA does.<sup>236</sup> Because the APA is strictly about the procedural form of rulemaking, not the substance of how agency staffs come to decisions, it has created the circumstances that Professor E. Donald Elliott famously described: “Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”<sup>237</sup>

Nevertheless, the APA invites the public to submit “written data, views, or arguments.”<sup>238</sup> So when an agency considers data and arguments,

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want,” so he may have thought commenters should influence rules. Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. xxv (1982).

<sup>230</sup> See *supra* Section II.A.

<sup>231</sup> Mendelson, *supra* note 5, at 1362.

<sup>232</sup> See Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 150 (2012) (noting that administrative agencies must engage any relevant comments and respond to them, which gives rise to a “right to be taken seriously”).

<sup>233</sup> See *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003) (explaining that the purpose of comments is to *present* issues to the agency).

<sup>234</sup> See, e.g., *id.*

<sup>235</sup> See *id.*

<sup>236</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 524 (1978).

<sup>237</sup> E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

<sup>238</sup> Administrative Procedure Act, 5 U.S.C. § 553(c) (2012).

but glosses over the input that comes in the form of views, it arguably violates the APA. Because the interest representation model theoretically values the “views” comments most highly, scholars and judges who subscribe to this model should find it troubling to accept the democratic legitimacy of rules that fail to acknowledge the input of millions of citizens.

Even if a solution to the quandary of how to consider values-based comments were desired, it might not exist. One solution is to drop any pretense that the notice-and-comment process has any interest in mass comments.<sup>239</sup> That would mean removing the sentiments from the government websites and ending the practice of public figures calling on citizens to comment on a rule.<sup>240</sup> The other option is to explore how legal rules could be molded to require agencies to consider mass comments more thoroughly. In a forceful piece advocating more attention to mass comments, the closest that leading scholar Professor Nina Mendelson could come to a recommendation was to say that agency staff must “attend to” and “respond to” such comments, not “bury” them.<sup>241</sup> Though laudable goals, those recommendations are far from legal rules that courts could apply to require more consideration of comments and to change incentives for agencies when assessing comments. Legal rules requiring attention to mass comments will likely never come to fruition, and, given how much effort such consideration would require of the agencies, courts should not experiment.

## CONCLUSION

Ultimately, the rules on considering mass comments will likely not change, and neither will the general sentiment in the scholarship that vote comments are not useful to the commenting process or its legitimacy. But it is possible that the net neutrality rulemaking and a political milieu that is skeptical of the executive will fuel demands for more participation and legitimacy in rulemaking that the courts and the academy will find hard to ignore.

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<sup>239</sup> See Bill Funk, *The Public Needs a Voice in Policy. But Is Involving the Public in Rulemaking a Workable Idea?*, CPRBLOG (Apr. 13, 2010), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED1507624B63809E> (“[T]elling the public they can have a voice in the rule-making process verges on misleading.”).

<sup>240</sup> See, e.g., Gigi Sohn, *4 Steps to Writing an Impactful Net Neutrality Comment (Which You Should Definitely Do)*, MASHABLE (June 15, 2017), <http://mashable.com/2017/06/15/how-to-write-a-good-fcc-comment/#P48fyQNMIqx> (wherein a previous Counsel to a former Chairman of the FCC instructs the public on how to write a comment because, inexplicably: “In depth comments that address key issues show the breadth of support for the rules and can help bolster the inevitable legal case [challenging the validity of the rule].”).

<sup>241</sup> Mendelson, *supra* note 5, at 1373, 1375, 1380; see also Michael Herz, “Data, Views, or Arguments”: *A Ruminantion*, 22 WM. & MARY BILL RTS. J. 351, 377–78 (2013) (discussing the struggle in Mendelson’s work to come to a workable proposal).