

RESPONSE ESSAY

SHOULD MASS COMMENTS COUNT?

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I am grateful to the *Michigan Journal of Environmental & Administrative Law* for the opportunity to reply to “Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts,” a terrific article by Professor Cynthia Farina, Mary Newhart, and Josiah Heidt of the Cornell eRulemaking Institute (“CeRI”). Farina, Newhart, and Heidt’s continuing commitment to structuring public engagement in e-rulemaking, both through scholarship and CeRI’s Regulation Room project, is one of the most hopeful signs for the future of that process. In their Article, the authors are concerned with agency treatment of large volumes of public comments in rulemaking, an increasingly common phenomenon. In the first six months of 2012 alone, a quarter-million comments were filed on the Regulations.gov website.

In 2011, I noted that agencies apparently gave so-called mass comments short shrift, sometimes acknowledging them but typically offering no answer. But agencies often must resolve value-laden policy questions in issuing a rule and ought to do so in a democratically responsive fashion. Accordingly, I argued that agencies should consider more seriously engaging the large volumes of comments they receive, even when those comments amount to simple statements of preference or value.<sup>1</sup> All agree that public comments cannot serve as a plebiscite on the issue before the agency. But large volumes of comments could, as I argued, trigger more thoughtful consideration and evaluation by the agency.

Some comments from ordinary citizens are analytical and information-rich and will receive agency attention.<sup>2</sup> The mass comments of concern both to the authors and to me, however, may include only a simple statement of viewpoint, value, or preference. They may be taken from text prepared by an interest group. These comments occasionally can be unappealing. Com-

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1. Nina Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1380 (2011) [hereinafter *Torrents*].

2. See Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005) (agencies generally paid attention to sophisticated comments no matter who filed them).

ments in the Department of Health and Human Services' 2012 rulemaking on health insurance coverage for contraceptives, for example, included a comment amounting to a single-sentence petition signed by 8,000 people and for a while, an accidentally uploaded credit card statement.<sup>3</sup> But public comments also have included individually-filed views ranging from the single-minded (carbon abatement is needed for "future generations . . . the government needs to start taking sustainability seriously")<sup>4</sup> to the more nuanced (supporting regulation, but not a ban, of infant bath seats, because even with drowning risks, they serve a "vital purpose").<sup>5</sup>

The authors concede that views in public comments may be "genuinely held by those submitting" the comments, even if an interest group or advocacy organization has suggested language. They also concede that if public comments express personal views rather than communicate new information, they still may be "relevant in a broad sense to the rulemaking," since agencies must often answer value-laden questions.<sup>6</sup> As I argued in 2011,<sup>7</sup> statutes often require regulatory agencies to resolve such questions, including balancing the risk of injury from a consumer product against the public's need for the product and the effect of regulation on the product's cost and availability,<sup>8</sup> assessing whether a pesticide creates an "unreasonable adverse effect on the environment" in view of the pesticide's "economic, social, and environmental costs and benefits,"<sup>9</sup> and assessing whether a dietary supplement still presents an "unreasonable" risk of injury even with product labeling.<sup>10</sup>

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3. These comments were filed in the Health and Human Services' rulemaking entitled "Certain Preventive Services Under the Affordable Care Act." See 77 Fed. Reg. 16,501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147). *E.g.*, Comment on Proposed Rule: Certain Preventive Services Under Affordable Care Act, (July 12, 2012), <http://www.regulations.gov/#!documentDetail;D=CMS-2012-0031-11731> (multiple comment document). You'll have to take my word for the credit card statement; for privacy reasons, the comment was removed from Regulations.gov.

4. *E.g.*, Bridget Fahey, Comment on Proposed Rule: Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, (June 15, 2012), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2011-0660-9518>.

5. Howell Johnson, Comment on Proposed Rule: Safety Standard for Infant Bath Seats (Nov. 19, 2009), <http://www.regulations.gov/#!documentDetail;D=CPSC-2009-0064-0003>.

6. Cynthia Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 142 (2012); see Cuellar, *supra* note 2, at 414 (laypersons' comments studied "nearly always raise[d] concerns that are relevant to the agency's legal mandate").

7. Mendelson, *Torrents*, *supra* note 1, at 1347-48.

8. 15 U.S.C. § 2058(f)(1) (2006).

9. 7 U.S.C. § 136a(a) (2006); 7 U.S.C. § 136(bb) (2006) (defining term).

10. 21 U.S.C. § 342(f) (2006).

Meanwhile, the authors argue compellingly that we should provide better and more accessible information to citizens as a step to encourage higher-quality public participation.

So where is the disagreement? Agencies still must decide—now—how to handle the public comments that sometimes stream in in large quantities. The Regulations.gov website facilitates public comment on rules without restriction, and public officials, ranging from President Obama on down, extol the virtues of “open government” and public participation.<sup>11</sup> More to the point, perhaps, current federal law governing notice-and-comment rulemaking still requires an agency to provide unrestricted participation opportunities to “interested persons . . . through submission of written data, *views*, or arguments.”<sup>12</sup>

The authors argue that mass comments from the public, especially the brief, often standard form comments facilitated by groups, are simply “not good enough for rulemaking, even when rulemaking is heavily laden with value choices.”<sup>13</sup> Group involvement and potential information distortions threaten to taint comments, the authors argue. Thus agencies can reasonably assume that “standard brief, conclusory” mass comments are unreliable, unrepresentative, or both, and ignore them.<sup>14</sup>

I want to make two points in reply. First, as the authors and I fully agree, agencies must be more candid if their practice is to disregard these comments. Second, despite the authors’ arguments, a reasonable agency is not yet justified in ignoring mass comments. These comments at least deserve consideration by the agency as part of a well-reasoned agency deliberation process. That consideration would best be ensured by a brief response by the agency in the rulemaking. I close with a couple of additional suggestions for immediate reforms.

First, the candor problem is substantial. A rulemaking process in which large numbers of comments receive no meaningful agency attention amounts to “window dressing”<sup>15</sup> and, in the authors’ words, “peddling democratic snake oil.”<sup>16</sup> Lack of candor regarding the fate of mass comments may cause citizens justifiably to lose faith in the prospect of genuine oppor-

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11. *E.g.*, Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,685 (Jan. 21, 2009). *See generally* Harlan Yu & David G. Robinson, *The New Ambiguity of “Open Government”*, 59 UCLA L. REV. DISC. 178 (2012) (arguing that “open government” policies have largely turned out to focus on information disclosures rather than participatory or collaborative measures).

12. Administrative Procedure Act, 5 U.S.C. § 553(c) (2006) (emphasis added).

13. Farina et al., *supra* note 6, at 137.

14. *Id.* at 142–43.

15. Mendelson, *Torrents*, *supra* note 1, at 1369.

16. Farina et al., *supra* note 6, at 151.

tunities to participate in government, depriving them of the value of active participation.<sup>17</sup> That in turn may reduce civic engagement.<sup>18</sup>

Lack of candor regarding the fate of mass comments is a growing problem. Since May 2012,<sup>19</sup> for example, the FAQ portion of the Regulations.gov website has stated, “Public participation matters,” and “[C]omments give rule writers a chance to actively listen to a wide range of concerns, values, and preferences,” helping them determine “the level of acceptance or resistance in affected communities to a rule.”<sup>20</sup> Even though another part of Regulations.gov, “Tips for Submitting Effective Comments,” cautions that agencies value information-rich comments most highly and notes that mass comments are not votes,<sup>21</sup> the web page still invites simple comments: “A comment can express simple support or dissent for a regulatory action.”<sup>22</sup> If these comments are destined to receive no consideration and no response, agencies need to say so. Greater candor would address dignitary concerns by ensuring that citizens have more realistic expectations regarding agency treatment of their views.

Candor is not a complete answer, however. Agencies must still resolve how much value mass comments should receive now. Again, citizens have a statutory right to file “data, views, and arguments” in a rulemaking, and, generally speaking, these comments are relevant to the policy questions agencies must resolve under their authorizing statutes. Moreover, compared with votes for the president or members of Congress, public comments have more content because they are issue-specific expressions of citizen views. Accordingly, the burden should be on an agency to justify putting mass comments completely to one side. Mass comments should not be

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17. *E.g.*, Ellen Katz, *Race and the Right to Vote after Rice v. Cayetano*, 99 MICH. L. REV. 491, 514–15 (2000) (discussing intrinsic value of voting as act of public participation, including promoting an individual’s self-development and identification with community).

18. *Cf.* James Fishkin, *Response to Critics of When the People Speak: The Deliberative Deficit and What To Do About It*, 19 GOOD SOC’Y 67, 74–75 (2010) (“[T]he key ingredient is for [deliberation] participants to believe their voice matters . . . . The public is immensely capable if given the chance and a realistic basis for thinking that its voice matters.”); Clay Shirky, *Transparency is the New Marketing*, WHAT MATTERS, Feb. 26, 2009 (“[A] strategy based on rapid, honest, and direct reaction [to electronic opposition] not only helps an organization recover but can actually increase the loyalty of an increasingly engaged public.”).

19. E-mail exchange with Regulations.gov help desk (July 2012) (on file with author).

20. *Public Comments Make a Difference*, REGULATIONS.GOV, 1–2 (May 2012), [http://www.regulations.gov/docs/FactSheet\\_Public\\_Comments\\_Make\\_a\\_Difference.pdf](http://www.regulations.gov/docs/FactSheet_Public_Comments_Make_a_Difference.pdf) (posted in response to the FAQ “Do my comments make a difference?”).

21. *Effective Comments*, REGULATIONS.GOV (Feb. 2012), [http://www.regulations.gov/docs/Tips\\_For\\_Submitting\\_Effective\\_Comments.pdf](http://www.regulations.gov/docs/Tips_For_Submitting_Effective_Comments.pdf) (“[A] constructive, information-rich comment that clearly communicates and supports its claims is more likely to have an impact on regulatory decision making.” and “A single, well-supported comment may carry more weight than a thousand form letters.”); *see* E-mail, *supra* note 19.

22. *Effective Comments*, *supra* note 21.

dispositive, but they generally should not be ignored. They should prompt agency officials at least to think twice—and perhaps to consider and investigate public views more systematically.

Consider, for example, the Coast Guard's 2006 decision to set up thirty-four live-fire zones on the Great Lakes for its crews to practice firing machine guns and other weapons. Firing began before the Coast Guard completed its short comment process. Despite the Coast Guard's own projection that training would be useful for public safety and the environmental risks minimal, the decision provoked a significant public backlash from lake users and environmentalists concerned about firearms on the lake and contamination from lead bullets.<sup>23</sup> A longer and better-publicized public comment period completed before live-fire exercises began likely would have alerted the Coast Guard to the level of public resistance to the plan, a plan the agency ultimately ended up withdrawing.<sup>24</sup>

So, are the authors' concerns about reliability and representativeness sufficient to justify a blanket agency approach of ignoring mass comments? At the outset, these issue-specific comments are not "cheap talk." The commenter must invest in the comment by identifying the issue and her position, deciding to comment, and, in many instances, also providing personal information. Even if identical or brief, these comments thus likely communicate meaningful content.<sup>25</sup>

Beyond this, the fact that a comment is group-facilitated cannot alone be a reason to discredit it. Groups of all types, of course, both facilitate rulemaking comment through web portals to Regulations.gov and provide accessible information to citizens and businesses. For example, environmental nonprofits such as the Sierra Club and the National Wildlife Federation frequently provide website visitors with both information and portals to comment on current rulemakings.<sup>26</sup> So do the U.S. Chamber of Commerce, Americans United for Life, the Home Care Association of Florida, the American Kennel Club, and countless other groups.<sup>27</sup>

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23. E.g., *Coast Guard Discusses Live Fire Exercise Plans at Duluth Hearing*, MINN. PUB. RADIO NEWS (Oct. 17, 2006), <http://minnesota.publicradio.org/display/web/2006/10/17/livefirehearing/>. Thanks to John Masson for bringing this example to my attention.

24. *Id.*; Thom Burns, *Coast Guard Fires Live Ammo in Great Lakes Exercises*, SAILING BREEZES (Oct. 2006), [http://www.sailingbreezes.com/Sailing\\_Breezes\\_Current/Articles/Oct06/zones.htm](http://www.sailingbreezes.com/Sailing_Breezes_Current/Articles/Oct06/zones.htm).

25. Mendelson, *Torrents*, *supra* note 1, at 1375.

26. E.g., *Action Center*, NAT'L WILDLIFE FED'N, <https://online.nwf.org/site/SPageNavigator/ActionCenter> (last visited Sept. 12, 2012); *Tell the White House: Put Our Health First, End Mountaintop Removal Coal Mining!*, SIERRA CLUB, <https://secure.sierraclub.org/site/Advocacy?cmd=display&page=UserAction&id=7343> (last visited Sept. 12, 2012).

27. See, e.g., *AKC News*, AM. KENNEL CLUB, [http://www.akc.org/press\\_center/article.cfm?article\\_id=4656](http://www.akc.org/press_center/article.cfm?article_id=4656) (last visited Sep. 12, 2012).

The authors argue that group-facilitated comments should be suspect because groups may use action campaigns to help prompt individuals to join the group, and groups also may use persuasive techniques to engage citizens and motivate them to participate in commenting.<sup>28</sup> But many entities, groups, and individuals who file comments can have additional motives, including preserving or increasing the wealth of an entity or particular business, a group of entities (consider trade association comments), or an individual (take coastal landowners commenting on flood insurance restrictions). And the use of rhetoric—both to engage the public in rulemaking and in filed comments themselves—is commonplace.<sup>29</sup> Excluding rulemaking comments because groups are involved or rhetoric is used would leave very few comments.

Meanwhile, these groups can significantly reduce obstacles to public participation in rulemaking. One of the authors' express goals in e-rulemaking design is to engage traditionally under-involved groups, such as airline passengers in rulemakings on accessibility standards for disabled travelers.<sup>30</sup> Search and information costs, together with the costs of comment preparation, have long been barriers to public participation in rulemaking. One consequence: the rulemaking process has generally come to be dominated by business groups.<sup>31</sup> Interest groups and advocacy organizations can substantially lower the cost to large and diffuse groups of ordinary citizens of learning about relevant issues around pending government rules. Particularly in view of recent increases in participation costs associated with information overloading in rulemaking,<sup>32</sup> groups can help make relevant information digestible for individuals. Even though distor-

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28. Farina et al., *supra* note 6, at 135, 141–42.

29. Consider two comments filed in pending rulemakings on greenhouse gas standards for automobiles and stationary sources. *E.g.*, Comments of National Automobile Dealers Ass'n on EPA/NHTSA Greenhouse Gas Emissions/CAFÉ rulemaking (Feb. 13, 2012), at 3, 12–13 (terming proposed rule “costliest of any ever considered for the U.S. automobile industry,” and “strongly object[ing] to the needless deference being given to the California Air Resources Board and to its unnecessary and arguably preempted fuel economy rules”), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0799-9575>; Comments of Consumers Union on EPA Proposed Standards of Performance for Greenhouse Gas Emissions for Stationary Sources: Electric Utility Generating Units (June 25, 2012), at 2 (“The more we learn, the more imminent and catastrophic the dangers appear. Both as citizens and as consumers, we could pay a very high price for destabilizing the earth's climate.”), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2011-0660-9792>.

30. Farina et al., *supra* note 6, at 147–48.

31. See *e.g.*, CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 183–84 (2d ed. 1999); Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1386 (2010); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 131, 133 (2006).

32. See Wagner, *supra* note 31, at 1378–79.

tions are possible, group involvement thus seems likely to increase useful, accessible information on rulemaking to individual citizens and reduce participation costs for them.<sup>33</sup> Meanwhile, excluding these comments because organized groups have helped facilitate high levels of citizen participation might, ironically, worsen the longstanding imbalance in rulemaking in favor of wealthier, smaller groups.<sup>34</sup>

Nor should group facilitation of individual comments raise particular concerns that these concerns are unrepresentative. Whether public comments are representative, no matter who files them, is certainly a concern. But given current imbalances in rulemaking participation, group involvement that is focused on engaging individual citizens seems likely on the whole to make the rulemaking process more representative, rather than less. Moreover, group-provided web portals that facilitate individual comment have an important advantage over other group-filed comments. Interest group comment letters often indicate the size of the group's membership to lend weight to the comments, but without reporting whether the membership has been polled on the group's position.<sup>35</sup> With web portals, an individual can personally register an issue-specific view with the agency. Finally, group portals appear to be open to everyone; casual searching has yet to locate a rulemaking comment portal that is limited to use only by group members.

The authors also argue that mass comments can be assumed to be thoughtless and poorly informed and thus are unreliable indicators of public preferences.<sup>36</sup> They cite public deliberation literature suggesting that indi-

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33. Indeed, group endorsement, coupled with relevant information, may be a very efficient and effective way for a citizen to form a view. See Arthur Lupia, *The Wrong Tack*, LEGAL AFF., Jan.–Feb. 2004, available at [http://www.legalaffairs.org/issues/January-February-2004/feature\\_lupia\\_janfeb04.msp](http://www.legalaffairs.org/issues/January-February-2004/feature_lupia_janfeb04.msp) (discussing heuristic use in decision making).

34. For additional sources on the problem of imbalance in rulemaking, see Mendelson, *Torrents*, *supra* note 1, at 1357 nn.67–68; Wagner, *supra* note 31, at 1334–35 nn.40–41.

35. *E.g.*, Comment by National Automobile Dealers Association to the Office of Management and Budget on Notice: Federal Participation in Development and Use of Voluntary Consensus Standards, etc. (June 6, 2012), <http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0073> (“[NADA] represents more than 16,000 franchised automobile and truck dealers . . . [employing] upwards of 1,000,000 people nationwide . . .”); Comment by Consumers’ Union on USDA Proposed Rule on Bovine Spongiform Encephalopathy (March 11, 2007), at 1 n.1 (noting the “4.5 million paid subscribers to print and 2.5 million paid subscribers to the internet addition [sic]” of Consumer Reports), <http://www.regulations.gov/#!documentDetail;D=APHIS-2006-0041-0230>.

36. The authors’ assumptions regarding mass comments echo views historically expressed in dialogue regarding the usefulness of citizen views in government decisions. *E.g.*, WALTER LIPPMANN, PUBLIC OPINION 254 (1922) (without very disciplined analysis, requiring “time, money, labor, conscious effort, patience, and equanimity . . . most of us would hardly suspect the need of better ideas” in the realm of policy and would be susceptible to manipulation); *id.* at 257 (noting that early American democrats “insisted that a

vidual preferences can evolve if people are exposed to more information and are required to consider the viewpoints of others.<sup>37</sup> No doubt, some individual comments surely could be better informed and better reasoned. Engaging in a deliberative type of process may not be essential for informed preference formation,<sup>38</sup> however, and the authors do not suggest it.

The authors' focus on whether individual commenters have deliberated, moreover, is misplaced. Agencies, not public commenters, are the decision makers, and so the critical locus of deliberation is in the agency. Unlike in most federal elections, the public's views are not directly dispositive.<sup>39</sup> Thus, it is the agency's deliberation that must be sound and well-reasoned. This has two implications. First, to make informed, reasoned decisions, agency officials themselves must be fully informed about and have engaged the relevant range of information, issues, and public views.<sup>40</sup> That ought to include the range of public viewpoints, even those that appear to be "first cuts" at an issue or are imperfectly expressed.<sup>41</sup> Excluding mass comments altogether is surely contrary to the goal of ensuring a fully reasoned agency process. Second, agency officials can filter these comments, as they do with the range of scientific and technical materials they also receive in the rule-making process. Agency officials can assess and consider the possibility that

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reasoned righteousness welled up spontaneously out of the mass of men," though noting that "the cleverest, like Thomas Jefferson, had all sorts of private reservations").

37. Farina et al., *supra* note 6, at 143–44. The literature around public deliberation recognizes, however, the tradeoff between creating a deliberative setting in which individuals can confront opposing views and a setting in which any citizen who wishes has the opportunity to participate. Fishkin, *supra* note 18, at 75 (noting that deliberative policy efforts, even though they may shift individual attitudes "leaves out mass participation" despite its value of signaling "a form of mass consent").

38. Fishkin, *supra* note 18, at 72 (attitude changes tend to be "driven by information" as well as by "reason giving"). *But see* Lynn M. Sanders, *Making Deliberation Cooler*, 19 GOOD SOC'Y 41, 46 (2010) (noting "mixed" results of deliberative polling experiments that seek to demonstrate that confronting opposing viewpoints assists with opinion formation).

39. *But see* David Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. (forthcoming 2013) (on file with author) (advocating for virtual citizen juries to directly resolve rulemaking issues). Rather than confirming that uninformed citizen preferences may be good enough for electoral democracy, but not for rulemaking, as Farina et al. argue, *supra* note 6, at 137, the fact that citizen votes are generally dispositive of electoral results suggests that the risk of poor outcomes from thoughtlessness among citizens is greater in the electoral process.

40. *See* Farina et al., *supra* note 6, at 139.

41. *See* Mark Seidenfeld, *The Quixotic Quest for a "Unified" Theory of the Administrative State*, 5 ISSUES LEGAL SCHOLARSHIP, no. 1, art. 2, 2005 at 4–6 ("[S]takeholders themselves are too impassioned and poorly informed to expect them to change preferences in the short period during which regulatory controversies get resolved."); *see also* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (noting that APA requirements are to "enable [judges] to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did" (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968))).

certain public comments are underinformed or misinformed, reducing the danger that comments represent a distortion of public views.<sup>42</sup>

To what use could agency officials put large volumes of mass comment? The short answer: Some use. The rulemaking process is not a plebiscite, to be sure, and relative volumes of public comments should not be viewed by agency officials as dispositive. Further, mass comments may sometimes be only a rough cut at public views; systematically improved information access might well improve comment quality. Even with these concerns, there is value. Agency officials might pay attention to large volumes of comments, for example, to help gauge public resistance or anticipate significant opposing public views, as the Coast Guard failed to do when beginning live-fire exercises in the Great Lakes.<sup>43</sup> With respect to regulation of multiple-use resources like public lands and waterways, public comments from residents and resource users might receive weight. Public comments might also alert an agency to widespread misunderstanding or misinformation, possibly prompting the agency to improve the information it provides to the public.<sup>44</sup> Thus, without dictating the outcome, mass comments might give agency officials a reason to pause and to engage a wider range of viewpoints. Public comments also might prompt the agency to take steps to more systematically consider public views, whether that is through focused polling, focus groups, public deliberation efforts, so-called citizen juries, or other devices.<sup>45</sup>

Although the authors defend agency decisions to ignore mass comments, they also suggest that political officials are unlikely to ignore very large volumes of comments, particularly when they signal potential political backlash.<sup>46</sup> The danger of relying solely on the incentives of political officials, however, is that an agency might end up focusing upon comments from individuals or groups with clout in Congress and the White House. This in turn could worsen public choice concerns regarding disproportionate influence of certain groups on rulemaking. Further, the commenting

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42. As discussed below, a couple of simple reforms would enhance the ability of agency officials to perform this evaluation. See *infra* notes 49–52 and accompanying text (proposing disclosure of portal used and limiting “pleber” comments).

43. See *supra* note 23 and accompanying text (describing Coast Guard decision making process); see also Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 64 Fed. Reg. 60,556, 60,625–26 (proposed Nov. 5, 1999) (predicting significant public resistance to tying availability of air conditioner, automobile radio, and CD player to seatbelt use in view of unanticipated public resistance to 1970s ignition interlock proposals).

44. E.g., Mendelson, *Torrents*, *supra* note 1, at 1366 (discussing NHTSA’s convening of focus groups and ultimate choice of increased consumer education when public comments in airbag rulemaking revealed widespread misunderstanding of airbag risks).

45. See, e.g., *id.*

46. See Farina et al., *supra* note 6, at 138 (“implausible” that political officials would ignore mass public comments).

public may still perceive their comments have received short shrift from the agency, undermining civic engagement. To best ensure that an agency decisionmaking process is adequately reasoned and that agencies respond to all significant issues in public comments, particularly those from traditionally underrepresented groups, an agency should commit to acknowledging mass comments in the final rule document and to offering a brief answer.<sup>47</sup>

Whatever agencies do with mass comments, though, the authors' analysis is compelling that participation opportunities must be structured not just to engage the public, but to enhance the quality of public participation. Informed participation would unquestionably lead to a superior process. An evolved digital participation system—"Rulemaking 2.0"—must be designed to increase citizen access to digested and digestible information regarding rulemaking. The Regulation Room project, with its carefully prepared summaries of agency rulemaking documents and key issues, is, of course, a model, albeit a resource-intensive one. Another model might be voters' pamphlets distributed in some jurisdictions. For a voter initiative, for example, these include the proposal's text and explanation, together with brief arguments for and against, supplied by initiative supporters and opponents.<sup>48</sup> In addition, as the authors suggest, an agency Notice of Proposed Rulemaking could include a "people's version" as part of the rulemaking document. None of this information provision is free, but if mass commenting is to be a feature of rulemaking, it is worth at least a small investment to make it as useful and effective as possible.

Besides improved information to citizens, as the authors suggest, reform should also focus on ensuring that individual comments from citizens are what they purport to be. This would improve an agency's ability to evaluate the content of comments. First, interest group portals and Regulations.gov must deter so-called "plebers" from filing multiple identical comments in the same rulemaking.<sup>49</sup> (Other multiple filings, however,

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47. *E.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559–60 (1992). Such a response should be subject to only very limited judicial review. Mendelson, *Torrents*, *supra* note 1, at 1378–79.

48. *See, e.g.*, OFFICE OF THE SEC'Y OF STATE & KING CNTY. ELECTIONS, STATE OF WASHINGTON VOTERS' PAMPHLET—NOVEMBER 4, 2008 GENERAL ELECTION (2008), *available at* <http://your.kingcounty.gov/elections/200811/pamphlets/ED15B-King-Seattle-English.pdf>.

49. *Cf.* CONG. MGMT. FOUND., COMMUNICATING WITH CONGRESS 30 (2008) (recommending that grassroots organizations "not send . . . duplicate messages from the same constituent"), *available at* [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/cwc\\_recommendationsreport.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/cwc_recommendationsreport.pdf). It could be argued that permitting commenters to file multiple comments simply allows them to signal the intensity of their preferences. But the extremely low cost of clicking multiple times once a citizen is on a web portal and has drafted a comment suggests that the signaling value, if any, is very low. Meanwhile, if an agency were to draw any inference at all from the numerosity of comments, the distortion potential could be substantial.

might increase the deliberative potential of rulemaking, as with a reply comment.<sup>50</sup>) And second, comments filed through group web portals should indicate which group has provided the portal, as the Congressional Management Foundation recommends for digital communications to congressional offices.<sup>51</sup> Disclosure of the portal source might assist agency officials in distinguishing genuine grassroots comments from “astroturf.” In addition, because agencies then could readily learn what information a group with a portal has supplied to the public, disclosure of the web portal source might prompt groups to ensure website information for the public is balanced and reliable. That in turn could enhance the reliability and the effectiveness of comments.<sup>52</sup>

In short, the authors and I agree that public participation systems should be redesigned to improve the quality of public comments. In the meantime, large volumes of comments should be taken more seriously by agencies. They at least should trigger an agency to engage in further deliberation and investigation. They should also prompt a brief response in the rulemaking documents. At a minimum, if agencies decide that the public comment game—at least for comments filed in large volumes by ordinary citizens—is not worth the candle, complete candor with the public is essential.

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50. *E.g.*, Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 I/S: J.L. & POLICY FOR INFO. SOC'Y 1, 18 (2005) (recommending electronic comment threading to facilitate reply comments for “greater deliberation and responsiveness”). Professor Farina has noted the potential value of replies, without clearly endorsing multiple comments. *See* Cynthia Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 421 (2011). Farina’s casebook co-author, Professor Peter Strauss, recently filed four different comments in an Office of Federal Register rulemaking, including requesting a more general comment “reply period.” *See* Comments by Peter Strauss on National Archives and Records Administration rulemaking on “Incorporation by Reference,” (Mar. 12, Mar. 26, Mar. 29, and June 1, 2012), <http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0094>.

51. CONG. MGMT. FOUND., *supra* note 49, at 28 (“Congressional staff repeatedly report that if grassroots organizations were to identify themselves in the communications from their members, it would not only save them time, but also add to the credibility and effectiveness of those campaigns.”). I have elsewhere argued that a commenter should provide her name and affirm that she has not been paid to submit a comment. Mendelson, *Torrents*, *supra* note 1, at 1378.

52. Mendelson, *Torrents*, *supra* note 1, at 1378.

