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## Public Comments Run Amok: Reforming the Notice and Comment Process to Help Reduce the Negative Effects of Mass and Fake Comments

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## **Public Comments Run Amok: Reforming the Notice and Comment Process to Help Reduce the Negative Effects of Mass and Fake Comments**

GWENDOLYN MCKEE SAVITZ<sup>†</sup>

### ABSTRACT

The Administrative Procedure Act requires agencies to give the public an opportunity to submit comments in response to proposed regulations. When the proposed regulations address particularly hot-button issues, agencies can be flooded with millions of comments from the public in response. This most memorably occurred twice when John Oliver exhorted viewers of his show to write in to protect net neutrality. The vast majority of the millions of comments submitted in both processes were duplicative, providing no benefit for the agency; sent in under the name of a person who did not submit them; or both. If the vast majority of the comments coming in are essentially useless, it is time to rethink the process.

This Article argues that two simple fixes could help solve many of the problems caused by these duplicative and/or falsely attributed comments: (1) The submission process should be restructured so that individuals sign on to the comments of other individuals rather than submitting their own unique comment, and (2) Commentors should be allowed the option of verifying their identity when submitting a comment. These would help reduce the harm caused by both types of these comments and would be expected to be embraced by all affected interests: the agencies, the public, and the third-party organizations driving the proliferation of mass comments.

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## INTRODUCTION

The adage to “vote early and vote often” is understood as completely antithetical to the American concept of democracy.<sup>1</sup> But it is alive and well in comments to proposed administrative regulations, where individuals sometimes submit dozens or even hundreds of identical comments to an agency, presumably under the mistaken belief that it is the number of “votes” that will change the agency’s final rule. These submissions need not even be in the name of the person actually submitting them, since there is no verification of the identity of commentors. These related issues, mass comments and fake comments, have become a plague on the administrative state.

The prevalence of these issues demonstrates general public confusion about the role of comments in the administrative process. Agencies are only required to consider “substantive” comments—comments that bring to light issues the agency has not considered or not fully understood. Thus, the internet-driven phenomenon of mass participation is not only problematic for the rule-making agencies, which have to process an avalanche of nearly identical submitted comments, but for the public, which may believe that democracy is undermined when “voters” have spoken overwhelmingly in favor of the position that is ultimately rejected by the agency. The public can become even more concerned when fake comments are discovered so it appears that someone was stuffing the ballot box.

This Article argues that relatively simple alterations to the comment system would ameliorate these problems. Specifically, that the comment submissions process be revised so that individuals can sign on to a comment previously submitted by another individual (or interest group), and so that individuals can choose to verify their identity. These changes would provide the following benefits: 1. Decrease the review burden on agencies by making additions to mass comments coherent on their own and reducing the incentive for fake comments altogether. 2. Facilitate a shift in public understanding of the rule-making process. 3. Make it easier for stakeholders to see the variety of comments submitted to the agency. 4. Improve public trust in the rulemaking process. 5. Protect the individuals currently targeted in fake comments submitted to the agencies.

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1. DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* 19 (2004) (“[F]or years the mantra of Chicago politics.”)

This Article begins in Part I by briefly describing the history of the notice and comment process, including the ever-present but increasing role of mass comments, and the new plague of fake comments. In Part II it then describes in detail how these mass and fake comments affect each of the three interests: the agencies, the public, and the third-party interest groups. Finally, in Part III, it describes the related solutions, first for addressing mass comments and then for addressing fake comments, before briefly concluding.

#### I. A BRIEF OVERVIEW AND HISTORY OF NOTICE AND COMMENT RULEMAKING

Since 1946, when the Administrative Procedure Act (APA)<sup>2</sup> was passed, two options have been available for agency rulemaking. The first option is formal rulemaking.<sup>3</sup> Formal rulemaking is a trial-like process where interested parties are allowed to cross-examine the witnesses for all other interested parties at live hearings. Functionally, it results in a trial-like process where there are not simply a plaintiff and a defendant, but a plethora of parties, all trying to make their own points and cross-examining the witnesses of all the other parties. In retrospect, it should be of little surprise that formal rulemaking has proven virtually unworkable.<sup>4</sup>

The second option is informal rulemaking,<sup>5</sup> more often called notice and comment rulemaking. Informal rulemaking is informal in the same

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2. Codified starting at 5 U.S.C. § 551.

3. See 5 U.S.C. §§ 556–557. This process is required in all instances “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing.” 5 U.S.C. § 553.

4. One particularly notorious example of this practice was a years-long formal rulemaking process conducted by the FDA intended primarily to raise the required peanut content of peanut butter less than three percentage points. See *Ass’n of Nat’l Advertisers Inc. v. FTC*, 627 F.2d 1151, 1167 n.34 (D.C. Cir. 1979) *cert. denied*, 447 U.S. 921 (1980) (quoting a letter from then Chairman Robert Anthony to Congressman Staggers describing the lengthy rulemaking session and stating “a hearing transcript of over 7,700 pages has been devoted exclusively to the question whether peanut butter should consist of 87 ½ percent or 90 percent peanuts”); see also Robert W. Hamilton, *Rulemaking on A Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1142–45 (1972) (describing the proceeding in slightly greater depth). Food identity standards can now effectively be locked in place by requiring that they be changed only through formal rulemaking. See, e.g., 21 U.S.C. § 371(e) (requiring, among other things, that the standards of identity for all dairy products can be changed only through formal rulemaking).

5. 5 U.S.C. § 553.

way that black tie is informal. It's not, unless one compares it to white tie.<sup>6</sup> White tie here is equivalent to formal rulemaking both in its increased level of formality and its rarity in modern society.

Notice and comment rulemaking relies on the same bedrock principles of American law that formal rulemaking does: notice<sup>7</sup> and the opportunity to intervene when interests are at stake.<sup>8</sup>

In notice and comment rulemaking, this opportunity to intervene occurs through the comment system. When an agency initiates a rulemaking by publishing the proposed rule in the Federal Register, the public is given an opportunity to submit comments on the proposed rule. The agency must then review all substantive comments and respond to them when publishing the final rule.<sup>9</sup> The basic requirements of this process have not changed over time, but the means of accomplishing them have.

In the pre-internet era, notice was provided through the Federal Register. The Federal Register predates the passage of the APA<sup>10</sup> and serves as official notice for both executive and administrative action.<sup>11</sup>

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6. NICHOLAS STOREY, *HISTORY OF MEN'S FASHION: WHAT THE WELL-DRESSED MAN IS WEARING* 85 (2008) (describing the difference between white tie and black tie); *cf.* JESSICA FELLOWES, *THE WORLD OF DOWNTON ABBEY* 146, 149 (2011) (stating that the upper class only began to wear black tie in place of white tie to dinner around the end of the First World War, and even then black tie was considered "very (to some uncomfortably) informal" (quoting Julian Fellowes)).

7. Notice is a fundamental component of the American legal system. It is the reason for the prohibition against retroactive laws. U.S. CONST. art. I, § 9, cl. 3 (prohibiting all "ex post facto Law[s]"). It is also the reason why a defendant in a lawsuit must be served notice of the lawsuit. *See* *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 545 (2010) (analyzing whether a corporate entity related to the initial defendant should be held to have sufficient constructive notice of a lawsuit to get around the delay in formally serving the complaint).

8. *Cf.* FED. R. CIV. P. 24(a) (governing when an individual may intervene as a third party in a case as of right).

9. *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) ("An agency must also demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant.").

10. Amy Bunk, *Federal Register* 101, 67 PROCEEDINGS (SPRING) 55, 55 (2010).

11. 44 U.S.C. § 1507 (stating that publication in the Federal Register creates a rebuttable presumption that the statutory requirements of notice have been fulfilled); *Fed. Crop Ins. v. Merrill*, 332 U.S. 380, 384 (1947) (holding that farmers who were incorrectly told by an employee of the Federal Crop Insurance Corporation that they could reseed their wheat and still be eligible for crop insurance were in fact not eligible for crop insurance since a regulation prohibiting eligibility for reseeding had been published in the Federal Register). This is despite the generally understood fact that most people are likely not even aware of its existence. *See* JAMES T. O'REILLY, *REGULATORY MANUAL SERIES: ADMINISTRATIVE*

Physical copies of the Federal Register were (and still are) available in a limited number of locations throughout the country for viewing by interested parties.<sup>12</sup> These locations included law libraries and federal depository libraries.<sup>13</sup>

In practice, monitoring of the Federal Register was primarily done by those parties with a broad interest in particular areas of law. An environmental law firm, for instance, would monitor the Federal Register to stay apprised of all relevant action by the EPA. The firm, in turn, would inform its clients of any developments. Since one needed to be physically present to read the paper copy of the Federal Register, monitoring it required both time and physical access.<sup>14</sup> Comments were sent by mail to the appropriate agency, which processed them and retained them in a single physical location for examination by other interested parties.<sup>15</sup>

The Federal Register was initially moved online in 1994,<sup>16</sup> and found its current online location at [federalregister.gov](http://federalregister.gov) in 2003.<sup>17</sup> While this eliminated the need to travel to a discrete physical location to view

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RULEMAKING 1983 p.354 n.15 (“In actual experience, the Federal Register is not widely read.”).

12. In many instances it was also possible to get copies of complete documents from the Federal Register (for a fee) from the government through the mail, although one would need to know about the proposed rule and the appropriate fee in order to do so. Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 1995 Rates, 59 Fed. Reg. 45330 (Sept. 1, 1994) (to be codified at 42 C.F.R. pts. 412, 413, 466, 482, 485, 489).

13. *Id.* (stating that interested parties could order a copy of the relevant pages for six dollars or by photocopying “the Federal Register document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the Federal Register”).

14. This was difficult to do for many people, even ones who were actively trying to monitor it. *C.f.* Former Emps. of Bass Enter.s Prod. Co. v. United States, 688 F. Supp. 625, 628 (Ct. Int’l Trade 1988) (“Plaintiffs state that they live in an area of west Texas where there are two law libraries, one county library, and one junior college with a library, but that none of the four libraries subscribe to the Federal Register.”).

15. MICHAEL HERZ, ADMIN. CONF. OF THE U.S., USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS 9 (2013), <https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf>.

16. On June 8, 1994, issues of the Federal Register dating back to January 3, 1994, were placed online “on a newly inaugurated GPO Access service.” *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*, OFF. FED. REG. 15 (March 14, 2006) <http://www.archives.gov/federal-register/the-federal-register/history.pdf>.

17. *The eRulemaking Initiative*, REGULATIONS.GOV, <https://test.regulations.gov/about> Program (last visited June 19, 2019).

agency publications, it did not reduce the time or sophistication required to understand the documents.

Nevertheless, the move online was greeted with great excitement in the early days of the internet revolution. As commenting also came online there was speculation that the unique nature of the internet would allow collaborative commenting, where individuals with differing viewpoints on a rule would learn from each other in civilized discussions that would provide the agency with nuanced comments and greater buy-in from the public.<sup>18</sup>

That did not happen.<sup>19</sup> The shift online changed the physical way in which people were commenting on proposed rules, but not the nature of the comments being provided or the singularly reactive nature of the majority of the comments (as opposed to the reasoned arguments hoped for). The internet also did not create the mass comment phenomenon, but the ease of internet commenting has enabled citizen participation at an unprecedented scale.<sup>20</sup> These mass comments, and their effects on different constituencies, are discussed in the next section.

#### A. *The Rise of Mass Comments*

Mass comment campaigns are not a new phenomenon. Prior to the internet they were generally done with form letters or postcards.<sup>21</sup> While the internet did not create these comments, however, it did accelerate

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18. See Stephen Zavestoski et al., *Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking*, 31 SCI., TECH. & HUM. VALUES 383, 392 (2006) (referencing others arguing that the internet would enable a new form of dialogue).

19. Stuart W. Shulman, *The Internet Still Might (but Probably Won't) Change Everything*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 111, 115 (2005) [hereinafter *The Internet Still Might*] (“Six years later, it remains uncertain whether the technology has delivered many benefits beyond the periodic spike in public participation and education fostered by organized interest groups that have traded in their postcards for the lure of the mass e-mail and web site-driven awareness campaigns.”).

20. Transcript of Symposium, MASS AND FAKE COMMENTS IN AGENCY RULEMAKING, ADMIN. CONF. OF THE U.S. & ADMIN. L. REV. 93 (2018), <https://www.acus.gov/transcript/mass-and-fake-comments-agency-rulemaking-transcript> [hereinafter Transcript] (describing how the internet changed the raw number of comments, but not the nature of mass comments. “That’s always been the case. It was the case in the early years of rulemaking. It was the case in the old paper-based days of rulemaking. I think what we are seeing is the increase in the size of the bounce.”).

21. Zavestoski et al., *supra* note 18, at 387 (2006) (discussing a rulemaking that received over one million “postcards and other form letters”).

their rise in a couple different ways. Allowing comments to be submitted online—first through email and then through a dedicated federal website, [regulations.gov](https://www.regulations.gov)—reduced the cost of submitting a comment from the price of a stamp down to zero. Certainly many individuals commenting would have been equally willing to comment for the cost of a stamp, but there are also likely many more who would not comment as frequently if doing so required the price of a stamp or the effort to add the stamp and mail a letter.<sup>22</sup>

But the true growth in comments is likely driven by the outside organizations that would have traditionally been responsible for organizing these postcard or form letter campaigns. These organizations may have had an incentive to drive the mass comments merely in a (misguided) belief that doing so would significantly change the agency outcome. However, another factor has played a large role in this trend. The ability of third parties to submit comments directly to the docket of a proposed rule<sup>23</sup> has enabled them to turn the comment process into an opportunity to recruit interested members of the public, solicit monetary donations, and show their strength, as discussed further in Section II.C.2.

#### B. *The Rise of Fake Comments*

Fake comments can be considered any comment where the individual does not specifically elect to remain anonymous and instead uses another's name. In contrast to mass comments, fake comments have only become a major concern recently. Presumably comments with a fraudulent identity were being submitted to some extent all along, but the rise in internet-submitted mass comments seems to have dramatically accelerated the trend. Most people learned about the problem with fake comments for the first time after the second net neutrality rulemaking, when millions of fake comments were found to have been submitted,<sup>24</sup> but they did not start there, and there are different reasons a comment can be considered fake.

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22. This does not, however, necessarily mean that the solution is to charge the cost of a stamp. *See infra* note 102.

23. *Public notice and comment rulemaking*, ORG. FOR ECON. COOP. & DEV., <https://www.oecd.org/gov/regulatory-policy/USA-Public-Notice-and-Comment.pdf> (last visited April 17, 2021) (“The eRulemaking program has also developed a commenting Application Programming Interface (API) that allows partners to submit comments to agencies through their own applications and websites.”).

24. Nicholas Confessore, *New York Attorney General Expands Inquiry Into Net Neutrality Comments*, N.Y. TIMES, Oct. 17, 2018, at B3.

Sometimes the name chosen is clearly fake. Mickey Mouse, for instance, commented on multiple proposed rules in 2016, including Registration and Marking Requirements for Small Unmanned Aircraft,<sup>25</sup> Manufactured Home Procedural and Enforcement Regulations; Revision of Exemption for Recreational Vehicles,<sup>26</sup> and Federal Motor Vehicle Safety Standards; Federal Motor Carrier Safety Regulations: Parts and Accessories Necessary for Safe Operation; Speed Limiting Devices.<sup>27</sup> With a well-known fake name, such a comment can more accurately be interpreted as anonymous. And the comments submitted to each of those rules (available in full in the footnotes) do appear to potentially reflect the heartfelt beliefs of the submitters. These are the easiest to discover, but they are also the least likely to be problematic, since no individual will be hurt by the submission and there are no claimed expertise or group membership.<sup>28</sup>

More problematic are comments submitted in bulk using information obtained on the dark web.<sup>29</sup> These can provide the agency with a distorted view of the true public opinion on an issue, and the individuals involved could face potential embarrassment and frustration if they were to learn their stolen information was used to submit the comment.

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25. Mickey Mouse, Comment Post on Registration and Marking Requirements for Small Unmanned Aircraft (Jan. 20, 2016), <https://www.regulations.gov/document?D=FAA-2015-7396-5294> (“Anyone with a brain knows you’re looking to make examples of people to flex your muscle, it’s just a matter of time. I called the Heliport within 4.4 miles of my house and they had NO CLUE WHAT THE HELL I WAS TAIKING ABOUT. I for one am not letting you screw my life up because of a toy drone. Have fun screwing over people and check out eBay, I will give the dame thing away before I let you fine me or put me in jail.” (errors and emphasis in original)).

26. Mickey Mouse, Comment Post on Manufactured Home Procedural and Enforcement Regulations; Revision of Exemption for Recreational Vehicles (Feb. 9, 2016), <https://www.regulations.gov/document?D=HUD-2016-0013-4753> (“It is amazing to me that the government has to go after those who need this and are not hurting any one. Just because the government can’t mange their funds does not give them the right to attach those who don’t need this regulation. Maybe the politicians should take a look at their pocket and leave those who need this ALONE !!” (errors and emphasis in original)).

27. Mickey Mouse, Comment Post on Federal Motor Vehicle Safety Standards; Federal Motor Carrier Safety Regulations: Parts and Accessories Necessary for Safe Operation; Speed Limiting Devices (Nov. 25, 2016), <https://www.regulations.gov/document?D=FMCSA-2014-0083-3831> (“This the dumbest rule ever it unsafe u r probably to dumb to realize it but it will drive up freight costs but what do u care” (errors in original)).

28. See *infra* notes 57–58 and accompanying text.

29. See *infra* notes 68–70 and accompanying text.

From an agency perspective, identical comments submitted under a variety of names are unlikely to significantly alter the outcome, as discussed in Section II.A.1, nor will they consume a significant amount of agency time.

However, it is also possible for companies to use machine learning and natural language processing to create individual unique comments, each of which can then be submitted under a different false name.<sup>30</sup> These comments can be sophisticated enough, at least in terms of language, that they cannot immediately be identified as machine created.<sup>31</sup> While substantively these are also unlikely to influence the final outcome, they can potentially require significantly more agency resources for what is not a meaningful contribution to the agency's understanding of the issue.

Finally, the most problematic fake comments are those where a specific individual has been targeted, either to take advantage of some aspect of their identity (like pretending to be a doctor) or to personally hurt them by presenting the opposite of their true view because they have been involved in causes related to the rulemaking.

Presenting information to the agency that is falsely claimed to be from a given source could impact the final rule, as discussed in Section II.A.2, but in most instances the impact of this type of comment will be felt most acutely by those who have been impersonated, as discussed further in Section II.B.2.

## II. MASS AND FAKE COMMENTS CAUSE PROBLEMS FOR EVERYONE

This part analyzes the effects of both mass and fake comments on the three interest groups primarily affected by them: the agencies, members of the public, and the third-party interest groups that drive the mass comment campaigns.

### A. *How Agencies are Affected by Mass and Fake Comments*

These problematic comments affect agencies in multiple ways. At an initial level, they demonstrate a lack of understanding that the general public has for the way the agency operates, which can impact the

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30. See Jeremy Singer-Vine & Kevin Collier, *Political Operatives are Faking Voter Outrage with Millions of Made-Up Comments to Benefit the Rich and Powerful*, BUZZFEED (Oct. 3, 2019, 9:32 AM) <https://www.buzzfeednews.com/article/jsvine/net-neutrality-fcc-fake-comments-impersonation>.

31. See *infra* note 54 for examples of a simplified form.

reception of the resulting rule, but the problems go deeper than that.

### 1. The Impact that Mass Comments Have on Agencies

The APA requires agencies to consider substantive comments.<sup>32</sup> Mass comments are generally not substantive because the arguments in mass comments are primarily policy-based, the least useful type of comment from the agency perspective.<sup>33</sup> As mass comments are not substantive, they are also often not responded to in the preamble to final rules or even significantly considered when determining the final rule.<sup>34</sup> They make little difference to the final outcome because the primary purpose of commenting is to bring to the agency's attention issues it has not considered or not fully understood.<sup>35</sup> The most useful comments for the agency, which do things like compare the proposed regulatory text with the text of the authorizing statute,<sup>36</sup> require legal sophistication that

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32. *Am. Great Lakes Ports Ass'n v. Zukunft*, 296 F. Supp. 3d 27, 53 (D.D.C. 2017) (explaining how the Coast Guard is required under the APA to "respond in a reasoned manner to significant comments received." But that this "has never been interpreted to require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments, no matter how insubstantial." This is because "comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern." (first quoting *U.S. Satellite Broad. Co. v. FCC*, 740 F.2d 1177, 1188 (D.C. Cir. 1984); then quoting *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984); and then quoting *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973))).

33. *The Internet Still Might*, *supra* note 19, at 133 ("Agency personnel have stated consistently that whether it is 50 or 500,000 identical or similar comments, the value added to the rulemaking process is considerably less than one careful, specific, substantive comment.").

34. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1365 n.125 (2011) (noting that in the final version of the "Clean Air Mercury Rule" the EPA only addressed what it called "[s]ome of the more significant comments" in the preamble to the rule).

35. *Public notice and comment rulemaking*, *supra* note 23 ("The purposes of allowing public comment are (1) to provide the agency with information that will increase the agency's knowledge of the subject matter of the proposed rule and (2) to permit the public to challenge the factual assumptions, analyses and tentative conclusions underlying the proposed rule and to show the agency the respects in which it might be in error.").

36. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 478 (2005) (finding that in the three rulemakings studied, "three sophistication variables seem to have the strongest effect: (a) whether the comment distinguished the statutory requirement from the content of the regulation, (b) whether the comment suggested an explicit change in the proposed regulatory rule, and (b) whether the comment provided a page or more of legal or empirical background analysis. Distinguishing between the statutory requirement and what the regulation provides is associated with a 46-fold increase in the odds that a comment will contain an accepted suggestion.").

would not be expected from the average American.<sup>37</sup> With this understanding of the comment process, identical mass comments are pointless since they are by definition providing only the same information.

Mass comments are nevertheless a major proportion of the comments submitted and even dockets receiving relatively few total comments can still receive identical submissions.<sup>38</sup> The primary issue for the agency, then, is simply managing these comments. When comments were physically mailed in, every comment had to be physically dealt with. There was some uncertainty initially when comments began to arrive electronically whether the agency was similarly required to physically handle each individual submission, so early comments that had been emailed in were often printed and sorted exactly as the paper submissions had been.<sup>39</sup>

But volume alone is not necessarily a significant problem from the agency's perspective. Comments no longer need to be printed in physical form and computers can easily identify identical comments and flag them as such, ensuring that significant agency time is not wasted reviewing identical comments.<sup>40</sup>

Perhaps in response to this, many organizations recommend that commentors personalize their submissions, claiming that it will make the

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37. Cynthia R. Farina et. al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 438 [hereinafter *Rulemaking 2.0*] (noting that the reading level of the average American is only at the eighth-grade level, while the two proposed regulations they examined, despite being "(in [their] judgment) clearly organized, well-written and carefully explained" nevertheless received reading scores equivalent to a college or even graduate school education).

38. For instance, the docket related to Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska, received twenty comments, two of which were identical. Paola Castano & Elizabeth Nugent, Comment Posts on Proposed Rule to Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska (Apr. 1, 2019), <https://www.regulations.gov/document/NOAA-NMFS-2019-0026-0001/comment>.

39. Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23, 46 (2009) [hereinafter *The Case Against Mass E-mails*] ("Indeed all of the comments, dup[licates] and non-dup[licates] alike, were printed on paper (the legal record at EPA) and reportedly sorted by the shape of the words on the page by a team of 15 staffers making piles.").

40. Transcript, *supra* note 20, at 38–39 (stating that the primary purpose of the de-duplication tool is to enable faster processing of comments); *see also The Case Against Mass E-mails, supra* note 39, at 38.

comment more meaningful.<sup>41</sup> This push then results in many mass comments that contain some unique portions in addition to the mass text. But even though the agency can identify highly similar comments, using the same de-duplication tool used to identify identical comments,<sup>42</sup> similar comments can still require additional review by a human.

This requirement that the comment be read by someone, however, does not automatically mean the comment is being read by employees of the agency responsible for the relevant rule. The volume of comments submitted has in some cases required agencies to hire contractors specifically to deal with the comments.<sup>43</sup> These contractors then submit summaries to the agency and the agency directly deals only with the summaries.<sup>44</sup>

Mass comments from an agency's perspective are thus primarily a nuisance that must be dealt with. A nuisance no doubt caused, at least in part, by a persistent belief among members of the public that comments submitted are essentially votes for a particular policy that will in some way bind the agency to go along with the publicly expressed preference or at least that an avalanche of comments in favor of one outcome on a particular issue will force the agency to follow the public will.<sup>45</sup>

But while many outside observers are concerned by the increasing numbers of proposed regulations generating mass comments,<sup>46</sup> there is

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41. *E.g.*, *Don't Let President Trump's EPA Put Drinking Water At Risk*, SIERRA CLUB <https://addup.sierraclub.org/campaigns/dont-let-president-trumps-epa-put-drinking-water-at-risk> (proceeding the comment submission form with the note "Personal messages make a big impact on decision makers. Please add a note about why this issue matters to you!").

42. Transcript, *supra* note 20, at 82 (explaining how the tool can be set to flag comments with specific levels of similarity, such as 70% similar).

43. Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 901 (2011).

44. Michael A. Livermore et al., *Computationally Assisted Regulatory Participation*, 93 NOTRE DAME L. REV. 977, 1016 (2018) (noting that the process is also "potentially error prone because it would be inordinately expensive to hire seasoned experts to carry out this task").

45. *See Rulemaking 2.0*, *supra* note 37, at 431–32 (2011) (describing the two cultural patterns that could lead the public to feel the total number of comments submitted rather than the substance of the comments was important. "The first is the popular equation in the United States of democratic voice with casting a vote . . . . The second pattern is from online culture: Voting is how the Web works. Ranking or rating—by assigning stars, sliding a bar, or simply clicking 'Like' or 'Recommend'—is a staple of Web 2.0 interactivity.").

46. This issue is a significant enough concern to have become one of the two issues discussed at a recent symposium. *See generally* Transcript, *supra* note 20. *See also The Case Against Mass E-mails*, *supra* note 39, at 35 (deeming people who submit more than one

also broad support for allowing comments made by the general public.<sup>47</sup> Public comments are viewed as one means through which agencies are held accountable to the public.<sup>48</sup> As agencies are only politically accountable indirectly, through the chain of command to the executive<sup>49</sup> or through the oversight and purse string power of Congress,<sup>50</sup> this is one way that the public can make its views known to the agency.

In this way of thinking, agencies, even if they do not act on the mass comments, are made aware of the sensitivity of the issue and the potential political repercussions.<sup>51</sup> The mere fact that an issue has generated mass comments can alert the agency to potential future problems and potentially prompt major changes to the final rule, as occurred with the organic regulations (one of the rare times comments seem to have had a significant effect on the final rule).<sup>52</sup>

The public confusion over the true role of comments, however, can impact how the agency is viewed by the public. High profile rulemakings in which many, if not most, of the comments submitted go against the direction chosen by the agency can make the public feel that they are at

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comment “Plebers” as they were “contributing to the plebiscitary notion of electronic rulemaking by sending two or more e-mails”).

47. See Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361–62 (1972) (describing some of the benefits of public participation in the administrative process.) *But see* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174–75 (1997) (describing the interest in public participation in administrative law as “somewhat of a fetish”).

48. Rossi, *supra* note 47, at 182 (“[I]mmediate participation in the decisionmaking process before an agency takes action also serves as a type of informal oversight, ensuring that the agency is accountable to the public at large for its decisions.”).

49. See Mark Seidenfeld, *The Role of Politics in A Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1411–16 (2013) (describing the presidential control model for administrative action).

50. *Id.* at 1409–11.

51. Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 138 (2012) (claiming that even the mere mention of mass comments should be enough to put high level presidential appointees “on notice that the rulemaking has generated the level of advocacy/interest group support or opposition likely to draw the attention of White House staff, members of Congress, and the media”).

52. Zavestoski et al., *supra* note 18, at 385–86 (2006) (describing how the USDA reversed the proposed definition of organic food to one that did not allow “genetically modified organisms . . . , irradiated food, and food grown using biosolids” in response to public comments that were vehemently against such inclusions despite having no scientific evidence of harm from any of the practices).

the mercy of a dictatorship rather than participants in a marvelous democratic process. The problem is even worse when the comments have not been submitted by real people.

## 2. The Impact that Fake Comments Have on Agencies

To a large extent, agencies deal with fake comments the same way as mass comments, particularly when the comments are indeed identical, and are merely submitted in the names of individuals who did not in fact submit them. Since the total number of comments submitted in a given direction do not affect the final agency result in any meaningful way,<sup>53</sup> the validity of the given identity of a single submitter will have even less effect on the final agency result.

The issue becomes more concerning for what might be termed deep fake comments, comments that are not merely submitted in the names of individuals who did not submit them but are generated through background processing to make it look like they are in fact original comments.<sup>54</sup>

Because agencies must respond to any significant comments, these

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53. U.S. Cellular Corp. v. FCC, 254 F.3d 78, 87 (D.C. Cir. 2001) (“[T]he Commission has no obligation to take the approach advocated by the largest number of commenters; indeed, the Commission may adopt a course endorsed by no commenter. The Commission’s only responsibilities are to respond to comments, and to choose a reasonable approach backed up by record evidence.” (citations omitted)).

54. An early type of natural language generator was used on some of the net neutrality comments. BuzzFeed reverse engineered the generator, which worked by creating a basic comment with more than 30 open fields, each of which could be filled by a randomly selected option from a number of pre-set phrases or words. Two examples of comments generated from the BuzzFeed simulator are (exactly as provided):

FCC commissioners, I’m very worried about Internet regulation and net neutrality. I want to demand the commissioners to reverse Obama’s decision to take over the Internet. People like me, rather than unelected bureaucrats, should be able to enjoy the services they want. Obama’s decision to take over the Internet is a distortion of net neutrality. It ended a market-based approach that functioned remarkably well for many years with both parties’ backing.

and

Dear Mr. Pai, I’m contacting you about net neutrality and Title II. I want to implore the commission to reverse the Obama/Wheeler order to regulate broadband. Citizens, rather than so-called experts, should be able to buy the services we prefer. The Obama/Wheeler order to regulate broadband is an exploitation of net neutrality. It disrupted a pro-consumer approach that performed exceptionally well for decades with Republican and Democrat backing.

The simulator is available in Singer-Vine & Collier, *supra* note 30.

deep fakes must be reviewed with the same care as the mass comments that individuals have painstakingly personalized, to ensure that the comment does not somehow identify a meaningful argument the agency has not otherwise considered.<sup>55</sup> Given the ease with which these fakes can be produced, the cost to the agency could be quite significant, even if the impact to the final agency rule would be virtually nonexistent in most cases.

There are comments, however, where the identity of the individual commenting could make a big difference. A doctor writing about difficulty prescribing a desired name-brand medication due to agency mandated bureaucratic steps should be viewed differently than a drug company pretending to be a doctor writing in to complain about the same issue. And it is not merely cases where the commentor claims specific credentials where this makes a difference; it can also be a claimed personal identity, or specific situational knowledge or interests,<sup>56</sup> such as a rancher commenting on grazing restrictions<sup>57</sup> or a football fan concerned about what games are shown on local television.<sup>58</sup>

In any of these situations, how an agency should view the comment depends on whether the person making it in fact has the claimed expertise or characteristics. While a single comment of this type would be unlikely to impact the agency choice of action, fake comments compound this problem by significantly increasing the possibility of broad-scale comment manipulation. These types of comments, where the identity of the commentor does make a difference because of a personal connection

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55. See Transcript, *supra* note 20, at 32–33 (reminding the audience that the purpose of public comments “was to find out if there were some inconsistencies or issues that had been forgotten or just not properly addressed in the proposed rule”).

56. See *id.* at 61 (“[Y]ou look at the Coast Guard rule on anchorage locations, and the person says: I use that. I use it in this way and this is why I boat this way in that location. That comment is very useful, because it is personal experience that is going to help the agency understand the impact of the rule.”).

57. *Id.* at 102–03 (using the examples of a rancher explaining how they use a river and a consumer saying which label style they prefer as situations where the identity of the commentor makes a difference to how the agency should interpret the comment).

58. When the FCC was considering rescinding the blackout rule, a rule that let NFL teams prevent games from being shown on local television if a sufficient number of seats to the game itself had not been sold, a number of fake comments were sent by supposed football fans begging the FCC to keep the rule in place. These “fans” included fake names like Bilbo Baggins as well as the names and addresses of real people who denied submitting the comments. James V. Grimaldi & Paul Overberg, *Another NFL Problem: Fake Fans Lobbying the FCC—‘Luke Skawalker,’ others send letters pleading to keep blackout rule*, WALL ST. J., Sept. 8, 2018, at A1.

to the subject matter, are also likely to be the most useful type of comment submitted by members of the general public, since they provide the agency with insight into the effect of the regulation on a specific subgroup it might not otherwise easily learn about.

One proposed solution has been to have the agency remove the fake comments. However, agencies have expressed concern that removing a fake comment (and thereby removing the argument made in that comment, and so not considering it) could subject the agency to remand on judicial review. This has led to an agency refusal to remove comments identified as fraudulent. There has been little discussion of concern about remand over consideration of comments fraudulently attributed to someone with specific situational experience.

The harm fake comments do to the general credibility of the agency is equally problematic. Given the persistent belief among the public that comments are in a sense votes, the legitimacy of the entire process itself can be questioned when it appears that the agency has followed the tenor of demonstrably fake comments—that the rule appears to have been decided by ballot stuffing.

True election fraud in the United States is vanishingly small, but it remains a persistent concern among some segments of the population.<sup>59</sup> This likely contributed to the particular outrage with which the news of fraudulent comments in the net neutrality rulemaking was greeted.<sup>60</sup>

Fake comments significantly impact the public's view of the legitimacy of agency action. Even for those who understand how the process works, it can be frustrating to feel that their single, heartfelt comment has been drowned in a sea of fake comments.<sup>61</sup> And this does not even address the harm to individuals whose names were fraudulently used to submit comments, an issue addressed in Section II.B.2.

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59. Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, NEWS21 (Aug. 12, 2012, 10:39 AM) <https://votingrights.news21.com/article/election-fraud/> (relaying the results of a study conducted by New21 that found the rate of voter fraud to be “infinitesimal”); *see also* Opinion, *Election Fraud the G.O.P. Won't Stress About: North Carolina Officials Present Evidence a Republican Operative Stole a House Race*, N.Y. TIMES, Feb. 20, 2019, at A26 (“For years, Republicans have been in a tizzy over voter fraud by noncitizens, which they claim is eating away at American democracy and helping Democrats.”).

60. *See* Singer-Vine & Collier, *supra* note 30.

61. *Cf. id.* (“It’s too easy to post fraudulent comments . . . . It gave us this impression that it didn’t matter how we actually felt.” (quoting a woman whose information was used in a fraudulent comment)).

## B. *How the Public is Affected by Mass and Fake Comments*

It is not only the general public opinion of agency action that is affected by mass and fake comments—individual members of the public are hurt by them as well.

### 1. The Impact that Mass Comments Have on the Public

A belief that comments are considered votes is one explanation for commentors who submit multiple (identical) comments on a proposed rule.<sup>62</sup> In the extreme, individuals can submit well over 100 comments for a single rule.<sup>63</sup> Would these individuals still be doing the same thing if they understood that a comment does not count more, or more forcefully, the more times it is submitted?

The low informational value of mass comments means that the vast majority of individuals submitting one are likely wasting their time. However, given the even marginal informational gains for the agency there can still be legitimate reasons to submit such comments.

However, individuals who submit the same comment repeatedly are wasting their time without any informational gains for the agency, and these are the individuals most hurt by (otherwise legitimate) mass comments. It demonstrates a fundamental misunderstanding of the role that comments play in the system, and the power that comments have within the rulemaking process.

This lack of information is not corrected by a system that seems to

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62. *The Case Against Mass E-mails*, *supra* note 39, at 36 (“The top two submitters in [one rulemaking] accounted for 261 and 314 e-mail comments, respectively.”).

63. The net neutrality rulemaking was one of the most high-profile in recent memory and is one that continues to receive comments nearly two years after comments closed. *Restoring Internet Freedom Docket 17-108*, FCC Elec. Comment Filing Sys., [https://www.fcc.gov/ecfs/search/filings?proceedings\\_name=17-108&sort=date\\_disseminated,DESC](https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&sort=date_disseminated,DESC). Comments can be sorted by filer on the FCC website, where online comments were accepted, allowing comments from a single individual to be identified and counted. Lindsey Frohnen submitted 175 comments, all on a single day. *Restoring Internet Freedom Docket 17-108*, FCC Elec. Comment Filing Sys., [https://www.fcc.gov/ecfs/search/filings?express\\_comment=0&filers\\_name=Lindsey%20Frohnen&limit=100&offset=0&proceedings\\_name=17-108&sort=date\\_disseminated,DESC](https://www.fcc.gov/ecfs/search/filings?express_comment=0&filers_name=Lindsey%20Frohnen&limit=100&offset=0&proceedings_name=17-108&sort=date_disseminated,DESC). While some of these appear to be blank, the majority contained the same text through the same enclosed document: “Literally we need net neutrality this is a free country and free speech and internet should be equal for all. C’mon guys, I mean, seriously. We need net neutrality.” *E.g.*, Lindsay Frohnen, Comment Post on Restoring Internet Freedom (May 9, 2017), <https://ecfsapi.fcc.gov/file/1050964840376/Literally%20we%20need%20net%20neutrality%20this%20is%20a%20free%20country%20and%20free%20speech%20and%20internet%20should%20be%20equal%20for%20all.docx>.

reward simply whoever can send in the highest total votes. Correcting this misinformation could help clarify more broadly the role that comments play in the administrative process and encourage more helpful responses from the broader public.

Another problem with mass comments from the perspective of the public is that these responses make it virtually impossible to see the comments that will make a difference to the final agency action.

While all comments are made publicly accessible soon after receipt, no distinction is drawn between the types of comments, so someone looking to see what others have to say on the issue could scroll through dozens of pages on regulations.gov listing the exact same comment that has been submitted by the exact same person hundreds of times.

Not only do these multiple submissions block access to alternatives submitted, they further skew the public's belief in the importance of mass comments, in part because the public view does not mirror the agency view at all.

No one on the agency side will be scrolling through hundreds of identical comments trying to determine which ones are different. Instead, algorithms work behind the scenes to compress these identical comments into a single representative one, often without even the full list of individuals submitting it (perhaps only the total number). Aligning the public view with the agency view could help clarify the role that these comments really play in agency action and allow members of the public who wished to be politically active to do so in ways more likely to actually aid their cause.

## 2. The Impact that Fake Comments Have on the Public

While the individuals most affected by submitting mass comments are those spending the time to submit the same response over and over again, the individuals most affected by fake comments have often had no voluntary association with the comment process at all. This is because with fake comments, the most significant impact is on the people whose names the fake comments are submitted under.<sup>64</sup> This is particularly so

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64. Comments are also submitted in the names of fictitious entities, such as Mickey Mouse. While potentially humorous, this is less of a concern because: (1) it is generally quickly apparent that these are fake comments, and (2) the fictitious entity involved by definition does not have personal feelings or opinions on the matter (although the company holding the copyright may not be entirely thrilled). *See supra* notes 25–27 (providing sample comments from Mickey Mouse).

when the view expressed in the fake comment is counter to the true opinion held by the individual.<sup>65</sup>

Individuals can be targeted for fake comments in two ways. First: Some are simply the victims of data security breaches, and whoever obtained their information did so based on the data from the breach.<sup>66</sup> Second: Individuals can also be personally targeted as the supposed submitter, particularly when that individual is connected with the issue of the rulemaking in some way. In these instances, the comments generally express the opposite of the individual's true position.<sup>67</sup>

Comments submitted based on information from security breaches can include the correct full name and address for each supposed commentor.<sup>68</sup> The individuals affected here may have no opinion on the matter, but the tactic would presumably be more likely to be used to prop up a less popular viewpoint. For a politically popular position, legitimate commentors would presumably supply any desired volume, although it was observed going both ways for the net neutrality rulemaking.<sup>69</sup>

Many individuals are generally concerned about their privacy being

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65. See Singer-Vine & Collier, *supra*, note 30 (describing a woman who discovered that her late mother's personal information as well as her own had appeared in the net neutrality rulemaking in comments strongly opposed to net neutrality. While she believed her mother, when alive, had not had any feelings on the subject, the woman herself was strongly in favor of retaining the neutrality regulations).

66. *E.g., id.* (describing the results of a BuzzFeed analysis showing that of the comments coming from one suspicious source, 94% appeared to come from the Modern Business Solutions breach, while the remaining 6% recycled information commentors had submitted in other rulemakings in 2016).

67. Karl Bode, *The FCC Insists It Can't Stop Impostors from Lying About My Views on Net Neutrality*, TECHDIRT (Jul. 11, 2017, 3:23AM) <https://www.techdirt.com/articles/20170710/10071737756/fcc-insists-it-cant-stop-impostors-lying-about-my-views-net-neutrality.shtml> (describing his frustration “[a]s somebody that has spent the better part of twenty years advocating for a healthy and open internet” to learn that someone else had submitted a comment pretending to be him, pretending to “run an unlicensed political PAC” and “prattle[ing] through a series of repeatedly, painstakingly debunked claims about how the agency's arguably-modest rules somehow stifle investment, harm orphans, and damage the time-space continuum”)

68. *E.g.,* Singer-Vine & Collier, *supra* note 30 (noting how closely many supposedly fraudulent comments matched data from the breach, including underscores rather than spaces in addresses).

69. James V. Grimaldi & Paul Overberg, *Fake Comments Hit Rule Making—Phony Submissions Target Net Neutrality*, WALL ST. J., Dec. 13, 2017, at A1 (“The Journal found instances of fakes that favored antiregulation stances but also comments mirroring consumer-groups’ pro-regulation talking points, posted without permission of people whose names were on them.”)

protected online.<sup>70</sup> An individual may never know that a comment was submitted on their behalf, but they could be affected later if someone else comes across it while searching the internet and views it as an accurate representation of their feelings. In such polarizing times, someone who has tried to remain off the internet would be understandably upset to be on it at all, but it would be an even greater insult to be negatively affected by a comment that reflects views they do not agree with.

No one likes finding out their personal information was used in support of something they did not intend, but it is worse for someone who has worked for years to build a reputation in a certain area. They can be extremely distressed to see their name used in a contrary argument. Comments are not merely technically publicly available but are easily accessible to the general public over the internet—unlike the old days of reading rooms—and online identities are a critical part of people’s reputations. Someone vehemently in favor of net neutrality, who has published articles arguing in favor of net neutrality, will be understandably upset to learn that their personal identity was used on a comment arguing against net neutrality.<sup>71</sup>

This harm is furthered by the seemingly cavalier attitude of the agency. Due to concerns that a final result could be challenged if all comments are not retained and accessible, the general agency response is not to remove the comment or even the name from an allegedly fake comment when contacted by the person impersonated, but to require that individual to submit their own comment, under the same name, in which the individual must explain that a comment was previously falsely submitted by someone else and does not reflect their true view on the issue, and then share their view.<sup>72</sup> Even when this additional comment

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70. Individuals may not necessarily fill out all the details of the comment, so someone searching for John Smith online would not likely view a comment from someone named John Smith as indicative. But there is a difference between John Smith supports the idea of allowing alligators to count as passengers for HOV lanes and John Smith of 1234 Reptile Road in a given city does. *But see generally* Spyros Kokolakis, *Privacy Attitudes and Privacy Behaviour: A Review of Current Research on the Privacy Paradox Phenomenon*, 64 *COMPUTS. & SEC.* 122 (2017) (surveying the literature on the “privacy paradox,” the fact that “privacy is a primary concern for citizens in the digital age” and yet individuals generally do virtually nothing to secure their online privacy).

71. *See* Bode *supra* note 67.

72. Letter from G. Patrick Webre, Acting Chief, FCC Consumer & Governmental Affairs Bureau to Karl Bode (July 10, 2017), <https://assets.documentcloud.org/documents/3891550/FCC.pdf> (“To that end we continue to encourage you and all members of the public to submit comments to the FCC via ECFS [electronic comment filing system]

has been submitted, there is nothing done by the agency to make clear to someone reading the first comment submitted that it has been countered by an additional comment of the opposite opinion. Someone stumbling on that first comment has no way to know it has been explicitly disclaimed by the named individual.

C. *How Third-Party Interest Groups are Affected by Mass and Fake Comments*

Third-party interest groups, or third-party groups, are the umbrella term used in this Article to encompass both organized and more loosely associated organizations with an interest in the outcome of the agency rulemaking. This term includes nonprofits, like the Sierra Club, but is not exclusively restricted to nonprofits. It, instead, applies to any group soliciting others to comment and providing a possible option for the comment submitted. A business seeking to have customers submit comments would qualify as a third-party group,<sup>73</sup> even though the business itself could submit its own comment as well. These are treated as a single class of interests because they are the driving force behind mass comments. Individuals will not all submit the same comment text if not prompted to do so by some third party. A general exhortation to comment, without supplied text, would not count, since the comments submitted would be entirely the words of those submitting (even if the push for submission was not theirs entirely).<sup>74</sup> Since the comments

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that include accurate identifying information. This will ensure that the record reflects your views. You are welcome to include your correspondence on this matter—including a statement that the comment you reference were not filed by you—in ECFS for the public record.”).

73. There are also instances where a business will simply “assume” that all of its customers would agree with its position and make use of their information. Transcript, *supra* note 20, at 20 (alluding to such a situation in response to regulations under the Military Lending Act, where at least one customer said that not only had he not agreed for information to be submitted on his behalf but that he “did not like the experience [with the company] and . . . was not a supporter of pulling back on the Military Lending Act restrictions”).

74. The most extreme example of this general exhortation to comment would be the net neutrality comments prompted by Last Week Tonight with John Oliver, both in 2014, *Last Week Tonight with John Oliver: Net Neutrality*, YOUTUBE (June 2, 2014), <https://www.youtube.com/watch?v=fpbOEOrrHyU> [hereinafter Net I], and in 2017, *Last Week Tonight with John Oliver: Net Neutrality II*, YOUTUBE (May 8, 2017), <https://www.youtube.com/watch?v=92vuuZt7wak&t=1s> [hereinafter Net II]. Each time, John Oliver explained the impact the rulemaking could have before directing viewers to go to the FCC website to leave a comment. Net I (“We need you to get out there, and for once in your lives focus your indiscriminate rage in a useful direction. Seize your moment my lovely trolls.”); Net II (“I’m calling upon all of you, the internet time wasters, and troublemakers, to

submitted would be unique, they would also not necessarily lend themselves to processing the way traditional mass comments would. This part first addresses the benefit that mass comments have for these third-party groups before turning to the relatively little impact that fake comments have on them.

### 1. The Impact that Mass Comments Have on Third-Party Groups

The ability to submit mass comments in agency rulemakings has been a tremendous opportunity for nonprofits and other external organizations hoping to change government action. But this is not because these organizations believe that the comments submitted will significantly alter the final regulation.

Mass comment campaigns driven by the interest groups generally involve policy-based arguments,<sup>75</sup> the type of comment least likely to have any effect on the final agency decision.<sup>76</sup> This is not because interest groups are unable to submit stronger, more substantive comments;<sup>77</sup> it is because the process produces a number of external benefits for the organization.

First, when comments are submitted through the interest group's

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join me once more in just 5-10 minutes of minor effort.”). The first time, this was done with the direct FCC link displayed in the program. Net I. The second time, since the URL was more complex, the show bought a secondary website (gofccyourself.com). Net II. But that website automatically redirected to the FCC page for comment submission. In neither instance was the public presented with a page already supplied with proposed text. Nor, in either instance, was the comment process an attempt on the part of the show to capture any information about the individuals commenting. While this undoubtedly resulted in a mass of comments, they were not all identical comments originating from the same prepared text.

75. Mendelson, *supra* note 34, at 1346 (describing why these comments should still be considered by rulemakers).

76. This was true even before the dawn of the internet. Food and Drug Administration, Administrative Practices and Procedures, 40 Fed. Reg. 40681, 40688 (Sep. 3, 1975) (“[R]epetitive comments would be given no more weight than a single comment, and indeed that a single well-reasoned comment, relying upon sound data and information, would be given far greater weight than a large number of form letters which simply support or oppose a proposal in conclusory terms.”).

77. *The Case Against Mass E-mails*, *supra* note 39, at 30 n.7 (2009) (“In a focus group, a member of a national wildlife organization noted the split between the policy and grassroots staff members. Grassroots organizers see the e-mail campaign tools as a low-cost, high-return method to retain and attract members. Policy specialists, who prepare the group’s longer scientific and legal briefs for the agency, see little value added in the rulemaking process when duplicative, non-substantive comments come from the membership. When policy specialists ask the grassroots organizers to encourage the members to write better comments, there is considerable tension.”).

website, rather than through regulations.gov, it is the interest group that provides the form to fill out, and collects the information submitted.<sup>78</sup>

Some agencies allow anonymous comments.<sup>79</sup> The same is not true when the comment is submitted through the interest group's website.<sup>80</sup> Gathering this information allows the interest group to identify someone willing to take at least a token action in favor of a cause. The information can then be used by the interest group to push for greater involvement with the group or for monetary solicitations.

Indeed, a request for donations is often present on the comment submission page itself<sup>81</sup> or appears on the confirmation page showing the comment has been submitted. An individual motivated enough to submit a comment might well also be motivated enough to submit a donation or do something else to further the group's cause.<sup>82</sup>

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78. *Id.* at 29 (2009) (“The appearance, therefore, can be that the public comment exercise is just an efficient front-end for a more serious back-end data mining operation geared toward membership and donation campaigns.”).

79. *See id.* (Noting, in particular, that “the EPA is well known (for many good reasons) as an agency that considers anonymous comments.”). This is particularly relevant as the EPA is one of the primary targets of many environmentally oriented mass comment campaigns. And it is far from the only agency to accept mass comments. *See also, e.g.*, Control Date for the Northeast Multispecies Charter/Party Fishery; Northeast Multispecies Fishery Management Plan; Correction, 83 Fed. Reg. 14236, 14236 (Apr. 3, 2018) (“[The National Marine Fisheries Service] will accept anonymous comments (enter ‘N/A’ in the required fields if you wish to remain anonymous).”).

80. *E.g.*, *Don't Let President Trump's EPA Put Drinking Water At Risk*, SIERRA CLUB, <https://addup.sierraclub.org/campaigns/dont-let-president-trumps-epa-put-drinking-water-at-risk> (requiring contact information including physical address, phone number, and email for comments being sent to the EPA, an agency that allows mass comments.) The page notes that “All fields required unless noted otherwise.” *Id.* (No fields are noted otherwise.) After the statement is a question mark icon. Hovering over this icon produces the following text, “Recipients often require this information in order to accept your message, so we have to require it too.” *Id.* An argument could be made that it is too difficult for the agency to determine whether or not anonymous comments are accepted for each rulemaking, but this would not be true for agencies with which the group frequently sends comments to (such as the EPA). Instead, it can reasonably be understood that there is no incentive for the Sierra Club not to require this information.

81. *E.g.*, *Tell the Feds to Protect Water and Wildlife: No Jordan Cove*, CTR. FOR BIOLOGICAL DIVERSITY, <https://act.biologicaldiversity.org/onlineactions/nJb-IUKNf0ubPuFk8DVxOg2> (including a link at the bottom of the page to “Donate now to support the Center's work”).

82. The page showing the comment was submitted in the campaign referenced in the preceding note included options for donating \$100, \$35, or another amount. *See id.*; *see also* Transcript, *supra* note 20, at 146 (“So the Sierra Club might see, oh, you are willing to submit and be part of our mass comment campaign. Now let's see if you are willing to host a meeting

Similarly, these pages encourage commentors to “[p]lease share this action with your friends and family on social media,”<sup>83</sup> reinforcing the belief among the public that the number of comments will make a difference to the final agency action.

Even if the third-party group does not receive a donation from the commentor, or additional members if the commentor shares the page, the group itself can gain further influence based on the number of comments submitted through its site (or otherwise directly tied to it). Interest groups often use the number of comments they have encouraged supporters to submit as a demonstration of their effectiveness that can then be used to justify further solicitations from members (to ensure the group is able to continue to do such good work).

Finally, to the extent that second-order participation is a concern when an interest group submits a comment, a group submitting a comment that is also submitted by a large number of individuals makes clear that, at a minimum, those individuals also share the concern.<sup>84</sup>

Therefore, these third-party organizations stand in opposition to the general public and the agencies as mass comments, for them, are not only incredibly helpful, they are increasingly becoming an important part of their business plans.

## 2. The Impact that Fake Comments Have on Organized Interests

A distinction should be drawn at this point between fake comments the organization has directly attempted to obtain,<sup>85</sup> and organizations that are using the comment process to solicit information on those interested in further commitment to the cause. The second type stand little to gain from fake comments, as the information will not allow them to connect

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at your house at some later point in time.”).

83. This was the wording used in the same campaign and was immediately followed on the same page by links to twitter and Facebook. See *Tell the Feds to Protect Water and Wildlife*, *supra* note 81.

84. See generally, Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016) (explaining how it can be difficult for interest groups to show to what extent the position of the group represents the position of the members of the group).

85. Commentors can be bought fairly cheaply. See Media Bridge, *How to Take on the Government . . . and Win*, MEDIABRIDGE (Sept. 21, 2015) <http://web.archive.org/web/20160831212333/http://www.mediabridgellc.com/1033> (“With Media Bridge, you get what you pay for with our Cost-Per-Action pricing. That means what you only pay for results. Spend a million dollars with Media Bridge, and most likely, you’ll have a million people + advocating for your position.”).

with an individual interested in taking further action. However, an individual committed, on their own initiative, to repeatedly using the form to submit comments under different names might be identified as potentially being particularly receptive to opportunities for further action.

Organizations also boast about the number of comments they have encouraged others to submit to a given rulemaking,<sup>86</sup> so allowing those numbers to be artificially inflated by the over-enthusiastic action of a few members provides little downside to the organization, particularly when none of the members of that organization will ever see the list, they will only see the total number submitted showing how successful the organization is. That does not mean that these organizations would put deliberate time or effort into seeking out lists of fake participants, but that there is no reason for the organization to specifically go to extra effort to encourage each commentor to leave one and only one comment in their own name.

Given the relatively little benefit traditional non-profits get from fake comments, these organizations would have little reason to push to retain them, particularly given their political unpopularity. Public discovery or acknowledgment that fake comments were submitted on behalf of an organization can also hurt the reputation of that organization, especially when the little probative value of the comments themselves are considered. However, unlike members of the public, who can be extremely negatively impacted by fake comments, and the agencies, which must deal with fake comments, even if they are dealt with through computer processes behind the scenes, the third-party organizations responsible for many of the fake comments suffer little ill effect and consequently currently have the least incentive to control them. Thus necessitating the solutions described in Part III.

### III. HOW TO SOLVE MASS AND FAKE COMMENTS

Changes to the comment submission process at the federal level could help solve the problems caused by both mass comments and fake comments. The harm from mass comments would be reduced by allowing commentors to sign onto comments submitted by others rather than submitting their own unique comment. The harm from fake comments

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86. See e.g., *Don't Let Trump's EPA Allow More Dirty, Climate-Disrupting Coal Plants!*, SIERRA CLUB <https://addup.sierraclub.org/campaigns/dont-let-trumps-epa-allow-more-dirty-climate-disrupting-coal-plants> (last visited Mar. 23, 2021) (showing that the organization had already submitted nearly 60,000 messages of a 50,000 message goal).

would be reduced by allowing commentors the option to verify their identity as part of the comment submission process. These solutions are explored in greater detail in this section.

A. *How to Solve Mass Comments*

Many of the problems caused by mass comments would be reduced if not entirely eliminated by abandoning the notion that each submission must be considered its own unique comment and converting otherwise identical submissions to additional signatures to a single comment. This section expands this solution. It first describes it in more detail, explains why it would solve the problems caused by mass comments, and explains what it would actually look like for those commenting. It then briefly explains why it is better to use a solution like this, in which it is no more difficult to comment than it currently is, to solve mass comments, rather than suggestions that have in some way attempted to raise the requirements for commenting and thereby prevent or reduce mass comments. Finally, it explains why the solution in this Article would be acceptable to the three interested parties: the agencies, members of the public, and the third-party interest groups driving the mass comment phenomenon.

1. The Solution to Mass Comments

This Article argues that right now the best option for dealing with mass comments, the option that would not raise the bar for comments from individuals with relevant personal experience while best addressing the problems of public access and understanding, would be to allow individuals to sign on to comments submitted by other individuals rather than submit their own identical comment.

This would require only minor changes at [regulations.gov](https://www.regulations.gov). Comments are already given unique internet addresses once submitted, so it would be straightforward to allow additional signatures based on a particular comment. This process would be even more straightforward for outside websites that interface with [regulations.gov](https://www.regulations.gov), since those websites could look identical to the members of the public and it would be on the back end that the change was made from submitting the information as a comment to submitting it as an additional signature to a comment (presumably to a comment initially submitted by the interest group).

As is repeated by all scholars in this area of law, comments are not

votes. One man one vote is a sacred construct in American law,<sup>87</sup> but just as there is no reason now why a comment cannot be signed by more than one person before it is submitted, there is no reason why the agency cannot facilitate this after the comment has been submitted.

## 2. Why This Would Solve Mass Comments

The typical mass commentor is an individual who was offered the option of submitting a comment by an organization the individual trusts or believes in, and so the individual submits that single comment.

This person would have exactly the same experience signing onto the comment of someone else (such as the organization), particularly if that individual were submitting the comment through the organization's website where they could fill in forms that look identical to the current version.

Then there are the commentors who take it a step further. An individual who believes that the number of total comments makes a difference might well decide to "stuff the ballot box" and submit that comment not once, where it clearly will make little difference to the overall outcome, but potentially hundreds of times. While these identical comments can easily be collapsed in the agency view, the mere fact that they were submitted indicates that the person doing so has no understanding of how the comment process works and, as a consequence, wasted all the time submitting those comments.

Having individuals sign on to comments submitted by others could solve this. Not only would it be possible to only let one person sign a comment one time (using the same information), the individual could be notified that further comments weren't accepted, freeing them to do something more productive with their time. In essence, the structure of the comments would change in a way less likely to encourage this ballot stuffing, with an additional educational component explaining that an additional identical signature would not be added since someone can only sign once. This would help bring the public understanding of comment structure and function in the agency more in line with what actually happens, unlike the current version of regulations.gov, which can be so clogged with mass comments that it is difficult to find anything else.

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87. *See Avery v. Midland Cnty.*, 390 U.S. 474, 476 (1968) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). The distinction between comments and votes means that there is no reason to require a unique individual submission from each person wishing to comment on proposed regulations.

However, this only works for individuals interested in submitting one (or more) comments in their own name. Individuals concerned about an issue might take a different approach to stuffing the ballot box. Rather than submit their own identical comment repeatedly, they could submit comments in the names of others. Merely changing from everyone submitting their own individual comment to signing onto the comment of another does not alter the incentive for the submission of fake names. Preventing the submission of fake names is addressed instead in Section III.B.

### 3. How It Would Look

Thus far, the solution has simply been described as signing on to comments left by another. At a basic level, it is exactly as described. Individuals would be able to sign on to a comment submitted by another individual or organization, as opposed to the current system where everyone must submit their own comment. This section explains in greater detail what that would mean.<sup>88</sup>

There would be restrictions on the practice. First, one could only sign on to a comment in support. There would be no option to express disagreement with a comment. (Such disagreement would need to be expressed in a separately submitted comment to the agency.) Also, individuals would only be able to sign on to top level comments. That is, one could not sign on in support of a comment in support of another comment (and so on down the line). This would make it easier to review comments, as described in the following section, and simplify the explanation to users of the site.

There have long been calls made to take advantage of the internet to facilitate discussions in the comments.<sup>89</sup> That is not what this Article proposes. A dialogue would change the system far more significantly since it would place an expectation that an original commentor return to the website to reengage in the discussion. Instead, this proposal is designed to retain the current structure, where information flows in a single direction from the public back to the agency in the comment process.

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88. Since the website changes necessary to implement these suggestions would not require a significant reworking of the entire system, this section addresses broad design rather than specific logistics.

89. See Zavestoski et al., *supra* note 18, at 392 (2006) (referencing others arguing that the internet would enable a new form of dialogue).

In practice, individuals could find a comment they agreed with (or follow a link to a particular comment that had been sent to them) and then select a box saying they wanted to sign that comment as well. The individual would then follow a link to a page signing on to that comment, where they would be able to provide personal information. This page would also have a space to add any additional comments. Or, as mentioned, an interest group could construct a site visually identical to what the group now has in place except that the submission to the agency would be as an additional signature rather than as a separate comment.

The most pressing question would be whether to consolidate identical or highly similar comments that were not submitted as additional signatures but rather as unique original comments. Consolidating identical comments on the front end (so that it appeared to be one comment with multiple additional people signing on to it, as is effectively currently done on the back end when the comments are presented to the agency) would enable the public to better understand how such comments were viewed by the agency, as discussed in Section III.A.5.b. Combining comments in this manner would also reduce any incentive to submit extra comments rather than extra signatures. Just as agencies can currently group comments that are highly similar for review,<sup>90</sup> highly similar but not identical comments could similarly be turned into additional signatures (with additional commentary) to further bring the public view in line with the agency view.

#### 4. It is Important Not to Raise the Required Bar for Comments

Concerns about mass comments have led to calls for changes to the current system. As mentioned in the prior section, there have long been calls to allow commentors to engage in dialogue, a proposal that would radically alter the current comment structure.<sup>91</sup>

One different particularly persistent suggestion has been to separate out true substantive comments from mass comments.<sup>92</sup> This could initially seem promising. As described in II.A.1, mass comments do little

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90. Transcript, *supra* note 20, at 82 (describing how agencies are allowed to set the similarity percentage for “de-duplication,” although most set it at 70).

91. *Id.* at 78 (referencing others arguing that the internet would enable a new form of dialogue).

92. Daniel E. Rauch, *Two-Track E-Commenting*, 33 YALE J. ON REG. 303, 304–05 (2016) (suggesting that mass comment “spam” be removed from the primary comment track and relegated to a secondary “preference” track).

to influence the final agency action. The comments that are likely to affect the final rule tend to be far more detailed and legalistic. However, raising the bar to comments would further entrench a system that already rewards the most sophisticated players.

There is little doubt that a comment such as “Do NOT make ANY changes to the Clean Water Act, you absolute morons”<sup>93</sup> is not going to change the final rule in any way and will likely not even be seen by anyone at the agency.<sup>94</sup> It would also seem relatively simple to filter out such comments by requiring something as simple as even one relevant citation in the comment. Such a requirement would screen out comments like the one listed above.<sup>95</sup> However, even this low bar could also exclude comments by unsophisticated lay people who could be directly impacted by the rule.

For instance, a trucker concerned about mandatory rest time might have relevant personal experience to share directly related to such a requirement without knowing how to include citation to the specific area of concern.<sup>96</sup> In contrast, those with legal or lobbying connections, the

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93. Anonymous, Comment Post on Revised Definition of Waters of the United States (May 7, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9363>.

94. Assuming that the agency is using outside contractors to review many of the mass comments, as described in notes 43–44 and accompanying text.

95. Or, less frequently, converted by the commentor to something more like “Do NOT make ANY changes to the Clean Water Act, 33 U.S.C. §§1251–1387, you absolute morons.”

96. *See, e.g.*, Tony Young, Comment Post on Proposed Rule ANPRM: Hours of Service of Drivers (Aug. 24, 2018), <https://www.regulations.gov/document?D=FMCSA-2018-0248-0264>. The comment is reproduced in full below, including errors in the original. While there are no citations or direct reference to any portion of the proposed rules, Mr. Young provides real life examples of the consequences of the current rule requiring ten-hour breaks, a requirement the agency was specifically reevaluating:

Dear sir ,

I am a trucker of 30 yrs. I have worked hard in this business to get to where i am today . I would like to explain how these current rules and regulations affect me. We start are days sitting at shipper or recievers for hrs upon hrs waiting to unload , reload to only realize our day is about shot . Then we drive 4 maybe 6 hrs untill we have to take our 10 . Not being tired we are up until we get tired only to find we only got a few hrs before we have to start racing the clock because we couldnt get no where the day before. Now fighting morning rush hr where we could manage our time before ELD. we are having to drive faster , and more tired than ever before . NOT SAFE at all. I personally cant stand the ELD but i believe with the right reciepe it would be a good thing. There are more accidents than ever before , i know you have noticed. RAY CHARLES could see it. We all want safety but the way it is now its not . Wait until winter comes it is going to be scary. Im asking you make changes before more people are hurt by this little black box. Thanks for listening.

players already submitting the types of comments most likely to be considered by the agency,<sup>97</sup> are presumably including such citations as a matter of course,<sup>98</sup> further dividing the commenting abilities of highly sophisticated commercial interests from less sophisticated individuals facing significant consequences as a result of new regulations.

Increased public participation has been sought through efforts like the Regulation Room that engaged moderators to help guide comments from interested members of the public.<sup>99</sup> While there seemed to be somewhat promising success with earlier trials (in that the researchers were able to engage people who might not have otherwise participated in the comment process),<sup>100</sup> the time investment required of those directing the project mean that such a goal is unlikely to be put into broad practice.<sup>101</sup>

There have also been calls to put in place some other low hurdle to participation, like charging the cost of a stamp to submit a comment, under the belief that those submitting fake comments are doing so only because submission in the current system is free.<sup>102</sup> But this misunderstands the problem. Meaningless spam comments (composed of things like meaningless strings of symbols), the most likely comments to be eliminated by a charge, can be filtered by computer.<sup>103</sup> It is the higher value comments, like the deep fakes, that consume agency resources. The

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97. See Cuéllar, *supra* note 36.

98. Cf. Stephen M. Johnson, *#Beterrules: The Appropriate Use of Social Media in Rulemaking*, 44 FLA. ST. U. L. REV. 1379, 1387–88 (2017) (noting that agencies also have particular reason to pay attention to the submissions of sophisticated parties because they are also the most likely to challenge the rule in court).

99. *Rulemaking 2.0*, *supra* note 37, at 432–33 (2011) (explaining how the role of moderators was primarily to “mentor[] more effective ways of commenting, and nudg[e] users toward broader engagement”).

100. *Id.* at 431 (describing how the group experienced increased success by adding an online poll to the initial welcome page).

101. *Id.* at 443–44 (acknowledging that the group’s desire for “more better” participation was almost certainly at odds with a goal of cost savings).

102. See Harold Furchtgott-Roth, *How to Reduce Frivolous Comments in Federal Proceedings*, HUDSON INSTITUTE (July 21, 2017), <https://www.hudson.org/research/13779-how-to-reduce-frivolous-comments-in-federal-proceedings> (“Abuse of federal dockets by computer-generated filings was not a problem when ordinary Americans had to submit filings on paper and affix a postage stamp to an envelope. Today, such abuse is a problem.”).

103. Transcript, *supra* note 20, at 63–64 (describing spam comments as containing links to porn cites, single words, or random punctuation).

cost of a stamp (currently \$.55) is less than half what companies are already paying for fake comments. A company willing to spend \$1 million for “a million people +” likely would not be too bothered spending \$1.5 million for “a million people +.”<sup>104</sup> At the same time, the difficulty of paying even a nominal charge could be off-putting to legitimate commentors. Some may not feel they have any money to spare while others might simply have no way to convey small sums of money to a government entity online. It is easy to have a pack of stamps lying around the house and stick one on when needed. However, a stamp cannot simply be stuck to the computer screen, and the transaction itself would be a barrier for those engaged in single comment submission. In this case, it would actually be easier for companies submitting many comments to pay the larger total sum using a credit card than someone who is unbanked and uses cash for everything but is trying to submit a single comment online.<sup>105</sup>

In order to ensure that individuals with unique perspectives who would be directly impacted by a regulation are not excluded from a rulemaking process, the bar to comment submission should not be raised.

Keeping the bar low ensures that important comments from unsophisticated parties can be accepted and potentially considered. A low bar does not do anything to stem the vast numbers of repetitive comments of little substantive value. However, as discussed, agencies are generally able to process these comments behind the scenes already, viewing them merely as duplicate submissions. This Article proposes that the idea of commenting be reconfigured so that the public has the same understanding of these comments: that they are effectively one comment signed on to by many people.

This is exactly the type of revision that the modern internet is tailor-made for. Given that comments are understood not to be votes, it is strange that the system still seems to require each individual to submit an individual comment.

Changing to a system where individuals can sign on to comments, but where there is no substantive bar to commenting, would keep the comment process open and benefit each of the interest groups, as discussed in the next section.

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104. See Media Bridge, *supra* note 85.

105. Physically mailing in a comment is not as easy as it might have once been either. Not everyone has legible handwriting or home printers to put the comment to paper.

### 5. This Solution Would be Beneficial to All Parties

Switching to this type of system would be a win-win-win for all interested parties. As discussed further below, agencies would find the comment review process streamlined, and could even receive more useful comments. The public would have a better understanding of how these comments were being viewed by the agency, might understand better how to submit truly substantive comments that would better assist the agency, and would have an easier time viewing the range of comments submitted to the agency. Finally, interest groups would more directly be able to claim the number of individuals supporting their position, while retaining all benefits they enjoy under the current system.

#### a. It Would Benefit Agencies

Agencies are able to handle many of the problems of duplicative comments behind the scenes, ensuring the agency does not need to re-read comments that are identical.<sup>106</sup> The same software can also mark which passages are identical when the comments are not an exact match.<sup>107</sup>

However, someone is still required to review all of these similar but not identical comments.<sup>108</sup> The system proposed, in which commentors are asked to submit a complete separate statement in support of a comment, if desired, would ensure that the additional supportive statements were coherent by themselves. Currently, as discussed in II.A.1, a commentor wishing to submit a mass comment is often told to add personal details by the organization behind the mass comment. These comments may be added anywhere in the submitted comment including being sprinkled throughout the boilerplate text.

While software can identify identical portions in merely similar comments, the reviewer cannot ignore all identical portions if the unique additional sections are interwoven with them. Someone reviewing such comments must spend additional time with at least some of the comments

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106. See Transcript, *supra* note 20, at 37–38 (acknowledging that a human could not have read all 22 million comments in the net neutrality rulemaking).

107. *Id.* at 41 (“[W]e go through and present to the comment reader the exact text with unique material highlighted, and a count. . . . [T]his lets the agency focus on what the unique elements are in a way that if they actually had to read through all of these things, they might miss.”).

108. *Id.* at 91–92 (describing the importance of a thorough review of mass comments during OIRA review of the final rule).

in which the additions have been sprinkled throughout to understand the context in which the additions are made.

The proposed system, where additional comments can only be added separately from the original text, would reduce this reviewing burden by ensuring that the additional text is coherent by itself and eliminate the need to review any of the original mass comment text.

This could also be useful for comment submissions from loosely organized groups like trade associations, as opposed to the current practice of sending out suggested text and then encouraging members to add their own comments, which are also sprinkled throughout the trade association's prepared text when submitted.<sup>109</sup>

Agencies could also push the public to make these additional comments more useful by reminding commentors what types of comments from them would in fact be of most assistance to the agency on the secondary page.

The agency could even seed the process by including some initial comments expressing expected views to allow commentors to sort their additional comments by topic and allow the additional comments to be more focused and on point.

#### b. It Would Benefit the Public

The agency generally does not see multiple copies of identical comments. Instead, a single copy of the comment is shown with the notation that a certain number are similar.<sup>110</sup> This means that ten thousand submissions of an identical comment are understood to be a large number of identical submissions, but the agency does not need to interact with the full number.

However, a member of the public viewing the docket at [regulation.gov](http://regulation.gov), does need to interact with these identical comments if they wish to view comments submitted. These can clog the system from

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109. *Id.* at 34–35 (confessing that a trade organization views comments submitted from multiple sources as more persuasive than a single comment with multiple signers. The trade organization therefore provides templates for comments to members and encourages them to personalize their submissions).

110. ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-1: LEGAL CONSIDERATIONS IN E-RULEMAKING: ADMIN. CONFERENCE OF THE U.S. 4 (2011) (“While 5 U.S.C. § 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.”). However, not having anyone read something that is only similar could result in the agency missing a substantive point.

the public's viewpoint, making it difficult to understand the opinions and positions of those not submitting these mass comments.

Displaying all comments in the current manner can make the mass comment campaigns seem like an overwhelming show of force to viewers. This viewpoint is completely at odds with the way the same comments will be viewed by the agency.

Changing the system so the public understands that the substance of the comment is what will be considered would help clarify that quantity does not trump quality. It would also help those individuals who currently "vote early and vote often" to understand that they are not making their point more forcefully by repeatedly sending in the same message.

The agency could also help push those commentors who wished to add additional thoughts to a comment they were signing to do so in a manner that would provide more useful information to the agency. This could be done by reminding those adding their signatures that any additional information will be most useful when it deals with specific experiences the individuals have, rather than general policy arguments. Since the public is presumably commenting in hopes of influencing the final outcome, enabling more effective commenting would directly benefit those engaged in it.

Changing the system so that unique comments can more easily be seen by individuals could also help foster at least some of the responses to comments hoped for by e-rulemaking cheerleaders early in the process,<sup>111</sup> since it is difficult to understand and respond to the arguments of the other side when those arguments cannot be found.

#### c. It Would Benefit Third-Party Interest Groups

The strong benefits interest groups enjoy under the current system, which have to this point been the driving force behind mass comments, would not change under the new system as proposed.

To the extent that the goal of the groups is simply to show the desire of the portion of the public willing to send in comments, the effect on the agency would be the same. The agency would see the comment officially submitted by the group, as well as the number of people signing on to it, something that is already being done in some instances by outside groups

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111. See Zavestoski et al., *supra* note 18, at 392 (referencing others arguing that the internet would enable a new form of dialogue).

of their own initiative.<sup>112</sup> The other benefits of these outside groups would not be affected either.

Just as interest groups can now use their own website to allow individuals to comment on the regulations.gov website, they could collect additional signatures to their comment through dedicated pages on their site. This would allow them to collect the same information and make the same pushes for donations and expanded outreach that they currently do without requiring the person to go through a single additional link.

It would even strengthen the ability of the groups to use comments submitted as a show of strength. Rather than explain that the group encouraged the submission of X number of comments, the group could boast that X number of people were mobilized to sign on to its comment.

Retaining the current benefits for the interest groups would be critical, since without buy-in from this group there would be little reason to expect interest groups to create the pages allowing additional signatures rather than simply maintain the status quo, where the groups push individuals to submit identical comments that clog the system with little benefit to the rulemaking process.

#### B. *How to Solve Fake Comments*

Fake comments are such a problem because in the current process all of the information submitted by the commentor is self-identified. The solution to fake comments, therefore, is to allow the commentor the option to verify their identity when submitting a comment. This section describes in more detail how this would work.

##### 1. The Solution to Fake Comments

Reducing the problem with fake comments would be as straightforward as for mass comments. Creating a verification method and then placing a mark (as simple as a green dot) next to comments (or additional signatures, if the mass proposal were adopted) that have been

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112. Press Release, World Wildlife Fund, More than One Million Sign on to Stop Elephant Slaughter: WWF Hands Over Record Signatures to Stop Illegal Ivory Trade (Sept. 28, 2015), <https://www.worldwildlife.org/stories/more-than-one-million-sign-on-to-stop-elephant-slaughter> (describing how the WWF obtained more than one million signatures in response to a proposed rule by the Fish and Wildlife Service). The loose distinction organizations can draw between mass comments and signatures is shown by the organization alternatively saying that this is the first time more than one million comments have been attributable to a single organization in a Fish and Wildlife Service rulemaking. *See id.*

verified would raise the value of these comments. This in turn would comparatively lower the value of unverified comments, even though they could still be allowed.

Verification would reduce the incentive for both types of fake comments—those intended to hurt particular individuals and those done in an attempt to fool others into believing a position has greater support than it in fact does.

Reams of unverified comments for a position, particularly when the proportion of verified comments was significantly different than comments going the other way, would start to look very suspicious, further lowering their value and thereby reducing the incentive to submit large numbers of fake comments to begin with.

Comments intended to hurt someone would also have less of an impact under a verified system. Not only would it be clear if both comments were seen during a search for which one was the correct one, but someone stumbling across only the fake comment would be able to tell from the lack of a verification mark that there was reason to be suspicious about it.

And this, like the solution to mass comments discussed earlier, could be done without any change in the ability of individuals currently submitting comments to continue doing so.

## 2. Why this Would Solve (or At Least Reduce) Fake Comments

Adding a verified mark to comments would at a minimum reduce fake comments by eliminating part of the incentive for them as well as providing better protection to those currently being hurt by them.

Those currently hurt—individuals in whose name a fake comment is submitted—would have greater protection because someone seeing only the fake comment would have an immediate warning that the comment may not be authentic. This would be further reinforced in instances where the targeted individual chose to submit their own unique comment. Now someone viewing the two comments would immediately be able to tell which was the correct one, further lowering the value of the fake comment.

The reduced value these fake comments offer would also reduce the incentive for them to be submitted to begin with. Currently there is no way to immediately distinguish mass comments solicited from a large group of supporters and faked mass comments. While there are some signals (such as all originating from a particular IP address) there are also

legitimate reasons for that, since as explained in Section II.C.1, outside organizations are specifically enabled to connect to regulations.gov for comment submission directly from the organization's website,<sup>113</sup> and there are incentives for the organization to do it that way because of the additional information they are able to gather.<sup>114</sup>

While merely adding a verification mark would not eliminate fake comments, as long as comments can be submitted without verification (and they would be, in part for reasons discussed in Section III.B), it would dramatically reduce the harm they can currently cause for individuals falsely claimed to be the submitter and should reduce the overall number of such comments.

### 3. The Logistics of the Solution

The initial design questions would be (1) when the mark should be visible and (2) whether the absence of the mark should be conspicuously noted.

To be most effective, the verification mark should be displayed both if the comment is viewed individually (as its own unique webpage) or in a list of comments at regulations.gov. This will ensure that regardless of how someone finds the comment, they can immediately tell that it is verified.

To further reinforce this fact, the location for the mark should be obvious, so that the lack of a verification mark is immediately apparent to someone seeing the comment out of context—further protection for those who are trying to overcome a false comment submitted in their name. Any solution would also need to determine the core components of the process: how to verify someone's identity, and what to do if someone cannot verify their identity, the subjects for the remaining part of this section.

#### a. How to Verify Identity

The current federal government recommendations are (1) that identity verification be centralized, absent a compelling reason to do otherwise<sup>115</sup> and (2) that this verification occur through official

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113. See *Public notice and comment rulemaking*, *supra* note 23.

114. See *supra* Section II.C.1.

115. Paul A. Grassi et al., *NIST SPECIAL PUBLICATION 800-63-3: Digital Identity Guidelines*, NAT'L INST. OF STANDARDS & TECHNOLOGY, U.S. DEP'T OF COMMERCE, (June 2017), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-63-3.pdf>.

documents, rather than the knowledge-based questions that have become common.<sup>116</sup> It is thus necessary to first examine whether there is a compelling reason not to use centralized verification in comment submission.

There is an important distinction between identification for verifying comments and the more common reasons for identity verification at the federal level. Generally, an individual will seek to verify an identity to obtain some service or benefit from the government and will be creating an account that there is reason to believe they will want to return to, like with the Social Security Administration to check their benefit status.<sup>117</sup> While some commentators may want to comment on different rulemakings over time, others may just wish to submit a single comment, so the same type of verification may not be necessary.

However, since the goal of the process is in fact to validate the identity, and the work necessary to do it a single time for a single submission would not necessarily be less than the work needed to enter a larger federal ecosystem that would allow repeated submissions with little additional verification needed, there does not appear to be a compelling reason not to use central government verification. This is particularly so since in some cases the proposed regulations at issue would involve the same agencies individuals were otherwise seeking to validate their identity with.

Fortunately, federal identity verification is one area where technology used by the federal government has made dramatic strides in recent years.<sup>118</sup> This is a good thing, given that the current government recommendation is also that identity verification for federal purposes be centralized.<sup>119</sup> Login.gov has been created as a central federal

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Although the guidelines say they are agnostic as to whether identity should be federated, they also say “identity federation is preferred over a number of siloed identity systems that each serve a single agency.” *Id.*

116. See generally *Data Protection: Federal Agencies Need to Strengthen Online Identity Verification Processes*, U.S. GOV'T ACCOUNTABILITY OFFICE, (May 2019), <https://www.gao.gov/assets/700/699195.pdf> (highlighting the need for federal agencies to move away from knowledge-based verification).

117. *Id.* at i (“[T]he Social Security Administration (SSA) uses this technique to verify the identities of individuals seeking access to the “My Social Security” service, which allows them to check the status of benefit applications, request a replacement Social Security or Medicare card, and request other services.”).

118. *Id.* at 15 (“Recently developed technology allows an agency to remotely examine a physical credential, such as a driver’s license or a passport, to verify an individual’s identity.”)

119. See Grassi et al., *supra* note 115.

identification site.<sup>120</sup>

Login.gov is also using the recommended form of verification—verification based on documents that can be checked with the issuing institution, rather than social security numbers or other information that could be obtained for a fee on the dark web.<sup>121</sup> The move to this document-based verification is recent, but lines up well with the current recommendations.<sup>122</sup> Using a central verification method also means that it would be relatively easy to add verification, since the entire process would not need to be recreated from scratch for regulations.gov.

#### b. What if Someone Cannot Verify Their Identity

Any systematic push for verification, particularly when that verification is to be through official government identification documents, must acknowledge that doing so will inevitably affect some population groups more than others.

Concern about unequal access to government identification is a concern about unequal access to the benefit guarded by the verification. While this is a concern, and approaches in general through the federal government to provide alternative methods of secure verification could

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120. *Login.gov Partners*, LOGIN.GOV, <https://www.partners.login.gov/> (last visited Mar. 27, 2021).

121. Paul A. Grassi et al., *NIST Special Publication 800-63A, Digital Identity Guidelines: Enrollment and Identity Proofing*, NAT'L INST. OF STANDARDS & TECHNOLOGY, U.S. DEP'T OF COMMERCE (June 2017, updated Mar. 3, 2020), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-63a.pdf> at 20 (“Information accessible freely, for a fee in the public domain, or via the black market SHALL NOT be used.”).

122. *See id.* at 6 (providing a good run-through of the three stages of the “identity proofing process”). In the resolution phase, a credential service provider (CSP) collects basic information from the applicant and pictures of the applicant’s identity evidence “such as a driver’s license and a passport.” *Id.* In the validation phase the CSP checks that the documents do not appear to be altered and verifies the information on them with the issuing entity. *Id.* Finally, in the verification stage, the CSP asks for an additional picture of the applicant and checks it against the picture on the documents. If they match, an enrollment code is sent “to the validated phone number of the applicant, the user provides the enrollment code to the CSP, and the CSP confirms they match.” *Id.* At this point the identity has been officially verified. *Id.* There is also a concern about reducing the risk of impersonation, the major identity concern for validation of comments. However, one of the primary methods used to thwart another’s use of an individual’s identity is by having the individual also provide evidence of bills from utilities or credit cards sent to the correct address and addressed to the correct person. *Id.* at 25. While this method does lead to increased confidence in the identity assertion, it would not facilitate comment by individuals without the foresight to continually save utility bills with the correct name and address that may only arrive once a month, an even more difficult task if bills are split among different members of the household.

likewise enable expanded access here, there is still an important distinction.

Identification here is not required as a gateway before submission of a comment is possible, it is merely used to add credibility to a comment that could be submitted without verification as well. A lack of identification therefore does not prevent any voices from being heard. It results in a slight reduction in value rather than a prohibition.

The issue at stake, submitting comments to a rulemaking, while an important component of our democratic system, as discussed in Part I, is nevertheless not as significant a fundamental right as voting, another instance where identification has been a concern.<sup>123</sup> Not being able to place a verified mark next to a comment does not compare to being completely prevented from voting.

Identification could also be a concern for individuals who may not wish to reveal their personal information due to stalking or other concerns. Anonymous comments could continue to be submitted, when allowed by the agency, and an individual could make a choice to submit unverified (altered) details rather than comment under a verified identity if they felt it necessary.

Adding a verification option for comment submission, rather than a verification requirement, helps mitigate any potential negative effects for those for whom the current system offers some important advantage.

#### 4. This Solution Would be Beneficial to All Parties

Verifying comments would help the agencies by reducing the total number of comments and particularly reducing the number of fake comments. It would protect members of the public from having their identity used without their permission in comments. Finally, for third parties, it would not only allow them to retain the current beneficial structure, as with mass comments, but would potentially enable them to improve the accuracy of the data they are currently collecting, thereby making it particularly useful for them, and making the transition easier.

##### a. It Would Benefit Agencies

Fake comments harm agencies by wasting agency time and resources, providing inaccurate information, and damaging the public's

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123. See generally Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007) (explaining the then state of the laws and criticizing photo-ID requirements).

opinion of the entire rulemaking process. Reducing the comparative value of fake comments, by helping distinguish the verified comments, would be expected to reduce the number of fake comments. This in turn would reduce the amount of agency resources that go into addressing these comments, particularly to the extent it would reduce the number of deep fakes, the fake comments constructed to each be unique enough to avoid being treated as a single mass comment.<sup>124</sup>

Unlike traditional mass comments, which can often be bundled and processed as a single comment, a deep fake will generally need to be read through on its own, to check and make sure that there is nothing substantive the agency could miss. Reducing the value of these comments would reduce the number, saving agency resources.

Reducing the number of fake comments would also help improve the public's perception of the rulemaking process, since better control of fake comments would help reduce the public concern that those fake comments were manipulating the final agency decision.<sup>125</sup>

#### b. It Would Benefit the Public

The members of the public most significantly affected by fake comments are those whose identities were used without their permission on comments submitted to the agency. Reducing the comparative value of fake comments, and thus the number of fake comments in general, would help prevent additional members of the public from falling victim to this.

Verifying comments would also directly help those who do find their identities were compromised. There have been calls to force agencies to remove comments identified as fake, and there is no justifiable reason why an agency should refuse to remove one of many identical comments if it has been identified as fake,<sup>126</sup> but a court could take issue with the removal of a comment that was not already substantively duplicated in the record elsewhere, and those are the most likely comments to be

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124. See *supra* note 54 (providing early examples of “deep fakes”).

125. As discussed in Section II.A, the substance of the vast majority of fake comments would be expected to have no effect on the final rule. However, the public perception, that the total number of comments received on an issue should impact the final decision of the agency, does not agree with this and has proven very difficult to change.

126. Cf. Transcript, *supra* note 20, at 22–23 (raising the possibility of simply removing the identifying information from a comment identified as fake while retaining the substance of the comment).

damaging to someone's reputation.<sup>127</sup> Removing the name from a comment that was reported as fake while leaving the substance of the comment would seem to help solve this issue. Indeed, there is no reason an agency should not be willing to do this.

But removal in that situation requires that the individual notify the agency that a fake comment has been found in time to remove it, and many people are unaware that their identities were used in a submitted comment (people do not routinely check the dockets of rules they otherwise have little interest in on the off chance someone has stolen their personal information and used it to submit a comment).

Having something to signify that a comment is not known for sure to have been submitted by the person claimed would help to protect the public from fake comments that remain up either because they might still provide information or because the agency was not notified to take them down.

#### c. It Would Benefit Third-Party Interest Groups

Some third parties have used fake commentors in the past.<sup>128</sup> For an organization dependent on fictitious commentors, reducing the value and hopefully eliminating the use of fake comments would not be considered a benefit.

For all the other third-party groups, however, allowing comments to be validated would make their legitimate comments more valuable, since they would each clearly stand for an individual backing the statement of the organization. Getting validated information from commentors would also be a particular value to the organization.

Since this desire for data on commentors is likely behind the rise in mass comments, this makes this proposal even more appealing for these groups. The mass comment proposal (discussed in Section III.A) is designed to allow these organizations to retain the benefits they currently enjoy through the mass comment process; that is, it is essentially value neutral for them. Verifying comments, however, has the potential to actually make the process more valuable for these groups, and would lead to even greater buy-in.

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127. *See supra* Section II.B.2.

128. These fake commentors could be obtained directly or indirectly. *See* Singer-Vine & Collier, *supra*, note 30 (“[Shane] Cory was working for Ralph Reed . . . who himself was working for Broadband for America. Cory, in turn, enlisted LCX Digital to find the commentors.”).

## CONCLUSION

One man one vote is a sacred construct in much of American law, but not in the notice and comment process. This does not mean the process should encourage multiple repetitive comments from a single person or paid by an organization. This is neither necessary nor desirable in the age of the internet. Instead, the shift should be in the other direction, allowing and encouraging individuals to sign on to a comment submitted by someone else. Turning mass comment campaigns into campaigns for additional signatures would also make clear to those signing that there is no benefit to signing more than once, countering the vote early and vote often commentators who currently submit dozens or even hundreds of the same comments.

Similarly, allowing commentators to choose to verify their identity when submitting a comment would reduce the value of fake comments and help eliminate them from the process. It would also safeguard agency resources, protect those currently the victims of fake comment campaigns, and could even provide interest groups with better information than they are currently receiving, which would be expected to lead to greater buy-in from the entities driving the mass comment phenomenon.