

In December, 2015, the Government Accountability Office (GAO) concluded that the Environmental Protection Agency's (EPA) use of various social media tools in a rulemaking under the Clean Water Act violated prohibitions in federal appropriations laws against publicity, propaganda and lobbying.¹ Although academics previously explored whether the use of technology in rulemaking might violate the Administrative Procedures Act (APA)², the Paperwork Reduction Act³, or the Federal Advisory Committee Act⁴, none predicted that one of the first firestorms surrounding the use of social media in rulemaking would arise out of federal appropriations laws.⁵

While critics of the EPA "waters of the United States" (WOTUS) rule⁶ vigorously chastised the agency for its "illegal" activity⁷, a close reading of the GAO report indicates that the agency's

¹ U.S. Government Accountability Office, GAO-B-326944, *Environmental Protection Agency - Application of Publicity or Propaganda and Anti-Lobbying Provisions* (2015), available at: <http://www.gao.gov/assets/680/674163.pdf> (last visited June 10, 2016) [hereinafter "GAO Report"].

² 5 U.S.C. § 551, et seq. (2006).

³ 44 U.S.C. §§ 3501-3521 (2006).

⁴ Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. at 1175 (1988)).

⁵ See, e.g., Keith W. Rizzardi, *Why Don't Federal Advisory Committees Like Facebook? Social Media, Public Input and the Federal Advisory Committee Act*, 9 Charleston L. Rev. 75 (2014); Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0 and a Vision for Broader. More Informed and More Transparent Rulemaking*, 65 Admin. L. Rev. 77, 78 (2013) [hereinafter "Beyond the Usual Suspects"]; Cynthia R. Farina, Mary J. Newhart, Claire Cardie, Dan Cosley, *Rulemaking 2.0*, 65 U. Miami L. Rev. 395 (2011); Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 Admin. L. Rev. 893 (2011).

⁶ The rule that sparked the controversy was a rule adopted by EPA under the Clean Water Act to define the scope of federal jurisdiction over "waters of the United States" under the statute. See 80 Fed. Reg. 37054 (June 29, 2015).

⁷ See, e.g., Eric Lipton and Coral Davenport, *Critics Hear E.P.A.'s Voice in 'Public Comments'*, N.Y. Times, May 19, 2015, at A1, available at: <http://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html> (last visited June 9, 2016) [hereinafter "Critics"]; Rich Edson, *EPA Under Fire for Social Media 'PR Campaign' Pushing Water Regs*, FoxNews.com, May 26, 2015, available at: <http://www.foxnews.com/politics/2015/05/26/epa-under-fire-for-social-media-pr>

violations of appropriations rules were relatively minor and could be easily avoided in the future.⁸ Despite the outcry in the wake of the report, an analysis of the appropriations legislation demonstrates that it poses very few restrictions, in practice, on agencies' use of social media in rulemaking.⁹

However, an analysis of the WOTUS rulemaking and the manner in which EPA used social media in the rulemaking demonstrates that agencies may decide to use social media in rulemaking for a variety of reasons, some of which are more legally defensible than others. Proponents of the use of social media in rulemaking tout its potential for educating the public, gathering more information from a broader range of participants, and developing better, more democratic and more widely accepted rules.¹⁰ Cornell University, through its Cornell eRulemaking Initiative, has partnered with various federal agencies to demonstrate, through its Regulation Room project, effective, though resource-intensive, ways to use technology and social media to meet those goals.¹¹ However, an agency might also be tempted to use social media tools in the rulemaking process to evangelize, rather than educate, and to contour information (selectively promote the submission of information to support a pre-determined outcome). While EPA did not cross that line in the WOTUS rulemaking, when an agency uses social media to evangelize and contour information, it can run afoul not only of prohibitions in appropriations laws, but also of requirements of the APA.¹² Although the violation of appropriations laws would only trigger minor sanctions, violation of the APA requirements could trigger invalidation of the agency rule.¹³

Further, when an agency uses social media to evangelize and contour information, the public, or certain segments of the public, may feel that the agency is merely using the rulemaking process as

campaign-pushing-water-regs.html (last visited June 10, 2016).

⁸ See *infra* Part IV., and accompanying text.

⁹ *Id.*

¹⁰ See *infra* Part I.

¹¹ Cornell University, *Cornell eRulemaking Initiative*, available at: <http://www.lawschool.cornell.edu/ceri/> (last visited June 10, 2016). See also, Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 107-112. Students and faculty from Cornell work with federal agencies and use a variety of tools beyond those used by most agencies in the notice and comment rulemaking process to expand the universe of persons participating in the rulemaking process, educate the public about the process and the issues involved in a proposed rule, and improve the quality of public comments on rules. *Id.*

¹² See *infra* Part V.

¹³ *Id.*

a tool to build public support and a judicially defensible record for an outcome that was determined before the agency sought public input. In those cases, the agency risks sacrificing all of the benefits that are normally associated with public participation in a transparent, open rulemaking process, including public support and acceptance for the final rule, ease of enforcement and reduced judicial challenges.¹⁴ In an attempt to develop public support, the agency might actually spark hostility and increase the likelihood of a challenge to its rules.

As the Administrative Conference of the United States recently recommended, therefore, agencies should think carefully about what legitimate goals they expect to achieve through the use of social media in rulemaking before embarking on rulemaking and should develop a strategy for using social media tools in a manner that best achieves those legitimate goals.¹⁵

This article examines the benefits of using social media in rulemaking, the limitations imposed on the use of social media by appropriations laws and the APA, and the practical considerations involved in choosing the right mix of social media tools for rulemaking. Part I of the article outlines the various goals that agencies might have when choosing to use social media tools in rulemaking. Part II explores the variety of social media tools that are available to agencies and provides a brief overview of federal support for the use of those tools in rulemaking. Part III examines the extent to which social media tools can actually achieve the goals that motivate agencies to use them. Part IV outlines the limits imposed on agencies' use of social media by appropriations laws and Part V outlines the APA challenges that might be raised if agencies use social media to evangelize and contour information in the rulemaking process. Finally, Part VI provides some concluding suggestions regarding the appropriate use of social media tools in rulemaking.

I. Why Agencies Might Use Social Media in Rulemaking

As the federal government embraced e-Rulemaking at the beginning of this century, proponents extolled the benefits of using technology to create better, more defensible, and more widely accepted rules through a more democratic and transparent process.¹⁶ While early eRulemaking efforts have

¹⁴ See *infra* notes 33-37, and accompanying text.

¹⁵ See ACUS Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269, 76271 (Dec. 17, 2013), available at: https://www.acus.gov/sites/default/files/documents/Social%20Media%20Rec_Final_12_9_13.pdf (last visited June 10, 2016).

¹⁶ See, e.g., Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 92-94; Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 Admin. L. Rev. 451, 453-454 (2010); Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 Duke L.J. 893, 898-899 (2006); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 Emory L.J. 433, 473-474 (2004); Dooling, *supra* note 5, at 896; Stephen M.

not yet revolutionized the rulemaking process in the manner that supporters hoped they would¹⁷, advocates for the increased use of social media in rulemaking tout many of the same potential benefits for those tools. Supporters argue that the effective use of social media tools can involve broader and more diverse segments of the public in the development of rules¹⁸, educate the public about proposed rules and the rulemaking process so that they can provide better input into that process¹⁹, change the nature of public participation in the rulemaking process to create opportunities for dialogue and interaction between commenters²⁰, and increase the transparency of the rulemaking process.²¹ All of those benefits may be possible when the tools are used by an agency that enters the rulemaking process with a genuine interest in receiving broad public input and a willingness to make changes to the rule in ways that are informed by that input.

However, social media tools can also be used by agencies for more nefarious purposes. If an agency begins the rulemaking process with a pre-determined outcome in mind, hoping to use the process to cultivate public support for that outcome and to develop a judicially defensible record to support that outcome, an agency might use social media tools in the rulemaking process to evangelize, rather than educate, and to contour information (promote the public submission of information to support the agency's desired outcome), rather than to simply gather information. It is in those cases that agencies are most likely to act in contravention of the APA or appropriations laws.²²

A. Generating Broader Public Participation

In traditional federal notice and comment rulemaking, very few citizens participate in the process.²³

Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 Admin. L. Rev. 277, 304 (1998).

¹⁷ See *infra*, Part II.

¹⁸ See Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers*, Final Report to the Administrative Conference of the United States (November 21, 2013), at 86, available at: <http://perma.cc/N9VU-5T2F> (last visited June 10, 2016). See also *infra* Part I.A.

¹⁹ See *infra*, Part I.B.

²⁰ See *infra*, Part I.C.

²¹ See *infra*, Part I.D.

²² See *infra*, Parts IV and V.

²³ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 78; Cynthia R. Farina, Paul Miller, Mary J. Newhart, Claire Cardie, and Dan Cosley, *Rulemaking in 140*

In general, regulated entities, trade associations and professional organizations submit most of the comments on proposed rules, while regulatory beneficiaries and private citizens are largely silent.²⁴ Thus, through the traditional rulemaking process, agencies are frequently only hearing part of the story regarding the impacts of their rules.²⁵ Federal agencies recognize, however, that social media tools like Facebook and Twitter can play an important role in broadening and diversifying participation in the rulemaking process.²⁶ One of the greatest barriers to public participation in the

Characters or Less: Social Networking and Public Participation in Rulemaking, 31 Pace L. REV. 382, 386 (2011). Several studies examining rulemaking by different agencies at different times have found that fewer than 35 comments are provided by citizens on most proposed rules. See, Johnson, *Beyond the Usual Suspects*, *supra*, at 82. The WOTUS rule that is the subject of this article is an exception to that rule, but there have been other rulemakings in the past that have also generated significant public input. For instance, 250,000 comments were submitted for a 1997 rule addressing standards for organic products, and hundreds of thousands of comments were submitted on the Federal Communications Commission’s rules on the concentration of media ownership, an EPA rule regarding mercury emissions, and a Forest Service rule banning construction of roads in wilderness areas. *Id.*

²⁴ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 78; Farina, et al., *supra* note 23, at 386, 423; Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 Reg. & Governance 46 (2007); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 Duke L.J. 943 (2006); Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the Bureaucracy*, 68 J. Pol. 128 (2006). While public interest organizations provide comments on major rulemakings, they have limited resources, so they must be judicious in deciding when to participate in the process.

²⁵ See Herz, *supra* note 18, at 5.

²⁶ EPA’s Social Media Policy identifies “increased ability ... to engage and collaborate with .. the American public” as a major benefit of using social media. See U.S. Environmental Protection Agency, *Social Media Policy*, §4, available at: http://www.epa.gov/sites/production/files/2013-11/documents/social_media_policy.pdf (last visited June 10, 2016). Similarly, the agency’s Facebook Guidance notes that Facebook “allows [EPA] to reach out to people who use Facebook, but may not engage the government in more formal, traditional ways.” See U.S. Environmental Protection Agency, *Facebook Guidance*, available at: [http://govsocmed.pbworks.com/w/page/27521304/EPA Facebook Guidance](http://govsocmed.pbworks.com/w/page/27521304/EPA%20Facebook%20Guidance) (last visited June 10, 2016). In discussing Twitter, EPA notes that “when followers ‘retweet,’ ... our message has the potential to spread far beyond our followers; ...

rulemaking process is the lack of public awareness that most rulemakings are occurring.²⁷ Social media tools provide great promise for reducing that barrier and spreading the word that government agencies are seeking public input on important proposed rules, or on important issues prior to the development of proposed rules.²⁸

Ideally, those tools could help agencies gather expert opinion from sources other than the major regulated entities and trade associations that normally participate in the process.²⁹ They could help agencies gather the local and situational knowledge about the concrete impacts of a proposed rule on communities, small businesses and individuals that the agency frequently cannot access through

it's another channel beyond epa.gov where people gather, so we can reach a broader audience with our existing messages ...” See U.S. Environmental Protection Agency, *Twitter Guidance*, available at: [http://govsocmed.pbworks.com/w/page/27521294/EPA Twitter Guidance](http://govsocmed.pbworks.com/w/page/27521294/EPA%20Twitter%20Guidance) (last visited June 10, 2016).

²⁷ See Anne E. Boustead & Karlyn D. Stanley, *The Legal and Policy Road Ahead: An Analysis of Public Comments in NHTSA's Vehicle-to-Vehicle Advance Notice of Proposed Rulemaking*, 16:2 Minn. J.L. Sci. & Tech. 693 (2015); Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 84; Herz, *supra* note 18, at 9, 32; Farina, et al., *supra* note 23, at 385, 389. Prior to eRulemaking efforts, notice of proposed rulemaking was often limited to publication in the Federal Register, which is not frequently read by average citizens. See Boustead & Stanley, *supra*, at 706. Even in the eRulemaking era, few citizens spend much time following rules on Regulations.gov, although the site allows users to sign up for e-mail alerts to track proposed rules or other regulatory actions. See Regulations.gov, *How to Use Regulations.gov*, available at: <https://www.regulations.gov/#!help> (last visited June 10, 2016).

²⁸ See Herz, *supra* note 18, at 32. See also, *infra* Part III.A. However, increased public awareness about proposed rules, in and of itself, will not necessarily result in broader and more diverse participation in the rulemaking process as there are other barriers to participation and as individuals will frequently not be motivated to comment on rules unless the effects of the rule on them are great enough to justify the cost of participating in the process. See Boustead & Stanley, *supra* note 27, at 706.

²⁹ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 83; Herz, *supra* note 18, at 32. Professor Cynthia Farina and her colleagues believe that members of the public will be motivated to share their expertise with agencies through web-based interactions in rulemaking in the same way that they have donated their expertise to develop Wikipedia or to help patent examiners identify prior art through the PeerToPatent project. See Farina, et al., *supra* note 23, at 424.

the traditional notice and comment process.³⁰ When an agency has access to more complete information, it can identify and address issues that it might not otherwise have considered adequately.³¹ As a result, the agency should be able to develop better rules, in that they are more rational and defensible than if they were developed without the benefit of the additional input.³²

Broader public participation has many other benefits. A broadly inclusive process that is carried out in a transparent manner will be viewed as a much more democratic process.³³ To the extent that participants in the process can better understand a rule and feel that the rulemaking process was carried out in a manner that allowed them to have their views heard and addressed, they should be less antagonistic towards the final rule.³⁴ Ideally, they should be less likely to challenge the rule and

³⁰ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 83; Farina, et al., *supra* note 23, at 424-426. “Local knowledge” is “the first-hand experience of those who deal directly with the objects and targets of rulemaking.” See Farina, et al., *supra* note 23, at 426. It is the insight that a local sanitation engineer could provide to EPA about implementing drinking water standards that the national trade organization for water treatment plants might not be able to provide. See Cary Coglianese, *Weak Democracy, Strong Information: The Role of Information Technology in the Rulemaking Process*, in GOVERNANCE AND INFORMATION TECHNOLOGY: FROM ELECTRONIC GOVERNMENT TO INFORMATION GOVERNMENT 101, 117 (Viktor Mayer-Schonberger & David Laze eds., 2007).

³¹ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 79; Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 Mo. L. Rev. 695, 702-07, 735 (2007); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 Cornell L. Rev. 397, 402 (2007).

³² See Boustead & Stanley, *supra* note 27, at 706; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 83; Herz, *supra* note 18, at 6. See also U.S. Environmental Protection Agency, *Public Participation Guide 5*, available online at: https://www.epa.gov/sites/production/files/2014-05/documents/ppg_english_full-2.pdf (last visited June 10, 2016).

³³ See Boustead & Stanley, *supra* note 27, at 702-703; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 80; Herz, *supra* note 18, at 2, 6.

³⁴ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 79-80; Herz, *supra* note 18, at 6.

the rule should be easier to enforce.³⁵ Fewer legal challenges and greater acceptance of rules should reduce costs and resource demands for agencies, as litigation to defend rules and to enforce rules against recalcitrant violators is time consuming and expensive.³⁶ Similarly, the public can receive the benefits that rules are designed to provide more quickly when the rules are not challenged and when the regulated community acts quickly to come into compliance. Even if broader participation does not reduce challenges to agencies' rules, it provides the agencies with more information about the level of public support for, or opposition to, rules as they are being developed.³⁷

Broader public participation can also be instrumental in reducing opportunities for agency capture.³⁸ The traditional notice and comment process is dominated by a few major players³⁹ and empirical

³⁵ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 79-80; Herz, *supra* note 18, at 6; David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 *Env'tl. L.* 651, 677-78 (2006); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 *Emory L.J.* 433, 459 (2004). See also U.S. Environmental Protection Agency, *Public Participation Guide*, *supra* note 32, at 5. Conversely, as more persons participate in the rulemaking process, there are more persons who might be disappointed with the outcome and who might, therefore, choose to challenge the rule.

³⁶ Between 1998 and 2010, for instance, the Justice Department spent \$46.9 million just to *defend* EPA in lawsuits challenging its rules. See U.S. Government Accountability Office, GAO-15-803T, *Information on Cases against EPA and FWS and on Deadline Suits on EPA Rulemaking* (Aug. 4, 2015), available at: <http://gao.gov/assets/680/671846.pdf> (last visited June 10, 2016).

³⁷ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 80; Farina, et al., *supra* note 23, at 428-429.

³⁸ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 78. Agency capture occurs “when organized groups successfully act to vindicate their interests through government policy at the expense of the public interest.” See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture and Agency Inaction*, 101 *Geo. L. J.* 1337, 1343 (2013). Academics frequently cite broad participation in a transparent process as a safeguard against regulatory capture. *Id.* at 1356. See also Steven R Croley, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 293 (2008); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 *Harv. L. Rev.* 4, 59 (1998).

³⁹ The process tends to be dominated by a small number of regulated entities, industry trade associations and, to a lesser extent, non-governmental

studies have demonstrated systemic biases in favor of regulated entities in rulemakings where the public input is dominated by those entities.⁴⁰ Broader public participation can help counterbalance that disproportionate input.

B. Educating the Public

While agencies might use social media tools to broaden and diversify the pool of participants in the rulemaking process, they might also use them to educate the public about the rules for which they are seeking public input and to educate the public about the rulemaking process itself.⁴¹ Education can address some of the major barriers to broader public participation in the rulemaking process. Although rulemakings frequently have significant impacts on the public, citizens often do not participate in the process because the issues involved in the rulemaking and the language of the rulemaking (often written on a graduate school reading level) are complex, technical and difficult to understand.⁴² The volume of information that someone may need to review in order to provide effective comments on a rule may be staggering, leading to information overload.⁴³ Further, citizens

organizations. *See supra* notes 23-24, and accompanying text. *See also* Herz, *supra* note 18, at 4-5. Even when an agency isn't "captured," it tends to reach out more frequently to regulated entities than to regulatory beneficiaries for input in policy development because (1) the agency directly interacts with regulated entities, so it knows their identities, while it may not know the identities of regulatory beneficiaries; (2) the agency is interested in maintaining a good long-term relationship with regulated entities; and (3) regulatory entities are more likely to have information about a policy's costs and feasibility than regulatory beneficiaries or the agency itself. *See* Mendelson, *supra* note 31, at 429-430.

⁴⁰ *See* Wendy Wagner, Katherine Barnes, & Lisa Peters, *An Empirical Study of EPA's Air Toxic Emission Standards*, 63 Admin. L. Rev. 99, 108-109 (2011).

⁴¹ EPA stresses the educational value of social media tools in its Facebook Guidance and Twitter Guidance. *See* U.S. Environmental Protection Agency, *Facebook Guidance*, *supra* note 26; U.S. Environmental Protection Agency, *Twitter Guidance*, *supra* note 26.

⁴² *See* Farina, et al., *supra* note 23, at 385, 437-438. Describing the rules that the Cornell eRulemaking Initiative included in its Regulation Room pilot program to improve public participation through technology, Professor Farina observed that the notice of proposed rulemaking for one of the Department of Transportation rules in the program was twenty two pages long, written at a post-graduate reading level, and accompanied by a 107 page regulatory impact analysis. *Id.* at 437-438.

⁴³ *See* Farina, et al., *supra* note 23, at 389-390; Herz, *supra* note 18, at 32; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 84-85.

may decline to provide comments on a rule because the technocratic nature of the process leads them to believe that their comments will be ignored or that they have nothing worthwhile to provide.⁴⁴

Even when citizens provide comments on a proposed rule, their comments may be less effective than comments provided by the regulated entities, trade associations and non-governmental organizations because citizens don't fully comprehend the manner in which their input can or will be used by the agency in the rulemaking process.⁴⁵ They may not understand that, in most cases, rulemaking is not a plebiscite, so that a simple expression of support for, or opposition to, a rule, is not likely to have a significant impact on the formulation of the rule.⁴⁶ Similarly, they may not understand that the agency does not have the statutory authority to take an approach that they are suggesting.⁴⁷ Consequently, they frequently submit comments that address issues of values and policy and agencies generally give those types of comments little weight, regardless of the volume of comments in support of a specific value or policy.⁴⁸ By contrast, the repeat players that dominate the notice and comment process often address the scientific and technical issues that are central to the agency's rule and provide data and analyses to support their comments.⁴⁹ Agencies tend to give those comments significant weight because they understand that the repeat players are likely to challenge the final rule in court and the rule will be invalidated if the agency does not adequately address the issues raised in those comments.⁵⁰

Many of the barriers to public participation in the rulemaking process can be reduced through education. Agencies can take steps to make the language of proposed rules and the documents supporting the rules easier to understand, to summarize the issues involved in the rulemaking more succinctly, and to educate the public about the rulemaking process and the type of public comments that can be the most helpful and effective.⁵¹ Better educated and informed citizens should provide better and more effective input, which should improve the quality of the rules adopted by agencies.

⁴⁴ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 84-86.

⁴⁵ *Id.* at 85.

⁴⁶ *Id.* at 85-86.

⁴⁷ *Id.* at 89.

⁴⁸ *Id.* at 88.

⁴⁹ *Id.* at 87.

⁵⁰ *Id.* at 87-88.

⁵¹ Some of the tools used by the Cornell eRulemaking Initiative in its Regulation Room to summarize the issues in proposed rules, make the rules more readable, and educate the public regarding the comment process and effective commenting are discussed in Part IV of this article.

In addition, the education efforts by agencies should increase the volume of citizen participation in the rulemaking process.

Beyond those benefits, when citizens learn more about the rulemaking process and the issues involved in a rule, they will develop a greater understanding of the rule and the reasoning behind the rule.⁵² Ideally, this should lead to greater acceptance of rules, which will make them easier to enforce and less likely to be challenged.⁵³

In light of all of those benefits, it is not surprising that education is central to the mission of many agencies. In the environmental arena, Congress recognized the need for greater public education when it enacted the National Environmental Education Act, finding that “[e]ffective response to complex environmental problems requires understanding of the natural and built environment, awareness of environmental problems and their origins .. and the skills to solve those problems” and that “[c]urrent federal efforts to inform and educate the public concerning the natural and built environment and environmental problems are not adequate ..”⁵⁴ The law imposes a duty on EPA to address that deficiency and requires the agency to work with schools, non-governmental organizations, broadcasting entities, and the private sector to develop programs and activities to improve awareness of environmental problems.⁵⁵ It creates, within EPA, an Office of Environmental Education, which is required to develop and support programs and related efforts to improve the understanding of the environment, develop and disseminate environmental education materials, and otherwise provide for implementation of the law.⁵⁶ The Federal Clean Water Act, pursuant to which EPA published the WOTUS rule, emphasizes the importance of encouraging and assisting citizen participation in the development of rules under the law⁵⁷, and educating the public to facilitate that participation falls comfortably, therefore, within EPA’s responsibilities under the Clean Water Act and the National Environmental Education Act.

It seems only natural that agencies, including EPA, might turn to social media and other technologies

⁵² See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 79-80; Herz, *supra* note 18, at 6; U.S. Environmental Protection Agency, *Public Participation Guide*, *supra* note 32, at 5.

⁵³ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 79-80; Herz, *supra* note 18, at 6; U.S. Environmental Protection Agency, *Public Participation Guide*, *supra* note 32, at 5.

⁵⁴ 20 U.S.C. §§ 5501(a)(4); 5501(a)(6) (2006).

⁵⁵ *Id.* § 5501(a)(8).

⁵⁶ *Id.* §§ 5503(b)1); 5503(b)(3).

⁵⁷ 33 U.S.C. § 1251(e) (2006).

to advance their educational mission because Congress enacted the E Government Act of 2002 “to promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in government” and “to promote better informed decisionmaking by policymakers.”⁵⁸

C. Changing the Nature of Public Participation

While agencies might choose to use social media tools to broaden citizen participation in rulemaking or to educate those citizens, they might also use the tools to change the nature of public participation in the rulemaking process. Traditional notice and comment rulemaking is frequently criticized because it does not provide an opportunity for dialogue between the agency and commenters or between the commenters.⁵⁹ In the traditional process, comments are provided to the agency during the notice period and the agency considers and responds to the comments after the notice period closes. Until the advent of e-rulemaking, commenters generally were not aware of the comments that other commenters were submitting, and many commenters waited until the last minute to submit their comments in order to prevent any other commenters who happened to learn about the substance of the comments from rebutting the comments.⁶⁰ In contrast, Professor Cynthia Farina notes that the ideal public comment period “would create a knowledge advancing exchange during which participants react to the agency’s proposal, respond to each other’s comments, vet claims and data, and discuss alternative proposals.”⁶¹

Although agencies have not taken advantage of technology in the first generation of e-rulemaking to transform rulemaking into a more collaborative and dialogic process, agencies might utilize social media tools to attempt to achieve that goal.⁶² EPA’s social media policies, for example, extol the benefits of using social media “to engage and collaborate with ... the American public.”⁶³ EPA’s

⁵⁸ Pub. L. No. 107-347, 116 Stat. 2899 (2002), §§ 2(b)(2); 2(b)(7).

⁵⁹ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 78; Herz, *supra* note 18, at 5.

⁶⁰ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 78, 90.

⁶¹ See Farina, et al., *supra* note 23, at 422.

⁶² *Id.* See also Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 79-80; Herz, *supra* note 18, at 5.

⁶³ See U.S. Environmental Protection Agency, *Social Media Policy*, *supra* note 26, § 4. See also U.S. Environmental Protection Agency, *Using Social Media to Communicate With the Public*, available at: http://www.epa.gov/sites/production/files/2013-11/documents/comm_public.pdf (last visited June 10, 2016).

Facebook guidance encourages employees to “encourage discussion among fans by asking questions. ... Ask for your community’s thoughts, experiences, and stories.; Listen to what they’re saying and respond as appropriate.”⁶⁴ Similarly, EPA’s Twitter guidance reminds employees that Twitter “gives us a chance to respond to discussion about us or our mission.”⁶⁵

D. Improving Transparency of the Rulemaking Process

Agencies may also choose to use social media tools to make the notice and comment rulemaking process more transparent.⁶⁶ Like education, transparency should lead to greater public understanding of, and acceptance of, rules.⁶⁷ As noted above, that should ease enforcement for agencies and reduce the number of legal challenges brought against rules.⁶⁸ EPA’s social media policy identifies transparency as a major objective for the agency’s use of social media.⁶⁹

E. Evangelization

Agencies that are genuinely interested in seeking out as much information as possible during the rulemaking process and remain flexible regarding the substance of the rule throughout the rulemaking process are likely to use social media tools, if they use them, to achieve one or more of the goals outlined above. There are times, however, when agencies may be tempted to use those tools for less commendable purposes. Cynics argue that agencies rarely enter the rulemaking process with an interest in having their rules transformed by the process and that the public input in the process comes too late.⁷⁰ In the oft-cited words of Professor E. Donald Elliott, “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.”⁷¹

⁶⁴ See U.S. Environmental Protection Agency, *Facebook Guidance*, *supra* note 26.

⁶⁵ See U.S. Environmental Protection Agency, *Twitter Guidance*, *supra* note 26.

⁶⁶ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 78.

⁶⁷ *Id.* at 79.

⁶⁸ See, *supra* notes 33-36, and accompanying text.

⁶⁹ See U.S. Environmental Protection Agency, *Using Social Media to Communicate With the Public*, *supra* note 63, § 4.

⁷⁰ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 78,86; Dorit Rubenstein Reiss, *Modernizing the APA Rulemaking Process*, 12 N.Y.U. J. Legis. & Pub. Pol’y 321, 330-335 (2009).

⁷¹ See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 Duke L.J. 1490, 1492 (1992).

While that portrayal of the rulemaking process may be a bit too pessimistic, there are certainly times when an agency might enter the rulemaking process with a desire to minimize changes to its proposed rule and to use the notice and comment process to build public support for the approach the agency has chosen in the proposed rule. Such an agency may be tempted to use social media tools to evangelize the agency's work. Although rulemaking is not a plebiscite, strong public support for a rule can counteract aggressive lobbying by regulated entities seeking Congressional legislation or Executive action to overturn the rule. While broadening public participation, increasing public education, transforming the nature of the rulemaking process and increasing transparency in the rulemaking process can all indirectly increase public support for agency rules, evangelization is a much more direct attempt to cultivate that support. Evangelization can have detrimental effects for an agency, though, in that it could strengthen opposition to the agency's rule from regulated entities if they believe that the agency improperly cultivated support for the rule (and antagonism towards the concerns advanced by the regulated entities).⁷² That opposition could generate additional negative comments from opponents during the rulemaking process and increased likelihood of litigation at the end of the process.⁷³

Evangelization differs from education in the goals that each seek to achieve. Evangelization involves advocating a doctrine or idea with the object of making converts, whereas education simply involves providing persons with training or information.⁷⁴ An agency evangelizes to shape public input and support for a specific position. An agency educates to improve public input and generate support for whatever rule the agency ultimately adopts, regardless of whether it was the rule advanced by the agency at the outset of the rulemaking. At times, it may be difficult to distinguish education from evangelization. In the EPA WOTUS rulemaking, legislators, regulated industry trade groups, and journalists argued that the agency used social media tools to manufacture grass roots support for, and drown out opposition to, a rule that the agency had no intention of changing in any manner throughout the notice and comment process.⁷⁵ EPA, on the other hand, maintains that it was

⁷² See *infra* notes 248-251, and accompanying text.

⁷³ *Id.*

⁷⁴ See *Evangelize*, Collins English Dictionary (Harper Collins 10th ed. 2016), available at: <http://www.dictionary.com/browse/evangelize> (last visited June 10, 2016).

⁷⁵ See Lipton & Davenport, *supra* note 7; Letter from 24 U.S. Senators to Gina McCarthy and John M. McHugh (Oct. 17, 2014) (on file with author), available at: <http://www.barrasso.senate.gov/public/index.cfm/news-swc?ID=3554425b-701d-4ced-936b-2ef2ecfc5067> [hereinafter "*Letter from 24 U.S. Senators*"]; Jennevieve Fong, *EPA Chief Downplays 'Covert Propaganda'*, The Hill, February 11, 2016, available at: <http://thehill.com/policy/energy-environment/269167-epa-chief-downplays-covert>

necessary to adopt an aggressive public education campaign during the rulemaking process to counter an aggressive misinformation campaign supported by the American Farm Bureau.⁷⁶ In such circumstances, it may be difficult to know the true motivations for the agency's social media campaign, but it seems reasonable to accept the agency's defense of its efforts in light of the need to provide accurate information to the public in order to obtain meaningful input on the impacts of the proposal and public reaction to the proposal and in light of the agency's duty under the National Environmental Education Act to improve awareness of environmental problems and its duty under the Clean Water Act to encourage and assist citizen participation in the development of the WOTUS rule.⁷⁷

F. Information Contouring

Just as an agency that enters the rulemaking process intent on minimizing changes to the rule during the rulemaking process may use social media to build *public support* for the rule through the rulemaking process, it may use social media to build a *record* to support the rule through the rulemaking process. An agency that enters the rulemaking process with an open mind will use the process to *gather* information, while an agency that enters the rulemaking process intent on reaching a predetermined outcome may use the process to *contour* information.

Although rules developed by agencies do not need to be supported by a formal administrative record, courts will strike down rules that are arbitrary and capricious.⁷⁸ Although the standard is deferential,

-propaganda (last visited June 10, 2016).

⁷⁶ See Lipton & Davenport, *supra* note 7; Fong, *supra* note 75; Farm Futures, *EPA's McCarthy: Ditch the Myths, Not the Waters of the U.S. Rule*, available at: <http://farmfutures.com/story-epas-mccarthy-ditch-myths-waters-rule-0-114845-pri-ntversion> (last visited June 10, 2016). See also *infra* Part II.C. EPA's use of social media to counter the Farm Bureau's anti-regulatory campaign is part of a broader strategy by the White House and its newly created Office of Digital Strategy to use social media to educate the public and respond to criticism. See Eric Lipton and Michael D. Shear, *E.P.A. Broke Law With Social Media Push for Water Rule, Auditor Finds*, N.Y. Times, December 15, 2015, available at: http://www.nytimes.com/2015/12/15/us/politics/epa-broke-the-law-by-using-social-media-to-push-water-rule-auditor-finds.html?_r=0 (last visited June 10, 2016).

⁷⁷ See *supra* notes 54 - 58, and accompanying text. In its social media policy, EPA notes that it is the agency's policy to use social media "where appropriate in order to meet its mission of protecting human health and the environment." See U.S. Environmental Protection Agency, *Social Media Policy*, *supra* note 26, § 6.

⁷⁸ See 5 U.S.C. § 706(2)(A) (2006).

courts will not uphold agency rules based on naked assertions of agency expertise.⁷⁹ Instead, agencies must support their rules with reasonable explanations.⁸⁰ While rules developed through informal rulemaking are not reviewed “on the record,” courts frequently examine the information that agencies receive through the notice and comment process when determining whether an agency’s rules are reasonable.⁸¹ Courts often strike down agency rules when agencies fail to adequately address issues raised during the rulemaking process.⁸² Since judicial review of agencies’ rules frequently focuses on the information provided to agencies in the notice and comment process, agencies that enter the rulemaking process intent on reaching a predetermined outcome have an incentive to build a record of public input that supports that outcome. Those agencies could decide to use social media to prompt appropriate members of the public to provide input in the rulemaking process that supports the agencies’ desired outcome. Just as there is a fine line between education and evangelization, there is a fine line between information gathering and information contouring. Agencies can appropriately seek to gather information to fortify the ultimate factual, legal and policy decisions that they make in the rulemaking process against judicial attack, as long as they remain open to being transformed by the information that they receive through the notice and comment process.⁸³ Agencies should not, however, seek to cultivate information submission that supports a desired outcome if the agencies have determined that they do not intend to, or need to, consider

⁷⁹ See, e.g., *Nat'l Wildlife Fedn v. Nat'l Marine Fisheries Serv.*, 2016 U.S. Dist. LEXIS 59195 (D. Ore. 2016); *Bear Valley Mut. Water Co. v. Salazar*, 2012 U.S. Dist. LEXIS 160048 (C.D. Cal. 2012); *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988).

⁸⁰ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 479 (3d Cir. 2004).

⁸¹ The APA requires agencies to provide a “concise general statement of the basis and purpose” of their rules when they publish them as final rules. 5 U.S.C. § 553(b). The statement should allow courts “to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

⁸² See, e.g., *Lloyd Noland Hospital & Clinic v. Heckler*, 762 F.2d 1561(11th Cir. 1985); *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1470 (7th Cir. 1985); *Action on Smoking & Health v. CAB*, 699 F.2d 1209, 1216 (D.C. Cir. 1983).

⁸³ On several occasions, the D.C. Circuit has suggested that an agency’s rule can be invalidated if the agency does not review public comments with an open mind. See *infra* Part V.

information that supports alternative approaches.⁸⁴ As with education and evangelization, it is often difficult to discern an agency's intent to engage in information contouring, as opposed to information gathering.

II. eRulemaking and Social Media

A. First Generation eRulemaking Efforts

Agency experimentation with social media tools in the notice and comment rulemaking process is an outgrowth of broader agency efforts to utilize technology to transform the process to achieve the goals outlined in the preceding section.⁸⁵ Early agency eRulemaking efforts have not, however, transformed the process.⁸⁶

The E Government Act of 2002⁸⁷ required agencies to accept comments on notice and comment rulemaking electronically⁸⁸ and to create electronic dockets for rulemakings which are publicly accessible on the Internet through a Federal government website.⁸⁹ Congress' goal in the statute was

⁸⁴ See *infra* Part V. Agencies must be wary, though, of the unintended consequences of broad social media campaigns. An effort to use social media to cultivate information submission may be viewed with hostility by opponents of the agency's rule and generate a groundswell of negative comments from those opponents. See *supra* notes 248-251 and accompanying text. The agency must respond to all of those negative comments in a rational manner when finalizing its rule or risk having the rule invalidated because the agency failed to provide a concise general statement of the basis and purpose of the rule, or because the agency acted arbitrarily and capriciously. See *infra* Part V.

⁸⁵ Some academics forecast an eRulemaking revolution that would make rulemaking "more broadly participatory, democratic and dialogic." See Herz, *supra* note 18, at 2. At a minimum, the technologically enhanced process would be more efficient. *Id.* at 6.

⁸⁶ See *ACUS Recommendation 2013-5*, *supra* note 15, at 76270.

⁸⁷ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁸⁸ *Id.* § 206(c).

⁸⁹ *Id.* §206(d). The Office of Management and Budget, which was obligated to implement eRulemaking under the law, delegated that authority to EPA's Office of Environmental Information. See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 91. Regulations.gov is the website that the federal government launched to carry out its obligations under the law. *Id.*

to increase citizen participation in government, improve decisionmaking by government decisionmakers, and make the government more transparent and accountable.⁹⁰ While supporters of eRulemaking noted that technology could be used to host public meetings online or use social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings, and hoped that it could make the process more dialogic, most of the early eRulemaking efforts simply involved moving the paper process of notice and comment rulemaking online.⁹¹ The early efforts provided some of the benefits that supporters predicted. By making the rules, the rulemaking process and the information that agencies rely upon in developing rules available online, eRulemaking has helped increase public awareness about rules and educate the public about the rules that agencies are developing, as well as the rulemaking process.⁹² The increased public awareness and education leads to greater transparency in the rulemaking process and a more democratic process. By making the public comments accessible online, eRulemaking has made it easier for persons to find, read, and respond to the comments.⁹³ This provides agencies with broader information, which should lead to better decisionmaking and better rules.

However, critics argue that the nature of the notice and comment rulemaking process has not been changed by eRulemaking.⁹⁴ Early eRulemaking efforts have not significantly increased public participation in rulemaking⁹⁵ and have not improved the quality of input from the public⁹⁶ or generated the “situational knowledge” from persons who failed to participate in the traditional notice and comment process.⁹⁷ Instead, critics note, in some proceedings, the technological reforms have spurred submission of hundreds of thousands of duplicate public comments orchestrated by interest

⁹⁰ E-Government Act of 2002, *supra* note 87, §2(b).

⁹¹ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 92.

⁹² *Id.*

⁹³ *Id.* at 93.

⁹⁴ See Farina, et al., *supra* note 23, at 387; Balla & Daniels, *supra* note 24; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 81.

⁹⁵ See Herz, *supra* note 18, at 8; Boustead & Stanley, *supra* note 27, at 707; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 93-94.

⁹⁶ See Herz, *supra* note 18, at 8; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 94-95.

⁹⁷ See Herz, *supra* note 18, at 8. Herz notes that public commenters frequently “fail to provide the things that agency staff most need: concrete examples, specific alternatives to the proposal, an awareness of statutory limitations, hard data to back up conclusions, and direct responses to any specific questions the agency may have asked.” *Id.*

groups, transforming notice and comment rulemaking into “notice and spam” rulemaking.⁹⁸ Those comments frequently simply articulate broad support or opposition to the rule and are given less weight than the lengthy, well-researched and narrowly focused comments of the regulated entities and trade associations.⁹⁹ Further, critics note that regulated entities and other traditional repeat players in the notice and comment process continue to submit their comments at the close of the comment period, negating any possibility of a dialogue in the comment period.¹⁰⁰

B. Rulemaking 2.0 and Support for Social Media in Rulemaking 2.0

While first generation eRulemaking efforts have fallen short of expectations thus far, reformers argue that a new generation of the internet, Web 2.0, and social media tools could change the nature of the notice and comment rulemaking process to achieve many of the goals outlined above. Until recently, the Web was a place where organizations or people created static, text-based sites to make information broadly and easily retrievable.¹⁰¹ Developers of websites provided and controlled the content of the sites and there was very little interaction between the website owner and users or among the website users.¹⁰² Over time, though, the Internet transformed. Primitive discussion boards were replaced by blogs.¹⁰³ Social networking services, such as Facebook, were created.¹⁰⁴ Media sharing sites, such as YouTube, were launched, as were applications designed to facilitate collaboration, such as Google Docs and Media Wiki, the platform for Wikipedia.¹⁰⁵ Unlike Web 1.0, Web 2.0 and social media tools are collaborative and allow users to produce and generate content, rather than simply receive content.¹⁰⁶ Websites in the Web 2.0 world tend toward dynamic, multi-media platforms with significant amounts of content created by users.¹⁰⁷ It is for those reasons that

⁹⁸ *Id.* at 9.

⁹⁹ *Id.* at 9.

¹⁰⁰ *Id.* at 10.

¹⁰¹ *See* Farina, et al., *supra* note 23, at 393; Herz, *supra* note 18, at 2, 11.

¹⁰² *See* Farina, et al., *supra* note 23, at 393; Herz, *supra* note 18, at 2, 11..

¹⁰³ *See* Farina, et al., *supra* note 23, at 394.

¹⁰⁴ *Id.* at 394.

¹⁰⁵ *Id.* at 394.

¹⁰⁶ *See* Herz, *supra* note 18, at 2-3, 11.

¹⁰⁷ *See* Herz, *supra* note 18, at 11; Jonathan A. Obar, Paul Zube, and Clifford Lampe, *Advocacy 2.0: An analysis of How Adovcacy Groups in the United States Perceive and Use Social Media as Tools for Facilitating Civic Engagement and*

reformers argue that a new generation of eRulemaking (Rulemaking 2.0) that incorporates social media could make the notice and comment process more dialogic and transparent, as well as increasing public participation in the process and improving the nature of public comments.¹⁰⁸

EPA defines “social media” as “any online tool or application that goes beyond simply providing information, instead allowing collaboration, interaction, and sharing.”¹⁰⁹ According to the agency, the essential features of “social media” include “the ability to support two way social interactions in real time; the ability to allow creation and exchange of user-generated content ... and easy and low-cost accessibility by large numbers of people without specialized skills or training.”¹¹⁰ Social media tools that might be used in notice and comment rulemaking include social networking sites, like Facebook, Linked In and Google+; blogs and microblogs, like Twitter or Thunderclap; file or photo sharing sites, like YouTube, Vine, Snapchat, Flickr and Instagram; wikis; and applications that allow users to vote or rank specific items, such as Reddit or Ideascale.¹¹¹

The Administrative Conference of the United States (ACUS) has supported the expanded use of technology in notice and comment rulemaking for more than two decades. As early as 1995, the organization recommended that agencies should use electronic bulletin boards and other means of electronic communication to solicit public input on rules.¹¹² In 2011, ACUS recommended that agencies consider using social media in appropriate rulemakings to raise the visibility of rulemakings.¹¹³ Two years later, ACUS adopted a series of recommendations that encourage agencies to use social media for a wide variety of purposes (beyond raising the visibility of rules)

Collective Action, 2 J. Info. Pol’y 1,7 (2012).

¹⁰⁸ See Herz, *supra* note 18, at 2-3, 11.

¹⁰⁹ *Id.* at 12; See also Obar, et al., *supra* note 107, at 7 (providing an alternative definition of social media as “a group of Internet-based applications that build on the idological and technological foundations of Web 2.0, and that allow the creation and exchange of user generated content.”); ACUS Recommendation 2013-5, *supra* note 15, at 76269 (defining social media to include “any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public.”)

¹¹⁰ See Herz, *supra* note 18, at 12.

¹¹¹ *Id.*

¹¹² See Administrative Conference of the United States, *Recommendation 95-3: Review of Existing Agency Regulations*, ¶ IV.A. , 60 Fed. Reg. 43108, 43110 (Aug. 18, 1995).

¹¹³ See Administrative Conference of the United States, *Recommendation 2011-8: Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2257, 2264 (Jan. 17, 2012).

in the rulemaking process.¹¹⁴

The White House also strongly supports the expanded use of social media across agency functions. On his first day in office, President Obama issued a memorandum on transparency and open government that called on agencies to harness technology to put information online and to use innovative tools to collaborate and communicate with the public.¹¹⁵ The eRulemaking Program Management Office, within the Executive Branch, subsequently endorsed the use of new tools, such as blogs, wikis, user generated feedback and ratings, videos, and social media networks, to promote and facilitate transparency, public engagement and collaboration.¹¹⁶ According to a 2013 report for ACUS, there were almost 2,500 government social media accounts at that time, not counting blogs. At that time, EPA maintained 35 Twitter feeds and 32 Facebook pages from headquarters or regional offices, 12 blogs, a YouTube channel, a Flickr photostream, multiple discussion forums, a collection of podcasts, an RSS feed for its news releases, a wiki, a page on Foursquare, and even a page on Google +.¹¹⁷

C. Social Media Tools Used by EPA and the American Farm Bureau in the “Waters of the United States” Rulemaking

In light of the strong Executive Branch support for the use of social media in rulemaking, it is not surprising that EPA recently employed a variety of social media tools to issue a rule to define the agency’s jurisdiction over “waters of the United States” (WOTUS) under the Federal Clean Water Act.¹¹⁸ To some extent, though, the breadth of the agency’s social media campaign was prompted by the social media campaign preemptively launched by opponents of the rule.

¹¹⁴ See Administrative Conference of the United States, *Recommendation 2013-5: Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

¹¹⁵ See Memorandum from President Barack Obama on Transparency and Open Government to the Heads of Exec. Dep'ts & Agencies (Jan. 21, 2009), available at: http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment (last visited June 10, 2016).

¹¹⁶ See E-Rulemaking Program Management Office, *Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies* 8 (2010), available at: http://exchange.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf (last visited June 10, 2016).

¹¹⁷ See Herz, *supra* note 18, at 16-18.

¹¹⁸ See 80 Fed. Reg. 37054 (June 29, 2015).

The agency anticipated that the rulemaking would be controversial, because the statutory language being interpreted in the rule had been the subject of three Supreme Court decisions.¹¹⁹ At the time that EPA issued the notice of proposed rulemaking, the agency posted a YouTube video from Gina McCarthy, the agency's Administrator, and several other agency officials, explaining the proposed rule and inviting public input in the development of the rule.¹²⁰ A day later, the agency released a summary of statements from various advocacy groups that were supporting the proposal.¹²¹ A few days after the proposed rule was released, the American Farm Bureau issued a press release criticizing the rule and calling on its members to urge EPA to "ditch the rule."¹²² The Farm Bureau was supported by home builders, the fertilizer and pesticides industries, oil and gas producers, and a national association of golf course owners.¹²³ A week later, 213 members of Congress wrote to EPA, expressing "serious concerns" with the rule and asking EPA to withdraw the rule.¹²⁴ Shortly thereafter, the American Farm Bureau and local Farm Bureaus began a massive social media campaign to oppose the rule. The Missouri Farm Bureau posted a satirical video parodying the EPA

¹¹⁹ See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

¹²⁰ See U.S. Environmental Protection Agency, *EPA and Army Corps of Engineers Clarify Protection for Nation's Streams and Wetlands: Agriculture's Exemptions and Exclusions from Clean Water Act Expanded by Proposal* (March 25, 2014), available at: <https://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30> (last visited June 10, 2016).

¹²¹ See U.S. Environmental Protection Agency, *Here's What They're Saying About the Clean Water Act Proposed Rule* (3/26/2014), available at: <https://yosemite.epa.gov/opa/admpress.nsf/ec5b6cb1c087a2308525735900404445/3f954c179cf0720985257ca7004920fa!OpenDocument> (last visited June 10, 2016).

¹²² See American Farm Bureau Federation, *American Farm Bureau Tells Members to 'Ditch' EPA Water Rule* (April 22, 2014), available at: http://www.fb.org/newsroom/news_article/42/ (last visited June 10, 2016).

¹²³ See Lipton and Davenport, *supra* note 7.

¹²⁴ See Letter from Rep. Chris Collins and other members of Congress to Gina McCarthy and John McHugh (May 1, 2014), available at: http://www.nytimes.com/interactive/2015/05/19/us/document-epa.html?_r=4 (last visited June 10, 2016).

rule to the tune of Disney’s “Let it Go”, which attracted over 100,000 views.¹²⁵

In September, 2014, the American Farm Bureau launched a “Ditch the Rule” website and began a Twitter campaign, urging followers to express their opposition to EPA using the hashtag #DitchTheRule.¹²⁶ In the campaign, the Farm Bureau incited farmers by claiming that EPA’s rule would regulate groundwater, puddles, and all ponds and ditches on farms.¹²⁷ It claimed that the rule would require farmers to obtain a federal permit to pull weeds on their land and would give the agency veto authority over a farmer or rancher’s ability to operate.¹²⁸ The Farm Bureau also asserted that EPA’s rule violated the limits imposed on the agency by the Supreme Court decisions and warned that everyone who depends on agriculture for food would suffer because of the rule.¹²⁹

In response to the aggressive social media campaign of the American Farm Bureau, EPA turned to social media to clarify the scope and details of the rule, to allay public concerns and to hopefully improve the quality of public comment on the proposal.¹³⁰ In late September, 2014, EPA began its social media outreach with a Thunderclap campaign to publicize the proposed rule.¹³¹ Thunderclap is a social media platform that “allows a single message to be shared across multiple Facebook, Twitter and Tumblr accounts at the same time.”¹³² The organizer of a Thunderclap campaign drafts

¹²⁵ See Missouri Farm Bureau, *That’s Enough - (“Let it Go” Parody)* (5/23/2014), available at: <https://www.youtube.com/watch?v=9U0OqJqNbbs> (last visited June 10, 2016).

¹²⁶ See Nina Hart, Elisabeth Ulmer, and Lynn White, *Social Media: Changing the Landscape of Rulemaking*, 30:1 Nat. Res. & Env’t 1 (2015); American Farm Bureau, *Ditch the Rule*, available at: <http://ditchtherule.fb.org> (last visited June 10, 2016).

¹²⁷ See American Farm Bureau, *Ditch the Rule*, *supra* note 126.

¹²⁸ See American Farm Bureau, *It’s Time to Ditch the Rule*, available at: http://ditchtherule.fb.org/custom_page/its-time-to-ditch-the-rule/ (last visited June 10, 2016).

¹²⁹ See American Farm Bureau, *Ditch the Rule*, *supra* note 126; American Farm Bureau, *Ditch the Rule - Answers*, available at: <http://ditchtherule.fb.org/#filter=.gosocial> (last visited June 10, 2016).

¹³⁰ See Lipton and Davenport, *supra* note 7; *GAO Report*, *supra* note 1, at 3; Hart et al., *supra* note 126, at 2.

¹³¹ See Lipton and Davenport, *supra* note 7; Hart et al., *supra* note 126, at 2.

¹³² See Thunderclap, *Frequently Asked Questions*, available at: <https://www.thunderclap.it/faq> (last visited June 10, 2016).

a message of no more than 117 characters that will be shared with persons who sign up to support the campaign once the campaign is supported by a specific number of persons chosen by the organizer of the campaign (e.g., 500 supporters).¹³³ For the WOTUS rule, EPA created a Thunderclap campaign page entitled “I Choose Clean Water.”¹³⁴ The page was visibly attributed to EPA and, when EPA met its goal of 500 supporters, the campaign posted the following message to the supporters’ social media accounts: “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family and my community.”¹³⁵ The message, which included a link to the EPA web page for the proposed rule, was posted on 980 social media accounts through the Thunderclap campaign, where it was viewed by about 1.8 million followers and friends of those accounts.¹³⁶

The agency also created its own Twitter hashtag, #DitchTheMyth, connected to YouTube videos and Facebook postings, that addressed the inaccuracies in the Farm Bureau’s #DitchTheRule campaign.¹³⁷ The Twitter campaign directed the public to EPA’s website, where the rule was explained and the public were invited to comment on the rule.¹³⁸

In addition to the #DitchTheMyth campaign, the Communications Director for EPA’s Office of

¹³³ See Thunderclap, *Getting Started*, available at: <http://www.thunderclap.it/guide> (last visited June 10, 2016).

¹³⁴ See *GAO Report*, *supra* note 1, at 4.

¹³⁵ *Id.*

¹³⁶ *Id.* at 5. See also Hart et al., *supra* note 126, at 3.

¹³⁷ See Lipton and Davenport, *supra* note 7; *GAO Report*, *supra* note 1, at 5-6.

¹³⁸ See Lipton and Davenport, *supra* note 7. See also U.S. Environmental Protection Agency, *Ditch the Myth*, available at: <http://www.epa.gov/ditchthemyth> (last visited June 10, 2016). EPA’s website included a fact sheet that identified and corrected twenty-three mis-statements regarding the agency’s proposed rule. See U.S. Environmental Protection Agency, *Ditch the Myth: Let’s Get Serious About Protecting Clean Water*, available at: https://www.epa.gov/sites/production/files/2014-07/documents/ditch_the_myth_wotus.pdf (last visited June 10, 2016). For instance, the document clarified that the proposed rule (1) reduced regulation of ditches, rather than expanded their regulation; (2) did not regulate groundwater; (3) was consistent with authority under the Supreme Court precedent; and (4) was based on a scientific assessment that was developed through review of more than 1000 peer reviewed and publicly available scientific studies. *Id.*

Water created an EPA blog post entitled Tell Us Why #CleanWaterRules.¹³⁹ The Communications Director urged followers to post, to Facebook, Twitter, or Instagram, a photo of themselves holding a #CleanWaterRules sign, explaining why clean water is important to them.¹⁴⁰ As outlined in the next section, EPA's social media efforts focused on educating the public, increasing public awareness that the rule was being developed, encouraging greater participation in the development of the rule and encouraging public support for the rule.¹⁴¹ Critics argued, however, that the agency's social media campaign violated federal anti-lobbying laws and demonstrated that the agency was not interested in receiving any public input that opposed the approach that the agency preferred to take in finalizing its rule.¹⁴²

III. Effectiveness of Social Media

As EPA and other agencies turn more frequently to social media in the rulemaking process, it is useful to examine whether those tools can effectively be used to achieve the purposes outlined earlier in this article. While EPA's use of social media in the WOTUS rulemaking provides one lens through which to examine those questions, this section of the article will not confine its focus to EPA's efforts in that rulemaking, as the Department of Transportation and the Consumer Financial Protection Bureau have engaged in a more sophisticated and robust use of social media tools in conjunction with the Cornell eRulemaking Initiative as part of its experimental Regulation Room program,¹⁴³ and other agencies are using social media tools in other ways in notice and comment rulemaking. Nevertheless, EPA's use of social media tools in the WOTUS rulemaking exhibits some of the strengths and limitations of those tools, so this section of the article will pay particular attention to the extent to which EPA was able to use those tools to increase public awareness, educate the public, generate broader participation, change the nature of participation, and generate support for the agency's rule.

A. Increasing Public Awareness

To the extent that members of the public do not participate in the notice and comment rulemaking process because they are not aware that the government is developing rules that would impact them

¹³⁹ *Id.* See also *GAO Report*, *supra* note 1, at 6-7.

¹⁴⁰ See Lipton and Davenport, *supra* note 7; *GAO Report*, *supra* note 1, at 6-7; Hart et al., *supra* note 126, at 3. The blog post was submitted by the Communications Director after the agency submitted the final rule to the Office of Management and Budget for review. See *GAO Report*, *supra* note 1, at 21.

¹⁴¹ See *infra* Part III. See also *GAO Report*, *supra* note 1, at 3.

¹⁴² See *infra* notes 248-251, and accompanying text.

¹⁴³ See *supra* note 11, and accompanying text.

or that the government is seeking their input, social media tools appear to be an effective way to overcome that barrier.¹⁴⁴ As of March 31, 2016, an average of more than 1 billion persons used Facebook every day and an average of more than 1.6 billion persons used it every month.¹⁴⁵ Similarly, there were more than 310 million active users of Twitter as of March 31, 2016, and more than 1 billion unique visits per month to sites with embedded Tweets.¹⁴⁶ Advocacy groups have already recognized the power of social networking to recruit members and to publicize the goals and activities of their organizations.¹⁴⁷ In a recent survey of more than 100 advocacy groups, all of the organizations indicated that they used social media to interact with the public.¹⁴⁸ The groups understand that social networks increase the speed, reach and effectiveness of their communication efforts.¹⁴⁹

Social media advocates suggest that social networking serves a democratic function by empowering and connecting individuals and groups, moving persons toward civic engagement and collective action.¹⁵⁰ Today, advocacy organizations focus more heavily on connecting people to their message through their friends and followers, rather than pushing a message out to the public en masse.¹⁵¹ They recognize that users living in online communities such as Facebook and Twitter are unlikely to venture out to an organization website and interact with the organization unless a friend has already done so and promoted that action in the online community.¹⁵² In the survey of advocacy groups mentioned above, Facebook and Twitter were the most popular social networking tools and two-thirds of the organizations reported using Facebook and Twitter every day to communicate with

¹⁴⁴ “Telling the agency’s story” is perhaps the most obvious way that agencies can use social media in the rulemaking process and it has been endorsed by the eRulemaking Program Office. *See Herz, supra* note 18, at 8.

¹⁴⁵ *See* Facebook, *Newsroom*, available at: <http://newsroom.fb.com/company-info> (last visited June 10, 2016).

¹⁴⁶ *See* Twitter, *Company*, available at: <http://about.twitter.com/company> (last visited June 10, 2016).

¹⁴⁷ *See* Obar, et al., *supra* note 107, at 13-14.

¹⁴⁸ *Id.* at 12.

¹⁴⁹ *Id.* at 4-5, 15.

¹⁵⁰ *Id.* at 2-3.

¹⁵¹ *See* Farina, et al., *supra* note 23, at 395.

¹⁵² *Id.* at 395.

the public.¹⁵³

Agencies are beginning to learn the lessons that advocacy groups learned over the last decade. Agencies can take advantage of person-to-person connections to spread the news about rules and the input they are seeking on the rules more broadly through social networks than they ever could through public meetings and legal notices.¹⁵⁴ As Professor Michael Herz has noted, federal agencies are beginning to post notices regarding their proposed and final rules on their websites, blogs, Twitter feeds, and Facebook pages, and even posting videos about rulemakings to many of those sites.¹⁵⁵

The Administrative Conference of the United States has also concluded that social media tools can be very effective to increase public awareness of rules and of the opportunity to participate in the rulemaking process. In 2013, ACUS recommended that agencies “take an expansive approach to alerting potential participants to upcoming rulemakings by posting to the agency website and sending notifications through multiple social media channels” since social media “may provide an effective means to reach interested persons who have traditionally been under-represented in the rulemaking process (including holders of affected interests that are highly diffused.)”¹⁵⁶

Through its Thunderclap campaign for the WOTUS rule, EPA was able to take advantage of Facebook, Twitter and Tumblr to notify almost 2 million people that the agency was developing a rule designed to protect water quality and that the agency was seeking their input and support.¹⁵⁷ That is a significantly greater number of persons than the agency likely reached through the

¹⁵³ See Obar, et al., *supra* note 107, at 12.

¹⁵⁴ In some cases, social networking may open doors for person-to-person communication that were closed in the offline world. For instance, when the Cornell e-Rulemaking team was trying to use associations of pilots, flight attendants, ground crews, and travel agents to solicit input from the members of those associations for a proposed Department of Transportation rule regarding airline passenger rights, the associations refused to facilitate the involvement of their members. See Farina, et al., *supra* note 23, at 413. That experience reinforced the team’s belief that experts, as much if not more than other members of the public, will be more responsive to information coming peer-to-peer than to information that comes from a source outside of the expert community. *Id.* at 413-414.

¹⁵⁵ See Herz, *supra* note 18, at 30-31. See also Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 105.

¹⁵⁶ See ACUS Recommendation 2013-5, *supra* note 15, ¶ 2.

¹⁵⁷ See *supra* notes 131-136, and accompanying text.

publication of the proposed rule in the Federal Register.¹⁵⁸ In light of the fact that the agency ultimately received over 1 million public comments on the rule¹⁵⁹, it appears that the agency’s social networking efforts contributed to increased public awareness of the rule, regardless of whether they achieved any of the other goals outlined above for social media.

B. Educating the Public

While agencies have been using social media primarily to increase public awareness of their activities thus far, a public education goal is not far behind. As EPA did in the WOTUS rulemaking, agencies are increasingly creating YouTube videos, webinars, and fact sheets to explain the issues in proposed rules or to explain the notice and comment rulemaking process, and linking to those resources through Facebook, Twitter, blogs, and other social media platforms.¹⁶⁰ ACUS’ 2013 recommendations urge agencies to use multiple social media channels to educate the public about rules and the rulemaking process¹⁶¹, and to create a blog or social media site for each rulemaking that provides information, updates, and clarifications regarding the rule.¹⁶² The recommendations also encourage agencies to create, and post to social media, videos about the rulemaking process and how to comment effectively in the process, and to hold webinars or online classes to demonstrate how to draft comments and to review draft comments and suggest ways to improve the comments.¹⁶³

In addition, ACUS recommends that agencies create plain language versions of their rules and simplified statements of issues that they can distribute through social media to solicit input from the

¹⁵⁸ As Professor Michael Herz notes, “quite simply, social media sites are the places in the virtual world where the most people can be found.” *See Herz, supra* note 18, at 14.

¹⁵⁹ *See Lipton and Davenport, supra* note 7.

¹⁶⁰ *See Herz, supra* note 18, at 19, 30-31; Johnson, *Beyond the Usual Suspects, supra* note 5, at 105. When EPA announced a proposed rule to limit greenhouse gas emissions from power plants, the agency produced a 33 minute video that addressed greenhouse gases, electricity generation and the Clean Air Act to help citizens understand the issues involved in the rulemaking. *See Herz, supra* note 18, at 30-31.

¹⁶¹ *See ACUS Recommendation 2013-5, supra* note 15, ¶ 2.

¹⁶² *Id.* ¶ 10.

¹⁶³ *Id.* ¶ 4. Many agencies already provide, on their websites, guidance on drafting effective comments, but the ACUS recommendations envision more robust and interactive programs that take advantage of the powers of social media. *See Herz, supra* note 18, at 46.

public.¹⁶⁴ Most agencies have not yet adopted that approach, which is time and resource intensive, but the Cornell e-Rulemaking Initiative (CeRI) pioneered it and regularly uses it in the rules in its Regulation Room program.¹⁶⁵ When the faculty and students on the Regulation Room team work with a federal agency on a rulemaking, they create a plain language version of the rule and divide the rule into conceptually coherent issues that are posted on the Regulation Room website for the rule.¹⁶⁶ The team provides moderators to answer questions regarding the proposal and to provide feedback regarding the effectiveness of comments drafted by visitors to the site.¹⁶⁷ While comments submitted in the Regulation Room are not official comments, the Regulation Room team submits a summary of all the comments to the agency sponsoring the rulemaking during the comment period for the rule.¹⁶⁸

While social media can, therefore, play an important educational role in the rulemaking process, there are important limitations to its effectiveness. First, educational materials produced by agencies and provided through social media can only be effective if members of the public actually read and engage with the materials. However, studies suggest that readers do not pay close attention to most material that they read online.¹⁶⁹ While many Americans report using the web, rather than conventional media, as their primary news source, a 2010 Pew Research survey found that the average visit to an online news site lasts about three minutes.¹⁷⁰ Most web users briefly scan a web page and click on the first link that interests them.¹⁷¹ One social media expert recently estimated that

¹⁶⁴ See ACUS Recommendation 2013-5, *supra* note 15, ¶ 12.

¹⁶⁵ See Farina, et al., *supra* note 23, at 390-391, 437-439. CeRI has worked with the Department of Transportation and the Consumer Financial Protection Bureau to solicit public input on six rules in the Regulation Room Program. See CeRI, *Regulation Room*, available at: <http://regulationroom.org> (last visited June 10, 2016).

¹⁶⁶ See Farina, et al., *supra* note 23, at 438-439. The plain language versions are linked to the full text of the rule, impact analyses and other legal and scientific documents associated with the rule. *Id.*

¹⁶⁷ *Id.* at 421-422. See also, Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 107-108; Herz, *supra* note 18, at 46.

¹⁶⁸ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 108.

¹⁶⁹ See Farina, et al., *supra* note 23, at 440.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

64% of web pages are never even scrolled “below the fold” of the monitor screen.¹⁷² The nature of the interaction between social media sites and users is not conducive to deep reflection or contemplation.

In light of the realities of the interaction between users and social networking sites, social media encourages simplification of information. Unfortunately, 140 character Tweets, single sentence or single paragraph Facebook posts, or 6 second Vine videos are imperfect vehicles for explaining the intricacies of rules or the accompanying scientific and economic analyses that are frequently drafted at graduate school reading levels. Something is bound to get lost in the translation.

Further, even when the information can be distilled into manageable and accessible formats that can be distributed through social media, it tends to be a bit dry and unlikely to go viral. In a recent article, Professor Michael Herz described how a short video on the rulemaking process that won a White House competition attracted fewer than 700 views on YouTube, while videos produced by a conservative anti-regulatory organization to parody the winning video were viewed tens of thousands of times.¹⁷³ He notes that content must be “really interesting, funny or edgy” to go viral.¹⁷⁴ Educational materials produced by agencies are unlikely to be “really interesting, funny or edgy.”¹⁷⁵

Despite those limitations, social networks can still serve as valuable vehicles to deliver educational materials. Although there are space limits on Tweets, Facebook posts, blog posts, and other social networking platforms, it is not necessary to include the entirety of one’s message in a social media post. Tweets, Facebook posts, blog posts, and other social media posts frequently include embedded links, so agencies may spread the word about videos, webinars, fact sheets, and other educational materials and websites through those links.¹⁷⁶ That is precisely what EPA did in the WOTUS rulemaking through its #DitchTheMyth campaign and Thunderclap campaign.¹⁷⁷ In both cases, the agency linked its communications to a website that provided educational materials regarding the

¹⁷² *Id.*

¹⁷³ *See Herz, supra* note 18, at 34-35.

¹⁷⁴ *Id.* at 35.

¹⁷⁵ *Id.*

¹⁷⁶ Advocacy organizations have understood that for a decade or more and, in the survey outlined earlier in this article, most organizations identified Facebook and Twitter as the preferred vehicles for education. *See Obar, et al., supra* note 107, at 12-13, 18-19. Surprisingly, the organizations surveyed ranked YouTube as the least effective social media tool for education. *Id.* at 19.

¹⁷⁷ *See supra* notes 130-138, and accompanying text.

rule.¹⁷⁸ EPA’s #CleanWaterRules blog post also linked to EPA websites (and external websites) regarding the rule and clean water, although the blog entry was posted after the public comment period for the rule was closed.¹⁷⁹

It was incumbent on EPA to engage in a broad social media campaign to educate the public on the WOTUS rule for two reasons. First, the rule was exceedingly complex and was posted to Regulations.gov with 282 supporting documents, including an 82 page economic analysis of the rule and a connectivity study that reviewed and synthesized 1200 publications from peer reviewed scientific literature.¹⁸⁰ Second, opponents of the rule were aggressively using social media to distribute false and inaccurate information about the rule.¹⁸¹ It was important, therefore, for the agency to use the same platforms to rebut the information that opponents were using to distribute it.

C. Generating Broader Participation and Better Comments

Advocates argue that social media tools provide a vehicle to reach out to persons who have frequently been left out of the rulemaking process, including minority communities¹⁸², and to solicit

¹⁷⁸ *Id.*

¹⁷⁹ The entry was posted on the blog when the agency submitted its final rule to the Office of Management and Budget for review prior to publication, so the campaign was clearly not targeted to educate the public as a means of facilitating broader input into the development of the rule. *See GAO Report, supra* note 1, at 21. Instead, EPA approached the campaign with more general educational goals. As noted in Part IV.E., critics may question whether the agency’s motivation for the #CleanWaterRules campaign was educational at all.

¹⁸⁰ *See* U.S. Environmental Protection Agency, *Waters of the United States Rulemaking Docket : Supporting Documents*, EPA-HQ-OW-2011-0880, available at: <https://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=SR%252BO;D=EPA-HQ-OW-2011-0880> (last visited June 10, 2016).

¹⁸¹ *See supra* notes 122-129, and accompanying text.

¹⁸² A 2009 report on *The Internet and Civic Engagement* prepared by the Pew Research Center found that African Americans and Latinos were using social media considerably more than Caucasians and were significantly more likely to find government social media helpful and informative. *See* Farina et al., *supra* note 23, at 433. At the same time, though, to the extent that there may still be a “digital divide,” where some socio-economic groups lack access to the Internet, relying on the web as a participation tool exacerbates that inequity. *See* Johnson,

information that is essential to the development of the rule from persons who have access to that information.¹⁸³ Although social media tools may be effective for increasing public awareness about rules and the rulemaking process and may have some value for educating the public about rules and the rulemaking process, they have not yet proven to be very useful for attracting those new participants to the process or improving the quality of the comments provided in the process.¹⁸⁴ The limited success may be due to the fact that most citizens, including teens and younger adults who are more likely to be engaged with social media¹⁸⁵, are not interested in participating in the process even if they know it is going on and have been educated about the process and the issues involved in the rulemaking.¹⁸⁶ Social media has not significantly increased citizen interaction with government agencies outside of the rulemaking context, so the lack of participation in rulemaking may simply be an extension of that phenomenon.¹⁸⁷

To some extent, though, the limited success may be due to the fact that agencies have not utilized the tools in an optimal manner. In order to attract new participants to the rulemaking process and receive better comments from the public, agencies must be diligent in developing a plan to reach

Beyond the Usual Suspects, *supra* note 5, at 95-96.

¹⁸³ See *supra* Part I.C. In the survey of advocacy organizations described earlier in this article, almost all of the organizations felt that social media tools are effective in facilitating collective action and civic engagement and most organizations indicated that they use those tools every day. See Obar et al., *supra* note 107, at 18. For purposes of mobilizing citizens and submitting citizens' comments to government, the advocacy organizations ranked Facebook and listserves as the best tool, followed closely by Twitter. *Id.* at 13.

¹⁸⁴ See Herz, *supra* note 18, at 20-24.

¹⁸⁵ See Farina, et al., *supra* note 23, at 435.

¹⁸⁶ See Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 115; Farina, et al., *supra* note 23, at 435-436 (speculating that most issues in federal rulemaking are likely to have little interest for younger adults.) In the advocacy organization survey, a number of participants suggested that generational and digital literacy gaps prevent social media from being a more effective civic engagement tool. See Obar et al., *supra* note 107, at 16-17. Although most rulemakings attract significantly more comments from regulated entities and interest groups than from the general public, there are exceptions. For instance, in a recent National Highway Transportation Administration rulemaking addressing vehicle to vehicle communications, 94% of the comments were submitted by members of the general public. See Boustead & Stanley, *supra* note 27, at 714.

¹⁸⁷ See Herz, *supra* note 18, at 20-21.

those persons using traditional tools and social media and encourage them to participate in the process and provide more effective input.

ACUS addressed this issue in 2013, when it recommended that agencies develop communications plans for rules using tools specifically tailored to the rule and to all types of stakeholders or participants that the agency is trying to engage, and to target those communications in an evenhanded manner that encourages all types of stakeholders to participate.¹⁸⁸ Critics would likely argue that while EPA’s social media campaign for the WOTUS rulemaking was tailored to attract particular types of participants, it did not encourage all types of stakeholders to participate.¹⁸⁹ In another 2013 recommendation, ACUS noted the value of using multilingual social media outlets to reach under-represented groups and stressed the importance of creating a social media message that clearly and specifically identifies how a proposed rule would target participants and what information would be most useful to the agency.¹⁹⁰ Here again, critics would likely suggest that EPA’s social media messaging did not clearly identify the type of information that would be most useful to the agency in the rulemaking process.¹⁹¹ Consequently, while the WOTUS rulemaking generated over a million public comments, most of the comments provided by “new voices” simply expressed general support or opposition to the rule and the agency’s use of social media did not unearth significant amounts of “localized knowledge.”¹⁹²

The Regulation Room Program administered by the Cornell eRulemaking Initiative provides an example of the outreach approach envisioned by ACUS. When CeRI was working with the Department of Transportation on a rule that would ban texting while driving by commercial vehicle drivers, they identified six groups that might have an interest in the proposed rule, and developed targeted messaging for those groups using traditional media, phone calls, e-mails and social network

¹⁸⁸ See ACUS Recommendation 2013-5, *supra* note 15, ¶ 3.

¹⁸⁹ The Thunderclap campaign seemed to very broadly target persons who would support the agency’s rule and enlisted them to spread the word about the rule to their friends and followers on social media. While the #DitchTheMyth campaign was designed to target an audience of supporters *and* opponents, it would be difficult to argue that the agency was trying to solicit more informed comments from opponents of the rule through that campaign.

¹⁹⁰ See ACUS Recommendation 2013-5, *supra* note 15, ¶ 3.

¹⁹¹ EPA simply directed commenters to the agency’s web page for the rule and encouraged commenters to provide input on the range of issues covered in the rule.

¹⁹² See Hart, et al., *supra* note 126, at 3-4. Many commenters criticized EPA for failing to proactively seek out input from stakeholders, including state and local officials. *Id.*

posting.¹⁹³ They adopted a proactive and reactive approach, monitoring social networks and posting responses to persons who posted comments or questions about the rule.¹⁹⁴ They adopted a similar approach when working with the agency on an airline passenger rights rule.¹⁹⁵ As a result of the planning and targeted outreach, 90% of the persons who participated in the Regulation Room program indicated that they had never participated in notice and comment rulemaking before.¹⁹⁶ Despite that success, only a small percentage of the traffic to the Regulation Room rulemaking site came from Facebook or Twitter.¹⁹⁷

The Regulation Room experiment demonstrates the importance of combining social media with traditional outreach tools, identifying appropriate social media groups to reach targeted audiences, and being diligent in monitoring and replying to social network postings.¹⁹⁸ All of that is very time consuming, and few agencies have expended the time and resources to target that input. Consequently, in the cases where social media efforts, and e-rulemaking in general, have increased public participation in rulemaking, they have merely increased the quantity of participation, but have not connected agencies to the localized knowledge and expertise which would be most helpful to agencies in the rulemaking process.¹⁹⁹ It has not been uncommon, in the e-rulemaking era, for

¹⁹³ See Farina et al., *supra* note 23, at 396-397.

¹⁹⁴ *Id.* at 398-399. Using a social network monitoring tool, the Regulation Room team found almost 100 blogs about the rulemaking and posted comments to those blogs, inviting persons to participate in the rulemaking through the Regulation Room program. *Id.*

¹⁹⁵ *Id.* at 403-404.

¹⁹⁶ *Id.* at 392-393.

¹⁹⁷ *Id.* at 411-412. In the airline passenger rights rulemaking, only 4.5% of the visits to the Regulation Room website came from Facebook or Twitter. *Id.* However, the potential power of social media in the rulemaking process was demonstrated by the fact that 44% of the traffic pertaining to one issue in the rulemaking, peanut allergies, originated from Facebook. *Id.*

¹⁹⁸ See Herz, *supra* note 18, at 32.

¹⁹⁹ The extent to which “localized knowledge” will be helpful to agencies will vary, depending upon the nature of the rulemaking. See See Farina, et al., *supra* note 23, at 427-428; Reiss, *supra* note 70, at 331, 344. Such input will, however, almost always be more helpful than the input of members of the public who are generally interested in a rule, but have no specialized expertise or knowledge to offer in comments. See Herz, *supra* note 18, at 22. ACUS has recognized that “both the quality of comments and the level of participation in social media discussions are often much lower than one might hope.” See ACUS

regulated entities and interest groups to spearhead mass e-mail comment campaigns that generate thousands, or hundreds of thousands of comments on high profile rules.²⁰⁰ In the WOTUS rulemaking, for instance, several organizations sponsored comment submission campaigns that generated tens of thousands of comments each.²⁰¹ Agencies must devote significant time and resources to reviewing the comments, which are frequently duplicative or nearly duplicative and often simply express support or opposition to the rule, or a portion of the rule, without providing any useful data, expertise, or localized knowledge.²⁰²

Recommendation 2013-5, *supra* note 15, ¶ 3. In the NHTSA vehicle to vehicle rulemaking mentioned above, although a significant majority of the comments came from the general public, comments from advocacy organizations averaged 133 pages and comments from manufacturers or industry averaged 32 pages, but 90% of the comments from the general public were less than one page long. *See* Boustead & Stanley, *supra* note 27, at 715.

²⁰⁰ *See* Farina, et al., *supra* note 23, at 416-417; Obar, et al., *supra* note 107, at 6; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 95-96; Stuart W. Shulman, *The Case Against Mass Emails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 *Pol'y & Internet* (2009) [hereinafter Shulman, *Perverse Incentives*]; Stuart W. Shulman, *The Internet Might Still (But Probably Won't) Change Everything*, 1 *J.I. & Pol'y for Info. Soc'y* 111 (2004); Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 *J. E-gov't* 41 (2007).

²⁰¹ *See* Stephen M. Johnson, *WOTUS Rulemaking - Mass Comments*, available at: http://www2.law.mercer.edu/elaw/WOTUS_rule_mass_comments.html (last visited June 10, 2016). Of the 1,127,925 comments that were posted on Regulations.gov for the WOTUS rulemaking as of June 10, 2016, only 20,592 (less than 2% of the total) were unique comments. *Id.* A search of the comments posted on the site revealed that 18 organizations promoted comment campaigns via the web, e-mail, or postcards that generated more than 10,000 comments each. *Id.* The ten largest mass comment campaigns generated 844,951 submissions, or 75% of the 1,127,925 comments received by EPA. *Id.* Environment America organized a campaign that contributed 218,542 duplicate comments and the Natural Resources Defense Council organized a campaign that contributed 108,076 duplicate comments. *Id.*

²⁰² *See* Farina, et al., *supra* note 23, at 416-417; Herz, *supra* note 18, at 26; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 95-96, 112. Professor Michael Herz notes that an agency would need to expend 700 staff hours to review 250,000 comments from a mass e-mail campaign, even if the agency spent less than ten seconds reviewing each comment to ensure that it was merely duplicative. *Id.* Consequently, researchers are exploring automated tools to review such

It is not surprising that social media tools have not yet produced an outpouring of useful data, expertise and localized knowledge from commenters, as the nature of social media is not conducive to the development of that type of public input. As noted earlier, users spend little time on Facebook or other social networks reading or engaging in the type of deep thought necessary to develop comments on proposed rules.²⁰³ Social networks facilitate the *distribution* of content, but they do not necessarily make the *production* of content easier.²⁰⁴ Thus, social networks do little to make it easier for citizens to write comments.²⁰⁵ In addition, to the extent that social media tools do facilitate creation of content, the content is generally videos, photos, and mashups.²⁰⁶ That is not necessarily the type of content that is optimal for rulemaking comments.²⁰⁷

There are other reasons why social media tools do not encourage the development of the type of public input that is most helpful to agencies. Social network users spend a lot of time liking, ranking and sharing preferences.²⁰⁸ Voting is a powerful tool to engage users in online communities.²⁰⁹ Consequently, when commenting on proposed rules, social networkers are more likely to express general support for, or opposition to, a rule or a part of a rule than they are to engage in a critical analysis of the rule or provide data or expertise to support their position. However, rulemaking is not a plebiscite, so agencies normally will not materially alter rules in the rulemaking process simply because a majority of commenters support or oppose a particular approach.²¹⁰ Consequently, in many cases, general expressions of support for a rule are not particularly helpful comments for an agency.²¹¹ Commenters who do not realize that legal and policy barriers may prevent the agency from adopting an approach in a rule that a majority of commenters support may become disillusioned

comments. *Id.* at 25.

²⁰³ See *supra* notes 169-172, and accompanying text. See also Herz, *supra* note 18, at 25-26.

²⁰⁴ See Herz, *supra* note 18, at 24.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See Farina, et al., *supra* note 23, at 441-442.

²⁰⁹ See Farina, et al., *supra* note 23, at 443-444.

²¹⁰ See Herz, *supra* note 18, at 26.

²¹¹ Nevertheless, in defending the agency's final WOTUS rule against critics, the EPA Administrator stressed that almost 90% of commenters supported the approach the agency took in the final rule. See Lipton & Davenport, *supra* note 7.

with the rulemaking process and feel that the agency is ignoring their input.²¹²

Finally, in the Web 2.0 world, users also spend a lot of time engaging in flaming, trolling, and other forms of “uncivil discourse.”²¹³ When those traits carry over into public commenting on a rule, it does not improve the quality of comments on the rule.²¹⁴

Even though social media tools may not ultimately increase the *quality* of public comments, there may be some value in increasing the *quantity* of public comments on rules. For some rules, knowing public sentiment toward a particular approach that the agency is considering in a rule may help the agency develop a better and more effective rule.²¹⁵ For instance, when an agency is developing a rule designed to provide consumers with information on a label or to solicit information from the regulated community on a form, the agency will likely be able to develop a more effective form or label once it knows how consumers or the regulated community are likely to react to various versions of the form or label.²¹⁶ In light of that, while ACUS counsels that rulemakings are not generally enhanced by crowdsourcing, it recommends that “when the issue to be addressed [in a rulemaking] is the public or user response itself ..., direct submission to the public may lead to useful information.”²¹⁷

²¹² See Herz, *supra* note 18, at 27; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 96, 114; See ACUS Recommendation 2013-5, *supra* note 15, at 76269-76270.

²¹³ See Farina, et al., *supra* note 23, at 447-448; Herz, *supra* note 18, at 24.

²¹⁴ See Herz, *supra* note 18, at 20-21. However, Professor Cynthia Farina and her colleagues suggests that online disinhibition can allow for “a more open and direct exchange of ideas, especially unpopular ones.” See Farina, et al., *supra* note 23, at 450-451.

²¹⁵ See Farina et al., *supra* note 23, at 428-429; Reiss, *supra* note 70, at 344.

²¹⁶ See Farina, et al., *supra* note 23, at 428-429 (discussing how DOT used information about existing tire labeling requirements and consumer tire purchasing behavior in conjunction with preferences expressed by consumers toward a variety of tire labeling options in the rulemaking process to develop a label to provide information to consumers regarding how tire purchasing choices affect fuel economy).

²¹⁷ See ACUS Recommendation 2013-5, *supra* note 15, ¶ 14. In many other situations, the type of input provided through social media is not helpful for rulemaking. In his report to ACUS that formed the basis for ACUS’ recommendations, Professor Michael Herz suggests that “[r]ulemakings that primarily involve questions of statutory interpretation, technical knowledge, or scientific expertise may be poorly situated to the kinds of responses usually

For other rules, even if the level of public support for, or against, an approach considered in a proposed rule may not help the agency develop a *better* rule, it may provide the agency with valuable information regarding whether the regulated community are likely to challenge that approach, whether it will be difficult to enforce that approach, and whether Congress will likely oppose that approach when the rule is finalized.²¹⁸ Although rulemaking is not a plebiscite, agencies have limited enforcement and litigation resources. In cases where they have *discretion* to choose between one regulatory approach that is likely to be vigorously challenged and another that can be enforced more readily, they may choose to adopt the less controversial approach if they appreciate the depth of opposition to the controversial approach and there are not strong policy reasons for adopting the other approach despite the likelihood of the challenge.²¹⁹

Finally, as noted above, broad public participation, which can be demonstrated by a significant increase in the quantity of public comments on a rulemaking, can legitimize agency decisionmaking and increase public confidence in, and acceptance of, agency rules.²²⁰ However, since citizen support for agency rules may be eroded when an agency adopts an approach that is at odds with the approach preferred by a majority of the public participants in the rulemaking process²²¹, ACUS recommends that agencies explain to the public how the agency plans to use input generated from voting or ranking tools if the agency uses such tools.²²²

D. Changing the Nature of Public Participation

Just as social media tools have been largely ineffective for generating broader public participation in the rulemaking process and better public comments, they have also been ineffective for changing

produced by social media.” *See Herz, supra* note 18, at 28.

²¹⁸ *See Farina, et al., supra* note 23, at 429-430; Reiss, *supra* note 70, at 344-345.

²¹⁹ *See Farina, et al., supra* note 23, at 429 (discussing the prioritization of regulatory interventions in DOT’s airline passengers rights rulemaking based on the level of concern expressed in the rulemaking process toward various regulatory interventions). Information about public preferences may be valuable to an agency even if the agency does not choose to change a rule in any meaningful way in response to that information, simply because it provides the agency with more information about public concerns that may be useful to the agency in future rulemakings. *See Boustead & Stanley, supra* note 27, at 709.

²²⁰ *See supra* notes 33-36, and accompanying text. *See also* Reiss, *supra* note 70, at 344-345.

²²¹ *See, supra* note 112, and accompanying text.

²²² *See* ACUS Recommendation 2013-5, *supra* note 15, ¶ 16.

the *nature* of public participation in the process. Despite the hopes of supporters²²³, social media tools have not opened up a dialogue between agencies and the public or between commenters during the rulemaking process.²²⁴ This should not be surprising, since the predominant currencies of social networking - liking, ranking, and voting - are not conducive to stimulating a deeper dialogue or interchange of views.²²⁵ In addition, the prevalence of flaming, trolling, and uncivil dialogue online provide significant barriers to improved dialogue between agencies and the public or between commenters during the rulemaking process.²²⁶

The CeRI Regulation Room Program demonstrates the potential for social networking to change the nature of the dialogue in the rulemaking process, as threaded commenting could be a useful tool to facilitate greater interaction between agencies and the public or between commenters during the process.²²⁷ Along those lines, ACUS has recommended that agencies consider using blogs to generate a dialogue about rules.²²⁸ However, the CeRI project is successful because it involves human intervention and moderation²²⁹, and ACUS has recommended that agencies consider the use of facilitators to manage rulemaking discussions conducted through social media.²³⁰ Employing moderators and facilitators to manage the social media dialogue may be too time consuming and

²²³ See, e.g., Farina, et al., *supra* note 23, at 422; Herz, *supra* note 18, at 14-15, 47. Advocacy groups also praise social media tools as a means of facilitating conversations with citizens, allowing them to adapt their message and strategies in response to those interactions. See Obar, et al., *supra* note 107, at 15.

²²⁴ See Herz, *supra* note 18, at 49. Professor Herz notes, though, that a transformation in the nature of the dialogue may not provide significant benefits to agencies, since “the informational challenges involved in rulemaking do not lend themselves to elucidation by broad lay commentary” and because most issues in rulemaking do not lend themselves to crowd-sourcing. *Id.* at 57.

²²⁵ See, Farina, et al., *supra* note 23, at 440-445; Herz, *supra* note 18, at 26.

²²⁶ See, Farina, et al., *supra* note 23, at 447-451.

²²⁷ See, Farina, et al., *supra* note 23, at 422; Herz, *supra* note 18, at 49-50; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 106.

²²⁸ See ACUS Recommendation 2013-5, *supra* note 15, ¶ 10.

²²⁹ See, Farina, et al., *supra* note 23, at 422; Herz, *supra* note 18, at 50; Johnson, *Beyond the Usual Suspects*, *supra* note 5, at 107-108.

²³⁰ See ACUS Recommendation 2013-5, *supra* note 15, ¶ 13.

resource intensive for most rulemakings.²³¹ It is difficult to conceive how agencies would change the nature of the dialogue in the rulemaking process to increase the interaction between the agencies and the public and between commenters during the process, though, without expending considerable additional resources.

Even if agencies had the resources to provide facilitators or moderators for blogs and social networking dialogues for every rulemaking, it is unlikely that they would expend those resources to change the nature of the dialogue in the rulemaking process. Like many agencies, EPA has adopted guidelines to discourage its employees from responding to social media postings except in certain circumstances, and to limit the content of the responses.²³² Every comment made by a representative of the agency on social media may have relevance in challenges to the rules ultimately adopted by the agency and may open up additional avenues for opponents to challenge the rule.²³³ Consequently, agencies are unlikely to be interested in engaging in extensive dialogues with the public during the rulemaking process through social media.

E. Generating Public Support for Agency Rules

While it does not appear that social media tools have been particularly helpful in changing the nature of the dialogue in rulemaking, broadening participation in rulemaking, or improving the quality of comments in rulemaking, they hold some promise for educating the public and increasing public awareness of rulemaking. Their greatest strength, though, may be in generating public support for agency rules, and this is an area where agencies must proceed with caution. To the extent that an agency uses social media in the rulemaking process to evangelize, rather than to educate or raise awareness, it opens itself up to charges that the rulemaking process violated the procedures of the

²³¹ *Id.* at 76270. EPA's social media policy requires the agency to review comments that are going to be posted to social networks used by the agency before the comments are posted, if the network allows such moderation. *See* U.S. Environmental Protection Agency, *Social Media Policy*, *supra* note 26, § 6. If the comments cannot be reviewed before they are posted, the policy requires agency representatives to review the comments, and possibly remove them, as soon as possible during business hours after they are posted. *Id.*

²³² *See* U.S. Environmental Protection Agency, *Twitter Guidance*, *supra* note 26; *See* U.S. Environmental Protection Agency, *Facebook Guidance*, *supra* note 26.

²³³ *See, infra* Part V. *See also* Herz, *supra* note 18, at 49. The implications for litigation would be reduced if the agency were engaging in social media discussions prior to the commencement of the rulemaking process. In his report to ACUS, Professor Michael Herz notes that agencies could use blogs and social networking prior to the publication of a notice of final rulemaking to facilitate increased dialogue among the agency and stakeholders. *See* Herz, *supra* note 18, at 36-39.

APA or that the agency acted arbitrarily and capriciously in adopting the rule.²³⁴ As noted earlier in this article, evangelization involves advocating a doctrine or idea with the object of making converts, whereas education simply involves providing persons with information.²³⁵ An agency evangelizes to shape public input and support for a specific position. An agency educates to improve public input and generate support for whatever rule the agency ultimately adopts, regardless of whether it was the rule advanced by the agency at the outset of the rulemaking.

Advocacy organizations recognize the power of social media to organize supporters in collective action and rely on Facebook, Twitter, and blogs almost every day to evangelize their mission, raise funds, and prompt followers to action.²³⁶ Agencies are using social media for similar purposes, following the lead of President Obama, who formed an Office of Digital Strategy to generate support for his programs.²³⁷ The difference between using social media to raise awareness of a rule or the rulemaking process and using social media to promote support for a rule is important. The difference is apparent in the tone of the message provided by the agency. Unlike messages designed to educate or inform, messages designed to generate support for agency action usually involve some call to action.

Social media can be a powerful tool to generate support for a rule. EPA's Thunderclap campaign in the WOTUS rulemaking is estimated to have reached 1.8 million people.²³⁸ In response to that campaign, advocacy organizations on both sides of the debate organized their own social media campaigns.²³⁹ More than 98% of the 1 million comments received by EPA on the rulemaking were generated by mass communication campaigns by advocacy organizations.²⁴⁰ Ultimately, almost 90%

²³⁴ See *infra* Part V.

²³⁵ See *supra* note 74, and accompanying text.

²³⁶ See Obar, et al., *supra* note 107, at 6, 11-15, 18-19

²³⁷ See Lipton & Spear, *supra* note 7. EPA indicates that it is the agency's policy "to use social media ... to meet its mission of protecting human health and the environment." See U.S. Environmental Protection Agency, *Social Media Policy*, *supra* note 26, § 6.

²³⁸ See Hart, et al., *supra* note 126, at 3; *GAO Report*, *supra* note 1, at 5.

²³⁹ See *supra* notes 121-129, and accompanying text. See also Hart, et al., *supra* note 126, at 1-2.

²⁴⁰ See Johnson, *WOTUS Rulemaking - Mass Comments*, *supra* note 201. See also Hart, et al., *supra* note 126, at 2. The largest campaign in opposition to the rule was organized by the Committee for a Constructive Tomorrow and generated 62,882 comments. See Johnson, *WOTUS Rulemaking - Mass Comments*, *supra* note 201.

of the comments received by EPA on the rule supported the rule.²⁴¹

Although EPA adopted an aggressive social media campaign for the WOTUS rulemaking, which ultimately resulted in strong public support for the agency's rule, the major focus of the agency's campaign was educational and informational, rather than evangelical. EPA's #DitchTheMyth campaign was a clear example of an educational campaign. The campaign focused on providing very detailed and specific facts to the public to clarify misconceptions regarding the rule that were being created by the social media campaign of the American Farm Bureau.²⁴²

The primary focus of the Thunderclap campaign was also educational and informational, as it provided a link to EPA's website with background information about the proposed rule, the rulemaking process, and ways to get involved in the rulemaking process.²⁴³

While the #CleanWaterRules campaign also provided links to agency web pages with educational material regarding the rulemaking, it focused more heavily than the #DitchTheMyth or Thunderclap campaigns on generating support for the agency's rule. The campaign encouraged followers to take pictures of themselves with a #CleanWaterRules sign and share the picture (and words of support for clean water) on social media.²⁴⁴ To the extent that the campaign included an educational message, it was clearly secondary. However, the #CleanWaterRules campaign was launched *after* the comment period on the rule was completed and the agency had prepared a final rule that was being reviewed by the White House prior to publication.²⁴⁵ For all intents and purposes, that social media campaign was launched at the end of the rulemaking process. The only reason agency evangelization of a rule may be problematic is because it could demonstrate that the agency is not willing to consider changes to a rule during the rulemaking process. That is not a concern when the rulemaking process has been completed.

²⁴¹ See Lipton & Davenport, *supra* note 7.

²⁴² *Id.*

²⁴³ See *supra* notes 131-136, and accompanying text. Critics may claim that the campaign was evangelical, rather than informational, because the message provided by EPA for the campaign was, "I support EPA's efforts to protect [clean water] for my health, my family and my community." See *supra* note 135. Although the agency used that message to attract attention to the ongoing rulemaking, the primary focus of the message was to direct readers to the agency's website, where the agency provided information and educational materials on the rule and the issues involved in the rulemaking.

²⁴⁴ See *supra* note 140, and accompanying text.

²⁴⁵ *Id.*

Even if an agency uses a social media campaign to evangelize its rule *during* the comment period for the rule, the agency's rule is not per se invalid. There is no statute or rule that prohibits agencies from soliciting support for their rules during the rulemaking process.²⁴⁶ An agency's evangelization is only problematic when it is motivated by an underlying unwillingness to consider changing the rule based on input during the comment period.²⁴⁷ If an agency is unwilling to consider changing a rule based on public input, though, the agency's rule is likely to be invalidated regardless of whether the agency used social media to generate support for the rule. Social media is not the problem in that case. The agency's closed mind is the problem.

While agencies may view social media as a powerful tool to generate support for a rule, aggressive efforts to generate support for a rule may have unintended consequences for agencies. For example, although EPA's social media campaign contributed, to some extent, to a flood of public comments and 90% support for the rule, the rule was still challenged by states, local governments, farmers, developers, and other regulated entities in numerous lawsuits.²⁴⁸ Many of those challengers expressed resentment over the agency's social media campaign, arguing that the campaign demonstrated the agency's refusal to consider public input on the rule.²⁴⁹ Federal legislators expressed similar concerns²⁵⁰ and introduced bills to overturn the rule.²⁵¹ In short, even though the

²⁴⁶ It is, however, unusual. See Lipton & Davenport, *supra* note 7. ACUS, for instance, recommends that agencies adopt social media plans that are evenhanded and encourage all types of stakeholders to participate. See ACUS Recommendation 2013-5, *supra* note 15, ¶ 3.

²⁴⁷ See *infra* Part V.

²⁴⁸ Within the first two days after the agencies published the final rule, 27 states filed lawsuits challenging the rule. See Chris Marr, *More Than Half States Sue EPA to Block Rule on Water Jurisdiction*, 46 Env. Reporter 2012 (July 3, 2015). Within another two weeks, 14 agriculture and industry groups filed lawsuits, see Amena H. Saiyid and Anthony Adragna, *Chamber of Commerce Joins in Water Rule Lawsuit*, 46 Env. Reporter 2143 (July 17, 2015).

²⁴⁹ See Hart, et al., *supra* note 126, at 3-4.

²⁵⁰ See Fong, *supra* note 75; *Letter from 24 U.S. Senators*, *supra* note 75. In the letter to EPA from Mitch McConnell and 23 other Senators, the legislators argued that "EPA's social media advocacy removes any pretense that the agency will act as a fair and neutral arbiter during the rulemaking." *Id.*

²⁵¹ The bills that were introduced in the months surrounding the agency's issuance of the final rule include the Defense of Environment and Property Act of 2015, S. 980, 114th Cong. (2015), the Federal Water Quality Protection Act, S. 1140, 114th Cong. (2015), the Defending Rivers for Overreaching Policies Act of 2015,

social media campaign generated fairly broad public support for the rule, it exacerbated the significant opposition to the rule from those most likely to challenge the rule and delay its implementation. In the end, courts will not care that 90% of the public comments supported the agency's rule. Neither will federal legislators, unless those 90% are major contributors.

IV. Appropriations Laws and Social Media

EPA's use of social media in the WOTUS rulemaking sparked claims that the agency was violating not only the APA, but also federal appropriations laws. The GAO report mentioned at the outset of this article addressed the appropriations laws limits.²⁵² As will be apparent from the following discussion, an agency will be more likely to run afoul of appropriations limits when it is using a social media campaign to evangelize than when it is using the tools to increase awareness, educate the public or increase transparency of the agency's rules. Although GAO found that the agency violated some provisions of those laws, in the long term, appropriations laws will impose far fewer restrictions than the APA on agencies' use of social media in rulemaking.

A. Statutory Limitations

Pursuant to the Anti-Deficiency Act, federal agencies may only spend money in ways authorized by Congress.²⁵³ When Congress appropriates funds to agencies, it is not unusual for the legislature to impose limits on the agencies' use of those funds.²⁵⁴ The limitations that applied to EPA's use of funds for the WOTUS rulemaking were typical of limits that Congress places on most agencies when it appropriates funds to the agencies. Section 718 of the Financial Services and General Government Appropriations Act of 2014 prohibited the use of EPA's appropriations for unauthorized "publicity or propaganda purposes."²⁵⁵ Section 715 of that law prohibited the use of EPA's appropriations for

S. 1178, 114th Cong. (2015), the Don't Ignore the Will of the American People Act, H.R. 2599, 114th Cong. (2015), the Federal Regulatory Certainty for Water Act, H.R. 2705, 114th Cong. (2015), and the Department of Interior, Environment, and Related Agencies Appropriations Act, 2016, H.R. 2822, § 429, 114th Cong. (2015).

²⁵² See *supra* note 1.

²⁵³ The law makes it unlawful for a federal agency to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation." 31 U.S.C. § 1341(a)(1)(A)(2006).

²⁵⁴ See Katie Stith, *Congress' Power of the Purse*, 97 Yale L. J. 1343, 1353 (1988).

²⁵⁵ See Pub. L. No. 113-76, div. E, title VII, § 718, 128 Stat. 5, 234 (2014). Congress imposed the same restrictions on EPA's 2015 appropriations. See 3 Pub. L. No. 113-235, div. E, title VII, §§ 715, 718, 128 Stat. 2130, 2382-83 (2014).

“indirect or grassroots lobbying in support of or opposition to pending legislation.”²⁵⁶

The limitations in appropriations laws are interpreted and administered by the Government Accountability Office (GAO), which is headed by the Comptroller General.²⁵⁷ With regard to the provisions in appropriations laws that prohibit unauthorized “publicity or propaganda,” GAO has interpreted the provisions to limit three categories of activities by agencies: (1) self-aggrandizement by public officials; (2) “covert propaganda” that is designed to influence the public without identifying the government as the source of the information; and (3) materials that are “purely partisan” in nature.²⁵⁸ Since agencies must communicate information to the public regularly and may have statutory missions to educate the public, GAO interprets the limits on agencies’ use of funding for publicity narrowly.²⁵⁹

With regard to “self aggrandizement,” GAO defines the term to mean “publicity of a nature tending to emphasize the importance of the agency or activity in question.”²⁶⁰ The prohibition against “self-aggrandizement” does not prohibit agencies from engaging in legitimate information activities, so

²⁵⁶ See Pub. L. No. 113-76, div. E, title VII, § 715, 128 Stat. 5, 234 (2014). Section 401 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2015, prohibited the use of EPA's 2015 appropriations for grassroots lobbying. See 3 Pub. L. No. 113-235, div. E, title VII, §§ 401, 128 Stat. 2130, 2382-83 (2014).

²⁵⁷ See 31 U.S.C. 712 (1), (3-4) (2006). The statute authorizes the Comptroller General to “investigate all matters related to the receipt, disbursement, and use of public money; ... [and] make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures.” *Id.* The GAO’s interpretations are published in a federal publication known as the Red Book. See U.S. Government Accountability Office, *Principles of Federal Appropriations Law* (3d ed. 2004) [hereinafter “Red Book”].

²⁵⁸ See U.S. Gov’t. Accountability Office, *Principles of Federal Appropriations Law, Annual Update to the 3d Edition*, GAO-15-303SP (March 2015) at 4-24.

²⁵⁹ See Robert H. Wood, *Lining the Pockets of Publicists with Federal Funds: The Prohibition Against Use of Agency Appropriations for Publicity and Propaganda*, 7 Loy. J. Pub. Int. L. 133, 147 (2006). According to the “necessary expense doctrine,” implemented by the GAO, since Congress cannot specify every detail of authorized expenditures in legislation, agencies may use reasonable discretion in determining how to carry out the purposes of the legislation. See Red Book, *supra* note 257, at 4-19.

²⁶⁰ See Red Book, *supra* note 257, at 4-199.

GAO has been reluctant to find violations of the limits as long as agencies can provide a reasonable justification for their activities.²⁶¹ Along those lines, the GAO has found that agencies may use funds to advocate their positions, even on controversial subjects, to report on their programs, justify their policies, and respond to criticism, without violating the prohibition against “self-aggrandizement.”²⁶²

With regard to “covert propaganda,” GAO defines the term to mean “materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency.”²⁶³ GAO will find such materials to be “covert propaganda” when the agency has concealed its role in producing or distributing the information.²⁶⁴

B. EPA’s Use of Social Media in the WOTUS Rule

After EPA finalized its WOTUS rule, Senator James Inhofe, chair of the Senate’s Committee on Environment and Public Works, asked GAO to investigate whether EPA’s use of social media in the rulemaking violated the appropriations limits on unauthorized publicity or propaganda or the limits on lobbying.²⁶⁵ In response, GAO examined whether EPA’s use of Thunderclap or its #DitchTheMyth or #CleanWaterRules social media campaigns violated those limits.²⁶⁶ EPA indicated that it used social media in the WOTUS rulemaking “to clarify the issues concerning the .. proposed rule, to provide information about streams and wetlands, to demonstrate the rule’s relevance, to provide opportunities for public engagement, and to correct what it viewed as misinformation concerning the rule.”²⁶⁷

GAO ultimately concluded that EPA’s #DitchTheMyth campaign did not violate any of the appropriations limits.²⁶⁸ In addition, it concluded that the agency’s #CleanWaterRules campaign did not violate any of the limits on publicity or propaganda²⁶⁹, although an EPA blog post that was part of that campaign linked to an external website in a manner that the GAO concluded violated the anti-

²⁶¹ *Id.* at 4-200.

²⁶² *See* Wood, *supra* note 259, at 147-148.

²⁶³ *See* Red Book, *supra* note 257, at 4-202.

²⁶⁴ *Id.*

²⁶⁵ *See* GAO Report, *supra* note 1, at 1.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 3.

²⁶⁸ *Id.* at 11.

²⁶⁹ *Id.*

lobbying limits of EPA’s appropriations laws.²⁷⁰ Finally, GAO concluded that EPA’s use of Thunderclap did not violate the anti-lobbying provisions of the appropriations laws and did not violate the limits on self-aggrandizement.²⁷¹ However, GAO determined that EPA did not adequately attribute the Thunderclap message to the agency, so its use of Thunderclap constituted “covert propaganda.”²⁷² Despite the outcry by critics of the agency, GAO’s report demonstrates that the appropriations laws impose fairly minor restrictions on agencies’ use of social media. EPA used social media very aggressively to generate support for its WOTUS rule and very few of its actions were found to have violated the self-aggrandizement, covert propaganda or anti-lobbying provisions of the appropriations laws. To the extent that the report found minor violations of the laws, those violations can be easily avoided in social media campaigns in future rulemakings.

1. #DitchTheMyth and #CleanWaterRules and the Publicity and Propaganda Limits

As noted above, the publicity and propaganda limits in EPA’s appropriations laws limit unauthorized “self-aggrandizement,” “covert propaganda,” and “purely partisan” activities by agencies. The GAO report did not find that any EPA actions were “partisan”, but reviewed several statements in the #CleanWaterRules campaign to determine if they constituted “self-aggrandizement.”²⁷³ Several of the social media posts touted benefits or positive changes that the agency’s rule would effect, including “Our new rule protects clean water and in turn protects everything that depends on it - including your neighborhood grocery store,” and “Our Clean Water Rule was just finalized. That’s great news for people’s health, the environment and our economy.”²⁷⁴ In the report, GAO indicated that a primary purpose of the prohibition on self-aggrandizement is to limit communication with an obvious purpose of puffery and that GAO balances the restriction with an agency’s right to disseminate information regarding its views and policies, so GAO traditionally affords agencies “wide discretion in their informational activities.”²⁷⁵ While the social media posts emphasized the importance of the agency’s rule, GAO stressed that “engendering praise for the agency was not the goal,” so GAO concluded that the agency was not engaged in “self-aggrandizing” activities in the campaign.²⁷⁶ GAO also noted that the National Environmental Education Act of 1990 and the E-Government Act of 2002 “evidence Congress’ intent in EPA informing the public regarding its

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 15-16.

²⁷⁴ *Id.* at 15.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 15-16.

policies and views” and that the appropriations limits should be interpreted in harmony with those provisions.²⁷⁷ In light of the GAO’s deferential review of EPA’s statements in praise of its rulemaking, it is likely that the “self-aggrandizement” limit in the agency’s appropriations laws present very few obstacles to agency’s use of social media to publicize and praise their activities.

GAO also reviewed EPA’s tweets in the #DitchTheMyth social media campaign and concluded that the agency’s tweets did not constitute “covert propaganda” because the graphics used in the campaign included the EPA logo and the tweets included the @EPAWater handle at the end, clearly signifying that EPA was responsible for the messages.²⁷⁸

2. Thunderclap and the Publicity and Propaganda Limits

GAO did not find that EPA’s use of Thunderclap violated the “purely partisan” or “self-aggrandizement” limits of the agency’s appropriations laws. However, the report found that EPA’s Thunderclap message violated the “covert propaganda” limits of the appropriations laws.²⁷⁹ As noted earlier in this article, with Thunderclap, once a campaign reaches a specific number of supporters, Thunderclap posts a message drafted by the campaign organizer to the supporters’ social media accounts.²⁸⁰ The message that EPA drafted provided, “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family and my community.”²⁸¹ Even though EPA advertised the campaign, recruited followers for the campaign, and composed a message that included a reference to EPA and linked to EPA’s website for the proposed rule, GAO determined that the agency’s message concealed EPA’s involvement in the campaign.²⁸² GAO concluded that while the initial followers of EPA’s campaign would be aware that EPA initiated the campaign, persons who saw the message on the social media sites of the initial followers would not be aware of that connection.²⁸³ GAO noted that “It is not enough that an agency disclose its role to the conduit of such material if it has not taken measures to identify its role to the intended recipient.”²⁸⁴

GAO found that “EPA constructed a message to be shared by others that refers to EPA in the third

²⁷⁷ *Id.* at 18.

²⁷⁸ *Id.* at 15.

²⁷⁹ *Id.* at 11-12. However, EPA contests that finding. *See Fong, supra* note 75.

²⁸⁰ *See supra* note 133, and accompanying text.

²⁸¹ *See supra* note 135, and accompanying text.

²⁸² *See* GAO Report, *supra* note 1, at 13-14.

²⁸³ *Id.* at 13.

²⁸⁴ *Id.* at 12.

person and advocates support of the agency’s efforts” and that by doing so, “EPA deliberately disassociates itself as the writer, when the message was in fact written, and its posting solicited, by EPA.”²⁸⁵ GAO distinguished EPA’s use of Thunderclap from the simple re-tweeting or sharing a Facebook post, noting that the previous or original author’s identity would be disclosed in either of those cases, whereas Thunderclap does not retain such identifying information.²⁸⁶ While GAO concluded that EPA’s Thunderclap campaign violated the “covert propaganda” limits in its appropriations laws, the decision should provide only a minor roadblock to agencies’ use of social media in rulemaking. In the future, EPA and other agencies will need to compose any Thunderclap messages more carefully to directly attribute the message to the agency. Similarly, to the extent that new social media delivery platforms are developed, agencies should take care to ensure that their messages will be formatted in a manner that attributes the message to the agency when it is delivered to all of the ultimate recipients.

3. #CleanWaterRules and the Anti-Lobbying Limits

EPA’s policy on using social media to communicate with the public prohibits agency employees from directly or indirectly lobbying Congress²⁸⁷ and the agency’s Twitter guidance prohibits employees from lobbying or promoting political viewpoints²⁸⁸, so it is not surprising that most of the components of EPA’s social media campaign in the WOTUS rulemaking were not found, by GAO, to have violated the anti-lobbying provisions of EPA’s appropriations laws. It is surprising, though, that GAO concluded that an EPA blog post that linked to an advocacy organization web page that linked to a separate web page that urged viewers to contact Congress violated the anti-lobbying provisions.²⁸⁹

As noted earlier, the EPA appropriations legislation, like most appropriations legislation, prohibits “indirect or ‘grassroots’ lobbying in support of, or in opposition to, pending legislation.”²⁹⁰ According to GAO, that provision is violated when there is evidence of a “clear appeal by an agency

²⁸⁵ *Id.* at 13.

²⁸⁶ *Id.* at 14.

²⁸⁷ See U.S. Environmental Protection Agency, *Using Social Media to Communicate With the Public*, *supra* note 63, at 3.

²⁸⁸ See U.S. Environmental Protection Agency, *Twitter Guidance*, *supra* note 26.

²⁸⁹ See *GAO Report*, *supra* note 1, at 11. In Congressional hearings after the report was issued, EPA Administrator Gina McCarthy disagreed with GAO’s conclusion that EPA violated any appropriations limits in the WOTUS rulemaking. See Fong, *supra* note 75.

²⁹⁰ See *supra* note 256, and accompanying text.

to the public to contact Members of Congress in support of, or in opposition to, pending legislation,” regardless of whether the appeal identifies a specific piece of legislation.²⁹¹ As part of the agency’s #CleanWaterRules campaign, an EPA employee posted a blog entry in which the author indicated that clean water was important to him because he is a surfer and doesn’t want to get sick from pollution and because he drinks beer and brewers need clean water to brew beer.²⁹² On its face, the blog entry does not appear to urge the public to contact Congress in support of, or opposition to, any legislation. However, the paragraph regarding the author’s interest in surfing included a link to a Surfrider Foundation web page that discussed clean water and the paragraph regarding the author’s interest in beer included a link to the Natural Resources Defense Council’s (NRDC) Brewers for Clean Water Page.²⁹³ Although *neither of those web pages* directly urged visitors to contact Congress in support of, or opposition to, specific legislation, and the NRDC web page did not even mention Congress, each web page linked to *another web page* that prompted visitors to contact Congress to express opposition to bills that would weaken the Clean Water Act or to express their support for strong Clean Water Act protections of waters of the United States.²⁹⁴ Neither of the action pages identified specific bills that were pending.²⁹⁵ However, in light of the fact that there *were* bills pending in Congress that would weaken the Clean Water Act at the time that the blog post linked to the external websites that linked to the action pages, GAO concluded EPA, through its blog post, appealed to the public to contact Congress in opposition to pending legislation in violation of the grassroots lobbying prohibition in its appropriations laws.²⁹⁶

Even though the call to action was posted on external websites, and was made by third parties, rather than EPA, GAO concluded that EPA “conveyed a message through the expressive act” of linking to the external websites.²⁹⁷ GAO cited several factors that influenced its determination. First, it noted that the external websites very clearly and prominently urged visitors to take some action to protect clean water.²⁹⁸ Second, it noted that EPA linked to the websites from its blog post at a critical time

²⁹¹ See *GAO Report, supra* note 1, at 17.

²⁹² *Id.* at 18-19. See also Travis Loop, *Tell Us Why #CleanWaterRules*, April 7, 2015, available at: <https://blog.epa.gov/blog/2015/04/tell-us-why-cleanwaterrules/> (last visited June 10, 2016).

²⁹³ See *GAO Report, supra* note 1, at 18-19.

²⁹⁴ *Id.* at 18-19.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 18.

²⁹⁷ *Id.* at 23.

²⁹⁸ *Id.* at 19.

in the rulemaking process when public expression of support for the rule to Congress would be very helpful.²⁹⁹ In addition, GAO noted that the websites to which EPA linked were both maintained by activist advocacy organizations.³⁰⁰

To the extent that the GAO found that EPA’s blog post violated the anti-lobbying provisions of EPA’s appropriations laws, GAO has adopted a fairly broad reading of those limitations. The report even suggests that an agency can be liable for violating the anti-lobbying provisions if the agency links to a website that does not include an appeal for citizen action, but the website owner adds such an appeal later. Specifically, GAO noted that it was not clear whether the Surfrider page included an action prompt when EPA initially linked to it, but that it included an action prompt after EPA linked to it and GAO concluded that “EPA is responsible for the message it continues to endorse, rather than just the message as it may have existed at a single point in time.”³⁰¹

In light of GAO’s interpretation of the anti-lobbying provisions of EPA’s appropriations laws, the agency may choose to avoid linking to external sites in its social media campaigns or to be vigilant in monitoring those sites to which it links to ensure that the first level sites do not prominently urge visitors to take some action that might ultimately result in lobbying members of Congress.

C. Enforcement of Appropriations Laws

Although EPA contested GAO’s determination that the agency engaged in covert propaganda and “grassroots lobbying” in the WOTUS rulemaking³⁰², there are very few sanctions available to punish agencies if they don’t comply with appropriations laws, so the limits in those laws are likely to have little impact on agencies’ use of social media in rulemaking. In the WOTUS rulemaking, for instance, when GAO concluded that the agency violated the limits in the agency’s appropriations laws, it noted that “[t]he agency should determine the cost associated with the prohibited conduct and include the amount in its report of its Antideficiency Act violation.”³⁰³ The Antideficiency Act requires agency heads to “report ... to the President and Congress all relevant facts and a statement of the actions taken” when an agency spends appropriations outside of the authority delegated to it by Congress.³⁰⁴ Thus, if an agency uses social media in rulemaking in a way that violates the limits on the agency’s appropriations, the agency may have to reimburse the Treasury for the funds

²⁹⁹ *Id.* at 21.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 23.

³⁰² *See Fong, supra* note 75.

³⁰³ *See GAO Report, supra* note 1, at 2.

³⁰⁴ *See* 31 U.S.C. §1351 (2006).

expended in violation of the appropriations limits. Beyond that, the law imposes few sanctions. Significantly, the validity of a rule will not be impacted by an agency's violation of appropriations limits. While an agency employee who spends appropriations outside of the agency's delegated authority is nominally subject to criminal penalties³⁰⁵, no employee or officer has ever been prosecuted for such violations.³⁰⁶

Although the GAO is charged by Congress with interpreting and administering appropriations laws, and the GAO asserts that the Comptroller General's decisions are binding on agencies³⁰⁷, the Comptroller General is a legislative branch officer³⁰⁸ and the Justice Department takes the position that GAO's opinions and legal interpretations are *not* binding on the Executive Branch.³⁰⁹ Further, the Comptroller General does not have any statutory authority to enforce its opinions or interpretations³¹⁰, so the GAO can only report perceived violations of appropriations limits to Congress, the President and the Justice Department.³¹¹ Even if the Executive Branch concludes that an agency's action may have violated appropriations limits, the Justice Department will not sue a federal agency for those violations, in light of the Unitary Executive Theory.³¹² In addition, even if violations of appropriations limits may be challenged judicially in some cases by appropriate plaintiffs, courts have often declined to decide such cases on the merits.³¹³

³⁰⁵ See 31 U.S.C. § 1350 (2006).

³⁰⁶ See *Red Book*, *supra* note 257, Volume II, § 6-144.

³⁰⁷ *Id.*, Volume I, §1-40.

³⁰⁸ See *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986).

³⁰⁹ See Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether Appropriations May be Used for Informational Video News Releases* at 1 (Mar. 11, 2005).

³¹⁰ See Wood, *supra* note 259, at 152-155. Indeed, since the Comptroller General is a Legislative Branch officer, enforcement against the Executive Branch could violate separation of powers principles. *Id.* at 155-156.

³¹¹ *Id.* at 155-156.

³¹² See Nelson D. Cary, *A Primer on Federal Facility Compliance With Environmental Laws: Where Do We Go From Here?*, 50 Wash. & Lee L. Rev. 801,828-32 (1993). Under the theory, agencies cannot sue each other in court because they are, in effect, the same party. *Id.*

³¹³ See Stith, *supra* note 254, at 1387-1388.

Therefore, the only repercussions that agencies may have to face in light of violations of appropriations laws caused by social media campaigns would come from Congress in the form of oversight hearings and some further limits on appropriations tailored to the agency's violations.

V. Social Media and the APA

Although appropriations laws may not impose significant limits on agencies' use of social media in rulemaking, the APA imposes more serious limits on the use of those tools, at least when agencies are using them for purposes of evangelization, as opposed to the other legitimate purposes outlined above. If an agency is so aggressive in its efforts to use social media to generate support for positions advanced in a proposed rule that it appears that the agency does not wish to receive any input that opposes those positions, the agency risks having the rule it ultimately adopts invalidated on the grounds that the agency failed to provide an opportunity for comment on the rule as required by the APA, or that the agency's rule is arbitrary and capricious because the agency failed to consider relevant factors or alternatives to the final rule.

Except in limited situations, the APA requires agencies to provide notice and an opportunity for comment when they adopt legislative rules.³¹⁴ A series of decisions in the U.S. Court of Appeals for the District of Columbia Circuit has held that an agency does not provide an opportunity for comment on proposed rules if the agency does not remain "open-minded" about the issues raised and engage with the comments submitted during the comment period.³¹⁵ The "opportunity for comment" must be a meaningful opportunity for comment.³¹⁶ However, the fact that an agency does not change a rule in response to public comments does not necessarily indicate that the agency lacked the necessary open-mind towards comments.³¹⁷ In many of the cases where the D.C. Circuit found that an agency had not provided an "opportunity for comment" on a rule, the evidence that the court relied upon was the short time period between the end of the comment period and the adoption of the final rule or the agency's failure to provide challengers with information upon which the agency

³¹⁴ See 5 U.S.C. § 553(c) (2006).

³¹⁵ See, e.g., *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449 (D.C. Cir. 2011); *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *Advocates for Highway Auto Safety v. Federal Highway Administration*, 28 F.3d 1288, 1292 (D.C. Cir. 1994); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988).

³¹⁶ See *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d at 1101.

³¹⁷ See *Advocates for Highway Auto Safety v. Federal Highway Administration*, 28 F.3d at 1292.

based its rule, rather than statements made by the agency during the comment period.³¹⁸

While overly aggressive calls for public support of a rule during the comment period may be problematic, the fact that an agency makes comments during the comment period in support of its proposed rule does not necessarily indicate that the agency has pre-determined the outcome of the rulemaking. Agencies develop proposed rules after much deliberation and one would hope that they enter the process believing that they have proposed a rule that is consistent with their authority under the law and that rationally balances competing interests within the range of acceptable policy discretion granted to them by Congress. As the D.C. Circuit has noted, “In order to avoid trenching upon the agency’s policy prerogatives, ... we presume that policymakers approach their quasi-legislative task of rulemaking with an open mind - but not an empty one.”³¹⁹ Similarly, that court has held that “[a]n administrative official is presumed to be objective [and] mere proof that [he or] she has taken a public position, or has express strong views, or holds an underlying philosophy with respect to an issue in dispute cannot overcome that presumption.”³²⁰

Accordingly, positive statements by the agency that encourage support for a rule or input on a rule are generally acceptable. However, to the extent that an agency solicits support, through social media or otherwise, in a way that sends a message that the agency is only interested in input that advances the approach that they have suggested in a proposed rule, it is more likely that a court might find that the agency is not interested in engaging with the comments and is not maintaining an open mind during the rulemaking. Indeed, several Senators alleged that EPA’s social media campaign in the WOTUS rulemaking demonstrated that EPA had predetermined the outcome of the rulemaking and was not approaching the comment period with an open mind.³²¹ Members of the House of Representatives raised similar concerns when questioning EPA Administrator Gina McCarthy at a House Agriculture Committee hearing after the rule was finalized.³²²

³¹⁸ See, e.g., *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431 (D.C. Cir. 2011); *Wash. Gas Energy Services v. District of Columbia P.S.C.*, 893 F.2d 981 (D.C. Cir. 2006).

³¹⁹ See *PLMRS Narrowband Corp. v. F.C.C.*, 182 F.3d 995, 1002 (D.C. Cir. 1999); *Lead Indus. Ass’n v. E.P.A.*, 647 F.2d 1130, 1179 (D.C. Cir. 1980).

³²⁰ See *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980).

³²¹ See *Letter from 24 U.S. Senators*, *supra* note 75. The Senators wrote, “EPA’s social media advocacy removes any pretense that the agency will act as a fair and neutral arbiter during the rulemaking” and “EPA’s social media advocacy is a firm indicator that adverse comments will receive scant attention during the rulemaking period.” *Id.*

³²² See *Fong*, *supra* note 75.

Several of the complaints raised by the Senators addressed statements made by EPA in its #DitchTheMyth campaign.³²³ However, EPA’s statements were simply clarifications of mis-statements being advanced by the American Farm Bureau in its social media campaign.³²⁴ The mere fact that an agency disagrees with the mis-characterization of facts supporting a rule does not indicate that the agency is proceeding with a closed mind in the rulemaking. Arguably, as opponents of an agency’s rule are more aggressive in spreading disinformation about a proposed rule, an agency should be able to be more aggressive in providing accurate information without being accused of having pre-determined the outcome of the rulemaking.

The Senators also suggested that EPA’s Thunderclap campaign demonstrated that the agency had pre-determined the outcome of the rulemaking³²⁵, but the agency, in that message, was simply spreading the word that it was engaged in an important rulemaking to protect water quality and urging public participation in the process by directing interested persons to the agency’s website for the rule.³²⁶ EPA’s solicitation of support for the WOTUS rule came close to evangelization at the end of the process, when the agency pursued its #CleanWaterRules campaign, but those calls for support came after the comment period was closed and the agency was preparing to publish a final rule that included several changes that responded to public comments.³²⁷ Even if the agency had closed its mind at that time, it would have been appropriate for it to do so. Although EPA did not cross a line in its use of social media in the WOTUS rulemaking, agencies must be careful to avoid using those tools so aggressively that it sends the message that the agency will not consider opposing viewpoints in the rulemaking, or they risk having their rules invalidated for failure to provide an opportunity for comment under the APA.

In the same way that agency evangelization of a rule may lead to claims that the agency violated the procedures of the APA for notice and comment rulemaking, it may lead to claims that the agency’s final rule is arbitrary and capricious because the agency failed to consider, or foreclosed consideration of, relevant factors or alternatives. Under the APA, courts are empowered to strike down agency actions that are “arbitrary, capricious, or an abuse of discretion.”³²⁸ In general, the arbitrary and capricious standard is a fairly deferential standard and does not allow courts to substitute their judgment for the agency’s judgment.³²⁹ However, in certain circumstances, courts

³²³ See Letter from 24 U.S. Senators, *supra* note 75.

³²⁴ See *supra* notes 137-138, and accompanying text.

³²⁵ See Letter from 24 U.S. Senators, *supra* note 75.

³²⁶ See *supra* notes 134-136, and accompanying text.

³²⁷ See GAO Report, *supra* note 1, at 21.

³²⁸ See 5 U.S.C. § 706(2)(A) (2006).

³²⁹ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

apply a more rigorous form of arbitrary and capricious review, known as “hard look” review, to agency actions.³³⁰ Through “hard look” review, courts require agencies to thoroughly explain the reasoning for their decision and courts focus on, among other things, whether the agency has considered all of the relevant factors and alternatives in making its decision.³³¹ As the Supreme Court explained in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, an agency decision can be arbitrary under the test if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”³³² Professor Cass Sunstein suggests that courts use hard look review, in part, to assure that agencies allow effective participation in agency decisionmaking by affected interests.³³³

When an agency uses social media to evangelize a proposed rule in a way that suggests that the agency is not interested in receiving or considering input that varies from the approach taken by the agency in the proposal, challengers may try to use that as evidence that the agency is failing to consider an important aspect of the problem, is considering improper factors as the basis for its rule, or is attempting to prevent interested persons from participating in the decisionmaking process. A federal district court in Wyoming bought arguments like those when it ruled in favor of an industry trade group that challenged a National Park Service rule that limited snowmobile use in various National Parks.³³⁴ The court relied on several statements made by agency officials during the rulemaking process about the problems created by snowmobile use in the parks to find that the Park Service had acted arbitrarily and capriciously by making a predetermined political decision regarding the rule and failing to seriously consider the public comments submitted during the process.³³⁵

³³⁰ The term “hard look” review originated in opinions of Judge Harold Leventhal in the D.C. Circuit. See *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970); *Pikes Peak Broadcasting Co. v. F.C.C.*, 422 F.2d 671, 682 (D.C. Cir. 1969).

³³¹ See *Motor Vehicle Manufacturers Ass’n. v. State Farm Mutual Automobile Insurance Co.*, 463 US 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

³³² 463 U.S. at 43.

³³³ See Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 Sup. Ct. Rev. 177, 181.

³³⁴ See *International Snowmobile Manufacturers Association v. Norton*, 340 F.Supp. 1249 (D. Wyo. 2004).

³³⁵ *Id.* at 1260 - 1265.

Decisions like the Wyoming federal district court decision are, however, the exception rather than the norm. In most cases, courts will not invalidate an agency's rule simply because the agency makes strong statements supporting the rule during the comment period, as long as the agency demonstrates, in its explanation, that it considered all of the factors and alternatives suggested by the commenters and required by law, did not consider factors or alternatives which it was not authorized to consider, and reasonably weighed all of the evidence before it in finalizing its rule. To the extent that the statute under which the agency is promulgating the rule provides it with a range of discretion in making the rule, courts will not substitute their judgment for the agency if the agency has adequately explained the reasons for its decision.³³⁶

Nevertheless, if an agency is too aggressive in its social media campaign during a rulemaking, so that it appears that the agency has pre-determined the outcome of the rulemaking, courts will likely examine the agency's consideration of factors and alternatives, and its explanation for the final rule, much more closely, and may be more likely to require the agency to provide additional justification for its rule before upholding it.³³⁷ Courts may be similarly diligent in their review of agency rules if it appears that the agency used social networking to solicit one-sided input in support of the rule (contour the record).³³⁸

³³⁶ See Matthew C. Stephenson, *A Costly Signaling Theory of 'Hard Look' Judicial Review*, 58 Admin. L. Rev. 753, 758-760 (2006). While agencies are frequently motivated by political considerations in their exercise of discretion, they rarely disclose that as a factor in their decisionmaking. See Stephen M. Johnson, *Disclosing the President's Role in Rulemaking: A Critique of the Reform Proposals*, 60 Cath. U. L. Rev. 1003 (2011). In most cases, if the agency doesn't identify political considerations as a factor in its decisionmaking, courts will not reach the conclusion, as the federal district court in Wyoming did, that the agency was influenced by those factors.

³³⁷ Professor Matthew Stephenson suggests that courts should review, as part of the "hard look" review, the procedures that an agency uses to ensure that the information that it receives is reliable and the breadth of information that an agency considers in its decisionmaking. See Stephenson, *supra* note 336, at 745-750. Although courts have not, in the past, focused on those issues directly when applying the "hard look" analysis, if they did, it would be more likely that a court would find that an agency's social media campaign that discouraged public input or encouraged one-sided public input was arbitrary or capricious.

³³⁸ Using Professor Stephenson's analysis, a court might find that an agency that engages in information contouring is acting arbitrarily because it is limiting the information that it receives during the rulemaking process or because it hasn't taken steps to ensure that the information is reliable. *Id.*

VI. Conclusion

Social networking is ubiquitous in the United States. A 2015 Pew Research Center study found that almost two thirds of adults and ninety percent of adults under the age of thirty use social networking sites.³³⁹ Another Pew survey found that almost two thirds of Twitter and Facebook users said that they relied on those social networking platforms as a news source.³⁴⁰ It is not surprising, therefore, that government agencies are beginning to incorporate social media tools into the rulemaking process. As noted above, social networks can help agencies increase awareness that rules are being proposed, increase transparency in the rulemaking process and can play some role in educating the public about the rules, the rulemaking process, and the issues involved in proposed rules.³⁴¹ While agencies have not yet been able to use social networks to improve the quality of comments or access localized information, it may also be possible for them to do that through more targeted use of social media tools.³⁴²

As agencies increasingly use social networking to achieve those goals, though, they must be careful to avoid using the tools to evangelize their rules or to contour the record to support their rules. When they engage in such conduct, they risk having their rules overturned as arbitrary and capricious or procedurally invalid. In addition, they run the risk of alienating the public, or segments of the public, who may feel that the agency is simply using the rulemaking process to build popular support for the rule or to build a judicially defensible record for an outcome that was determined before the agency sought public input. In those cases, the agency risks sacrificing all of the benefits that are normally associated with public participation in a transparent, open rulemaking process, including public support and acceptance for the final rule, ease of enforcement and reduced judicial challenges.

Finally, when an agency is using social media to evangelize a rule or contour the record, it may be

³³⁹ See Pew Research Center, *Social Media Usage: 2005-2015*, (Oct. 8, 2015), available at: <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>

³⁴⁰ See Pew Research Center, *The Evolving Role of News on Twitter and Facebook*, (July 14, 2015), available at: <http://www.journalism.org/2015/07/14/the-evolving-role-of-news-on-twitter-and-facebook/>

³⁴¹ See *supra* Parts III.A. & B.

³⁴² See *supra* Part III.C. In its 2013 recommendations, ACUS suggests, “if an agency needs to reach an elusive audience or determine public preferences or reactions in order to develop an effective regulation, social media may enable the collection of information and data that are rarely reflected in traditional rulemaking comments.” See ACUS Recommendation 2013-5, *supra* note 15, at 76270.

tempted to engage in activities that constitute covert propaganda, self-aggrandizement, or grassroots lobbying, in violation of federal appropriations laws. While the penalties for those violations are minor, the negative publicity surrounding the violations can increase opposition to the rule.

For all of those reasons, agencies should follow the guidance of the Administrative Conference of the United States and develop a plan for using social media if it will be used in rulemaking. ACUS recognizes that social media may not be appropriate and productive in all rulemaking, but that it can be used to supplement or improve the traditional commenting process.³⁴³ Therefore, ACUS recommends, “Before using social media in connection with a particular rulemaking, agencies should identify the specific goals they expect to achieve through the use of social media and carefully consider the potential costs and benefits.”³⁴⁴ Further, ACUS recommends, “Agencies should use the social media tools that best fit their particular purposes and goals and should carefully consider how to effectively integrate those tools into the traditional rulemaking process.”³⁴⁵ Finally, ACUS recommends that “agencies must clearly communicate to the public how the social media discussion will be used in the rulemaking.”³⁴⁶

The strategic planning and use of social media by the CeRI in its Regulation Room program is a model for federal agencies.³⁴⁷ EPA’s experience with the WOTUS rulemaking, on the other hand, demonstrates that the agency must work a little harder to implement ACUS’ recommendations. While EPA has a social media policy, a policy on using social media to communicate with the public, Facebook guidance and Twitter guidance, the agency does not have a policy that directly addresses the appropriate use of social media in rulemaking. In order to use social media effectively and appropriately in the rulemaking process, EPA, and federal agencies in general, should adopt and utilize policies that implement ACUS’ recommendations before embarking on major social media campaigns in future rulemakings.

³⁴³ *Id.*

³⁴⁴ *See* ACUS Recommendation 2013-5, *supra* note 15, ¶ 8.

³⁴⁵ *Id.* ¶ 9.

³⁴⁶ *Id.* at 76270.

³⁴⁷ *See supra* notes 164-168, 193-198, and accompanying text.

#BetterRules: The Appropriate Use of Social Media in Rulemaking

Stephen M. Johnson¹

¹ Walter F. George Professor of Law, Mercer University Law School. B.S., J.D. Villanova University, LL.M. George Washington University School of Law.