VISUAL RULEMAKING

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Federal rulemaking has traditionally been understood as a text-bound, technocratic process. However, as this Article is the first to uncover, rulemaking stakeholders—including agencies, the President, and members of the public—are now deploying politically tinged visuals to push their agendas at every stage of high-stakes, often virulently controversial, rulemakings. Rarely do these visual contributions appear in the official rulemaking record, which remains defined by dense text, lengthy cost-benefit analyses, and expert reports. Perhaps as a result, scholars have overlooked the phenomenon we identify here: the emergence of a visual rulemaking universe that is splashing images, GIFs, and videos across social media channels. While this new universe, which we call "visual rulemaking," might appear to be wholly distinct from the textual rulemaking universe on which administrative law has long focused, the two are not in fact separate. Visual politics are seeping into the technocracy.

This Article argues that visual rulemaking is a good thing. It furthers fundamental regulatory values, including transparency and political accountability. It may also facilitate participation by more diverse stakeholders—not merely regulatory insiders who are well-equipped to navigate dense text. Yet we recognize that visual rulemaking poses risks. Visual appeals may undermine the expert-driven foundation of the regulatory state, and some uses may threaten or outright violate key legal doctrines, including the Administrative Procedure Act and longstanding prohibitions on agency lobbying and propaganda. Nonetheless, we conclude that administrative law theory and doctrine ultimately can and should welcome this robust new visual rulemaking culture.

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INTRODUCTION

In 2014, late-night cable pundit John Oliver used his popular HBO show to illustrate the importance of federal regulation.[1] He ran a 13-minute segment—in truth, a rant—opposing the approach of the Federal Communications Commission (FCC) to so-called "net neutrality."[2] After excerpting a video that depicted a monotone FCC

[1] LastWeekTonight, *Net Neutrality: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 1, 2014), https://www.youtube.com/watch?v=fpbOEoRrHyU [hereinafter *John Oliver: Net Neutrality*].

[2] *See The Open Internet*, FED. COMM. COMMISSION, https://www.fcc.gov/consumers/guides/open-internet (last visited June 28, 2016) (explaining that net neutrality, or an Open Internet, means that "[b]roadband service providers cannot block or deliberately slow speeds for internet services or apps, create special 'fast lanes' for content, or engage in other practices that harm internet openness").

commissioner droning on about the proposed rule,[3] Oliver lambasted the proceedings as "even boring by C-Span standards."[4] Despite the tedium, Oliver insisted, net neutrality was vitally important, and he made this point to his viewers by relying on a series of humorous visuals, including images of Superman, fuzzy kittens, and one of a babysitting dingo—a metaphor for the industry-captured FCC supposedly taking care of the Internet.[5] Oliver closed his piece with a call to action, imploring Internet trolls to file comments with the FCC: "We need you to get out there and for once in your lives, focus your indiscriminate rage in a useful direction!"[6] With an inspirational soundtrack playing in the background and the Internet address of the FCC prominently displayed on the screen, he exhorted commenters to "Turn on caps lock, and fly, my pretties! Fly, fly, fly!"[7] And fly they did: The FCC received tens of thousands of comments following Oliver's segment, at one point crashing the agency's website.[8]

Notably, Oliver was not the only one to try to harness the power of visuals to influence the FCC's rulemaking. A few months later, as the FCC was preparing to finalize its net neutrality rule, President Obama published a video in which he urged the FCC to protect net neutrality.[9] Although critics charged that the President's video inappropriately interfered with the deliberations of an independent agency,[10] the FCC seemed perfectly willing to listen. After taking both

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[3] *John Oliver: Net Neutrality*, *supra* note 1, at 1:11; *see also Commissioner Michael O'Rielly*, FED. COMM. COMMISSION, https://www.fcc.gov/general/commissioner-michael-o'rielly [https://perma.cc/J56Z-GD36] (last visited Feb. 26, 2016) (providing information on Commissioner Michael O'Rielly, whose address was shown in John Oliver's segment).

[4] *Id.* at 1:19–:26.

[5] *Id.*

[6] *Id.* at 12:59–13:15.

[7] *Id.*

[8] *See* Ben Brody, *How John Oliver Transformed the Net Neutrality Debate Once and for All*, BLOOMBERG (Feb. 26, 2015, 10:00 AM), http://www.bloomberg.com/politics/articles/2015-02-26/how-john-oliver-transformed-the-net-neutrality-debate-once-and-for-all [https://perma.cc/3W5W-SPWA] (discussing the impact John Oliver's segment had on the net neutrality debate).

[9] The White House, *President Obama's Statement on Keeping the Internet Open and Free*, YOUTUBE (Nov. 10, 2014), https://www.youtube.com/watch?v=uKcjQPVwfDk [hereinafter *President's Net Neutrality Video*].

[10] *See, e.g.*, Mark W. Davis, *Sneaky, Stealthy and Serpentine: The Obama Administration Forced the FCC's Hand on the Awful New Net Neutrality Rules*, U.S. NEWS (Feb. 27, 2015, 5:45 PM), http://www.usnews.com/opinion/blogs/mark-davis/2015/02/27/obama-net-neutrality-underhanded-power-grab-is-bad-for-the-internet (arguing that President Obama bullied the independent agency and compromised regulatory independence in the process); Gautham Nagesh & Brody Mullins, *Net Neutrality: How the White House Thwarted FCC Chief*, WALL ST. J. (Feb. 4, 2015, 7:52 PM), http://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522 (discussing Obama's interference in the net neutrality debate and the concerns by critics).

the President's message and nearly four million public comments into account,[11] the agency ultimately implemented a regulatory scheme that looked very much like the plan Obama had proposed, which favored strong net neutrality rules.[12]

This Article argues that visual appeals like those issued by the President and Oliver are emblematic of an emerging and significant phenomenon that has gathered momentum only within the last few years: the use of visual media to develop, critique, and engender support for (or opposition to) high-stakes, sometimes virulently controversial,[13] federal rulemakings. These visual media include an evolving range of multimedia communications, such as still images, videos, infographics, and GIFs, many of which also contain auditory and textual elements. Visual communication has long served important, sophisticated functions in the administrative arena.[14] Yet visuals have played little historical role in the rulemaking process. Instead, the rarified realm of rulemaking has remained technocratic in its form—defined by linear analysis, black-and-white text, and expert reports.

Now, due to the explosion of highly visual social media, we are on the cusp of change. This Article uncovers a visual transformation in rulemaking that has resulted in what might at first appear to be two separate universes: On the one hand, the official rulemaking proceedings, which even in the digital age remain text-bound, technocratic, and difficult for lay citizens to comprehend, and on the other hand, a newly visual—newly social—universe in which agencies, the President, members of Congress, and public stakeholders sell their regulatory ideas. But as the influence of the visuals deployed by Oliver and Obama in the net neutrality rulemaking show, these universes are not in fact distinct. Visual rulemaking—even when it is

[11] *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5604, 5796 n.1223 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf (noting that the FCC was "[i]nformed by the views of nearly 4 million commenters," and briefly acknowledging "the President's push for Title II reclassification"); Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED (Feb. 4, 2015, 11:00 AM), http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/ (noting that nearly 4 million public comments were received).

[12] *See infra* notes 310–13 and accompanying text (describing the strong net neutrality principles in the final rule).

[13] Thomas McGarity has previously observed that "high-stakes rulemaking has become a 'blood sport' in which regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies." Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1671 (2012). The new visual rulemaking world we uncover in this Article exacerbates these dynamics.

[14] *See infra* Section I.A (discussing the communicative power of visuals).

outside the four corners of official rulemaking proceedings—is seeping into the technocracy.

This Article is the first not only to identify the emergence of this more visual form of rulemaking, but also to analyze the significant theoretical and doctrinal implications that it raises.[15] In terms of administrative law theory, we conclude that there are important justifications supporting the new visual rulemaking culture. Most notably, agencies' uses of visuals to market their regulatory agendas—often in direct coordination with the President's sophisticated exploitation of digital media—further two fundamental theoretical justifications underpinning the regulatory state: transparency and political accountability. For instance, in August 2015, President Obama issued a YouTube "Memo to America" in which he took political credit for the highly controversial Clean Power Plan, omitting any mention of the fact that the rule was promulgated by the Environmental Protection Agency (EPA).[16] In the same vein, at the outset of its recently finalized overtime pay rulemaking,[17] the Department of Labor (DOL) posted a whiteboard video to its blog featuring a hand-drawn sketch of President Obama directing the agency to "update the rules!"[18] These visuals bring greater transparency and political accountability to the regulatory state, helping Americans to understand the role that the President plays in directing and influencing federal agency rulemaking regarding key priorities, from workers' overtime pay to climate change.

In addition, these same visual tools have the potential to democratize public participation and to enable greater dialogue between agencies and the public. Because visuals are easy to create and to digest in today's social media culture, visual rulemaking empowers a broader range of stakeholders—not merely those privileged regulatory insiders who are well-equipped to navigate dense text.[19] It also enables agencies to compete with the narratives of powerful institu-

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[15] This Article focuses exclusively on informal notice-and-comment rulemaking governed by Section 553 of the Administrative Procedure Act. 5 U.S.C. § 553 (2012).

[16] The White House, *President Obama on America's Clean Power Plan*, YOUTUBE (Aug. 2, 2015), https://youtu.be/uYXyYFzP4Lc [hereinafter *Memo to America*]; *see also infra* notes 196–99 and accompanying text (discussing Obama's "Memo to America").

[17] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

[18] Heidi Shierholz, *Everything You Need to Know About Updating Overtime Pay*, U.S. DEP'T. OF LABOR: U.S. DEP'T OF LABOR BLOG (July 8, 2015), http://blog.dol.gov/2015/07/08/everything-you-need-to-know-about-updating-overtime-pay/; *see also infra* notes 255–57 and accompanying text (displaying the hand-drawn sketch).

[19] *See infra* Section I.A (discussing neuroscience literature on the seeming ease of visual communication).

tional stakeholders who might otherwise dominate political dialogue on regulatory actions.

Despite these theoretical advantages, visual rulemaking raises serious risks. Visual appeals may turn high-stakes rulemakings into viral political battles, undermining the expert-driven foundation of the regulatory state. Visuals may oversimplify complexities, appeal to emotions over intellect, and fuel partisan politics.[20]

Visual rulemaking also implicates significant doctrinal questions. As just one example, consider how in December 2015, the Government Accountability Office (GAO) found that EPA had violated a statutory prohibition on agency lobbying during a Thunderclap campaign—a kind of virtual flash mob—that it unleashed in support of its proposed Clean Water Rule.[21] In addition to these lobbying and propaganda prohibitions, we identify other key doctrinal road bumps to the growth of visual rulemaking, including fundamental provisions of the Administrative Procedure Act (APA) and the First Amendment.[22] While none of these doctrinal issues threatens to obstruct visual rulemaking entirely, they do suggest that agencies' use of visuals may need to change some around the margins.

This Article proceeds in three Parts. Part I explains that despite the widely acknowledged communicative power of images, visual communication has long been missing from the rulemaking realm. Deep-rooted assumptions about the solely textual nature of rulemaking have prevented even e-rulemaking scholars from recognizing the potential role that visual communication could play and indeed is now playing. Part II draws on examples from recent high-stakes rulemakings to demonstrate not only how key stakeholders in the regulatory arena are now using images to achieve their regulatory goals, but also how they are using visuals in different ways. These

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[20] *See, e.g.*, Timothy Williams et al., *Police Body Cameras: What Do You See?*, N.Y. TIMES, http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html (last updated Apr. 1, 2016) (interactive exercise showing how viewers' interpretation of police camera videos are influenced by the viewers' perspective, narration, or pre-existing beliefs). These effects are easily magnified by purposeful digital manipulation. *See, e.g.*, Nat'l Press Photographers Ass'n, *Forward*, NPPA: THE VOICE OF VISUAL JOURNALISTS (Oct. 17, 2012), http://blogs.nppa.org/ethics/2012/10/17/forward/ (describing how the *National Review* "used a Reuters photo showing President Obama addressing the crowd at the Democratic Convention as their October First cover, but they changed all the FORWARD signs the people were holding into signs that said ABORTION," and only later revealed (when challenged) that the photograph had been altered).

[21] U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter on Environmental Protection Agency's Application of Publicity or Propaganda and Anti-Lobbying Provisions, at 2 (Dec. 14, 2015) [hereinafter "U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter"].

[22] *See infra* Section III.B (discussing doctrinal implications).

stakeholders include agencies and the President, as well as members of Congress, industry representatives, and everyday Americans. Part III identifies and critiques the significant theoretical and doctrinal issues raised by visual rulemaking, explaining how different uses of visuals raise different legal and theoretical questions. Ultimately, we conclude that—while this very new phenomenon may unfold in unexpected and unforeseen ways—administrative law doctrine and theory can and should welcome the arrival of visual rulemaking.

I
Overlooking the Visual in Rulemaking

As this Part describes, the communicative power of visuals is widely recognized. Yet, at least until two or three years ago, visual communication played little role in the rulemaking realm. Instead, longstanding assumptions about the textual nature of rulemaking prevented even e-rulemaking scholars from recognizing the emergence and potential power of visual communication.

A. The Power of Visual Communication

Visuals matter because they pack a punch. Psychology and neuroscience (not to mention personal experience) indicate that visuals are efficient, powerful mechanisms for communicating even complex ideas. Foremost, they are incredibly efficient at conveying both information and emotion. This efficiency is partly a matter of processing speed: We grasp visuals substantially faster than we can read text—sometimes in less than a second.[23] We also approach visuals differently than we do text: we scan pictures, absorbing information in a sweeping, gestalt manner—"at a glance"—in contrast to the linearity and depth of traditional reading.[24] In other words, visuals can give us the big picture (literally and figuratively) without

[23] *See, e.g.*, Neil Feigenson & Christina Spiesel, Law on Display: The Digital Transformation of Legal Persuasion and Judgment 7–8 (2009) (stating that people can "get the gist of a visual display in a single fixation lasting less than a third of a second"); Steven Yantis, Sensation and Perception 262 (2014) (describing rapid visual presentation experiments demonstrating that "the gist of a scene" can be acquired even when the scene appears for only a fraction of a second); Christina M. Leclerc & Elizabeth A. Kensinger, *Neural Processing of Emotional Pictures and Words: A Comparison of Young and Older Adults*, 36 Developmental Neuropsychology 519, 520 (2011) (stating that "[p]ictures tend to be processed more rapidly than words"). Neuroscientists are still studying the precise pathways of this rapid cognition. *See* Kalanit Grill-Spector & Rafael Malach, *The Human Visual Cortex*, 27 Ann. Rev. Neuroscience 649, 656 (2004) (noting that "[o]ne of the greatest mysteries in vision research is how humans recognize visually presented objects with high accuracy and speed").

[24] Elizabeth G. Porter, *Taking Images Seriously*, 114 Colum. L. Rev. 1687, 1753 (2014).

demanding that we trudge through pages of text. Understanding an image might seem intuitive, even effortless.[25]

That sense of ease associated with the visual may be especially valuable for explaining scientific or complex topics to non-experts, or for organizing and conveying the significance of data.[26] Infographics and maps are visuals that are purposely designed to maximize this visual efficiency. They allow viewers to compare alternative narratives or data sets; to evaluate the evolution of a phenomenon over time and/or space; and to understand the interaction between many variables in complex systems.[27] Visual layering—"visually stratifying different aspects of the data"—declutters information, clarifying the relationships between ideas or information.[28] Infographics can also provide multiple ways to ingest information; for example, a chart or map can simultaneously invite a quick, "macro" reading and more leisurely, personal "micro-readings."[29]

In addition to their efficiency, visuals are engaging.[30] They instantly and memorably convey emotion, from pathos to humor.[31] And because they are tinged with emotion, we are more likely to remember images than we are words.[32] The combination of image, text, and even sometimes sound can further an image's emotional effect, by either reinforcing an image's meaning or exploiting the cognitive dissonance between the image and the text.[33] Together with this

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[25] *Id.*

[26] EDWARD R. TUFTE, THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION 50 (2d ed. 2001) [hereinafter TUFTE, VISUAL DISPLAY]; DONA M. WONG, THE WALL STREET JOURNAL GUIDE TO INFORMATION GRAPHICS 13 (2010) ("When a chart is presented properly, information just flows to the viewer in the clearest and most efficient way.").

[27] TUFTE, VISUAL DISPLAY, *supra* note 26, at 15.

[28] EDWARD R. TUFTE, ENVISIONING INFORMATION 53 (1990) [hereinafter TUFTE, ENVISIONING INFORMATION].

[29] *Id.* at 37 (describing how a micro-reading is personal and detailed; it can involve "individual stories about" data, in the context of a bigger—macro—picture).

[30] *See* Jan De Houwer & Dirk Hermans, *Differences in the Affective Processing of Words and Pictures*, 8 COGNITION & EMOTION 1, 1 (1994) (stating that images "have privileged access to a semantic network containing affective information"); Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 848 (2014) (noting that fMRI research confirms traditional psychological research finding that "pictures have a closer connection to emotion than words and are processed faster than words for emotional information").

[31] *See* Haupt, *supra* note 30, at 825 ("Images are processed at higher rates than textual components and they are more directly linked to emotion than text."); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 343 (2011) (arguing that "shared images convey information, perceptions, stories, or emotions; the stream of shared images establishes a sense of 'co-presence' in correspondents' lives").

[32] *See* Haupt, *supra* note 30, at 849 (noting that "emotionally charged pictures are particularly easy to remember").

[33] *See* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 691 (2012) (stating that "using pictures emphasizing one side of a

emotional impact, images carry an implicit but strong sense of credibility: *Seeing is believing*. Partly for that reason, and partly because of the new ubiquity of photos and videos, images are playing an increasingly central role in policy and legal debates. Almost eight years ago in *Scott v. Harris*, the Supreme Court for the first time embedded a link to a police video into an opinion.[34] From videos of police shootings[35] to the photos of Abu Ghraib[36] to the Syrian refugee crisis,[37] visual documentation of an event frequently shapes public perceptions and politics related to that event. This emotive power of images is likely to increase as virtual reality jolts us out of two-dimensional media.[38]

Notably, the strengths of visuals—their efficiency, their emotional impact, their very naturalness—are also images' greatest risks. Because they seem so comfortable and easy, "we may stop looking before we realize that critical thought should be applied to them."[39] Visuals can oversimplify complexities, distort facts, and manipulate emotions.[40] We may be able to think rationally about an event when we read textual descriptions, but that rationality may not withstand a visual depiction of the event. As neuroscientists have found, we do not interpret images in a vacuum; to the contrary, we use "top-down information"—information that flows from the viewer's knowledge and goals—to interpret images.[41] This means that, to some extent, we per-

balanced news report . . . biases readers' perceptions of contested issues in favor of the pictured side").

34 550 U.S. 372, 378 n.5 (2007); *cf.* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (discussing the Court's reasoning and contrasting such reasoning to a sample of Americans' reactions to the incident footage).

35 *See Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1799–803 (2015) (describing benefits and risks of increased video monitoring of police-civilian encounters).

36 *See generally* Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2085, 2091 (2005) (discussing graphic photos that were released to the public of tortured prisoners in Abu Ghraib prison).

37 *See* Susan Ager, *This Wouldn't Be the First Time a Child's Photo Changed History*, NAT'L GEOGRAPHIC (Sept. 3, 2015), http://news.nationalgeographic.com/2015/09/150903-drowned-syrian-boy-photo-children-pictures-world/ (discussing impact of photo of drowned Syrian three-year-old child who washed ashore in Turkey).

38 *See* Danfung Dennis, *American Bison*, N.Y. TIMES (Jan. 21, 2016), http://www.nytimes.com/2016/01/21/opinion/sundance-new-frontiers-virtual-reality.html (observing that in virtual reality, "we instinctively feel a surge of empathy for those whose experiences we are immersed in").

39 Tushnet, *supra* note 33, at 690.

40 *See* Porter, *supra* note 24, at 1754–56 (discussing how images often arouse emotions more significantly than text and how one's beliefs influence what one sees).

41 *See* YANTIS, *supra* note 23, at 144 (noting that visual perception combines "bottom-up" information, which flows from the retina to the brain, with "top-down information," which flows "from higher regions to lower regions" in the brain, in order to recognize visual stimuli); *see also id.* at 145 (explaining neuroscience finding that "the visual system

ceive what we expect to perceive. For example, research has shown that when people were thinking about beauty, "specific parts of the brain responded to more attractive faces."[42] In addition, seemingly extrinsic factors such as whether an image is color or black-and-white, affect our ability to remember an image.[43]

Both the power and the risk of visuals have become more prominent in recent years with the arrival of Web 2.0—which began around 2004 or 2005 with the founding of Facebook, YouTube, Flickr, and other social media.[44] The emergence of digital media has fundamentally altered the way that people ingest and share information.[45] Our cultural norms, and seemingly our brains, have been rewired to acclimate to the high-intensity, high-color Web in which we are now entangled.[46] Visual information is mobile, it is social, and it is influential.

Until recently, the law generally has underestimated the communicative value of images.[47] It "has tended to identify . . . rationality with texts rather than pictures, with reading words rather than 'reading' pictures, to the point that it is often thought that thinking in words is the only kind of thinking there is."[48] As the next Section will show, agency rulemaking has been no exception.

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unconsciously applies two probabilities in order to infer what type of scene produced the currently experienced retinal image: (1) the prior probability of all possible scenes and (2) for each possible scene, the probability that it produced the current retinal image").

[42] ANJAN CHATTERJEE, THE AESTHETIC BRAIN: HOW WE EVOLVED TO DESIRE BEAUTY AND ENJOY ART 76–77 (2013) (noting that the affected areas of the brain "included the face area and the adjacent lateral occipital cortex that processes objects in general").

[43] *See* ADAM ALTER, DRUNK TANK PINK 170 (2013); *see also id.* at 2–13 (noting that the color "drunk tank pink" originates from findings that police drunk tanks painted bright pink experienced fewer incidents of fights or aggression among detainees).

[44] *See* DAVID CROTEAU, WILLIAM HOYNES & STEFANIA MILAN, MEDIA/SOCIETY: INDUSTRIES, IMAGES, AND AUDIENCES 11 (4th ed. 2012) (listing major social media platforms by year); JANET LOWE, GOOGLE SPEAKS: SECRETS OF THE WORLD'S GREATEST BILLIONAIRE ENTREPRENEURS SERGEY BRIN AND LARRY PAGE 294 (2009) (explaining that "Web 2.0" describes "the proliferation of interconnectivity and social interaction on the World Wide Web").

[45] *See* Porter, *supra* note 24, at 1719–20 (describing digital innovations and their impact on how people read and interact with multimedia writing).

[46] *See* NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS 141 (2011) (citing Patricia M. Greenfield, *Technologies and Informal Education: What Is Taught, What Is Learned*, SCI., Jan. 2, 2009, at 69–71 (2009)) (arguing that digital technologies are enhancing people's visual-spatial intelligence but weakening our capacity for deep processing and reflection).

[47] *See* Porter, *supra* note 24, at 1699 (noting that, outside of trial, "text defines the profession").

[48] FEIGENSON & SPIESEL, *supra* note 23, at 4.

B. Rulemaking: A Technocratic, Textual Tradition

Rulemaking has long been viewed as a text-based affair. To be sure, rulemaking proceedings have historically included occasional visuals, such as evidentiary exhibits or explanatory figures. In fact, the very first volume of the Federal Register contained a diagram of a "marine signal pistol" relating to rule amendments promulgated by an agency within the Department of Commerce.[49] Since that time, the Federal Register has occasionally contained maps, charts, or diagrams, and stakeholders and policymakers have naturally submitted comments or evidence to rulemaking dockets that sometimes include visual material.[50] Moreover, on occasion, graphics have even entered into final rules. For example, figures in the Code of Federal Regulations depict requirements established by the Consumer Product Safety Commission for flammability tests for mattresses,[51] and the Code of Federal Regulations also includes depictions of sample graphic labels created by EPA and the Department of Transportation (DOT) concerning vehicles' fuel efficiency.[52] Yet, on the whole, rulemaking has historically been, and remains, a text-bound endeavor. As a result, neither rulemaking stakeholders nor legal scholars studying rulemaking have been attuned to the potential value of visual input into the regulatory process.

Notably, this dismissal of the visual has persisted despite agencies' longstanding recognition—outside of the rulemaking context—of the power of visual tools. From the U.S. Army's famous "I Want You" poster[53] to the long running Smokey Bear forest fire awareness cam-

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[49] Amendments to General Rules and Regulations Prescribed by the Board of Supervising Inspectors, 1 Fed. Reg. 441, 443 (May 23, 1936).

[50] *See, e.g.*, SCI. APPLICATIONS INT'L CORP., A GUIDE FOR THE INSPECTION OF RADIOACTIVE MATERIAL SHIPMENTS BY MOTOR VEHICLE OR AT FREIGHT FACILITIES 17, apps. a, b (1988), https://www.regulations.gov/document?D=FMCSA-1997-2180-0052 (click on attachment) (containing diagrams and charts and included as part of docket for proposed rule on Transportation of Hazardous Materials, 58 Fed. Reg. 33,418, 33,419 (proposed June 17, 1993) (not adopted)); WALDEMAR C. DREESSEN ET AL., U.S. PUB. HEALTH SERV., PNEUMOCONIOSIS AMONG MICA AND PEGMATITE WORKERS 7, 8, 12, 13 (1940), https://www.regulations.gov/document?D=OSHA-H020A-2006-0900-0313 (click on pdf symbol) (serving as a reference material for proposed rule on Air Contaminants, 57 Fed. Reg. 26,002 (proposed June 12, 1992) (not adopted)).

[51] 16 C.F.R. § 1633 figs.1–17 (2016) (showing, among other information, required structure of mattress testing equipment, and mandatory flammability labels for mattresses).

[52] 49 C.F.R. § 575.401 app. (2014) (showing fuel economy labels for gasoline-fueled vehicles).

[53] *The Most Famous Poster*, AM. TREASURES OF THE LIBR. OF CONGRESS, https://www.loc.gov/exhibits/treasures/trm015.html (last visited July 13, 2016) (displaying the famous U.S. Army "I Want You" poster, which was created by James Flagg and originally published in 1916).

paign,[54] the publicly oriented arm of agencies has routinely harnessed the power of visuals in creative and sometimes poignant ways to market their overall missions and to educate the American public.[55] Indeed, agencies' uses of visuals to market their agendas have sometimes pushed the envelope so far that they have elicited the ire of Congress. One such example involves agencies' use of "video news releases," or VNRs, to disseminate news. VNRs were agency-produced, pre-packaged news reports disseminated to news broadcasters across the nation for insertion into programs.[56] Under George W. Bush, agencies created VNRs that looked like real newscasts, but in which the "reporters" were actually agency employees promoting the President's legislative goals, such as Medicare legislation. At Congress's request, GAO investigated the matter and ultimately found that these fake news segments were a prohibited form of propaganda under federal law.[57] This example shows that agencies are well aware of—and willing to exploit—the power of the visual. But the public facing, publicity arm of agencies generally did not reach into the regulatory realm.

Rulemaking's fixation with text persisted despite the arrival of Web 2.0 and the explosion of new modes of visual communication. In 2003, the government launched Regulations.gov, which for the first time housed all rulemaking activity in a single website that allows the public to perform fundamental rulemaking tasks, including searching and submitting comments electronically.[58] President Obama's Open

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[54] *See, e.g.*, *Smokey's History*, SMOKEY BEAR, http://www.smokeybear.com/vault/#!prettyPhoto[1960sP]/0/ [https://perma-archives.org/warc/M5ZP-AYGX] (last visited July 13, 2016) (displaying an early Smokey Bear image).

[55] *See, e.g.*, Carolyn Puckett, *Administering Social Security: Challenges Yesterday and Today*, 70 SOC. SECURITY BULL. (Soc. Sec. Admin., Washington, D.C.), no. 3, 2010, at 27, 29–30, 32, 34, 37 (2010), https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p27.html [https://perma.cc/536E-PM45] (displaying pictures from the history of the Social Security Administration); *Historical Photos and Images*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/aboutepa/historical-photos-and-images [https://perma.cc/QSR7-KE8P] (last visited July 15, 2016) (providing photos from EPA's "Documerica Project," which "record[ed] the state of the environment and efforts to improve it"); *Social Security History*, SOC. SECURITY ADMIN., https://www.ssa.gov/history/comic1969.html (last visited July 16, 2016) (reprinting 1969 comic book from Social Security Administration).

[56] *See* STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 111TH CONG., *Analysis of the First Year of the Obama Administration: Public Relations and Propaganda Initiatives* 6–7 (Aug. 16, 2010), https://oversight.house.gov/wp-content/uploads/2012/02/8-16-2010_Propaganda_Report.pdf (discussing the use of propaganda in the Clinton administration).

[57] Dep't of Health and Human Servs., Ctrs. for Medicare & Medicaid Servs., B-302710, 2004 WL 1114403, at *11 (Comp. Gen. May 19, 2004), http://www.gao.gov/decisions/appro/302710.pdf [https://perma.cc/FG8M-2PLB].

[58] *See* E-Government Act of 2002, Pub. L. No. 107–347, § 206, 116 Stat. 2899, 2915–16 (establishing eRulemaking Program); *About Us*, REGULATIONS.GOV, https://

Government Memorandum, issued on his first day in office, further reinforced the ideals embodied by these digital rulemaking initiatives.[59] Scholars and policymakers were optimistic that these digital innovations would advance the rulemaking ideals of transparency and public participation, "open[ing] the political imagination to better ways of organizing, not simply documents, but the interpersonal relationships of the rulemaking process."[60] In many ways, however, the promise of a more participatory, newly dialogic rulemaking culture has not been fulfilled.[61] Although there is some evidence that the number of public comments has increased, at least in certain high-profile proceedings, there is no strong indication that the shift to a digital docket has expanded the number of influential comments, or that it has significantly improved the public's awareness of or respect for the regulatory process.[62]

Scholars have considered many possible reasons for this anti-climax. They have noted, for example, that everyday citizens might be deterred from participating in rulemaking due to information overload, ignorance about agencies and regulations, or ignorance of the existence of a rulemaking.[63] But scholars have not suggested, and have not seriously considered, the role that visuals might play in democratizing or making more transparent the process of creating federal regulations. In fact, in his recent report to the Administrative

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www.regulations.gov/aboutProgram [https://perma.cc/69P6-R5GA] (last visited July 16, 2016) (describing the eRulemaking Program).

[59] *See* Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC. 14 (Jan. 21, 2009) (stating that the government should be transparent, participatory, and collaborative).

[60] Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 435 (2004); *see also* MICHAEL HERZ, USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS 2 (Nov. 21, 2013), https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf [https://perma.cc/CYN3-3X3E] (noting that many expected e-rulemaking to "make rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic").

[61] *See* HERZ, *supra* note 60, at 14 ("[M]embers of the public remain largely unaware and uninformed about the process and particular rulemakings and do not know how to make useful contributions, there is no back-and-forth among commenters or between commenters and the agency, and the process remains largely sealed off from the public . . . .").

[62] *See* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 954–59 (2006) (discussing studies and other evidence suggesting that e-commenting has not increased the level of citizen comments or participation).

[63] *See generally* Cynthia Farina et al., *Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project*, 41 FORDHAM URB. L.J. 1527, 1549–65 (2014) (describing efforts to lower barriers including lack of awareness and information overload).

Conference of the United States (ACUS)[64] on the role of social media in rulemaking, scholar Michael Herz dismissed the potential of image-driven communication to inform or influence rulemaking. As Herz put it: "[O]ne of the defining characteristics of social media is that it is multi-media and therefore allows communication other than through words. That is breathtaking and wonderful and valuable in many settings. But writing regulations just is not one of them."[65] Like scholars more generally,[66] Herz has overlooked the visual.

In accordance with this text-focused tradition, efforts to make rulemaking more engaging and accessible have been almost entirely text-focused. Consider Federalregister.gov, an award-winning[67] website that features clean logos, color images drawn from Flickr, and even a "most viewed/most emailed" list.[68] In becoming more searchable and more comprehensible to a non-expert viewer, the online Register is indeed a huge leap forward. But when it comes to the actual regulatory process, entries in Federalregister.gov are visually identical to their textual counterparts: lengthy, in rather narrow columns and filled with dense, highly technical text. And the Office of Information and Regulatory Affairs' 2012 attempt to make regulations more comprehensible by requiring executive summaries of certain proposed rules has not helped.[69] One empirical analysis found that such executive summaries were "significantly less readable" than

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64 ACUS is an independent federal agency whose mission is to improve the administrative process through applied research. *About the Administrative Conference of the United States (ACUS)*, ADMIN. CONF. OF THE U.S., https://www.acus.gov/about-administrative-conference-united-states-acus (last visited July 17, 2016).

65 HERZ, *supra* note 60, at 24.

66 For instance, Cynthia Farina and others at Cornell's e-Rulemaking Initiative (CeRI) have developed RegulationRoom, a digital laboratory aimed at developing new ways of increasing public participation in the regulatory process. *See RegulationRoom*, CORNELL UNIV., http://regulationroom.org/ (last visited July 17, 2016). While RegulationRoom has made creative efforts to simplify and explain regulatory text, it sticks closely to the textual template of the proposed rules themselves. *See id.* (lacking a platform to accept visual comments or input); *see also* Farina et al., *supra* note 63, at 1546 (explaining how the RegulationRoom team "analyzed the original rulemaking documents and created ten 'topic posts,'" which "used more concise language to explain the problems" at issue in the rulemaking).

67 *See* Michael White, *Bright Idea Award: Harvard JFK School Recognizes Federal Register 2.0*, FED. REG. (Sept. 25, 2012), https://www.federalregister.gov/blog/2012/09/bright-idea-award-harvard-jfk-school-recognizes-federal-register-2-0 [https://perma.cc/T6G3-5V5X] (announcing that Federal Register 2.0 was recognized for the "Bright Idea Award" by the Ash Center for Democratic Governance and Innovation, part of the John F. Kennedy School of Government at Harvard University).

68 FED. REG., https://www.federalregister.gov/ (last visited Feb. 5, 2016).

69 *See* Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to Heads of Exec. Dep'ts and Agencies (Jan. 4, 2012), https://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/clarifying-regulatory-requirements_executive-summaries.pdf [https://perma.cc/3MFP-SKWT] [hereinafter Memorandum from Sunstein]

the preambles to the rules themselves.[70] In fact, even when agencies draft regulations that specifically require graphic warnings or labels, those images may not appear in the agency's notice of proposed rulemaking (NPRM), the draft rule, or the finalized regulation.[71]

We believe there are multiple factors undergirding this deep, implicit assumption that visual technology has no valuable role in rulemaking. First, regulation is largely a legal and technical endeavor—both fields in which written analysis and specialized languages are defining aspects of the profession. In almost every context outside of trial, law is a typographic, semantic field. Legal textbooks rarely contain images; statutes and regulatory codes are overwhelmingly textual; and litigation documents, legal scholarship, and judicial opinions are, almost by definition, exclusively textual.[72] In the context of rulemaking, these typographic cultural traditions are further reinforced by an "expertise-based" model, "which view[s] agencies as professional, apolitical experts."[73] Courts performing judicial review of agency decisions tend to view regulations in such "expert-driven terms."[74] Although a number of scholars now acknowledge a place for politics in agency rulemaking,[75] this more nuanced theoretical understanding has not permeated the nuts and bolts of the actual rulemaking process, which continues to look and feel staunchly technocratic. Thus, while agencies have long felt comfortable deploying visuals to market and to promote overarching governmental goals, such as educating Americans about the dangers of forest fires or

(stating that proposed and final rules should contain "straightforward executive summaries").

70 Cynthia R. Farina, Mary J. Newhart & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1405 (2015) (describing executive summary rule as a "regulatory misfire").

71 *See, e.g.*, Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,680 n.5 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141) (explaining where electronic files containing graphic cigarette warning labels could be found).

72 *See* Porter, *supra* note 24, at 1700 (describing legal discourse as "text-centered").

73 Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 15 (2009).

74 *Id.* at 19–21.

75 *See, e.g.*, *id.* at 7–9 (proposing that arbitrary and capricious review should be "expanded to include certain political influences from the President, other executive officials, and members of Congress," as long as they are disclosed in the record); *see also* CHRISTOPHER EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1128–31 (2010) (calling for agencies to summarize executive influence on significant rule-making decisions).

mobilizing wartime support,[76] only now is this visual—and somewhat political—approach migrating into the regulatory realm.

II
The Ad Hoc Emergence of Visual Rulemaking

This Part demonstrates the emergence of a new visual rulemaking culture that contrasts starkly with the text-bound traditions that have long prevailed. Agencies, the President, Congress, members of the public, and repeat-player institutions are all using the tools of the modern, quintessentially visual, information age to wield influence over the regulatory state. And while it might appear that this colorful and social rulemaking world is wholly divorced from its technocratic, textual rulemaking counterpart, this distinction does not hold. The two worlds are bleeding into each other.

A. Agencies

As might be expected given the enormous size and diversity of the federal bureaucracy,[77] not all regulatory agencies have embraced visuals in the same way. Some agencies are doing very little, if anything, to harness the power of visual communication in the context of their rulemaking proceedings. The FCC, which somewhat ironically bills itself as the nation's primary authority for "technological innovation,"[78] is one such agency. The FCC does have Facebook,[79] Twitter,[80] YouTube,[81] and Flickr[82] accounts, but it only occasionally posts visual

[76] *See supra* notes 53–55 and accompanying text (discussing agencies' history of using visuals to market their missions).

[77] Hundreds of federal agencies exist. *See Federal Agencies & Commissions*, The White House, https://www.whitehouse.gov/1600/federal-agencies-and-commissions [https://perma.cc/U945-BHRS] (last visited Feb. 25, 2016). Some implement their missions primarily through adjudication, others through rulemaking, and some use a mix of both. *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1399 (2004) (contrasting the National Labor Relations Board (NLRB) and the Federal Trade Commission (FTC), which rely heavily on adjudication; with the FCC, which relies primarily on rules; and the Federal Energy Regulatory Commission (FERC), which relies on both).

[78] *The FCC's Mission*, Fed. Comm. Commission, https://www.fcc.gov/about/overview [https://perma.cc/28D7-3QAH] (last visited Feb. 25, 2016).

[79] Fed. Commc'ns Comm'n, Facebook, https://www.facebook.com/FCC [https://perma.cc/9V3L-VAYS] (last visited Feb. 25, 2016).

[80] Fed. Commc'ns Comm'n (@FCC), Twitter, https://twitter.com/FCC [https://perma.cc/QQ3S-EZ78] (last visited Feb. 25, 2016).

[81] Fed. Commc'ns Comm'n, *FCCdotgovvideo*, YouTube, https://www.youtube.com/user/fccdotgovvideo [https://perma.cc/C9U2-GH95] (last visited Feb. 25, 2016).

[82] Fed. Commc'ns Comm'n, Flickr, https://www.flickr.com/photos/fccdotgov/ [https://perma.cc/66UG-VDVA] (last visited Feb. 25, 2016).

communications tied to its rulemaking proceedings.[83] Indeed, its online visual presence consists almost entirely of yawn-inducing images of speakers wearing suits as they sit or stand in front of microphones at workshops, meetings and employee-of-the-year events.[84] Other agencies, including the Department of Treasury and the Federal Energy Regulatory Commission, similarly fall on the visually lackluster end of the spectrum.[85] Rarely do these agencies' visual postings have anything to do with their rulemaking activities.[86]

At the other end of the spectrum, an evolving group of more visually adventurous agencies—nearly all of which are executive agencies under the control of the President—is beginning to deploy the power of visuals in the context of high-stakes, politically charged rulemaking proceedings. These agencies—which currently include, among others, the Food and Drug Administration (FDA),[87] DOT,[88] DOL,[89] and

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[83] *See, e.g.*, Fed. Commc'ns Comm'n, FACEBOOK (June 12, 2015), https://www.facebook.com/FCC/photos/pb.127812519670.-2207520000.1454287157./10153048168774671/?type=3&theater [https://perma.cc/7N4Y-27WT?type=image] (showing image of gavel accompanied by text announcing FCC's Open Internet Rules).

[84] *See, e.g.*, Fed. Commc'ns Comm'n, *FCCdotgovvideo*, *supra* note 81 (featuring video of speaker at a podium).

[85] *See, e.g.*, Fed. Energy Regulatory Comm'n (@FERC), TWITTER (Dec. 10, 2014), https://twitter.com/FERC/status/542728963484049408 [https://perma.cc/R6EA-BTBS] (providing photo of award recipients); Fed. Energy Regulatory Comm'n (@FERCgov), YOUTUBE, https://www.youtube.com/channel/UCo9LfvEBzLB7kIX85e-7GKQ/videos [https://perma.cc/E678-M7NW] (last visited Feb. 25, 2016) (posting videos of speakers at meetings); U.S. Dep't of Treasury, FLICKR, https://www.flickr.com/photos/ustreasury/ [https://perma.cc/4HQC-RR2G] (last visited Feb. 25, 2016) (posting many photos of speakers wearing suits).

[86] *But see* U.S. Dep't of Treasury, FACEBOOK (Oct. 21, 2015), https://www.facebook.com/ustreasury/photos/pb.128956403810041.-2207520000.1454353142./1000961269942879/?type=3&theater [https://perma.cc/G9Y4-RM4G?type=image] (posting photo of building and accompanying text discussing Treasury's proposed regulations involving tax treatment of same-sex spouses).

[87] *See, e.g.*, *FDA Proposes New Safety Measures for Indoor Tanning Devices: The Facts*, U.S. FDA, http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm350790.htm [https://perma.cc/8HPX-7FQJ] (last visited Feb. 25, 2016) (including link to video on risks of indoor tanning); *Food Serving Sizes Get a Reality Check*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM387442.pdf [https://perma.cc/82WQ-R4XP] (last visited Feb. 25, 2016) (providing FDA infographic on new food serving size standards); U.S. Food & Drug Admin., FACEBOOK (Nov. 17, 2015), https://www.facebook.com/FDA/photos/a.411715387298.184452.94399502298/10153722792287299/?type=3&theater [https://perma.cc/8X25-2AHC?type=image] (posting images of food related to rulemaking on labels for gluten-free foods).

[88] *See, e.g.*, U.S. Dep't of Transp., FACEBOOK (Dec. 8, 2015) https://www.facebook.com/USDOT/photos/a.10151397472936779.529479.63235616778/10153766384016779/?type=3&theater (including photo of car that crashed into rear of truck in post relating to rulemaking); U.S. Dep't of Transp., FACEBOOK (June 5, 2015), https://www.facebook.com/USDOT/photos/a.10151397472936779 .529479.63235616778/10153380360816779/?type=3&theater [https://perma.cc/GF83-V8NS?type=image] (including photo of truck with its wheels tipping up off the ground in post related to electronic stability control rule); U.S.

EPA[90]—are not monolithic in their use of visuals. Nonetheless, exploring their collective visual exploits makes clear that rulemaking is no longer a solely textual endeavor. To the contrary, as we demonstrate in this Section, agencies are deploying visuals in three primary ways. First, the predominant use of visuals in rulemaking by agencies involves what we call informational "outflow," by which we mean agencies' dissemination of information about proposed and final rules to constituents.[91] Second, agencies are occasionally using visuals to encourage what we call informational "inflow"—meaning the flow of information from rulemaking stakeholders to agencies.[92] Third, some agencies are engaging in what we call visual "overflow," which occurs when agencies use visuals to nudge Congress to take action that is aligned with, but outside the scope of, the agencies' delegated authority.[93] Overflow spills over the edges of specific rulemaking proceedings into the legislative arena.

1. Outflow

The most prominent way in which agencies are deploying visuals in the rulemaking context involves what we call the "outflow" of information from agencies to interested parties. Outflow-oriented visuals enable agencies to tell—and to sell—their rulemaking stories to the American people, often to counter the narratives offered by industry or other institutionalized stakeholders. While agencies have long used publicity tools such as video news releases and posters to engender support for their overall missions,[94] this kind of regulatory "outflow," which markets proposed or potential rulemakings, is new. Although a variety of agencies are disseminating visual outflow,[95] two have been at the forefront of this emerging trend: DOL and EPA.

Dep't of Transp., FACEBOOK (Dec. 14, 2015), https://www.facebook.com/USDOT/photos/a.10151397472936779.529479.63235616778/10153778352851779/?type=3&theater [https://perma.cc/NRQ6-S22Q?type=image] (including photo of drone in post about new unmanned aircraft registration rules).

[89] *See infra* notes 96–118 and accompanying text (discussing visual examples drawn from Department of Labor (DOL) rulemaking proceedings).

[90] *See infra* notes 119–50 and accompanying text (discussing visual examples drawn from EPA rulemaking proceedings).

[91] *See infra* Section II.A.1.

[92] *See infra* Section II.A.2.

[93] *See infra* Section II.A.3.

[94] *See supra* notes 53–57 (discussing agencies' use of video news releases and posters).

[95] *See, e.g.*, Fed. Trade Comm'n, *Green Guides*, YOUTUBE (Oct. 16, 2012), https://www.youtube.com/watch?v=CxzanX8PMXI (video describing FTC's Green Guides); Matt Trott, *Celebrating and Protecting Salamanders*, U.S. FISH & WILDLIFE SERV.: OPEN SPACES (Jan. 15, 2016), http://www.fws.gov/news/blog/index.cfm/2016/1/15/Celebrating-and-Protecting-Salamanders [https://perma.cc/MPG2-U5JF] (blog entry with pictures of salamanders to announce their designation as injurious wildlife); Nat'l Highway Traffic

a. Department of Labor

In a variety of recent, highly controversial rulemakings, DOL has used everything from emotional videos to humorous GIFs to persuade everyday Americans about the need for and benefits of its regulatory actions. Consider, for example, DOL's recently finalized "overtime pay" rule.[96] The overtime rule significantly expands the overtime provisions of the Fair Labor Standards Act (FLSA),[97] extending "overtime protections to nearly five million white collar workers."[98] DOL published its NPRM in the Federal Register in July 2015.[99] Not surprisingly, the NPRM consists of nearly 100 pages of intimidating text, dotted only occasionally by black-and-white charts, graphs, and tables. However, just two days after publication of the NPRM, the agency posted something that looked and felt entirely different: a whiteboard video.[100] The under-four-minute video, which DOL posted to its YouTube channel and its blog, depicts an animator's hand drawing simple sketches on a whiteboard, accompanied by upbeat music and a voiceover by DOL's chief economist. The sketches visually explain in a very simple and high-level manner how overtime works and why updates to overtime protections would help millions of Americans.[101] For example, one scene shows a worker and his briefcase falling off the edge of a cracked floor:

Safety Admin. (@NHTSAgov), TWITTER (Dec. 8, 2015), https://twitter.com/NHTSAgov/status/674307226207715328/photo/1 [https://perma.cc/MFY8-APNH] (image of intact crash-test dummies next to destroyed vehicle); U.S. Dep't of Agric., *Smarter Snacks for School Children*, YOUTUBE (June 27, 2013), https://youtu.be/6bKP4xluxYc (video with images of kids eating healthy snacks to announce new USDA rule); U.S. Fish & Wildlife Serv., *Listing the Lion*, YOUTUBE (Dec. 21, 2015), https://www.youtube.com/watch?v=_cOUvXi6NPk (video describing the extension of the endangered species act to lions).

[96] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541) (publishing final overtime rule).

[97] *See generally* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219; *see also* Presidential Memorandum Updating & Modernizing Overtime Regulations, 3 C.F.R. 351 (2014).

[98] *Notice of Proposed Rulemaking: Overtime*, U.S. DEP'T OF LABOR, https://www.dol.gov/whd/overtime/NPRM2015Archive/ [https://perma.cc/A5QB-Z86N] (last visited Aug. 5, 2016).

[99] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,516 (proposed July 6, 2015) [hereinafter Defining and Delimiting Exemptions] (to be codified at 29 C.F.R. pt. 541).

[100] U.S. Dep't of Labor, *White Board Explainer: What is Overtime?*, YOUTUBE (July 8, 2015), https://youtu.be/KfINs8Fr9c8; *see also* Shierholz, *supra* note 18 (posting video to Department of Labor Blog).

[101] U.S. Dep't of Labor, *supra* note 100, at 02:46 (noting that protection will cover "almost five million workers").

SKETCH FROM DOL'S WHITEBOARD VIDEO ON OVERTIME, 2015[102]

A voiceover states: "For decades, overtime pay has been the cornerstone of the middle class. But this foundation has weakened over the years and no longer lifts up as many workers as it can or should. That's why the Department of Labor is updating the overtime rules."[103] In another scene, the video explains that the rule changes would extend overtime pay to almost five million people—and, by merely adding little bits of hair and graduation caps to the heads of otherwise rudimentary stick figures—the video easily demonstrates that over half of these workers are women and over half have at least a college degree:

SKETCHES FROM DOL'S WHITEBOARD VIDEO ON OVERTIME, 2015[104]

102 *Id.* at 00:43; image available at http://www.nyulawreview.org/media/1464.

103 *Id.* at 00:26.

104 *Id.* at 02:48 (showing number of people affected); *id.* at 02:53 (showing how many affected are women or people with college degrees). Images available at http://www.nyulawreview.org/media/1497.

Other than briefly flashing DOL's overtime web page address,[105] nothing in the video explains where viewers can access the actual text of the proposed rule, or submit comments on the proposed rule. In addition, the video carefully avoids complex issues, such as cost-benefit analysis, that fill pages and pages of the NPRM.[106] In this sense, the video speaks to everyday Americans—not to knowledgeable lawyers and industry insiders—in an effort to show what DOL is doing to protect them.

Another DOL-created visual—an animated GIF that filled the entire front page of DOL's overtime webpage prior to DOL's finalization of the rule[107]—reinforced the same message.[108] The GIF flashed between an image of "Jason"—a father with a family to feed—sporting today's hipster beard and skinny jeans, carrying just one bag of groceries, and an alternate image of Jason's dad back in the 1970s, wearing bell-bottoms and sideburns, carrying three bags of groceries:

"THEN & NOW" GIF POSTED TO DOL'S OVERTIME WEB PAGE[109]

105 *Id.* at 03:38 (directing viewers to DOL's website at dol.gov/overtime).

106 *See* Defining and Delimiting Exemptions, *supra* note 99.

107 After the rule was finalized, DOL changed the image on its overtime webpage to a video about "Sam" and "Mattie," which illustrates how the final rule will help workers. *See OVERTIME: It's About Time*, U.S. DEP'T OF LABOR, https://www.dol.gov/featured/overtime/ (last visited June 10, 2016).

108 *See Rewarding Hard Work*, U.S. DEP'T OF LABOR, http://www.dol.gov/featured/overtime-proposal/ [https://perma.cc/A98U-BASX] (last visited Aug. 5, 2016).

109 *Id.*; images available at http://www.nyulawreview.org/media/1495.

The accompanying text explained: "When Jason was young, his father worked full time, but didn't have the same struggles. That's because Jason's father qualified for and was paid overtime when he worked more than 40 hours per week, and was able to make enough to afford the basics for his family."[110] Drawing on both humor and emotions, the GIF quickly and effectively conveyed DOL's message that American families need the agency's help.

DOL has relied on the power of visuals to sell its story in other high-profile rulemakings too. For example, DOL's recently completed "fiduciary duty" rulemaking[111] was filled with visuals. DOL's fiduciary duty rule, which had stirred up a great deal of political controversy and is currently being challenged in court,[112] requires retirement advisors to avoid conflicts of interest.[113] When DOL published its 33-page NPRM in the Federal Register in 2015,[114] it also posted a short one-minute video titled "Are Your Retirement Savings at Risk?" to its blog.[115] A few months later, DOL posted a three-minute whiteboard video to YouTube.[116] In addition, DOL's website on the rulemaking featured a moving video of a real woman, Ethel Sprouse, explaining that when her husband was diagnosed with Alzheimer's disease, she

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110 *Id.*

111 *See* Definition of the Term "Fiduciary," 80 Fed. Reg. 21,928 (proposed Apr. 20, 2015) [hereinafter Definition of "Fiduciary"] (to be codified at 29 C.F.R. pts. 2509–10); *see also* Definition of the Term "Fiduciary," 81 Fed. Reg. 20,946 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509–2510, 2550).

112 *See Legislative Efforts to Stop DOL Fiduciary Rule Destined to Fail, ERISA Attorney Says*, INVESTMENT NEWS (Feb. 4, 2016), http://www.investmentnews.com/article/20160204/FREE/160209961/legislative-efforts-to-stop-dol-fiduciary-rule-destined-to-fail (describing legislative efforts to stop "controversial" rule); Anna Prior, *Labor Department's Fiduciary Proposal: Key Provisions to Watch*, WALL ST. J. (Oct. 1, 2015, 8:01 AM), http://www.wsj.com/articles/labor-departments-fiduciary-proposal-key-provisions-to-watch-1443700801 (describing battle over rule as "fierce"); Jacklyn Wille, *Labor Department Faces Five Lawsuits Over Fiduciary Duty Rule*, BLOOMBERG BNA (June 10, 2016), http://www.bna.com/labor-department-faces-n57982073912/ (stating that "five separate lawsuits now attack the rule from seemingly every angle, from the way the department approached the rule-making process to the way the rule restricts the speech of investment professionals").

113 *See Are Your Retirement Savings at Risk?*, U.S. DEP'T OF LABOR, http://www.dol.gov/featured/protectyoursavings/ [https://perma.cc/YY8N-GW7Y] (last visited Feb. 17, 2016) (video explaining requirement that retirement investors avoid conflicts).

114 *See* Definition of "Fiduciary," *supra* note 111.

115 Secretary Tom Perez & Jeffrey Zients, *Today's Important Step to Strengthen Retirement Security*, U.S. DEP'T OF LABOR: BLOG (Apr. 14, 2015), https://blog.dol.gov/2015/04/14/strengthening-retirement-security/ [https://perma.cc/C4ZS-PXHG]. DOL also posted the same video to YouTube in February 2015 just before its Notice of Proposed Rulemaking (NPRM) was published in the Federal Register. *See* U.S. Dep't of Labor, *Are Your Retirement Savings at Risk?*, YOUTUBE (Feb. 23, 2015), https://youtu.be/dBs6H1P7Wd0.

116 U.S. Dep't of Labor, *supra* note 100.

turned to a financial advisor, who cost her family hundreds of thousands of dollars:

ETHEL SPROUSE'S STORY, 2015[117]

In the video, Ethel—a grandmotherly figure dressed in a cardigan—shows viewers how retirement advisors' conflicts of interest can create very real problems for everyday citizens, requiring a real governmental solution, not just regulatory jargon.[118]

b. Environmental Protection Agency

Like DOL, EPA has frequently leveraged visual media to promote contemporary, high-profile rulemakings. These rulemakings have involved everything from ozone standards[119] to mercury and air

117 U.S. Dep't of Labor, *Working to Protect Your Retirement Savings: Ethel Sprouse's Story*, YOUTUBE (Sept. 2, 2015), https://youtu.be/K-jV-tVAmDY. Image available at http://www.nyulawreview.org/media/1448.

118 *Id.*

119 *See, e.g.*, U.S. Envtl. Prot. Agency, *EPA Administrator Explains Proposed Smog Standards to Protect Americans' Health*, YOUTUBE (Nov. 26, 2014), https://www.youtube.com/watch?v=psAQULm5WcU; U.S. Envtl. Prot. Agency, *EPA Ozone Standards Protect Public Health*, YOUTUBE (Sept. 30, 2015), https://www.youtube.com/watch?v= Y6chlLb59zA.

toxics.[120] Its two most visually infused rulemakings, however, have involved the Clean Power Plan[121] and the Clean Water Rule.[122]

From the outset of its Clean Power Plan rulemaking, EPA unleashed a torrent of visuals aimed at marketing its proposed rule to the public. For instance, at the same time that it released its NPRM,[123] EPA posted a whiteboard video titled "Clean Power Plan Explained" to its YouTube channel.[124] The video uses basic drawings to illustrate how EPA's proposed Clean Power Plan will "boost our economy, protect our health and environment and fight climate change."[125] Although it closes by telling viewers that EPA wants "you to be part of the conversation" and by directing viewers to EPA's website for more information,[126] it does not explicitly suggest that viewers file rulemaking comments. The video seems primarily aimed at persuading viewers about the value of EPA's actions, not at drawing them into the rulemaking process.

EPA also used social media to disseminate colorful infographics,[127] photographs,[128] and videos about its Clean Power

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120 *See, e.g.*, U.S. Envtl. Prot. Agency, *EPA Mercury and Air Toxics Standards*, YOUTUBE (Dec. 19, 2011), https://www.youtube.com/watch?v=Sx0vvn_Wn8o; U.S. Envtl. Prot. Agency, *Jerome Bettis*, YOUTUBE (Jan. 5, 2012) https://www.youtube.com/watch?v=xegEGTsndcY (featuring NFL player Jerome Bettis speaking about EPA mercury and air toxics standards).

121 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

122 *See generally Clean Water Rule*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/cleanwaterrule [https://perma.cc/F3HM-WZS4] (last visited Feb. 15, 2016) (describing the scope and details of EPA's Clean Water Rule).

123 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60) (proposing "emission guidelines for states to follow in developing plans to address greenhouse gas emissions from existing fossil fuel-fired electric generating units").

124 U.S. Envtl. Prot. Agency, *Clean Power Plan Explained*, YOUTUBE (June 2, 2014), https://www.youtube.com/watch?v=AcNTGX_d8mY.

125 *Id.* at 00:24–00:30.

126 *Id.* at 02:58.

127 *See, e.g.*, U.S. EPA (@EPA), TWITTER (Sept. 24, 2014), https://twitter.com/EPA/status/514806567141908481 [https://perma.cc/BUR2-4U95] (posting infographic illustrating the health benefits of proposed Clean Power Plan); U.S. EPA (@EPA), TWITTER (June 4, 2014), https://twitter.com/EPA/status/474253944597000192 [https://perma.cc/9ZXM-JAJ9] (tweeting colorful chart depicting sources of power); U.S. EPA (@EPA), TWITTER (June 3, 2014), https://twitter.com/EPA/status/473919089900285953 (showing drawings from EPA's whiteboard video on proposed Clean Power Plan); U.S. EPA (@EPA), TWITTER (June 2, 2014), https://twitter.com/EPA/status/473528421201752064 [https://perma.cc/B58L-U8A3] (sharing infographic touting the benefits of proposed Clean Power Plan).

128 *See, e.g.*, U.S. EPA (@EPA), TWITTER (June 10, 2014), https://twitter.com/EPA/status/476402164169191424 [https://perma.cc/T5S3-DH59] (reproducing photo of EPA Administrator talking with reporters about proposed Clean Power Plan).

Plan.[129] Again, these visuals did not seek participation in the rulemaking. Instead, they visually marketed the benefits of EPA's proposed plan, enabling the agency to push its own political narrative out to the American people:

EPA TWEETS ABOUT PROPOSED CLEAN POWER PLAN, 2014[130]

When EPA announced in August 2015 that it was finalizing the Clean Power Plan, a slew of additional visuals followed.[131] In one emotional video, a young girl, who recounts lying awake crying at night with asthma, says to the camera: "When I have kids, I hope it's gonna be easy for them to breathe."[132] At another point, EPA Administrator Gina McCarthy states: "They need to know that someone has their back. That's what the Clean Power Plan is all about. It doesn't matter where you live or how much money you make."[133] This powerful combination of words and images aims to

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[129] *See, e.g.*, U.S. Envtl. Prot. Agency, *EPA Administrator Gina McCarthy Signs Proposal to Cut Carbon Pollution from Existing Power Plants*, YOUTUBE (June 2, 2014), https://www.youtube.com/watch?v=dGUIQ9I_VU0&feature=youtu.be; U.S. EPA (@EPA), TWITTER (June 4, 2014), https://twitter.com/EPA/status/474169813607383041 [https://perma.cc/4GCW-2GN4] (tweeting a video of EPA Administrator announcing proposed Clean Power Plan).

[130] U.S. EPA (@EPA), TWITTER (June 2, 2014), https://twitter.com/EPA/status/473528421201752064 [https://perma.cc/B58L-U8A3] (on left); U.S. EPA (@EPA), TWITTER (Sept. 24, 2014), https://twitter.com/EPA/status/514806567141908481 [https://perma.cc/BUR2-4U95] (on right). Images available at http://www.nyulawreview.org/media/1447.

[131] Interestingly, these visuals did not stop once EPA's final rule issued. *See, e.g.*, U.S. EPA (@EPA), TWITTER (Jan. 13, 2016), https://twitter.com/EPA/status/687278131208712192 [https://perma.cc/47VV-NLX9] (tweeting an infographic touting how the Clean Power Plan "will help to encourage more clean energy growth").

[132] U.S. Envtl. Prot. Agency, *The Clean Power Plan Protects Our Health & Our Air*, YOUTUBE, at 02:29 (Aug. 1, 2015), https://www.youtube.com/watch?v-rqu21-f7Qus.

[133] *Id.* at 02:00.

persuade viewers that the action EPA is taking is essential not only to protect the health of our environment but also the health of rising generations of everyday Americans.

A second high-profile, visually infused rulemaking from EPA is the recently completed clean water rulemaking (also referred to as the "Waters of the U.S." or "WOTUS" rulemaking).[134] During that rulemaking, EPA splashed a variety of visuals across social media. The visuals, which ranged from videos[135] to infographics[136] and photographs[137] to a social media Thunderclap campaign,[138] represented a highly coordinated effort to convince America that #CleanWaterRules, featuring everything from a fly fisherman[139] to a boat skimming across the water toward an idyllic sunset[140] to local beer:

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134 The WOTUS rulemaking was a joint rulemaking between EPA and the Department of Defense. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified in scattered parts of 33 C.F.R. and 40 C.F.R.).

135 *See, e.g.*, U.S. Envtl. Prot. Agency, *Clean Water Act Protections Under the Proposed Rule*, YOUTUBE (Sept. 26, 2014), https://youtu.be/QasJw_O9DNA; U.S. Envtl. Prot. Agency, *Clean Water and Agriculture*, YOUTUBE (Sept. 26, 2014), https://www.youtube.com/watch?v=iKqXQReYyUI; U.S. Envtl. Prot. Agency, *EPA Administrator McCarthy Gives an Overview of EPA's Clean Water Act Rule Proposal*, YOUTUBE (Mar. 25, 2014), https://www.youtube.com/watch?v=ow-n8zZuDYc; U.S. Envtl. Prot. Agency, *EPA White Board: Clean Water Act Rule Proposal Explained*, YOUTUBE (Mar. 25, 2014), https://www.youtube.com/watch?v=fOUESH_JmA0; U.S. EPA (@EPA), TWITTER (June 10, 2015), https://twitter.com/EPA/status/608685734086778881 [https://perma.cc/6LSL-S85K] (attaching a video to support its claim that the rule will protect drinking water).

136 *See, e.g.*, U.S. EPA Water (@EPAwater), TWITTER (June 4, 2015), https://twitter.com/EPAwater/status/606515913077215233 [https://perma.cc/RT6R-SMV9] (tweeting a map showing areas in which the drinking water sources will be protected under the Clean Water Rule); U.S. EPA Water (@EPAwater), TWITTER (May 26, 2015), https://twitter.com/EPAwater/status/603300591113216000 [https://perma.cc/2473-4MP8] (showing a colorful chart of the benefits of the Clean Water Rule for recreation).

137 *See, e.g.*, U.S. EPA Water (@EPAwater), TWITTER (May 21, 2015), https://twitter.com/EPAwater/status/601467780114751489 (posting an image of a leaf floating in a river); *see also* U.S. EPA Water (@EPAwater), TWITTER (May 4, 2015), https://twitter.com/EPAwater/status/595315441075093504 [https://perma.cc/RH4E-PHGL] (showing an image of river rafters); U.S. EPA Water (@EPAwater), TWITTER (Oct. 15, 2014), https://twitter.com/EPAwater/status/522451417161019392 [https://perma.cc/DA4F-ASGC] (displaying an image of a waterfall).

138 *See infra* notes 434–41 and accompanying text (discussing the EPA's Thunderclap campaign).

139 U.S. EPA Water (@EPAwater), TWITTER (Apr. 27, 2015), https://twitter.com/EPAwater/status/592688337489649665 [https://perma.cc/R6E7-Y72A].

140 U.S. EPA Water (@EPAwater), TWITTER (May 6, 2015), https://twitter.com/EPAwater/status/596015277848055808 [https://perma.cc/8P6Y-WWB5].

EPA #CLEANWATERRULES TWEET, 2015[141]

Interestingly, many of the visuals that EPA circulated during its Clean Water Act rulemaking were *responses* to public feedback on its proposed rule. For example, while the comment period was still open, EPA tweeted about various videos that outside parties had issued in support of the proposed rule.[142] Furthermore, when faced with a vehement #DitchTheRule campaign[143] unleashed by the American Farm Bureau—an organization that represents farmers and ranchers and that advocates on their behalf about issues related to agriculture in the United States—EPA fired back with its own highly visual campaign

[141] U.S. EPA Water (@EPAwater), TWITTER (May 26, 2015), https://twitter.com/EPAwater/status/603303236456558592 [https://perma.cc/3WS2-WRJL]. Image available at http://www.nyulawreview.org/media/1442.

[142] *See, e.g.*, U.S. EPA Water (@EPAwater), TWITTER (Aug. 27, 2014), https://twitter.com/EPAwater/status/504640273713205248 [https://perma.cc/NJ79-JFAD] ("Watch this video from farmers who support our proposal to protect clean water."); U.S. EPA Water (@EPAwater), TWITTER (Aug. 16, 2014), https://twitter.com/EPAwater/status/500702339121303552 [https://perma.cc/9898-H338] ("Listen to this support for our clean water proposal.").

[143] *See infra* notes 225–30 and accompanying text (discussing #DitchTheRule and #DitchTheMyth campaigns).

called #DitchTheMyth, which used a variety of infographics[144] and videos[145] to counter the American Farm Bureau's narrative.

While this very visual, politically tinged battle was being waged over social media, EPA continued collecting traditional written comments via Regulations.gov. Thus, the comment period during the clean water rulemaking played out in two parallel universes: one highly textual and legalistic in which EPA was silent, and the other a much more dialogic and political universe in which EPA had an ongoing voice. The second universe—the visual, social universe—enabled EPA to market its own political narrative directly to the American people.

In short, within the last few years, adventurous agencies like DOL and EPA have begun leveraging visual communication tools to push their narratives about regulatory actions out into the court of public opinion, and to counter the narratives being spun by other stakeholders. These efforts, which splash visual information about the regulatory world across smartphones and tablet computers, aim to educate and persuade American citizens about the value of agency actions.

2. Inflow

In contrast to their embrace of outflow-oriented visuals, agencies have been much less adept at—or perhaps much less interested in—leveraging visuals as a means of inviting what we call informational "inflow"—meaning the flow of information *from* the public *to* agencies in rulemakings. As we use the term, inflow encompasses both agencies' use of images to request and encourage public comment as well as the public's sending of image-based information to agencies.

Notably, agencies' requests for informational inflow often represent little more than an afterthought appended to an otherwise outflow-oriented visual.[146] Consider, for instance, a whiteboard video

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[144] *See, e.g.*, U.S. EPA Water (@EPAwater), TWITTER (Sept. 11, 2014), https://twitter.com/EPAwater/status/510098078398152704 [https://perma.cc/8XWL-AL9M] (posting #ditchthemyth infographic about agricultural exemptions); U.S. EPA Water (@EPAwater), TWITTER (July 24, 2014), https://twitter.com/EPA/status/492306785538412544/photo/1 [https://perma.cc/P7FS-N9CE] (posting #ditchthemyth infographic disclaiming the regulation of puddles).

[145] *See, e.g.*, U.S. Envtl. Prot. Agency, *Waters of the U.S.: Adjacent Waters and Floodplains Explained*, YOUTUBE (Sept. 26, 2014), https://www.youtube.com/watch?v=snrq6cbayS0 (explaining "adjacent waters" and "floodplains"); U.S. Envtl. Prot. Agency, *Waters of the U.S.: Ordinary High Water Mark & Tributaries Explained*, YOUTUBE (Sept. 26, 2014), https://www.youtube.com/watch?v=htpiTnAYy-I (explaining concept of "Ordinary High Water Mark").

[146] *See, e.g.*, Mark Rosekind, *Strengthening NHTSA's 5-Star Safety Ratings for the Future*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/fastlane/strengthening-

that EPA posted online to explain its proposed Clean Water Rule to the public.[147] The video depicts EPA Deputy Chief of Staff Arvin Ganesen using colorful drawings on a whiteboard to explain why EPA's proposed Clean Water Rule "is so important."[148] Only toward the very end of the nearly three-minute video does Mr. Ganesen make a nod toward inviting public comments, stating: "We are starting a national conversation on this, and we encourage you to tell us what you think of our proposal and make your voices heard."[149] The video does not show viewers how they can officially make their voices heard—other than to briefly flash the web address for EPA's Clean Water Rule across the bottom of the video. Nor does the video ever tell viewers—as EPA's textual NPRM expressly does—that comments may be filed in only four ways: via Regulations.gov, via email, by hand delivery, or via snail mail.[150]

Similarly, FCC also has failed to facilitate public feedback by integrating the visual world with the official textual rulemaking record. The agency states on its website that it welcomes citizens' thoughts, ideas, and feedback in "many forms—text, photos, and videos" via social media sites.[151] But in the same breath, FCC divorces its willingness to consider such online communications from its actual rulemaking proceedings, noting that—unless otherwise specified—commenting via social media platforms (whether textually or visually)

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nhtsa-5-star-safety-ratings [https://perma.cc/V8QH-M6JP] (last visited July 9, 2016) (noting at the bottom of a visual blog post that NHTSA is accepting comments on proposal to revise five-star safety ratings program); *Overtime*, U.S. DEP'T OF LABOR, http://www.dol.gov/featured/overtime-proposal [https://perma.cc/58SP-5DNS] (last visited July 9, 2016) (including only small "share your story" button at the bottom of lengthy DOL infographic on proposed overtime rule); *Clean Power Plan Explained*, *supra* note 124 (making only brief reference to how EPA wants to hear viewers' thoughts).

147 U.S. Envtl. Prot. Agency, *EPA White Board: Clean Water Act Rule Proposal Explained*, *supra* note 135.

148 *Id.* at 00:09–00:13.

149 *Id.* at 02:28–02:35.

150 *See* Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (articulating the four ways formal comments may be filed). Indeed, small text above the "comments" box on YouTube confusingly states that EPA "accept[s] comments" according to a policy posted to its blog that—upon close examination—turns out to involve only informal comments posted to blogs and other Internet sites. U.S. Envtl. Prot. Agency, *EPA White Board: Clean Water Act Rule Proposal Explained*, *supra* note 135; *see Comment Policy*, THE EPA BLOG, http://blog.epa.gov/blog/comment-policy/ [https://perma.cc/MUG7-U7H5] (last visited July 9, 2016) (pertaining to blog and web content etiquette and procedures, but never explicitly discussing users' ability to post formal comments on proposed rules).

151 *Comment Policy*, FED. COMM. COMMISSION, https://www.fcc.gov/general/comment-policy [https://perma.cc/N4ZY-YA28] (last visited July 9, 2016).

"is not a substitute for submitting a formal comment in the record of a specific Commission proceeding."[152]

Counterexamples do exist. This tweet from the Consumer Financial Protection Bureau (CFPB)—the only independent rather than executive agency[153] that is experimenting with any frequency with visual rulemaking—provides a good example of an agency's efforts to direct the public to the official rulemaking process:

CFPB TWEET, "LET US KNOW WHAT YOU THINK," 2014[154]

The tweet, which pictures two different prepaid cards, invites viewers to let CFPB know "what you think," and it includes a link that takes viewers directly to a CFPB blog post that clearly states: "If you want to influence the design of a new prepaid card fee disclosure, let

152 *Id.*

153 *See* Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc., 60 F. Supp. 3d 1082, 1084 (C.D. Cal. 2014) (describing CFPB as an "independent agency in the Federal Reserve System").

154 Consumerfinance.gov (@CFPB), TWITTER (Nov. 19, 2014, 9:33 AM), https://twitter.com/CFPB/status/535123637582708736 [https://perma.cc/LC65-QP7G]. Image available at http://www.nyulawreview.org/media/1435.

us know what you think. Submit a comment at Regulations.gov."[155] Indeed, the blog post even provides a hyperlink to the relevant docket page on Regulations.gov,[156] enabling citizens to easily find the appropriate forum for filing official comments.

In a slightly different vein, CFPB also has used visuals to organize and interpret feedback received from the public prior to issuing an NPRM.[157] For instance, when CFPB was preparing to propose a new mortgage disclosure rule, it embarked on a large-scale outreach campaign, launching a web-based initiative called "Know Before You Owe" that invited consumers to view and to comment on prototype disclosure forms that the CFPB had posted online.[158] Consumers could click on areas of the prototype disclosure forms that they liked and disliked, and the Bureau's information technology team compiled these "clicks" into heatmaps[159]:

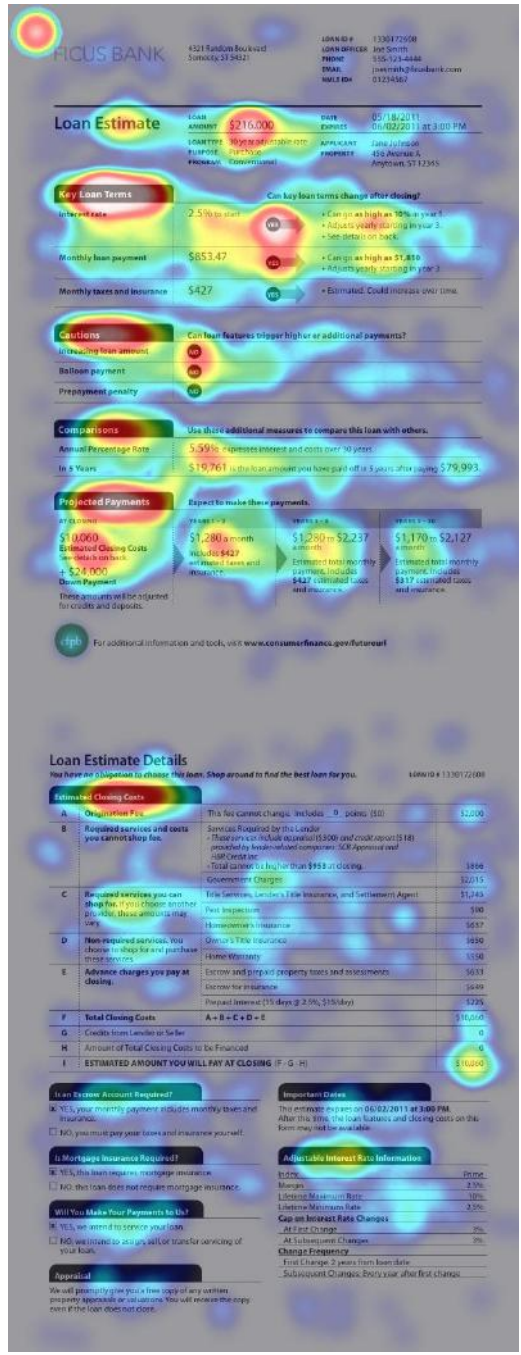
155 Eric Goldberg, *Prepaid Products: New Disclosures to Help You Compare Options*, CONSUMER FIN. PROT. BUREAU: CFPB BLOG (Nov. 13, 2014), http://www.consumerfinance.gov/about-us/blog/prepaid-products-new-disclosures-to-help-you-compare-options/ [https://perma.cc/7HHA-JNJ8].

156 *Id.*

157 *See, e.g.*, Consumer Fin. Prot. Bureau, FACEBOOK (June 5, 2015), https://www.facebook.com/CFPB/photos/a.313840478660349.85715.141576752553390/948402288537495/?type=3&theater [https://perma.cc/5H98-FNJF?type=image] ("Every story we receive helps to better inform us as we work with other policymakers to improve student loan servicing for borrowers."). *See generally* Patricia A. McCoy, *Public Engagement in Rulemaking: The Consumer Financial Protection Bureau's New Approach*, 7 BROOK. J. CORP. FIN. & COM. L. 1 (2012) (describing CFPB's willingness to invite public input).

158 *Id.* at 7–8.

159 *Id.* at 8.



CFPB HEATMAP, 2011[160]

160 *Mortgage Disclosure Is Heating Up*, CONSUMER FIN. PROT. BUREAU: CFPB BLOG (June 24, 2011), http://www.consumerfinance.gov/blog/mortgage-disclosure-is-heating-up/

Using color-coding, CFPB's heatmaps depicted which areas of different prototype disclosure forms received the most attention from readers.[161] Red and white areas indicate lots of clicks; purple and gray areas indicate the least clicks.[162]

As these examples demonstrate, agencies are deploying visuals from time to time in order to facilitate informational inflow. But overall, agencies have eschewed using visuals in this fashion, preferring instead to use visuals as a means of pushing information out to the public and shaping political discourse.

3. Overflow

A third and final way in which agencies are using visuals is to nudge Congress to take legislative action that would advance the agencies' and the President's political agenda. This form of visual communication—which we call "overflow" because it spills over the edges of specific rulemaking proceedings and into the legislative arena—is notable because it involves agencies using visuals to communicate with the public about problems in need of legislative, rather than mere regulatory, solutions.[163] Furthermore, overflow is legally significant because, as we discuss in Part III, if agencies are not careful, their overflow could veer in the direction of prohibited lobbying activity.[164]

Various visual campaigns launched by DOL over the past few years provide perfect examples of overflow. Consider, for instance, DOL's 2015 "Batgirl" video, which puts a new spin on a nearly 40-year-old video clip of Batgirl telling Batman: "I've worked for you for a long time and I'm paid less than Robin. Same job, same employer means equal pay for men and women."[165]

[https://perma.cc/VW7N-B9RQ]. Image available at http://www.nyulawreview.org/media/1434.

[161] *See* McCoy, *supra* note 157, at 8 (describing project).

[162] *Id.*

[163] *See, e.g.*, Tom Perez, #*LeadOnLeave Notes from the Road: Seattle*, U.S. DEP'T OF LABOR: U.S. DEP'T OF LABOR BLOG (Apr. 1, 2015), http://blog.dol.gov/2015/04/01/lead-on-leave-tour-seattle/ [https://perma.cc/CQX8-2GQG?type=image] (blog post from DOL's "Lead on Leave" tour); *Grow America*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/grow-america [https://perma.cc/R9HT-WEH5] (last visited July 9, 2016) (linking to video on DOT's "Grow America" campaign, which pushed for a six-year funding bill to increase transportation investment); *Paid Leave: It's Time for America to #LeadOnLeave*, U.S. DEP'T OF LABOR, http://www.dol.gov/featured/paid-leave [https://perma.cc/RY5H-YZZP] (last visited July 9, 2016) (posting a video and linking to other visual resources promoting DOL's "Lead on Leave" campaign).

[164] *See infra* Section III.B.4 (describing risks associated with overflow communication).

[165] *It's Time for #EqualPayNow*, DEP'T OF LABOR, http://www.dol.gov/featured/equalpay [https://perma.cc/6WCN-A89G] (last visited July 9, 2016). The Department of Labor

DOL'S "BATGIRL" VIDEO ADVOCATING FOR EQUAL PAY, 2015[166]

DOL did not issue this updated "Batgirl" video in the context of any specific rulemaking proceeding. Rather, following on the heels of President Obama's own efforts to push Congress to address the issue of equal pay,[167] DOL distributed the video to call attention to how—decades after Batgirl originally demanded to be paid the same as Robin[168]—the pay gap remains.[169]

The video does not directly urge viewers to contact Congress—likely in an effort to skirt various anti-lobbying provisions that we discuss in Part III.[170] Nonetheless, a DOL blog post featuring the Batgirl video calls out the need for congressional action, stating: "As President Obama said a few months ago in the State of the Union Address, 'Congress still needs to pass a law that makes sure a woman is paid the same as a man for doing the same work. It's 2015. It's

has posted the video on YouTube as well. U.S. Dep't of Labor, *Equal Pay for Equal Work*, YOUTUBE, at 00:15 (Apr. 8, 2015), https://youtu.be/zhQah4PT_AI.

166 *Id.*; image available at http://www.nyulawreview.org/media/1439.

167 *See, e.g.*, Colleen Curtis, *Congress Says No to Equal Pay*, WHITE HOUSE: BLOG (June 5, 2012), https://www.whitehouse.gov/blog/2012/06/05/congress-says-no-equal-pay [https://perma.cc/5WRA-3SH5] (highlighting Obama's efforts to push Congress to pass Paycheck Fairness Act); The White House, GOOGLE+ (June 5, 2012), https://plus.google.com/+whitehouse/posts/BhrxHRqMGfG [https://perma.cc/ZV6W-4YVA] (promoting Paycheck Fairness Act).

168 *See* U.S. Dep't of Labor, *Batgirl Teaches Batman a Lesson About Equal Pay*, YOUTUBE (Aug. 11, 2011), https://www.youtube.com/watch?v=n00xZ_mKQgk (recirculating 1974 public service announcement featuring Batgirl).

169 *See* COUNCIL OF ECON. ADVISERS, GENDER PAY GAP: RECENT TRENDS AND EXPLANATIONS (2015), https://www.whitehouse.gov/sites/default/files/docs/equal_pay_issue_brief_final.pdf (documenting the significant pay gap between men and women).

170 *See infra* Section III.B.4 (discussing anti-lobbying statutes).

time.'"[171] Thus, the context of the video suggests that it forms part of a broader political push for congressional legislation.[172]

DOL's ongoing #RaiseTheWage campaign also falls into the overflow category. DOL lacks regulatory authority to raise the minimum wage for all workers nationwide. Instead, as DOL admits, "Congress must pass a bill which the President signs into law in order for the minimum wage to go up."[173] But DOL has not been shy about speaking out on the issue. Consistent with President Obama's own minimum wage campaign,[174] DOL has posted an entire page of colorful "shareables" to its website that visually advocate for a higher national minimum wage.[175] These shareables draw upon everything from a humorous image of Grumpy Cat to an emotive photograph of smiling children:

SHAREABLES FROM DOL'S #RAISETHEWAGE CAMPAIGN[176]

171 Latifa Lyles, *It's Time for Equal Pay Now*, U.S. DEP'T OF LABOR: U.S. DEP'T OF LABOR BLOG (Apr. 13, 2015), https://blog.dol.gov/2015/04/13/its-time-for-equal-pay-now/ [https://perma.cc/P7CD-4VYL].

172 *See, e.g.*, The White House, TUMBLR, http://tmblr.co/ZW21es1UTYqM_ [https://perma.cc/5SV7-X2BQ] (highlighting pay inequality through infographic); The White House (@WhiteHouse), TWITTER (Feb. 12, 2013, 6:50 PM), https://twitter.com/whitehouse/status/301523725872922624 [https://perma.cc/Y3A2-USKC] (asking "Congress to declare that women should earn a living equal to their efforts").

173 *Questions and Answers About the Minimum Wage*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/minwage/q-a.htm [https://perma.cc/UN3X-Y6PR] (last visited July 11, 2016).

174 *See, e.g.*, The White House, INSTAGRAM, https://www.instagram.com/p/rnIEKmQigI/ [https://perma.cc/PR9V-WTR8] (last visited July 11, 2016) (calling on Congress to raise minimum wage to $10.10 through an infographic); The White House, TUMBLR, http://tmblr.co/ZW21es1SrHoB0 (explaining, in a video, why President Obama wants Congress to raise the minimum wage to $10.10).

175 *See Shareables*, U.S. DEP'T OF LABOR, http://www.dol.gov/featured/minimum-wage/infographics [https://perma.cc/K64F-TKU2] (last visited July 11, 2016) (posting visual shareables that advocate for raising the minimum wage).

176 *Id.*; images available at http://www.nyulawreview.org/media/1463.

These visuals demonstrate how agencies are leveraging visual communications even beyond the rulemaking realm, advocating for legislative solutions to problems that fall outside the confines of their delegated authority.

B. The President

Like agencies, President Obama has frequently turned to the power of visuals to control and shape the regulatory state. Notably, Obama—the "first president of the social media age"[177]—entered the White House in 2009, just two years after Apple launched its first iPhone and right on the heels of the rise of social media.[178] Whereas prior presidents had to rely on the mainstream media to spread their preferred visuals,[179] Obama has been able to speak directly to the American people through visual communications that his administration posts online.[180] Specifically, in the regulatory realm, Obama has relied on visuals in two primary ways. First, he has used visuals to publicly support rulemaking activity, either by directing the initiation and substance of rulemaking proceedings or by publicly throwing his political capital behind proposed rules. Second, Obama has deployed visuals as a tool for claiming credit for agency rulemakings, projecting the sense that executive agencies are simply an extension of his own policies and goals in a way that no other president has.[181]

1. Visual Direction & Support of Proposed Rules

One way in which Obama has leveraged the power of visual communications is by deploying visuals to publicly signal his support for regulatory action, either by directing the initiation and substance of

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[177] Juliet Eilperin, *Here's How the First President of the Social Media Age Has Chosen to Connect with Americans*, WASH. POST (May 26, 2015), https://www.washingtonpost.com/news/politics/wp/2015/05/26/heres-how-the-first-president-of-the-social-media-age-has-chosen-to-connect-with-americans/.

[178] *See* Porter, *supra* note 24, at 1718–19 (describing the rapid rise in use of social media during the relevant time period).

[179] *Cf.* Drake Martinet, *Egypt, Al Gore and the .XXX Domain—Bill Clinton Keynotes ICANN in San Francisco*, ALL THINGS DIGITAL (Mar. 17, 2011), http://allthingsd.com/20110317/egypt-al-gore-and-the-xxx-domain-bill-clinton-keynotes-icann-in-san-francisco/ (noting Clinton's comment that he became President at the "dawn of the Internet age," entering the presidency at a time when only 50 websites existed).

[180] *See, e.g.*, THE WHITE HOUSE: BLOG, http://www.whitehouse.gov/blog [https://perma.cc/DA7H-JCHP] (last visited July 11, 2016); The White House, TUMBLR, http://whitehouse.tumblr.com/ [https://perma.cc/C2XP-WQY4] (last visited July 11, 2016) (documenting "[t]hings going around the White House that we just had to share with you").

[181] *See* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 703–04 (2016) (describing Obama's extensive use of online media to control the regulatory state).

rulemakings or by throwing his political capital behind proposed rules while a rulemaking is ongoing. To the extent that these sorts of visuals are aimed at projecting to the public information about the President's involvement in and support for regulatory action, these visuals can be thought of as the President's own kind of visual "outflow."[182]

This use of visuals can be seen in a variety of high-stakes rulemakings, including DOL's fiduciary duty rule,[183] DOL's overtime rule,[184] and EPA's and DOT's fuel efficiency standards.[185] Perhaps the best example, however, can be seen in visuals he deployed to prompt regulatory efforts to tackle college affordability and student debt in our nation.[186] In June 2014, Obama signed a memorandum directing the Department of Education (DOE) to propose regulations involving student debt.[187] Simultaneously, the White House issued a steady stream of visual communications designed to spread the President's message of regulatory action. These visuals included a photo posted to the White House blog of Obama signing the memorandum while flanked by student borrowers,[188] as well as an image of a school

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[182] *See supra* Section II.A.1 (discussing agencies' use of outflow-oriented visuals).

[183] *See* The President's Weekly Address, 2015 DAILY COMP. PRES. DOC. 1 (Feb. 28, 2015), https://www.whitehouse.gov/the-press-office/2015/02/28/weekly-address-ensuring-hardworking-americans-retire-dignity [https://perma.cc/NWS7-SNNS] (calling on DOL "to update the rules and to require that retirement advisers put the best interests of their clients above their own financial interests"); *see also* Valerie Jarrett, *"Conflicts of Interest" Could Be Eroding Your Savings. Here's How We're Fixing It.*, LINKEDIN (Feb. 23, 2015), https://www.linkedin.com/pulse/conflicts-interest-could-eroding-your-savings-heres-how-jarrett (providing a video promoting the fiduciary rule).

[184] *See* The President's Weekly Address, 2014 DAILY COMP. PRES. DOC. 1 (Mar. 15, 2014), https://youtu.be/HGqFQxEtX5k?list=UUYxRlFDqcWM4y7FfpiAN3KQ (showing Obama explaining that he directed DOL to update its overtime rules).

[185] *See* The White House, FACEBOOK (Feb. 18, 2014), https://www.facebook.com/WhiteHouse/photos/a.158628314237.115142.63811549237/10152290509134238/?type=3&theater (explaining through an infographic how Obama directed the formulation of new fuel efficiency standards for large trucks); *see also infra* Section III.A.1 (discussing additional examples of Obama's visual direction of regulatory action).

[186] *See generally Making College Affordable*, THE WHITE HOUSE, https://www.whitehouse.gov/issues/education/higher-education/making-college-affordable [https://perma.cc/WT3T-WYLC] (last visited July 11, 2016) (introducing Obama's stance on higher education funding and providing infographics for advocates to share on social media platforms).

[187] *See* Presidential Memorandum on Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 3 C.F.R. 359 (2014), http://www.whitehouse.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments [https://perma.cc/HPS6-UAAW] (directing the Secretary of Education to "propose regulations that will allow" certain students to cap their federal student loan payments at 10 percent of their income); *see also* Watts, *Controlling Presidential Control*, *supra* note 181, at 704 (discussing Obama's memo on student loan repayments).

[188] *See* David Hudson, *President Obama on Student Loan Debt: "No Hardworking Young Person Should Be Priced Out of a Higher Education*," WHITE HOUSE: BLOG (June

notebook posted to Instagram that highlighted key points of Obama's plan:[189]

VISUALS ACCOMPANYING OBAMA'S DIRECTIVE TO DOE REGARDING STUDENT DEBT, 2014[190]

The White House also posted a video to its blog and to YouTube in which Obama spoke passionately about his personal student debt experiences, noting that he and his wife Michelle Obama had finished paying off their own student loans "just 10 years ago."[191] The next day, Obama sat down in the White House for his first-ever Tumblr Q&A, which focused on his student debt memorandum.[192] In explaining the impetus behind the Tumblr session, the President stated that his administration was "constantly looking for new ways to reach audiences that are relevant to the things we are talking about," and one-third of Americans who applied for student loans in 2014 were Tumblr users.[193] All of these visuals enabled Obama to push to

9, 2014), https://www.whitehouse.gov/blog/2014/06/09/president-obama-student-loan-debt-no-hardworking-young-person-should-be-priced-out-h; *see also* The White House, INSTAGRAM, https://www.instagram.com/p/pCvCwBQisI/ [https://perma.cc/9DHV-Y768] (last visited July 9, 2016).

189 The White House, INSTAGRAM, https://www.instagram.com/p/pCBHrSQisT/ [https://perma.cc/F4KD-JWUZ] (last visited July 11, 2016) (on left); The White House, INSTAGRAM, https://www.instagram.com/p/pCvCwBQisI/ (on right).

190 *Id.*; *see also* Hudson, *supra* note 188. Images available at http://www.nyulawreview.org/media/1477.

191 The White House, *President Obama Speaks on Student Loan Debt*, YOUTUBE, at 6:58 (June 9, 2014), https://youtu.be/Mz5prW9iw14; *see also* Hudson, *supra* note 188 (reporting on the talk in question).

192 The White House, TUMBLR (June 11, 2014), http://tmblr.co/ZW21es1IRxl6a [https://perma.cc/MV24-8X58]; *see also* The White House, *Behind the Scenes at the First-Ever White House Q&A*, YOUTUBE (June 13, 2014), https://youtu.be/M6soSKgW-MI (video featuring Tumblr founder David Karp describing his White House Q&A with President Obama); Tumblr Staff, TUMBLR (June 10, 2014), http://staff.tumblr.com/post/88403429765/whitehouse-so-this-just-happened [https://perma.cc/RRV4-PL8P].

193 The White House, *Behind the Scenes*, *supra* note 192, at 00:22–00:30.

the public images of his involvement in prompting DOE to address the issue of student debt. Ultimately, DOE listened, and it finalized a rule on the subject as a result of the President's prompting and his support.[194]

2. *Visual Ownership of Final Rules*

A second way in which President Obama uses visuals is as a mechanism for claiming credit for and asserting ownership over final rules.[195] One prominent illustration of this can be found in a visual "memo to America"—today's version of the fireside chat—that Obama issued just one day before EPA announced its final version of the Clean Power Plan[196]:

OBAMA'S MEMO TO AMERICA ON CLEAN POWER PLAN, 2015[197]

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194 *See* Student Assistance General Provisions, 80 Fed. Reg. 67,204 (Oct. 13, 2015) (amending the regulations "to create a new income-contingent repayment plan in accordance with the President's initiative to allow more Direct Loan borrowers to cap their loan payments at 10 percent of their monthly incomes").

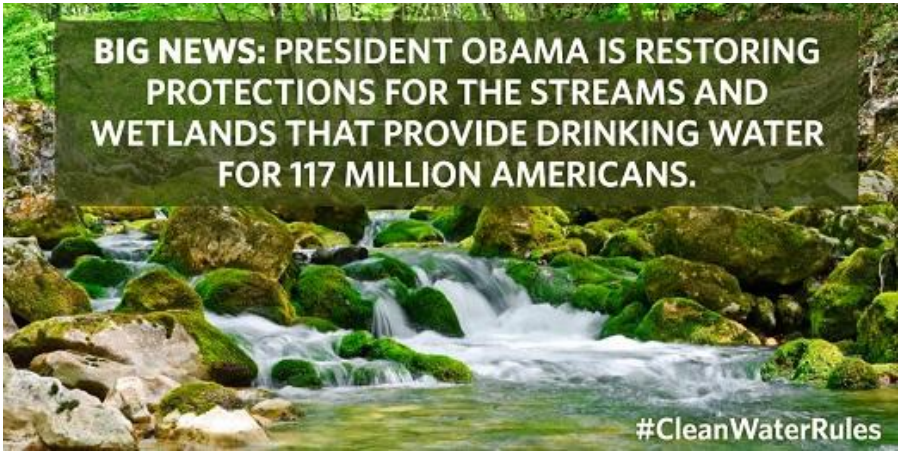
195 *See, e.g.*, The White House, FACEBOOK (June 2, 2014), https://perma.cc/M8WA-AT3M (photograph accompanied by text announcing "Obama's Clean Power Plant Standards"); The White House, FACEBOOK (May 27, 2015), https://www.facebook.com/WhiteHouse/photos/pb.63811549237.-2207520000.1454621534./10153484702829238/?type=3&theater [https://perma.cc/KY3B-NFNL?type=image] ("Big news: President Obama is restoring protections for the streams and wetlands that provide drinking water for 117 million Americans."); The White House (@WhiteHouse), TWITTER (May 17, 2016, 5:49 PM), https://twitter.com/whitehouse/status/732734934901764100 (touting that "@POTUS is taking action" to make millions more workers eligible for overtime pay).

196 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); *Clean Power Plan for Existing Power Plants*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants [https://perma.cc/Z4X6-BYBC] (last visited July 9, 2016) (noting that EPA announced its final Clean Power Plan on August 3, 2015).

197 *Memo to America*, *supra* note 16. Image available at http://www.nyulawreview.org/media/1456.

In it, Obama uses various images accompanied by music and his own voice to illustrate why his "administration" is releasing what he calls "the biggest, most important step we've ever taken to combat climate change."[198] Notably, the video does not mention that the Clean Power Plan was the product of a long and highly technical agency rulemaking process led by EPA.[199] Indeed, Obama does not mention EPA at all. Instead, he speaks in general terms about his "administration" taking action, using the video to claim political control over and ownership of the Clean Power Plan.[200]

Another example can be found in the following image, which was published on the White House blog the same day that EPA and the U.S. Army Corps of Engineers (the Corps) finalized their Clean Water Rule[201]:



#CLEANWATERRULES IMAGE ON WHITE HOUSE BLOG, 2015[202]

198 *Memo to America*, *supra* note 16, at 00:56–01:05.

199 *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,663 (noting the "unprecedented outreach and engagement with states, tribes, utilities, and other stakeholders" that led to promulgation of the final rule).

200 *Id.*

201 *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified in scattered parts of 33 C.F.R. and 40 C.F.R.).

202 Gina McCarthy & Jo-Ellen Darcy, *Reasons We Need the Clean Water Rule*, WHITE HOUSE: BLOG (May 27, 2015), https://www.whitehouse.gov/blog/2015/05/27/reasons-we-need-clean-water-rule [https://perma.cc/BC8T-22N6]. Image available at http://www.nyulawreview.org/media/1436.

Although the text of the blog post itself (which was cross-posted on EPA's own blog)[203] expressly notes that EPA and the Corps promulgated the Clean Water Rule, this image posted to the White House blog trumpeted in all caps that "PRESIDENT OBAMA" was restoring protections for streams and wetlands.[204] Thus, the image made the "news" look and sound like it was the result of a political victory championed by the President rather than the result of a technocratic, expert-driven rulemaking process run by agencies.

C. Stakeholders Outside of the Executive Branch

Agencies and the President are not the only parties leveraging the power of visual communications to shape and control regulatory action today. Rulemaking stakeholders outside the executive branch—including industry insiders, members of Congress, the media, and everyday Americans—also are using visuals in the regulatory sphere, creating a newly visual public dialogue about agency rulemaking. They are doing so in three primary ways. First, they are deploying visuals as a means of shaping agencies' regulatory agendas, seeking to prompt agencies to initiate rulemakings on specific subjects. Second, they are using visuals during the comment period on proposed rules. Third, after final rules are promulgated by agencies, interested parties are using visuals as a means of supporting or attacking the recently promulgated rules.

1. Visual Agenda Shaping

At the front end of the rulemaking process, outside parties are using visuals as agenda-shaping tools, seeking to prod agencies to write rules addressing specific problems.[205] One very emotionally powerful example of this can be found on a website created by the Karth family from North Carolina. The family lost their two young girls, Mary and AnnaLeah, when the car they were riding in was hit by

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[203] Gina McCarthy & Jo-Ellen Darcy, *Reasons We Need the Clean Water Rule*, EPA BLOG: EPA CONNECT (May 27, 2015), https://blog.epa.gov/blog/2015/05/reasons-we-need-the-clean-water-rule/.

[204] McCarthy & Darcy, *supra* note 202.

[205] *See, e.g.*, Low Power FM Advocacy Grp., *LPFM Petition for Rulemaking*, YOUTUBE (July 27, 2015), https://www.youtube.com/watch?v=miFPhODpS3M (video by Low Power FM Advocacy Group seeking support for rulemaking petition it filed with FCC); *Tell the CFPB: Stand up for American Families!*, NAT'L PEOPLE'S ACTION, http://action.npa-us.org/page/s/cfpb-stand-up-for-american-families [https://perma.cc/J655-9SRB] (last visited July 11, 2016) (web post including a photo of a shark that urges CFPB to "write strong consumer lending rules").

a truck and forced underneath a second truck's rear trailer.[206] The Karth family's website features photographs of the girls before they died, videos telling the family's tragic story, and a photograph of the crash scene, which graphically demonstrates how the car carrying the girls was quite literally crushed underneath the back end of a truck.[207]


PHOTOS OF MARY AND ANNALEAH KARTH AND THE SCENE OF THEIR DEATH[208]

The Karths' website is much more than a memorial. It is a call to action. Among other things, the Karth family has used their website to push the National Highway Traffic Safety Administration (NHTSA) to initiate a rulemaking to require trucks to use rear guards that would prevent cars from riding under trucks in the event of a collision.[209] Not surprisingly, the family's story has resonated with others, and in response to Ms. Karth's petition, NHTSA launched a rulemaking proceeding that proposes to enhance truck underride protections.[210] Thus, the Karth family's website and the very emotional images that are posted there illustrate how ordinary citizens can and do use visuals in powerful ways to bring attention to problems in need of regulatory solutions.

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206 *See About*, ANNALEAH & MARY, http://annaleahmary.com/about/ [https://perma.cc/CG95-KEFV] (last visited July 11, 2016) (describing the accident that killed the two girls).

207 *Id.*

208 *Id.*; images available at http://www.nyulawreview.org/media/1492.

209 *See Avoid an Impasse: Follow-up Underride Roundtable with Negotiated Rulemaking Meeting*, ANNALEAH & MARY (May 21, 2016) http://annaleahmary.com/2016/05/avoid-an-impasse-follow-up-underride-roundtable-with-negotiated-rulemaking-meeting/#comment-35113 (discussing efforts to engage in negotiated rulemaking).

210 *See* Rear Impact Guards, Rear Impact Protection, 80 Fed. Reg. 78,418, 78,418 (proposed Dec. 16, 2015) ("NHTSA is issuing this NPRM in response to a petition for rulemaking from the Insurance Institute for Highway Safety (IIHS), and from Ms. Marianne Karth and the Truck Safety Coalition (TSC).").

2. Visual Comments

Parties outside the executive branch also use images to provide or to prompt comments on proposed rules. Sometimes this occurs as part of the official commenting process when interested members of the public attach or incorporate visuals into their otherwise traditional textual comments.[211] Much more often, however, parties outside of the executive branch use visuals to raise public awareness during the comment period.

Members of Congress, for example, frequently circulate videos and other visuals that respond to proposed agency rules and that encourage members of the public to register comments on proposed rules.[212] Sometimes these visuals specifically direct constituents to the official rulemaking process, urging them to file comments in the rulemaking docket.[213] At other times, members of Congress simply encourage constituents to register their views using unofficial social media channels. A tweet from Senator Ted Cruz, which shows his opposition to a proposed Internal Revenue Service (IRS) rule involving tax-exempt social welfare organizations, falls into the latter category:

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[211] *See, e.g.*, Alliance of Automobile Manufacturers, Comment Letter on NHTSA Rule Regarding Rear Impact Protection, Lamps, Reflective Devices, and Associated Equipment, Single Unit Trucks (Sept. 24, 2015), https://www.regulations.gov/document?D=NHTSA-2015-0070-0032 [https://perma.cc/6XBT-88N9] (filing comment that includes images in NHTSA rulemaking); Marianne Karth, Comment Letter on NHTSA Rule Regarding Rear Impact Protection, Lamps, Reflective Devices, and Associated Equipment, Single Unit Trucks (Sept. 22, 2015), https://www.regulations.gov/document?D=NHTSA-2015-0070-0018 [https://perma.cc/TJ92-HUG3] (same); Natural Resources Defense Council, Comment Letter on Preliminary Effluent Guidelines Program Plan for 2004/2005 (Apr. 15, 2004), https://www.regulations.gov/document?D=EPA-HQ-OW-2003-0074-0748 [https://perma.cc/62AB-FQU6] (filing comment in EPA rulemaking docket that includes visuals).

[212] *See, e.g.*, Lisa Murkowski, *Alaska Grocery Prices*, FLICKR, https://www.flickr.com/photos/senatorlisamurkowski/sets/72157630782007502# [https://perma.cc/4QQG-YYTY] (last updated July 29, 2012) (displaying constituent-submitted photos of groceries with high prices in Alaska); Senator Pat Toomey, *Pushing Back on Out-of-Control EPA Regulations*, YOUTUBE (Apr. 9, 2014), https://www.youtube.com/watch?v=8VX-wiMGUEg (responding to EPA's proposed Clean Water Rule); Ron Wyden, *Wyden: Speak up for Net Neutrality*, YOUTUBE (July 17, 2014), https://www.youtube.com/watch?v=khhBDQjsZT4 (responding to FCC's net neutrality proposal).

[213] *See, e.g.*, Senator Chuck Grassley, *Supporting the Renewable Fuel Standard*, YOUTUBE (Jan. 16, 2014), https://www.youtube.com/watch?v=_r_oLk5e7dI (encouraging Iowans to weigh in and file comments with EPA on its proposed renewable fuel standard).

TWEET FROM SENATOR TED CRUZ, 2014[214]

Senator Cruz's visual plea was not designed to prompt constituents to file official comments during the public comment period,

[214] Ted Cruz (@tedcruz), TWITTER (Feb. 18, 2014, 12:16 PM), https://twitter.com/tedcruz/status/435870573051121664 [https://perma.cc/U6LC-ND2Y]. Image available at http://www.nyulawreview.org/media/1474.

which had already closed.[215] Rather, his tweet linked to a page that expressly called upon viewers to "[s]pread the word about this proposed rule change with your Facebook friends and Twitter followers."[216]

In addition to members of Congress, the media uses visuals to put a spotlight on proposed regulations and to encourage public comments on the rules. No better example of this exists than John Oliver's late-night comedy spot on FCC's net neutrality rulemaking, which not only called upon viewers to speak up but also actually gave them the web address for the agency's official commenting platform.[217] As we noted above, this proved tremendously effective, ultimately prompting 45,000 new comments to flood into FCC's comment system.[218]

Interest groups also have leveraged visuals in order to exhort their members and others to support or to oppose various proposed rules.[219] Sometimes these visuals expressly point viewers to the official rulemaking process, calling out the deadline for filing comments and providing viewers with the relevant Regulations.gov web address or the relevant rulemaking docket number in order to help facilitate the filing of official comments. Various videos circulated in response to the Federal Aviation Administration's (FAA's) recent rulemaking involving drones, for instance, not only provided details about how to

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215 *See Stop the IRS's Abuse of Power*, U.S. SENATOR FOR TEX. TED CRUZ, http://www.cruz.senate.gov/irs/ [https://perma.cc/YUY6-SN2F] (last visited July 11, 2016) ("The IRS was required to accept and publish comments from the public—and over 140,000 of you did. The public commenting period may have ended, but you can still make your voice heard."); *see also* Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535, 71,535 (Nov. 29, 2013) (noting that comment period would run through January 28, 2014).

216 *Id.*

217 *John Oliver: Net Neutrality*, *supra* note 1, at 11:07.

218 Brody, *supra* note 8.

219 *See, e.g., EPA: Protect Us from Toxic Air*, EARTH DAY NETWORK, http://action.earthday.net/p/dia/action/public/?action_KEY=7023 [https://perma.cc/QLQ7-TMG5] (last visited July 11, 2016) (reproducing a photo of factory spewing out pollution accompanied by call to comment on proposed EPA rule involving mercury and air toxics); *Healthcare Professionals' Perspectives: FDA Proposed Rule on Generic Drug Labeling*, GENERIC PHARM. ASS'N, http://www.gphaonline.org/media/cms/GPhA5886_infographic_v5_a_.pdf [https://perma.cc/7PTC-5R9F] (last visited July 11, 2016) (presenting infographic in opposition to proposed FDA rule on generic drugs); *Talking Points for the EPA Power Plant Rules Public Hearings*, STOP THE FRACK ATTACK (July 28, 2014) http://www.stopthefrackattack.org/talking-points-for-the-epa-power-plant-rules-public-hearings/ [https://perma.cc/JN26-8MMU] (last visited July 11, 2016) (featuring picture of Cookie Monster opposing proposed EPA rule).

file official comments but also called out when the comment period would close.[220]

At other times, visuals circulated by interested members of the public seem designed primarily to drum up unofficial, political dialogue in the court of public opinion using modern online tools such as Twitter hashtags and Storify boards.[221] A group of consumer advocates, for example, created a Storify board in March 2015 at the same time that the CFPB announced it was considering proposing "payday lending" rulemaking[222]—a rulemaking aimed at stopping predatory payday loans.[223] The consumer group's Storify board features images of everyday Americans across the country holding up rudimentary paper signs such as this one bearing the hashtag #StopTheDebtTrap:

IMAGE FROM STORIFY URGING CFPB TO ADDRESS PAYDAY LENDING, 2015[224]

220 *See, e.g.*, Acad. of Model Aeronautics, *FAA's Notice of Proposed Rulemaking (NPRM) COMMENT NOW!*, YOUTUBE (Apr. 9, 2015), https://www.youtube.com/watch?v=UwPGfbtOk-E&app=desktop (encouraging comments on proposed drone rules); Victor Villegas, *You Need to Comment on the #NPRM*, YOUTUBE (Mar. 6, 2015), https://www.youtube.com/watch?v=Cyr8oNhNZlo&app=desktop (featuring a music parody set to tune of the famous *YMCA* song designed to encourage comments on proposed drone rules).

221 Storify is a social media tool that lets users gather information from Facebook, Twitter, and other social media resources into one place, in order to tell a story about a particular event, issue, or topic. *See* Liz Dexter, *What Is Storify and How Do I Use It?*, LIBROEDITING (Nov. 27, 2013), https://libroediting.com/2013/11/27/what-is-storify-and-how-do-i-use-it/; *see also* https://storify.com/browse (demonstrating uses of Storify).

222 *Factsheet: The CFPB Considers Proposal to End Payday Debt Trap*, CONSUMER FIN. PROT. BUREAU (Mar. 26, 2015), http://files.consumerfinance.gov/f/201503_cfpb-proposal-under-consideration.pdf [https://perma.cc/3X5L-3ZUZ].

223 *See* StopTheDebtTrap, *Tell the CFPB to #StopTheDebtTrap*, STORIFY, https://storify.com/EndTheDebtTrap/tell-cordray-at-the-cfpb-to-stop-predatory-lending [https://perma.cc/7FR5-7Y55] (last visited Feb. 25, 2016).

224 *Id.*; image available at http://www.nyulawreview.org/media/1453. *See also Faith & Payday Lending Toolkit: Resources for Learning & Action*, PICO NAT'L NETWORK, http://

This kind of simple visual campaign can democratize and open up the rulemaking process. It does this by providing citizens with an accessible, social forum for publicly voicing their views—one that takes away some of the home court advantage that industry insiders and their lawyers have long enjoyed while operating in the traditional, densely textual rulemaking forum.

Another highly effective example of this social dialogue can be found in the American Farm Bureau's #DitchTheRule campaign,[225] which involved a full-scale assault on EPA's proposed Clean Water Rule.[226] A central visual in the Farm Bureau's anti-EPA campaign was a video parody set to the musical score "Let It Go" from the movie *Frozen*.[227] In the video, as a mother sings, her children—wearing swimsuits and goggles—pretend to canoe, fish, and swim in dry ditches on their farm:

#DITCHTHERULE VIDEO PARODY, 2014[228]

www.piconetwork.org/community-tools/payday-lending-toolkit (last visited June 10, 2016) (providing resources for faith communities to educate members about debt traps and to inspire members to contact the CFPB with their payday lending stories).

225 *See, e.g.*, Dave Lucas, *Farmers Fight EPA over Proposed Water Rule*, WAMC (June 19, 2014), http://wamc.org/post/farmers-fight-epa-over-proposed-water-rule#stream/0 (including a #DitchTheRule image from the Farm Bureau); Neb. Farm Bureau, *Waters of the U.S. Rule Explained*, YOUTUBE (June 30, 2014), https://www.youtube.com/watch?v=SFe9u2696gg&app=desktop.

226 *See It's Time to Ditch the Rule*, AM. FARM BUREAU, https://perma.cc/RJ96-LFVB?type=image (last visited Feb. 26, 2016) (attacking the EPA's Waters of the United States rule).

227 Mo. Farm Bureau, *That's Enough—("Let It Go" Parody)*, YOUTUBE (May 23, 2014), https://www.youtube.com/watch?v=9U0OqJqNbbs.

228 *Id.*; image available at http://www.nyulawreview.org/media/1438.

The video has more than 140,000 views,[229] and the family was interviewed by Fox News.[230] Thus, the Farm Bureau successfully used the video to call public attention to their opposition to EPA's proposed rule.

3. Visual Advocacy for and Against Final Rules

Parties outside the executive branch have even relied upon visuals to advocate for or against rules after they have been promulgated. These visuals often relate to rules that have come under attack after their promulgation (sometimes in judicial proceedings and sometimes in Congress). Many examples can be found in the wake of EPA's promulgation of the Clean Power Plan,[231] as well as EPA's and the Corp's promulgation of the Clean Water Rule.[232] For example, Earthjustice posted this tweet in support of the Clean Power Plan after a lower federal court refused to stay the rule:

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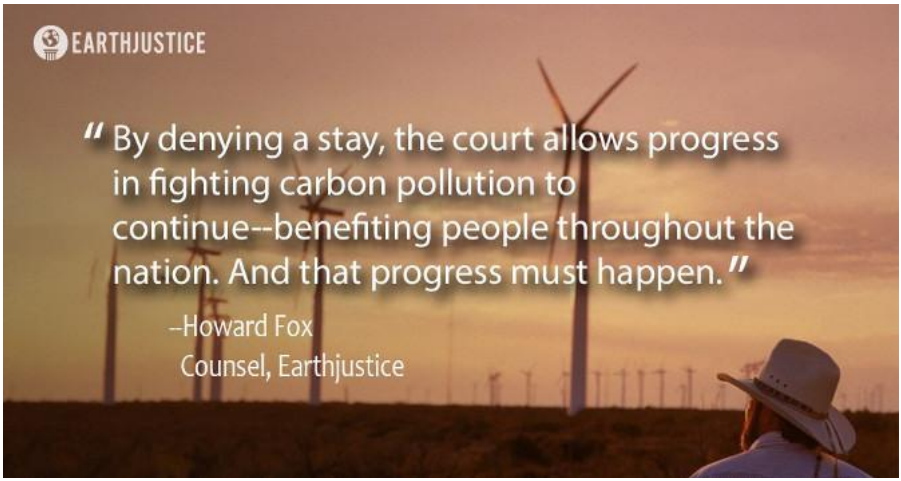
229 Mo. Farm Bureau, *supra* note 227.

230 *WATCH: Frustrated Farmers Parody "Let It Go" to Protest EPA Regulations*, FOX NEWS INSIDER (June 9, 2014), http://insider.foxnews.com/2014/06/09/video-frustrated-farmers-parody-let-it-go-protest-epa-regulations.

231 *See, e.g.*, Earthjustice (@Earthjustice), TWITTER (Jan. 21, 2016) https://twitter.com/Earthjustice/status/690307987596935168 [https://perma.cc/CTJ6-9RKS] (photo of solar panels used to celebrate lower court's refusal to block Clean Power Plan).

232 *See, e.g.*, Am. Farm Bureau (@FarmBureau), TWITTER (Nov. 3, 2015), https://twitter.com/FarmBureau/status/661551113548730368 [https://perma.cc/SGQ9-8U7R] (featuring photo of ditch and urging legislative repeal of EPA's rule); John Hoeven (@senjohnhoeven), TWITTER (Jan. 22, 2016), https://twitter.com/senjohnhoeven/status/690663376968638464 (tweeting image from highlighting Senator Hoeven's attempts to repeal EPA's Clean Water Rule); Steve Scalise (@SteveScalise), TWITTER (Jan. 13, 2016), https://twitter.com/SteveScalise/status/687316192378228736 (calling, in his capacity as a Representative, for repeal of the Clean Water Rule); T&I Comm. (@Transport), TWITTER (Jan. 13, 2016), https://twitter.com/Transport/status/687333707515039748 [https://perma.cc/3RRW-ERJB] (featuring a photo of agricultural ditches and calling EPA's rule "flawed").



EARTHJUSTICE TWEET SUPPORTING EPA'S CLEAN POWER PLAN, 2015[233]

Although Earthjustice's celebration proved to be short-lived,[234] this visual nonetheless demonstrates how parties do not stop their visual communications once high-profile rules are enacted. To the contrary, visual communications aimed at the court of public opinion can continue to fly in the online sphere long after rules are finalized, even as judicial battles are waged in the federal courts.

III
IMPLICATIONS FOR THE FUTURE OF RULEMAKING

As we have demonstrated, rulemaking is no longer a solely textual affair. To the contrary, executive agencies, the President, Congress, repeat-player institutions, and everyday Americans are turning to the tools of today's visual information age to push their agendas in the context of agency rulemakings. This emergence of visual communications in the rulemaking realm over the past few years has occurred largely outside of the four corners of the law, creating what might appear to be two very different rulemaking universes: one highly textual and legalistic, and a second that takes a much more political and visual shape. Yet the reality is that these two universes are not all that distinct. Visuals are reshaping the rulemaking landscape.

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233 Earthjustice (@Earthjustice), TWITTER (Jan. 22, 2016), https://twitter.com/Earthjustice/status/690579759428796416 [https://perma.cc/LJR9-TFNN]. Image available at http://www.nyulawreview.org/media/1441.

234 The U.S. Supreme Court subsequently granted a stay of the Clean Power Plan. Chamber of Commerce v. EPA, 136 S. Ct. 999, 999 (2016) (mem.).

Likely due to the legal profession's preoccupation with text,[235] administrative law scholars have failed to notice the emergence of visual communications, and little attention has been given to the legal implications of this emerging phenomenon. This Part fills that gap, identifying and analyzing a variety of theoretical and doctrinal implications that we believe flow from the rising prominence of visual rulemaking. Ultimately, we conclude that the benefits of visual rulemaking outweigh its risks and that administrative law doctrine and theory can and should welcome the use of visuals in rulemaking.

A. Theoretical Implications

Congress routinely transfers legislative-like power to agencies, enabling agencies to write legally binding regulations that touch on everything from the quality of the air we breathe to the safety of the food we eat.[236] Despite longstanding objections to this massive power transfer,[237] the reality is that administrative law today habitually tolerates—indeed, often welcomes—Congress's delegation of rulemaking powers to agencies.[238] It has done this by relying upon a variety of theoretical justifications, including notions of: (1) political accountability; (2) expertise; and (3) public deliberation.[239] As we discuss below, the emergence of a visual rulemaking world has important implications for each of these three central theoretical justifications underpinning the modern regulatory state.

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235 *See supra* note 72 and accompanying text.

236 *See* Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1005 (2015) (noting that agency "rules look and feel much like congressionally enacted statutes, providing binding legal norms that govern nearly everything ranging from the quality of the air we breathe to the safety of the products we buy").

237 *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 155–64 (1993) (arguing that delegation to administrative agencies is unconstitutional); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 379–80 (2002) (presenting examples of statutes that the author argues violate the nondelegation principle as the author defines it).

238 *See* Watts, *Rulemaking as Legislating*, *supra* note 236, at 1013 (noting that the nondelegation doctrine does little to constrain Congress's delegation of legislative-like power to agencies).

239 *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 423 (2012) (observing that courts condone power transfers to agencies based on considerations of agency expertise, accountability, and accessibility); *cf.* Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 23 (2011) ("[A]dministrative law's primary purpose has been to develop various legal structures and mechanisms—such as political oversight, judicial review, public participation, and reason-giving requirements—that help to legitimate and control agency action.").

1. Political Accountability

One major theoretical justification frequently offered in support of allowing Congress to delegate large swaths of legislative-like power to agencies involves notions of political accountability.[240] The justification goes as follows: Agency officials who write legally binding rules are not elected by the people and thus are not directly politically accountable.[241] Yet, "the Chief Executive is,"[242] and so agencies can be said to be indirectly politically accountable to the extent that "the President is accountable for the actions of agencies."[243] Courts frequently invoke this notion of political accountability to support the legitimacy of today's regulatory state.[244] Indeed, this political accountability rationale is part of the fabric of a variety of foundational administrative law doctrines, including *Chevron* deference[245] and judicial acceptance of *ex parte* communications in informal rulemaking proceedings.[246]

Outside the judiciary, scholars too have widely embraced the notion that presidential control over agency rulemaking helps legitimize regulatory activity by providing a mechanism for electoral accountability.[247] As one scholar has put it, "[w]e vote for presidents, not secretaries or administrators," and so "White House oversight

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[240] *See* Watts, *Proposing a Place for Politics*, *supra* note 73, at 35 (identifying political accountability as a newer justification for agency action, as policymaking decisions are "highly political decisions that should be made by politically accountable institutions"); *see also* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1763 (2007) (describing the transition in the 1980s in administrative doctrine and theory to presidential control of agency action). *See generally* Pardo & Watts, *supra* note 239, at 432 (noting that political accountability is a "reason frequently given for allowing administrative agencies to engage in policymaking").

[241] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that "agencies are not directly accountable to the people"); *see also* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 167 (4th ed. 2011) (stating that "rulemaking has a fundamental flaw that violates basic democratic principles" because "[t]hose who write the law embodied in rules are not elected").

[242] *Chevron*, 467 U.S. at 865.

[243] RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 114 (5th ed. 2010).

[244] *See id.* § 2.6, at 113 (noting that the Supreme Court has invoked political accountability to support the "legitimacy of the administrative state").

[245] *See Chevron*, 467 U.S. at 865 (embracing the political accountability rationale).

[246] *See* Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (rejecting the notion that "Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power").

[247] *See, e.g.*, Bressman, *supra* note 240, at 1764 (describing how the presidential control model enjoys "broad scholarly appeal" and "widespread support"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001) (asserting that presidential control promotes political accountability and transparency).

places accountability precisely where it should be, namely, where the electorate can do something about it."[248]

Notably, this reliance on political accountability rests on a big but often unstated assumption: that the electorate will indeed know about the existence of regulatory action and will know who to blame—or who to credit—for regulatory action or inaction. That, however, is not often the case. Indeed, agencies routinely fill their NPRMs and the statements of basis and purpose that accompany their final rules with technocratic, statutory, or scientific language, stripping the rulemaking record of any references to political influences.[249] Political influences, in other words, have historically been swept "under the rug" and omitted from agencies' rulemaking records.[250] The result is that political influences are rarely subjected to scrutiny by the courts or by the public. Nor does the public normally have much insight into the President's significant involvement in directing the regulatory state.

This lack of transparency has serious consequences for administrative law's heavy reliance on theories of political control and accountability.[251] For one thing, as Nina Mendelson has noted, obscuring political influence means that it is "less likely that the electorate will perceive that there *is* meaningful presidential supervision of agency decision making."[252] In addition, opacity "reduces the chance of the electorate understanding the *content* of that presidential supervision, further reducing the accountability of the President for those decisions."[253]

It is here, we believe, that the emerging visual rulemaking world could play a very valuable role. By raising the visibility of agencies' regulatory activities and the President's tight control over executive agencies, visual communications promise to make the regulatory state more transparent to the American people, enabling greater political accountability. Even though agencies' official rulemaking records continue to speak in technocratic terms with little, if any, acknowl-

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248 Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 568 (1987).

249 *See* Watts, *Proposing a Place for Politics*, *supra* note 73, at 23 ("[A]gencies today generally couch their decisions in technocratic, statutory, or scientific language, either failing to disclose or affirmatively hiding political influences that factor into the mix.").

250 *Id.* at 29.

251 Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1159 (2010) (noting that the presidential supervision process is largely "opaque").

252 *Id.*

253 *Id.*

edgement of political influences,[254] the new, more visual universe of agency rulemaking is bringing the political nature of rulemaking out into the open, putting a bright and very visible spotlight on the President's involvement in the regulatory sphere.

Sometimes agencies themselves cast this spotlight. An illustrative example of this can be seen in DOL's whiteboard video on its proposed overtime rule.[255] The video makes Obama's role in directing DOL's rulemaking crystal clear, providing viewers with an image of President Obama holding his hand up in the air and telling DOL to "update the rules":

DOL'S WHITEBOARD VIDEO ON DOL'S OVERTIME RULE, 2015[256]

This overt and very visual acknowledgement of Obama's involvement contrasts with the brief, almost passing mention of Obama that can be found in the lengthy, textual NPRM.[257]

Of course, the President himself frequently leverages the power of visuals to project his control over executive agencies. Consider, for example, the visuals he issued in the context of DOE's rulemaking on student debt, which we already discussed.[258] From the very beginning of that rulemaking, President Obama used visuals in a concerted manner to make his close involvement in the rulemaking unmistak-

254 *See* Watts, *Proposing a Place for Politics*, *supra* note 73, at 23–29.

255 Shierholz, *supra* note 18.

256 *Id.* at 02:22; image available at http://www.nyulawreview.org/media/1440.

257 *See* Defining and Delimiting Exemptions, *supra* note 99 (including few references to President Obama).

258 *See supra* notes 187–91 and accompanying text.

ably clear to the American people. Likewise, in the context of EPA's Clean Power Plan, Obama used visuals to quite literally claim the rule as his own, referring to it not as "EPA's Clean Power Plan" but rather as "President Obama's Clean Power Plan":

INFOGRAPHIC FROM WHITE HOUSE ASSERTING OWNERSHIP OVER CLEAN POWER PLAN, 2015[259]

In contrast to his overt claim of ownership over EPA's regulatory actions, Obama has been careful not to claim ownership over the actions of independent regulatory commissions, which—unlike executive agencies—enjoy some insulation due to the President's inability to remove the agency heads at will.[260] Consider, for instance, Obama's use of visuals in the FCC's net neutrality proceeding. President Obama was not shy about publicly urging the FCC, an independent regulatory commission, to adopt a net neutrality plan that was consistent with his own policy preferences.[261] Yet both his words and his visuals projected the notion that the decision was not his to make. Instead, it belonged to the FCC.[262]

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[259] The White House (@WhiteHouse), TWITTER (Mar. 31, 2015), https://twitter.com/WhiteHouse/status/582923408121442304 [https://perma.cc/287P-3NW4] (explaining in a visual that the Clean Power Plant Standards would prevent up to 150,000 asthma attacks each year). Image available at http://www.nyulawreview.org/media/1455.

[260] *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (upholding limits on President's ability to remove a member of the Federal Trade Commission, an independent regulatory commission).

[261] *See President's Net Neutrality Video*, *supra* note 9, at 01:23–01:27 (setting forth Obama's plan for net neutrality but recognizing that "FCC is an independent agency, and ultimately this decision is theirs alone").

[262] *See id.*; Ian Tuttle, *'Net Neutrality'? No, Thank You*, NAT'L REV. ONLINE: THE CORNER (Nov. 10, 2015, 5:51 PM), http://www.nationalreview.com/corner/392462/net-

Perhaps the best illustration of this can be found in a GIF posted by the White House to Tumblr after the FCC released its final net neutrality rule. It depicts Obama thanking the FCC for keeping the Internet free, and then flashes to images of cascading candy hearts inscribed with the word "INTERNET." The GIF, which prominently features the word "THANKS," is carefully designed to give credit to FCC rather than to claim the victory as the President's own:

TUMBLR GIF DEPICTING OBAMA THANKING THE FCC FOR ITS NEW NET NEUTRALITY RULE, 2016[263]

These sorts of visuals quite literally make visible what has historically been hidden from the sight of everyday Americans: that the President is carefully involved in directing the activities of executive agencies like EPA and in influencing (but not quite directing) the actions of independent agencies like the FCC. Thus, visual communications—even if they remain technically separate from agencies' official rulemaking records—promise to bring greater transparency and political accountability to the administrative state. They provide highly visible support for administrative law's heavy reliance on theories of political accountability and presidential control, demonstrating a connection between theory and reality on the ground.

neutrality-no-thank-you-ian-tuttle (republishing White House infographic in which Obama urged but did not direct FCC to take action).

[263] The White House, TUMBLR (Feb. 26, 2015), http://whitehouse.tumblr.com/post/112154742628/great-news-the-federal-communications-commission [https://perma.cc/LF2D-JSV3]. Images available at http://www.nyulawreview.org/media/1496.

2. *Expertise*

A second—and somewhat conflicting—justification frequently offered in support of agency rulemaking turns on notions of agency expertise.[264] Pursuant to this account, Congress's transfer of legislative-like powers to agencies makes sense because such delegations enable technically competent, specialized experts to fill in the details of complex regulatory schemes.[265]

During the Progressive and the New Deal eras, key founders of the modern administrative state broadly espoused this notion of agency expertise.[266] However, administrative law today is much more indecisive about how fully to embrace expertise. In particular, administrative law regularly veers between, on the one hand, acknowledging the important role that political control plays in justifying agency action, and, on the other hand, demanding that agencies act in a technocratic, expert-driven manner.[267] This vacillation is particularly acute in the judicial review arena, where courts routinely demand that agencies justify their actions in expert-driven terms in order to survive so-called "arbitrary and capricious" review.[268] Yet the courts also recognize—thanks to the Supreme Court's famous *Chevron* case—that an agency can "properly rely upon the incumbent administration's views of wise policy to inform its judgments" and that courts should defer to agencies' reasonable constructions of statutory ambiguity because agencies, unlike courts, are indirectly accountable to the people via the President.[269]

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264 *See infra* notes 265–68 and accompanying text. *See generally* Pardo & Watts, *supra* note 239, at 424 ("One of the main factors supporting congressional delegations of broad policymaking power to agencies is that agencies possess specialized expertise.").

265 *See generally* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 440–41 (1987) (noting that increase in delegations of authority to agencies during the New Deal was driven in part by a sense that agencies were "technically sophisticated").

266 *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 154–55 (1938) (describing administrators as "men bred to the facts"); Joseph B. Eastman, *The Place of the Independent Commission*, 12 CONST. REV. 95, 101 (1928) (describing agencies as "clearly nonpartisan in their makeup").

267 *See* Watts, *Proposing a Place for Politics*, *supra* note 73, at 33–37 (describing administrative law's vacillation between politics and expertise).

268 *See id.* at 15–23 (describing how judiciary's application of "arbitrary and capricious" review demands that agencies justify their actions in technocratic, expert-driven terms); *see also* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (solidifying expert-driven model of agency decision making, requiring evidence-based decision making documented in rulemaking records); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 226 (1990) ("[T]he submerged yet powerful message in the Supreme Court's decision in *State Farm* [was] that the political directions of a particular administration are inadequate to justify regulatory policy.").

269 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

Not surprisingly, the visual rulemaking world that we have uncovered reflects—indeed, heightens—this longstanding, simmering tension between expertise and politics in administrative law. Foremost, visuals such as those we have described above make clear to everyday Americans what has always been true but often goes unspoken: There is no perfectly clean demarcation between expert-driven decisions and policy-driven decisions.[270] Even purportedly fact-driven decisions often involve value-laden policy judgments about difficult political questions.[271] Consider, for example, a video created by the Occupational Safety and Health Administration (OSHA) relating to its efforts to amend existing rules for occupational exposure to crystalline silica. Just a few weeks before OSHA published its highly technical, 231-page NPRM in the Federal Register,[272] it posted a video called "Deadly Dust" to YouTube.[273] The nine-minute video includes, among other things, interviews with a white-coated doctor,[274] a safety expert,[275] and an official-looking bureaucrat wearing a formal coat and a tie.[276] It also features x-rays that graphically depict the difference between healthy, clear lungs (on the left) and the scar-filled lungs of someone suffering from advanced silicosis (on the right):

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270 When delegating rulemaking power to agencies, Congress only occasionally tries to draw a clear line between scientific considerations and policy considerations. *See, e.g.*, Endangered Species Act (ESA) of 1973, 16 U.S.C. § 1533(b)(1)(A) (2012) (requiring that the Secretary of Interior base ESA decisions "*solely* on the basis of the best scientific and commercial data available" (emphasis added)). Most of the time, Congress says nothing about what factors may be relevant to an agency's decision-making process, leaving the door open to blend of factual as well as policy-laden factors. *See* Watts, *Proposing a Place for Politics*, *supra* note 73, at 45–52.

271 *See* Watts, *Controlling Presidential Control*, *supra* note 181, at 724 ("When science and expertise alone cannot answer questions concerning how or when best to regulate, competing value-laden policy preferences necessarily and inevitably will come into play."); *see also* Kagan, *supra* note 247, at 2356–57 (arguing that a strong presidential role is appropriate when agencies "confront the question, which science alone cannot answer, of how to make determinate judgments regarding the protection of health and safety in the face both of scientific uncertainty and competing public interests"); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 744 (2011) (noting that even "good" science often integrates policy choices).

272 Occupational Exposure to Respirable Crystalline Silica, 78 Fed. Reg. 56,274 (proposed Sept. 12, 2013) (codified at 29 C.F.R. pts. 1910, 1915 & 1926).

273 *See* U.S. Dep't of Labor, *2013 "Deadly Dust" Silica*, YOUTUBE (Aug. 23, 2013), https://youtu.be/eXsGJ1C4Xcw [hereinafter *Deadly Dust Video*].

274 *Id.* at 01:35.

275 *Id.* at 02:37.

276 *Id.* at 01:52.

X-RAYS FEATURED IN OSHA'S "DEADLY DUST" VIDEO, 2013[277]

All of these images demonstrate OSHA's technical competency and its knowledge on the issue of silicosis.

At the same time, the video depicts the human impact of this disease. It includes emotional pictures of various workers who have died from silicosis and footage of grief-stricken family members talking about the devastating effects silicosis had on their loved ones. One segment, for instance, tells the true story of a sandblaster from Tennessee who died from silicosis. The video shows his widow, who now works two jobs and can barely make ends meet, taking flowers to his grave.[278] These moving stories shed light on how the silica rulemaking turns not only on facts and science but also on sensitive policy questions about the value of human life. The video, accordingly, serves as an excellent example of how visuals can make more apparent what agencies' lengthy rulemaking documents too often obscure: Rulemaking is not always just about the facts. It often turns on complex, highly value-laden, and sometimes emotional policy choices, such as how to protect human life. These policy choices may be easier for people to understand when they can quite literally visualize them.

Notably, however, there is a risk that visuals will tell only one side of the story, thus obscuring important facts that do exist. Visuals are powerful precisely because they simplify and boil down information. They encourage quick reactions and they often invite emotional

277 *Id.* at 02:27; image available at http://www.nyulawreview.org/media/1478.
278 *Deadly Dust Video*, *supra* note 273, at 08:00.

responses.[279] Thus, when deployed in the rulemaking context, visuals inevitably emphasize some facts and downplay others. Some visuals might obscure the deep technical complexity that exists in agencies' lengthy textual notices and final rules. OSHA's "Deadly Dust" video,[280] for example, does not discuss the costs of the proposed rule. Nor does it acknowledge that industry has voiced significant opposition to it based on concerns about cost and feasibility.[281] Instead, the video is one-sided, avoiding the technicalities of its proposed rule in favor of telling a powerful, emotion-filled story about the human costs of silicosis.

Similarly, the American Farm Bureau's #DitchTheRule campaign—and EPA's corresponding #DitchTheMyth campaign—highlight how visuals may present matters as "fact" when the reality is much more nuanced. In its largely visual campaign against EPA's proposed Clean Water Rule, the American Farm Bureau unleashed a variety of visuals designed to establish as "fact" various takes on EPA's rule that EPA said were "myths."[282] For example, the Farm Bureau asserted that EPA's proposed rule would alter the regulatory landscape for agricultural farms, whereas EPA labeled that assertion a "myth."[283]

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279 *See supra* Section I.A (discussing the power of images).

280 *Deadly Dust Video*, *supra* note 273.

281 *See* Robert Iafolla, *Industry Coalesces in Opposition to Silica Proposal, over Costs, Feasibility, Impacts*, BLOOMBERG BNA (Feb. 13, 2014), http://www.bna.com/industry-coalesces-opposition-n17179882099/ (detailing industry comments criticizing OSHA's rule for being economically infeasible and relying on incorrect assumptions).

282 *Compare* Am. Farm Bureau, *#DitchTheRule*, DITCH THE RULE, https://perma.cc/K2RN-TM6V (last visited Feb. 26, 2016), *with Ditch the Myth*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/sites/production/files/2014-07/documents/ditch_the_myth_wotus.pdf [https://perma.cc/Q6FQ-YKPT] (last visited Feb. 26, 2016) (presenting conflicting information on the impacts of the proposed Waters of the United States rule).

283 *Compare Take Action: Tell EPA to #DitchTheRule*, MCCLEAN COUNTY FARM BUREAU, (June 13, 2014), http:// www . mcfb . org / 2014 / 06 / take - action - tell - epa - to - ditchtherule/ [https://perma.cc/R593-X7P7] (showing image of agricultural farms with a call to "ditch the rule"), *with Ditch the Myth*, *supra* note 282 (including infographic claiming that proposed rule will not change exclusions and exemptions for agriculture).

Image of Agricultural Land, #DitchTheRule Campaign, 2014[284]

[284] Am. Farm Bureau, *supra* note 282; image available at http://www.nyulawreview.org/media/1454.

EPA'S RESPONSE, #DITCHTHEMYTH, 2014[285]

Lost in this tussle between EPA and the American Farm Bureau was an acknowledgement of the legal and technical complexities of the rulemaking proceeding, which resulted in a 74-page final rule.[286] Instead, simplified "facts" and "myths" were visually slung back and forth in what looked much more like a political campaign than a technocratic process.

Thus, when it comes to the expertise rationale that is frequently invoked to justify the legitimacy of agency rulemaking, visual communications present a mixed bag. On the one hand, visuals threaten to oversimplify, to obscure, and to twist facts. Yet, on the other hand,

[285] *See Ditch the Myth*, *supra* note 282; image available at http://www.nyulawreview.org/media/1444.

[286] *See* Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified in scattered parts of 33 C.F.R. and 40 C.F.R.).

visuals also demonstrate that even purportedly technocratic rulemakings often involve policy calls, thereby enhancing transparency in the rulemaking process. In this sense, visuals shed much needed light on what has always been true but is often unacknowledged: There is no hermetically sealed division between expertise and politics in rulemaking.

3. Public Participation

A third justification frequently offered in support of the legitimacy of agency rulemaking is that, although agencies are not directly accountable to the people, they must allow significant public participation when promulgating rules.[287] Agencies, for example, must publish detailed NPRMs in the Federal Register, alerting the public to their proposed rules;[288] they must give interested members of the public an opportunity to present facts and arguments by filing comments;[289] and they must respond to all significant comments they receive, ensuring that the notice-and-comment process is a meaningful two-way interchange.[290]

E-rulemaking scholars focused on improving the effectiveness of Rulemaking 2.0[291] initiatives have identified three persistent barriers that are thwarting broader, better participation in rulemaking: (1) "[i]gnorance about the rulemaking process"; (2) "[u]nawareness that rulemakings of interest are going on"; and (3) "[i]nformation [o]verload from the length, and linguistic and cognitive density, of

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287 *See* Watts, *Constraining Certiorari*, *supra* note 239, at 36 (noting that public participation is a way in which rulemaking is subject to "significant external checks").

288 *See* 5 U.S.C. § 553(b) (2012) (requiring notice of proposed rules).

289 *See id.* § 553(c) (requiring that the public be given an opportunity to comment); *see also* PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 243, § 7.3, at 583 ("The purpose of the notice required by § 553(b) is to permit potentially affected members of the public to file meaningful comments under § 553(c) criticizing (or supporting) the agency's proposal.").

290 *See, e.g.*, Reyblatt v. U.S. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997) (concluding that agencies must respond in reasoned manner to all significant comments); Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530–31 (D.C. Cir. 1982) (noting that comment process is intended to ensure a "genuine interchange" of views); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) ("[T]here must be an *exchange* of views, information, and criticism between interested persons and the agency.").

291 *See* Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 104 (2013) (describing "Rulemaking 2.0" as efforts "to take advantage of new technologies to transform the notice-and-comment process into a more social and collaborative process").

rulemaking materials."[292] Remarkably, however, in trying to address these barriers, these scholars have remained fixated almost exclusively on the textual world of rulemaking, seeking to develop new ways of highlighting, clarifying, organizing, and inviting text.[293] Meanwhile, scholars and e-rulemaking pioneers have failed to consider the potential promise of the visual world.

This oversight is unfortunate. In a way that dense textual documents cannot, visuals promise to offer a quick and easy way of drawing the public eye to noteworthy rulemakings. Visuals often distill complex information into easy-to-digest pieces,[294] and they provide a simple, engaging means of communicating. Thus, visuals offer a significant and valuable means of overcoming many of the barriers that currently exist to broader public participation in the rulemaking process.

For example, EPA's whiteboard video explaining the Clean Power Plan has been viewed more than 29,000 times on YouTube.[295] While this number is not overwhelming, it does indicate that EPA's outflow-oriented video is reaching a sizeable chunk of interested viewers on a topic—the regulation of carbon pollution from power plants—that everyday Americans might ordinarily dismiss as too complex or too dull. Similarly, the President's visuals draw national attention to regulatory action that has a direct effect on the lives of everyday Americans but that otherwise might not catch their attention.[296] Obama's video message to the FCC on net neutrality is one such example. It has been viewed nearly one million times on YouTube.[297]

Visuals circulated by parties outside of the executive branch also are encouraging the public to pay attention to the regulatory world.[298] John Oliver's late-night cable spot on net neutrality, which now has

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[292] Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 389–90 (2011) (emphasis omitted).

[293] *See, e.g.*, Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 405–06 (2011) (summarizing proposals to provide the public with "plain English" versions of rules and to use the Internet to make it easier to find the text of rules); *see also* Johnson, *supra* note 291 (describing barriers to public participation).

[294] *See supra* notes 24–28 and accompanying text (discussing the at-a-glance quality of visuals).

[295] *Clean Power Plan Explained*, *supra* note 124.

[296] *See supra* Section II.B (discussing presidential use of visuals in the rulemaking context).

[297] *See President's Net Neutrality Video*, *supra* note 9.

[298] *See supra* Section II.C (discussing visuals circulated by rulemaking stakeholders outside of executive branch).

over ten million views, is a paradigmatic example.[299] Another can be found in the #DitchTheRule video parody based on the hit song "Let It Go," which, as we already noted, has been viewed on YouTube more than 140,000 times[300]—a fairly high number for a video about the regulation of water. In other words, visual rulemaking is exposing regulatory proposals to the marketplace of ideas.

While these examples demonstrate that visuals are indeed being used to raise public *awareness* of rulemakings and to enhance the public's voice, it remains uncertain whether they will lead to enhanced and more meaningful public *participation*. Sometimes, as in the Karth family's efforts, these visual appeals from the public may have a direct impact on the official rulemaking machinery.[301] More often, however, they simply represent political dialogue surrounding—but not necessarily integrated into—rulemaking.

Even more significantly, it is unclear whether many citizens are aware that their social media comments are typically not subsumed into the agency's official rulemaking record. Agencies can and should take simple steps to make this clear to the public. For example, agency infographics and visual tweets on proposed rules could embed links that would take interested stakeholders straight to the relevant docket folder on Regulations.gov, making it easier for the public to determine how to file comments. Similarly, agency videos could tell viewers exactly how to file official comments on Regulations.gov, rather than simply directing viewers to an agency's website on the rulemaking. And most importantly, agencies also should more clearly explain to the public the distinction between "official" comments that become part of the rulemaking record, and social media comments that generally do not.[302] Indeed, as we discuss below, this last step is likely required by the Administrative Procedure Act.[303]

Of course, these steps would be fairly simple for agencies to implement, and so one must wonder why agencies have not taken them already. The answer very likely rests, at least in part, in ambivalence surrounding the value of public participation.[304] Agencies might well believe that increased public participation in the e-rulemaking realm—whether or not it flows from visual prompts—is unlikely to

299 *See John Oliver: Net Neutrality*, *supra* note 1.

300 *See supra* notes 227–30 and accompanying text.

301 *See supra* notes 206–10 and accompanying text.

302 *See supra* notes 147–50 and accompanying text (explaining how EPA's whiteboard videos do not clearly explain how viewers could file official comments).

303 *See infra* Section III.B.1.a.

304 *Cf.* HERZ, *supra* note 60, at 22 ("[I]t is unclear that broad participation by the general public is valuable in rulemaking.").

yield many relevant, informed comments. Or agencies might fear that any increase in public participation would yield little other than a slew of "me too" form letters,[305] which agencies are generally quick to dismiss.[306]

These concerns could prove valid. However, until agencies experiment more with inflow-oriented visuals that aim to increase public participation, it seems premature to give up the effort. Furthermore, even if inflow-oriented visuals do generate little more than form letters and "astroturf"-like email campaigns,[307] there is still likely important value added by the increased participation. Of course, agencies should not make rulemaking decisions simply based on the number of comments received in support of a certain position.[308] Nonetheless, as Nina Mendelson has argued, many rulemakings turn more on value-laden judgment calls than on hard scientific facts, and it is in these value-laden rulemaking proceedings that mass comments—whether prompted by text or visuals—serve a useful role, making public opinion on value-laden issues clear and encouraging agencies to take a closer look at public opinion.[309]

This may have been part of what was at play in the FCC's net neutrality rulemaking. In that rulemaking, the FCC adopted strong net neutrality rules after receiving and considering nearly four million public comments,[310] most of which strongly favored net neutrality.[311]

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[305] *See* HERZ, *supra* note 60, at 8–9 (stating that where rulemakings have generated widespread public participation, "the comments have been dominated by duplicative submissions resulting from organized 'astroturf' campaigns," which can result in "[t]ens or hundreds of thousands of near-identical submissions"); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1361 (2011) (noting that campaigns encouraging the public to comment have resulted in a flood of "form letters, postcards, or e-mails to an agency, each with identical or near-identical text").

[306] *See* Mendelson, *supra* note 305, at 1363–64 (discussing how agencies "occasionally acknowledge the number of lay comments and the sentiments they express [but] they very rarely appear to give them any significant weight").

[307] *See supra* note 305 (discussing "astroturf" comment campaigns).

[308] *See* Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENVTL. & ADMIN. L. 173, 181 (2012) (stating that "[t]he rulemaking process is not a plebicite, to be sure, and relative volumes of public comments should not be viewed by agency officials as dispositive").

[309] *Id.* at 180–81 (discussing how mass comments help support fully reasoned agency process and help rulemakers gauge public opinion); *see also id.* at 175 (arguing that mass comments "at least deserve consideration by the agency as part of a well-reasoned agency deliberation process").

[310] Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738, 19,739 (Apr. 13, 2015) (to be codified in scattered parts of 6, 7, 10, 14, 15, 20, 22, 28, 29, 32, 34, 38, 40, 45, and 49 C.F.R.).

[311] *See id.* at 19,746 ("[I]t is clear that the majority of comments support Commission action to protect the open Internet."); Elise Hu, *3.7 Million Comments Later, Here's Where Net Neutrality Stands*, NPR: ALL TECH CONSIDERED (Sept. 17, 2014, 3:12 PM), http://www.npr.org/blogs/alltechconsidered/2014/09/17/349243335/3-7-million-comments-later-

About half of these comments were duplicative rather than unique.[312] Yet the FCC expressly acknowledged the value of the comments in its final rule, stating: "Congress could not have imagined when it enacted the APA almost seventy years ago that the day would come when nearly 4 million Americans would exercise their right to comment on a proposed rulemaking. But that is what has happened in this proceeding and it is a good thing."[313]

In sum, visual rulemaking has the potential to strengthen and further democratize public participation, even though this potential has yet to be fully tapped. It also promises to advance transparency and political accountability in the regulatory world. Yet visual rulemaking poses serious risks as well, including the risk that visual appeals may turn high-stakes rulemakings into viral political battles, undermining the expert-driven foundations of the regulatory state. As visual rulemaking continues to grow, these risks and benefits should be reassessed to ensure that visual rulemaking furthers rather than undermines the fundamental values that underpin the regulatory state.

B. Doctrinal Implications

In addition to raising theoretical issues, the emergence of a visual rulemaking world has important legal implications. In particular, the use of visuals in the rulemaking realm is likely to raise significant legal issues in at least four key doctrinal areas: (1) Section 553 of the Administrative Procedure Act (APA); (2) the APA's "record" requirement, which flows from Section 706 of the APA; (3) the First Amendment; and (4) various anti-lobbying and anti-propaganda laws.[314] This Section considers each in turn.

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heres-where-net-neutrality-stands (noting that one study of the first 800,000 comments found that "fewer than 1 percent were opposed to net neutrality enforcement").

312 *See* Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,746 ("[B]y some estimates, nearly half of all comments received by the Commission were unique.").

313 *Id.* at 19,739.

314 Other legal issues might surface as well. For example, copyright questions could arise. *See generally EPA Comment Policy*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/home/epa-comment-policy [https://perma.cc/XG86-U3JJ] (last updated July 16, 2015) ("Copyrighted and other proprietary material should not be posted or submitted in any form unless permission to do so is clearly indicated."). In addition, questions might arise concerning whether undocketed textual or visual communications between an agency and stakeholders that occur online violate agencies' policies on ex parte contacts. *See* HERZ, *supra* note 60, at 87–89 (noting that although the APA itself does not bar ex parte contacts in notice-and-comment rulemakings, agencies' use of social media to interact online with public stakeholders might nonetheless implicate agencies' own ex parte contact policies); *see also* ESA L. SFERRA-BONISTALLI, *EX PARTE* COMMUNICATIONS IN INFORMAL RULEMAKING: FINAL REPORT 81–83, 87–88 (2014), https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20

1. Section 553 of the Administrative Procedure Act

The APA, which was enacted in 1946,[315] sets out three central procedural requirements that govern notice-and-comment rulemaking: (1) agencies must provide the public with notice of the proposed rulemaking;[316] (2) agencies must allow "interested persons an opportunity" to comment on the proposed rule through the "submission of written data, views, or arguments"; and (3) an agency's final rule must be accompanied by a statement of basis and purpose.[317] These statutory requirements were not written with the modern, quintessentially visual, age in mind.[318] As a result, nothing in the APA expressly speaks to agencies' or others' use of visuals in the rulemaking realm. Nonetheless, if agencies are not careful, their use and treatment of visuals could run afoul of the APA's general notice-and-comment requirements.

a. The Adequacy of Agencies' Notices

Agencies' creation of two rulemaking worlds—one visual and one textual—and their failure to clearly notify the public of the difference between the two, very likely violates the APA's notice requirement. The APA requires that agencies' NPRMs include, among other things, "a statement of the time, place, and nature of public rule making proceedings."[319] At its core, this notice requirement is designed to facilitate public participation and debate, ensuring that notices are sufficient to "afford interested parties a reasonable opportunity to participate in the rulemaking process."[320]

Currently, when agencies deploy online visuals in order to invite feedback from the public on proposed rules, they routinely fail to clearly notify the public of whether or not that invited feedback will be considered official "comments," triggering agencies' obligation to consider the comments and to respond to all significant comments

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Rulemaking%20%5B5-1-14%5D_0.pdf [https://perma.cc/UM9X-BQ2M] (discussing interplay between agencies' use of social media and agencies' ex parte contact policies).

315 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2012)).

316 5 U.S.C. § 553(b).

317 *Id.* § 553(c).

318 *Cf.* HERZ, *supra* note 60, at 67 (noting that confusion has surrounded agencies' use of social media during rulemakings as "the APA was not written with these tools in mind").

319 5 U.S.C. § 553(b)(1).

320 MCI Telecomms. Corp. v. FCC, 57 F.3d 1136, 1140–41 (D.C. Cir. 1995) (quoting Fla. Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988)); *see also* Friends of Iwo Jima v. Nat'l Capital Planning Comm'n, 176 F.3d 768, 774 (4th Cir. 1999) ("[T]he purpose of providing notice [is] soliciting comments and fostering debate . . . .").

received.[321] To the extent that this lack of clarity prevents the public from understanding the proper forum for participating in the official rulemaking process, it undermines the central purpose of the APA's notice requirement by confusing the public about where to submit comments.[322]

Consider the overtime pay rulemaking from the Department of Labor.[323] DOL's web page on the proposed rulemaking featured a large, colorful infographic, which included a "share your story" button.[324] That button linked to a separate web page that flashed alternating images of a letter, an envelope, and a smartphone and that asked viewers: "What would getting paid overtime mean to you?"[325] The page invited members of the public to fill out various textual boxes and to thereby "share" their story with DOL.[326] Nothing on this page, however, explained the difference between the unofficial, online comments it sought and official comments that would be included in the rulemaking docket. As a result, a citizen would be entirely justified in assuming that filling out the "share your story" form was an appropriate mechanism for participating in the rulemaking. Yet, as DOL's official NPRM that was published in the Federal Register suggested, that was not the case. Indeed, DOL's NPRM stated that comments could be filed in only two ways: electronically via Regulations .gov or via snail mail.[327] Thus, although DOL's official notice in the Federal Register was clear (when read in isolation) as to where and how to file comments, DOL's web page in which readers could share their stories could very well have misled public stakeholders. EPA's

321 *See, e.g.*, Reytblatt v. U.S. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997) ("An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems."); *see also* La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (quoting Am. Mining Cong. v. U.S. EPA, 907 F.2d 1179, 1188 (D.C. Cir. 1990)) (stating that the agency in question needed to respond to comments which "would require a change in [the] proposed rule").

322 In the context of his ACUS report on social media and rulemaking, Michael Herz reached a similar conclusion, although he framed this as a commenting rather than a notice issue. *See* HERZ, *supra* note 60, at 75 ("If a layperson would be reasonably misled into thinking that the social media discussion was an official forum for commenting, then a strong argument could be made that the agency is interfering with or denying the opportunity to comment.").

323 *See supra* notes 96–99 and accompanying text (discussing DOL's overtime pay rulemaking).

324 *See* U.S. DEP'T OF LABOR, *supra* note 108.

325 *See Overtime/Share*, U.S. DEP'T OF LABOR, http://www.dol.gov/featured/overtime/share [https://perma.cc/J67L-USE8] (last visited July 3, 2016).

326 *Id.*

327 *See* Defining and Delimiting Exemptions, *supra* note 99.

whiteboard video on its proposed Clean Water Rule, discussed above, suffers from the same problems.[328]

A November 2015 Facebook post by FDA provides an additional example. The post, which includes a large photo of colorful fruits and vegetables, asks viewers: "What is 'natural'?"[329] It invites members of the public to share their feedback with FDA on what the term "natural" should mean in the context of food labeling[330]:

FDA'S VISUAL ANNOUNCEMENT INVITING COMMENTS ON USE OF TERM "NATURAL," 2015[331]

Text accompanying the visual Facebook announcement does contain a link leading directly to an FDA webpage, which prominently and clearly notifies interested stakeholders how and where they can file official comments.[332] Nonetheless, because Facebook allows users to "comment" on posts (indeed, more than 120 Facebook users commented on this particular post),[333] the visual announcement still leaves

328 *See* U.S. Envtl. Prot. Agency, *EPA White Board Video: Clean Water Act Rule Proposal Explained*, *supra* note 135 (calling for public input on EPA's Clean Water Rule, but failing to indicate where to submit comments that would be considered in the rulemaking and whether comments submitted to EPA's YouTube page would be considered in the rulemaking).

329 U.S. Food & Drug Admin., FACEBOOK (Nov. 10, 2015), https://www.facebook.com/FDA/photos/a.411715387298.184452.94399502298/10153709622187299/?type=3&theater [https://perma.cc/G9EH-8NSB?type=image].

330 *Id.*

331 *Id.*; image available at http://www.nyulawreview.org/media/1449.

332 *"Natural" on Food Labeling*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm456090.htm [https://perma.cc/7983-UW3Q] (updated Dec. 24, 2015).

333 *See* U.S. Food & Drug Admin., *supra* note 329.

the door open to confusion. In particular, viewers who fail to click through to the linked page might reasonably conclude that they could participate in FDA's proceedings simply by commenting on FDA's Facebook post.[334]

As these examples illustrate, by creating two separate rulemaking universes—one characterized by its social, highly visual nature and another characterized by text and legalese—agencies risk confusing public stakeholders as to which universe serves as the proper forum for registering comments on proposed rules. If an agency only wants to include feedback filed in the highly textual, legalistic universe as official comments that must be considered by the agency, then it needs to clearly notify public stakeholders of this fact.[335] This notification should occur not just in its official Federal Register documents but also in the online visuals that affirmatively invite public feedback. Alternatively, if an agency wants both universes to serve as proper forums for filing comments that will constitute part of the official rulemaking record and that will trigger the agency's obligation to consider the comments, then the agency must be clear about that.[336]

Ultimately, we believe the latter approach—merging the two worlds—is likely required in light of the APA's "record" requirement, which we discuss below.[337] Regardless, the APA's notice requirement standing alone does not bar agencies' use of visuals in the rulemaking context so long as agencies clearly notify the public of what distinctions, if any, exist between providing feedback in one forum or another. Indeed, if agencies provide this clarity, "visual announcements"—whether posted to Facebook, YouTube, Twitter or other social media sites—are a potentially valuable new tool that can be deployed in addition to the official, textual NPRMs in order to reach a broader audience.

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334 FDA's official notice published in the Federal Register explains that there are only two approved methods of submitting comments: (1) sending them electronically via Regulations.gov; or (2) delivering written/paper submissions via the mail, courier or by hand. Use of the Term "Natural" in the Labeling of Human Food Products, 80 Fed. Reg. 69,905, 69,905 (Nov. 12, 2015).

335 *Cf.* Adoption of Recommendations, 77 Fed. Reg. 2257, 2265 (Jan. 17, 2012) (recommending that agencies promoting discussions of rulemaking on social media "provide clear notice as to whether and how [they] will use the discussion in the rulemaking proceeding").

336 As an example of an agency explicitly notifying the public that official comments can be filed in both types of forums, see Preserving the Open Internet, Broadband Industry Practices, 74 Fed. Reg. 62,638, 62,638–39 (proposed Nov. 30, 2009) (codified at 47 C.F.R. pt. 8) (identifying various methods for submitting comments, including via two selected blogs).

337 *See infra* Section III.B.2 (discussing how agencies should include both textual and visual communications in the administrative record).

b. The Adequacy of Text-Bound Comments

As visuals continue to seep into the rulemaking arena, another APA-related question will likely arise: Must agencies allow public stakeholders to file visual materials, such as videos and infographics, if a commenter wishes to do so? Or could agencies allow only written comments? At least one agency, EPA, has already grappled with these questions, opting in favor of a policy that allows commenters to file multimedia submissions but that requires that such submissions "be accompanied by a written comment."[338] According to the policy, only "[t]he written comment is considered the official comment."[339] Indeed, the written comment must "include discussion of all points [the commenter] wish[es] to make."[340]

EPA's insistence that only written comments will be considered "official" makes sense from a logistical perspective. Videos and images are not as easily searchable as text,[341] and, as a result, the agency is likely concerned that it would be logistically difficult—and quite resource intensive—for "it" to process and consider multimedia submissions. "Link rot" and "reference rot" pose further problems. Link rot occurs when a link no longer works, while reference rot occurs when a link's content changes.[342] Given the prevalence of these phenomena,[343] if the agency considers comments that are embedded within links, there is a strong likelihood that many of those links will eventually disappear or change, impoverishing the administrative record. Also, storing permanent links for all such sites in order to avoid this issue might be a significant administrative burden.

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338 *See Commenting on EPA Dockets*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/dockets/commenting-epa-dockets#rules [https://perma.cc/NS9D-MTG5] (last updated July 14, 2016).

339 *Id.*

340 *Id.*

341 Currently, the text element of images may be searchable but the images themselves are not. *See Answers to Frequently Asked Questions (FAQs)*, FED. DOCKET MGMT. SYS., https://perma.cc/R9DX-MH67 (last visited Sept. 17, 2016) ("If the system identifies the attachment as an 'Image Only' file, the document is run through an automated Optical Character Recognition (OCR) process that renders the document into a 'Text Searchable' .pdf file. This process adds a 'text layer' to the .pdf so that any recognizable text in the image is identified.").

342 *See* Jonathan Zittrain, Kendra Albert & Lawrence Lessig, *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, 127 HARV. L. REV. F. 176, 177 (2014) (providing definitions of these terms).

343 *See id.* at 180 (finding that link rot or reference rot affects 50% of links in Supreme Court opinions through the Court's October Term 2011); *see also* The Chesapeake Dig. Pres. Grp., *"Link Rot" and Legal Resources on the Web—2015 Data*, LEGAL INFO. ARCHIVE, http://cdm266901.cdmhost.com/cdm/linkrot2015#orig (last visited July 4, 2016) (providing results of research that checked a set of web links since 2008 and finding that, as of 2015, 53% of the links "no longer went to the original resources").

Furthermore, the text of the APA seems to put EPA and other agencies that want to limit stakeholders' ability to file visual comments on solid ground. Section 553(c), after all, merely requires agencies to give interested persons the opportunity to present "*written* data, views, or arguments."[344] Yet the APA was not drafted with modern digital media in mind, and an agency's refusal to consider visual comments as part of the rulemaking record could potentially interfere with the central purpose of the comment requirement: enabling meaningful public participation.[345] Currently there may be technological barriers to agencies' incorporation of visual comments. But due to constantly advancing technology, those limitations are likely temporary; in any event, they do not alter the need for agencies to gather input in whatever forms are most meaningful. As a result, agencies should likely exercise caution when adopting policies that prohibit or severely restrict commenters' use of visuals,[346] and, in any event, agencies should make whatever policies they do adopt on this matter clear.

c. The Adequacy of Agencies' Consideration of Comments

Finally, agencies' use of visuals to campaign for proposed rules could call into question the legitimacy of agencies' consideration of public comments—particularly when the agency's campaign is part and parcel of a broader political campaign being pushed by the President. The APA's comment requirement rests on the assumption that agencies will "maintain minds open to whatever insights the comments produced by notice under § 553 may generate."[347] Although courts recognize that agency policymakers must be allowed to "discuss the wisdom of various regulatory positions"[348] and thus need not remain entirely neutral, courts also have held that agency policymakers may not have an "unalterably closed mind on matters critical to the disposition of the proceeding."[349] This rule makes sense in the

344 5 U.S.C. § 553(c) (2012) (emphasis added).

345 *See* MCI Telecomms. Corp. v. FCC, 57 F.3d 1136, 1140–41 (D.C. Cir. 1995) (quoting Fla. Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988) (discussing how, under the APA, interested parties must be provided a "reasonable opportunity to participate in the rulemaking process").

346 *Cf.* HERZ, *supra* note 60, at 74 ("[T]here have to be some limits on the agency's ability to define what a 'comment' is.").

347 Nat. Res. Def. Council, Inc. v. EPA, 859 F.2d 156, 194 (D.C. Cir. 1988).

348 *See* Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (noting that the ability to have such discussions is necessary for the FTC to use "its broad policymaking power" under the specific statute governing FTC rulemaking).

349 *Id.*; *see also* Miss. Comm'n on Envtl. Quality v. EPA, 790 F.3d 138, 183 (D.C. Cir. 2015) (quoting Air Transp. Ass'n of Am. v. Nat'l Mediation Bd., 663 F.3d 476, 487 (D.C. Cir. 2011) ("[A]n individual should be disqualified from rulemaking only when there has

context of notice-and-comment rulemaking because, as one court has explained, "[a]llowing the public to submit comments to an agency that has already made its decision is no different from prohibiting comments altogether."[350]

Given that agencies must consider comments with an open mind, agencies should ensure that their visuals—especially outflow-oriented visuals designed to promote proposed rules that tie to the President's political agenda—do not turn into what appear to be uncompromising advocacy campaigns. Otherwise, those who wish to challenge an agency's final rule will likely point to the visual campaigns as evidence that the agency had an unalterably closed mind.

Indeed, EPA's aggressive visual social media campaign, which it unleashed during the comment period on its proposed Clean Water Rule, has already prompted such claims. One legal complaint challenging EPA's Clean Water Rule, for example, alleges that EPA "engag[ed] in an unprecedented advocacy campaign that led to a distorted and biased comment process" and "undermined the proper functioning of the notice-and-comment process."[351] In a similar vein, the *New York Times* quoted one scholar as asserting that EPA's social media campaign clashed with the idea that agencies serve as "honest broker[s]" rather than "partisan advocate[s]."[352]

To avoid these claims moving forward, agencies will need to carefully attend to the line between, on the one hand, using visuals to educate the public and to promote the wisdom of their regulatory proposals and, on the other hand, using visuals as part of uncompromising, relentless advocacy campaigns. In addition, when deploying inflow-oriented visuals that directly link to the official rulemaking record, agencies should take care to avoid asking overly loaded or overly simplified questions (such as "Do You Choose Clean Water?"[353]) that could be read to invite only one point of view. If

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been a clear and convincing showing that the . . . member has an unalterably closed mind on matters critical to the disposition of the proceeding.").

350 Nehemiah Corp. of Am. v. Jackson, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008); *see also Nat. Res. Def. Council*, 859 F.2d at 194 ("[A] binding promise to promulgate in the proposed form would seem to defeat Congress's evident intention that agencies proceeding by informal rulemaking should maintain minds open to whatever insights the comments . . . may generate.").

351 Complaint for Declaratory and Injunctive Relief at 3, 28, Am. Farm Bureau Fed'n v. EPA, No. 3:15-cv-00165 (S.D. Tex. July 2, 2015).

352 *See* Eric Lipton & Coral Davenport, *Critics Hear E.P.A.'s Voice in 'Public Comments*,' N.Y. TIMES, May 19, 2015, at A1 (quoting Professor Jeffrey W. Lubbers).

353 *See* Travis Loop, *Do You Choose Clean Water?*, EPA BLOG: OUR PLANET, OUR HOME (Sept. 9, 2014), https://blog.epa.gov/blog/2014/09/do-you-choose-clean-water/ (asking readers to participate in a "virtual flash mob" in support of the EPA's Clean Water Rule).

agencies fail to pay careful attention to this line—particularly when using visuals during comment periods as part of broader presidential efforts—they will invite questions about whether they improperly began the rulemaking with a decision already in mind, which would thwart the entire point of the comment process.

2. *The APA's "Whole Record" Requirement*

The use of visuals in rulemaking also raises questions relating to the APA's "whole record" requirement, which stems from Section 706 of the APA.[354] If an agency's final rule is challenged in court, Section 706 directs courts to review the rule based on the "whole record" created by the agency[355]—often referred to today as the "administrative record."[356] In informal, notice-and-comment rulemakings, the APA does not elaborate on what should constitute the "whole record."[357] Nor does it explain how agencies should compile administrative records for judicial review.[358] Nonetheless, courts have clarified the "record" requirement over time, declaring that the administrative record must contain materials that are considered in some manner by the agency, not just those materials that the agency actually relied upon.[359] An agency may not, for example, "skew the record by excluding unfavorable information" that was before it when it made its decision.[360] Notably, however, courts grant agencies "a presumption that [they] properly designated the administrative record absent

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354 5 U.S.C. § 706 (2012).

355 *Id.*

356 *See* LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING 2 (May 14, 2013), https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf (explaining that the "whole record" is now generally referred to as the "administrative record").

357 *See id.* at 2 ("The APA provides little guidance on the creation and compilation of the 'whole record' or 'administrative record' as it has come to be known.").

358 *See id.*

359 *See, e.g.*, Thompson v. U.S. Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989) ("The 'whole' administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." (emphasis omitted) (quoting Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 33 (N.D. Tex. 1981)); Tafas v. Dudas, 530 F. Supp. 2d 786, 793–94 (E.D. Va. 2008) ("The whole administrative record includes pertinent but unfavorable information, and an agency may not exclude information on the ground that it did not 'rely' on that information in its final decision."); *see also* Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002) (holding that EPA needed to include in the administrative record a transcript it considered but "did not 'rely' upon").

360 Sears, Roebuck & Co. v. U.S. Postal Serv., 118 F. Supp. 3d 244, 246 (D.D.C. 2015) (quoting Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007)).

clear evidence to the contrary."[361] In practice this has meant that agencies' record determinations are final except in rare circumstances, such as where an agency deliberately excludes adverse documents[362] or acts in bad faith.[363]

These judicial glosses have important implications for agencies' current attempts to keep the official rulemaking record separate from the more visual rulemaking records that they are creating or engaging with online. An agency's failure to include its videos in the administrative record—or an agency's omission of written feedback submitted by the public in response to an agency video, tweet, or other communication—might lead to disputes over the sufficiency of the administrative record. For example, it would seem problematic for EPA to omit from the administrative record all visual communications from its #DitchTheMyth campaign, which responded to the opposing #DitchTheRule campaign. Similarly, it would be implausible for EPA to claim that it did not consider—and that it could therefore exclude from the administrative record—videos circulated by members of the public that EPA itself retweeted via its Twitter account.[364] In response to claims that these kinds of communications must be included in the administrative record, a court might be able to take judicial notice of any communications publicly posted to the agency's own website or to its social media sites.[365] In order to avoid creating the impression that it is trying to sweep visual advocacy campaigns under the rug, EPA and other similarly situated agencies should simply include such communications in the administrative record from the get-go.[366]

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361 Lee Mem'l Hosp. v. Burwell, 109 F. Supp. 3d 40, 47 (D.D.C. 2015) (quoting Fund for Animals v. Williams, 391 F. Supp. 2d 191, 197 (D.D.C. 2005)).

362 *See* Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46, 55 (D.C. Cir. 2015) (noting the D.C. Circuit's holding that the administrative record could only be supplemented in three scenarios, including when the agency has purposefully omitted documents from the record).

363 *See, e.g.*, Fence Creek Cattle Co. v. U.S. Forest Serv., 602 F.3d 1125, 1131 (9th Cir. 2010) (rejecting plaintiffs' request to supplement the administrative record with certain files on the basis that plaintiff did not show that the agency omitted the files in bad faith); Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 943 (9th Cir. 2006) (noting that the court may add material to the record when plaintiff shows that the agency acted in bad faith); Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (stating that "an extra-record investigation . . . may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers").

364 *See supra* note 142 and accompanying text (noting EPA's retweeting of videos created by public stakeholders).

365 *Cf.* Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 705 & n.5 (3d Cir. 2004) (taking judicial notice of Notice of Allowance for trademark on the website of the Patent and Trademark Office).

366 The one major downside to doing so would be practical: As agencies increasingly engage in textual and visual communication with public stakeholders online, the distinction

In addition, when justifying a final rule, an agency may not rely upon materials that are not in the rulemaking record.[367] Put another way, upon review, courts require that agency decisions be based on materials that are actually in the record.[368] Thus, the artificial separation that agencies are currently trying to maintain between the "unofficial" visual rulemaking world and the "official" textual, legalistic rulemaking world will necessarily break down if agencies try to justify their final rules by relying upon communications the agency received in the visual, online world. In order to rely upon such communications, the agency should include them in the rulemaking record, thereby connecting the two rulemaking worlds.

All of this suggests that a merger of the visual and textual worlds may ultimately be required. Agencies could achieve such a merger by simply including in the record all visuals that they deployed in the rulemaking proceeding (outflow), all visuals submitted to agency-sponsored sites by public stakeholders (inflow), and all textual feedback provided to agencies over social media channels. Doing so would not only help to avoid issues with the record, but it would also prevent the issues with notice discussed earlier. The APA was drafted in an earlier, less visual time. But its spirit strongly suggests that agencies should incorporate the products of visual rulemaking culture into the four corners of rulemaking proceedings.

3. The First Amendment

The tensions between the two rulemaking universes we describe here—the legalistic/factual and the visual/political—also raise significant First Amendment issues for agencies. As discussed above, visuals are laden with emotion.[369] Particularly because of this emotional tinge, when visually communicated statements bleed into the technocratic universe, both courts and agencies may silence or ignore them, deeming such speech inappropriate or irrelevant to some aspect of the regulatory process. Within constraints, the First Amendment may tol-

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between the rulemaking record and the World Wide Web might be difficult to maintain, thus rendering the administrative record unwieldy in size. *See* HERZ, *supra* note 60, at 74 n.323 ("Integration of the electronic rulemaking docket with social media discussions and the web as a whole might ultimately blow apart the model of the all-inclusive record . . . .").

367 *See* HERZ, *supra* note 60, at 73 ("[M]aterial that is not put into the rulemaking docket, either by the agency or by the public submitter, cannot be relied on to justify the final rule . . . .").

368 *See* Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (noting that evidence consisting of "'post hoc' rationalizations" has "traditionally been found to be an inadequate basis for review").

369 *See supra* notes 30–33 and accompanying text.

erate that silencing.[370] The proliferation of social media visuals surrounding high-stakes rulemakings, as well as the rising appeal of using visuals as elements of regulations themselves, requires a reexamination of the role of the First Amendment in protecting visual contributions to the regulatory world.[371]

a. Visual Participation in Rulemaking

Agencies take in public commentary on proposed regulations in many forms. As described above, currently there is a divide between the "official" rulemaking docket—which continues to be dominated by institutional stakeholders and textual analysis—and the more visual/political commentary online. In both of these realms, agencies place restrictions on public comments. On Regulations.gov, for example, agencies seek to restrict comments to protect privacy and maintain civility.[372] Similarly, in the more visual regulatory universe, when agency-sponsored social media sites welcome public comments, they frequently moderate those comments, either before or after posting, for both relevance and decorum.[373] FDA's Facebook policy, for example, prohibits posters from "[s]preading misleading or false information," and it asks that posters refrain from "comments that

370 *See* Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2404–08 (2014) (discussing how D.C. Circuit struck down FDA's proposed graphic warnings for cigarettes on grounds that images did not provide relevant factual information and were overly emotional).

371 *See id.* at 2393 ("[C]urrent First Amendment law doesn't have a consistent account of the proper role of emotion in speech regulation.").

372 A standard disclaimer on Regulations.gov comment sections for rules states: "Agencies review all submissions, however some agencies may choose to redact, or withhold, certain submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign." *E.g.*, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, REGULATIONS.GOV, https://www.regulations.gov/document?D=WHD-2015-0001-0001 (last visited July 5, 2016) (inserting standard comment publication disclaimer into overtime rulemaking docket).

373 *See, e.g.*, Fed. Emergency Mgmt. Agency, *YouTube Policy*, YOUTUBE, https://www.youtube.com/user/FEMA/about [https://perma.cc/R328-XXHL] (last visited July 7, 2016) (stating that agency reviews comments and will not allow comments that are, for instance "off-topic," "vulgar," "personal attacks," or "advertisements" to be posted); United States Census Bureau, *Comment Policy*, U.S. CENSUS BUREAU: RANDOM SAMPLINGS (Sept. 10, 2010), http://blogs.census.gov/2010/09/10/comment-policy/ [https://perma.cc/7YFQ-V93N] ("[W]e expect conversations to follow the conventions of polite discourse" and therefore "try to remove any objectionable content."); *EPA Comment Policy*, *supra* note 314 (stating that EPA "expect[s] comments generally to be courteous" and will not post comments that include, for instance, hate speech, profane language, defamatory statements, or product promotions).

contain partisan political statements."[374] Other agency policies are similar.[375] These policies reflect agencies' understandable wish to encourage dialogue without allowing it to degenerate into irrelevant or offensive tirades that fail to advance the regulatory discussion. Especially when broadly worded, however, agencies' social media comment policies raise significant First Amendment questions, and the risk of unconstitutional exclusion of speech may be particularly acute when the speech takes visual form.

Scholars who have recently begun to analyze the impact of the First Amendment on agency social media have divided agency-related speech into two categories.[376] The first category is government speech, in which the government itself is considered the only speaker.[377] This category does not trigger First Amendment scrutiny, and agencies therefore have unfettered editorial control when speaking unilaterally.[378] The second category, which covers situations where government and private speech are intermingled, is a limited public forum.[379]

Agency websites, agency Twitter feeds, and other one-way forms of communication fall within the first category.[380] In these contexts, agencies may refuse to include views that are contrary to their own.[381] Those few courts that have examined the question have agreed that governments selecting items for inclusion on their websites are engaged in government speech, and thus they may exclude speech that

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374 U.S. Food & Drug Admin., *FDA Facebook Comment Policy*, FACEBOOK, https://www.facebook.com/FDA/app/1646495632251303/ [https://perma.cc/X9GF-BHUX] (last visited July 7, 2016).

375 *See, e.g.*, Dep't of Homeland Sec., *Facebook Comment Policy*, U.S. DEP'T OF HOMELAND SECURITY (Oct. 14, 2015), https://www.dhs.gov/facebook-comment-policy [https://perma.cc/5WWZ-THT3] (listing specific reasons for rejecting posts, and also stating authority to reject comments that are "otherwise objectionable").

376 *See* HERZ, *supra* note 60, at 82–85 (discussing where agency websites and social media sites fall under First Amendment doctrine's categories of speech); *see also* Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 304 (2013) (discussing whether agency social media sites are government speech or limited public forums, and arguing that such sites are the latter).

377 *See* HERZ, *supra* note 60, at 82 ("Agency web sites, for example, are almost entirely a forum for agency speech.").

378 *See* David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1983–84 (2010) ("The government speech doctrine, however, grants the government nearly carte blanche ability to exclude speakers and speech on the basis of viewpoint so long as the government can show that it 'effectively controlled' the message being conveyed.").

379 *See* HERZ, *supra* note 60, at 84 ("[W]ithin a limited public forum, content-based (though not viewpoint-based) restrictions are permissible.").

380 *See id.* at 82 (noting that these forms of communication are government speech since "the government is speaking").

381 *See id.* (noting that agencies can "take sides" when acting as government speakers).

other parties seek to have included.[382] The Supreme Court's 2015 decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* supports this broad application of the government speech doctrine to agency-controlled websites.[383] Despite the obviously tight intermingling of state and individual speech on vanity license plates, the Court characterized vanity plates as government speech and held that a state could reject a proposed plate featuring the Confederate battle flag. Even though agency websites similarly mix state and individual speech, courts following *Sons of Confederate Veterans* would likely find that an agency is still engaged in government speech on its website and would thus have the right to exclude speech.

However, when agencies create online "space for dialogue, exchange, and the receipt of public input,"[384] they lose the protection—and the unfettered discretion—of the government speech doctrine.[385] So, for example, agency-sponsored Facebook or YouTube accounts that accept comments, agency blogs that solicit public commentary, and Regulations.gov, which is dedicated to collecting public comments related to rulemaking, do not constitute forms of government speech—or at least they are not solely government speech.[386] Instead, these agency-initiated dialogues are likely "limited public forums" for First Amendment purposes.[387] In limited public forums,

[382] *See, e.g.*, Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 329–32, 335 (1st Cir. 2009) (finding that a town's selection of hyperlinks to include on its website constituted government speech, thereby allowing the town to exclude certain hyperlinks from its website); Page v. Lexington Cty. Sch. Dist. One, 531 F.3d 275, 277–78 (4th Cir. 2008) (holding that school district's use of its website to campaign against proposed legislation was government speech, thereby allowing the district to exclude a proponent of the legislation from using the website to campaign for the legislation).

[383] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2243–44, 2246 (2015); *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009) (holding that a town's installation in a public park of a donated Ten Commandments monument was government speech, thereby allowing the town to decline to install the monument to Summum religion).

[384] HERZ, *supra* note 60, at 82; Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1997–98 (2011) (discussing the extent and limit of agencies' authority over speech in interactive government social media sites).

[385] HERZ, *supra* note 60, at 82 (discussing how agency social media sites do not involve one-way government communication and thus do not qualify as government speech).

[386] *See* Lidsky, *supra* note 384 (noting that interactive government Facebook accounts, such as the White House Facebook page, "might involve both government speech and a public forum," but concluding that many such sites are "likely to be categorized as limited public forums").

[387] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects." (citation omitted)); Lidsky, *supra* note 384, at 1984 ("[T]he government may engage in *some* types of content-based discrimination to define the (limited) range of subjects to be discussed in the forum and to preserve those limits once established.").

the government retains significant latitude to regulate private speech, but restrictions must be reasonable and must not discriminate on the basis of viewpoint.[388] The precise lines between reasonable and unreasonable and between viewpoint neutral and viewpoint discriminatory are difficult to draw with certainty—and the interpretive challenges of visuals might exacerbate that difficulty.

In some regulatory contexts, the government's exclusion of visual forms of speech within a limited public forum might be uncontroversial. For example, in a recent proceeding by the Centers for Disease Control and Prevention (CDC) relating to male circumcision and the prevention of HIV infection, the notice seeking public comment on a draft recommendation stated that it would not consider or post comments containing vulgar language, or comments intended to promote commercial products.[389] In addition, the notice specifically stated that it would not post any images or pictures that were submitted.[390] Presumably the agency had no wish to create a database of circumcision-related photos.

However, in closer cases, agency implementation of supposedly viewpoint-neutral policies might result in agencies excluding relevant but emotionally laden images from the regulatory dialogue. This risk seems especially relevant to agencies' interactive social media sites. For example, the distinction between rejecting a potential post as "misleading," as the FDA's Facebook policy would uphold, and rejecting the post because it expresses a disfavored viewpoint, seems too fine-grained.[391] Defining "partisan political" comments seems even more fraught. Would a government agency remove a Facebook post by a user whose profile photo contained a Confederate flag because the photo was "partisan" in a regulatory discussion relating to race? It is also possible that agencies might choose to prohibit visual

388 *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 (2010) (reaffirming that in a limited public forum, "[a]ny access barrier must be reasonable and viewpoint neutral"); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). *See generally* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696–97, 751–53 (2011) (discussing tension between viewpoint neutrality and government speech, and suggesting that commitment to viewpoint neutrality be modified).

389 Recommendations for Providers Counseling Male Patients and Parents Regarding Male Circumcision and the Prevention of HIV Infection, STIs, and Other Health Outcomes, 79 Fed. Reg. 71,433, 71,433 (Dec. 2, 2014).

390 *Id.*

391 *See* Lidsky, *supra* note 384, at 2001–02 (observing that "[t]his question about how much deference to give government actors in regulating profane or 'abusive' speech in online forums is particularly pressing because computer mediated communications are more likely than those in the 'real world' to become profane or abusive").

comments entirely. As the graphic cigarette warning cases discussed below indicate,[392] precisely because images can invoke visceral, emotional responses, they might be perceived as more partisan, more misleading, or less relevant, than would an analogous textual comment. Finally, if agencies adopt our suggestion that they should incorporate comments received through social media channels regarding proposed regulations, they might have an increased incentive to use vague terms such as "objectionable" or "partisan" to edit those social media posts in order to prevent some types of comments from entering the administrative record.

The Supreme Court has not yet integrated government speech or the limited public forum doctrine into the realm of e-rulemaking, so the contours of these doctrinal boundaries remain blurry. In light of the significant democratic benefits of government-sponsored social media,[393] the Court is likely to grant agencies discretion to moderate those sites as limited public forums to maintain their civility and utility. However, there is a risk that the law's general mistrust of the visual could lead to under-protection of visual speech in social media dialogues with agencies about regulatory issues.

b. Visual Regulation

The emotionally laden nature of visuals may also result in the silencing of visual speech in another facet of rulemaking: the integration by agencies of visuals into federal rules themselves. As visuals play an increasing role in rulemaking, enhanced by the rapid evolution of visual technologies, this new visual language will spill over into the substance of regulations. Indeed, as described above, some regulations already contain visual elements.[394] Frequently these visual regulations involve warnings that seek to inform, and also to influence, consumer choice.[395] But the very reason that the warnings may be effective—their emotional power—has rendered them suspect to courts under the First Amendment.

The most famous example of this emotional taint in a regulatory context is the rejection in 2012 by the D.C. Circuit of FDA regulations mandating graphic warnings on cigarette labels. In 2009, Congress

[392] *See infra* note 399 and accompanying images and text (discussing various federal courts' rejection of graphic cigarette warnings proposed by the FDA).

[393] *See* Lidsky, *supra* note 384, at 2003–10 (arguing that government websites build community engagement, are efficient and responsive, crowdsource decision making, and improve access to younger citizens).

[394] *See supra* notes 51–52 and accompanying text.

[395] Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 515 (2014).

directed the Department of Health and Human Services (HHS) to issue regulations requiring cigarette manufacturers to use warning labels that included "color graphics depicting the negative health consequences of smoking."[396] Pursuant to this instruction, FDA, which sits within HHS, proposed and in 2011 finalized a rule in which it selected nine graphic images for use on new, larger cigarette warning labels.[397] In addition to the graphic images, each label would contain a cessation hotline number, 1-800-QUIT-NOW.[398]

FDA WARNINGS, 2011[399]

Courts reviewing challenges to this regulation agreed that these graphic warning labels would be emotionally powerful communicative tools.[400] Ironically, however, the images' very power—their emotional appeal, their visceral impact—spurred significant First Amendment skepticism.

Characterizing the warning requirement as mandating factual disclosure, the Sixth Circuit upheld the constitutionality of the *statute* mandating the creation of visual warnings against a facial First

396 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1845 (2009).

397 Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

398 *Id.* at 36,674.

399 U.S. Food & Drug Admin., *Health Warnings for U.S. Food and Drug Administration Proposed Regulation "Required Warnings for Cigarette Packages and Advertisements*," REGULATIONS.GOV 26, 57 (Nov. 12, 2010), https://www.regulations.gov/contentStreamer?documentId=FDA-2010-N-0568-0002&attachmentNumber=2&disposition=attachment&contentType=pdf [https://perma.cc/8JUT-LK98] (last visited July 9, 2016). Images available at http://www.nyulawreview.org/media/1452.

400 *See* Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 529 (6th Cir. 2012) (Clay, J., dissenting) (agreeing that "colorful graphic images can evoke a visceral response that subsumes rational decision-making"); *see also* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (images were "primarily intended to invoke an emotional response"); R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 272 (D.D.C. 2012) (same).

Amendment challenge.[401] But one judge dissented, describing the graphic requirement as an unconstitutional "attempt to flagrantly manipulate the emotions of consumers."[402] In *R.J. Reynolds Tobacco Co. v. FDA*, a divided panel of the D.C. Circuit used precisely that logic to strike down the graphic warning label *regulation* on First Amendment grounds, calling the graphic warnings "inflammatory" and criticizing them as "primarily intended to invoke an emotional response."[403] Based on its characterization of the images as "ideological" rather than "informational,"[404] the court rejected the relaxed *Zauderer* standard for evaluating commercial speech, under which the graphic labels would pass constitutional muster if they presented "purely factual and uncontroversial" information that was "reasonably related to the State's interest in preventing deception to consumers."[405] In lieu of *Zauderer*, the court in *R.J. Reynolds* applied the more stringent *Central Hudson* test, under which the government had to show that the graphic warning labels would directly advance a substantial government interest.[406] Finding that the agency had "not provided a shred of evidence" that the regulations would advance the agency's goal of reducing smoking, especially among youth, the court struck down the regulation.[407] Because the agency opted not to petition the Supreme Court for review of the decision, *R.J. Reynolds* ended—at least as of now—the FDA's experiment with visual cigarette warnings, despite the fact that the D.C. Circuit has since overruled *R.J. Reynolds*' rejection of the *Zauderer* standard in this context.[408] Even under *Zauderer*, however, courts may construe visual

401 *See Discount Tobacco*, 674 F.3d at 562 (reiterating that "graphic warnings can convey factual information, just as textual warnings can," and that both textual and graphic warnings are "reasonably related" to the statutory purpose).

402 *Id.* at 529.

403 *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216.

404 *See id.* at 1211–12 (describing regulation as a government attempt "to compel a product's manufacturer to convey the state's subjective—and perhaps even ideological—view").

405 *Id.* (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).

406 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980).

407 *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1219.

408 In *Am. Meat Inst. v. USDA (AMI II)*, 760 F.3d 18 (D.C. Cir. 2014), the D.C. Circuit sitting en banc upheld a regulation mandating country-of-origin labels on meat. *American Meat Institute* overruled *R.J. Reynolds*' rejection of *Zauderer* in the context of product labeling. *Id.* at 22.

appeals as more than "purely factual and uncontroversial," precisely because of their high emotional impact.[409]

The practical takeaway from this debate is that if Congress and/or agencies wish to use graphic warnings on a product label, the graphics should be capable of characterization as predominantly factual rather than predominantly emotional—as a form of notice or debiasing[410] rather than a government-imposed nudge—in order to withstand First Amendment scrutiny.[411] Yet that distinction between information and influence, between fact and emotion, bleeds together at the margins.[412]

4. Anti-Lobbying and Anti-Propaganda Statutes

Agencies are entirely creatures of Congress—Congress creates them, funds them, and empowers them. For nearly as long as agencies have existed, Congress has been uncomfortable with agencies' power and with the potential for them to compete with Congress for the attention and affection of the American public.[413] Perhaps most troubling, from Congress's perspective, is when agencies use federal funds—funds granted to them by Congress—to turn back and lobby Congress.[414] Thus, for over a century, Congress has passed statutes that attempt to circumscribe agency communications.

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409 *Cf. id.* at 27 (noting without deciding that "we can understand a claim that 'slaughter,' used on a [meat] product of any origin, might convey a certain innuendo" that presumably could render it more than purely factual and uncontroversial).

410 *See* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 216 (2006) (describing debiasing as, inter alia, a requirement "that firms identify the potential negative consequences associated with their product").

411 *See* Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 775 (2014) (distinguishing between a *nudge*, in which a governmental organization purposefully influences citizens' behavior through regulatory incentives or disincentives, and *notice*, which provides citizens with information in the hope that it will create better-informed choices); *see also id.* at 793 ("If the warnings' purpose was merely to provide truthful information . . . in a salient format, then the warnings were simply a new form of notice, and the First Amendment would not have stood in the way. . . .").

412 *See* Goodman, *supra* note 395, at 545 (describing as "illusory" the "distinction between the government's informational goals to advance truth and its normative ones to push a substantive agenda").

413 *See generally* MORDECAI LEE, CONGRESS VS. THE BUREAUCRACY: MUZZLING AGENCY PUBLIC RELATIONS (2011).

414 *See* THE LOBBYING MANUAL 338 (William V. Luneburg, Thomas M. Susman & Rebecca H. Gordon eds., 4th ed. 2009) ("Congress does not want to fund anyone who tries to influence its actions."). Note that the Consumer Financial Protection Bureau, an independent agency funded through the Federal Reserve rather than through congressional appropriations, may not be subject to these appropriations-linked restrictions. *See* CONSUMER FIN. PROT. BUREAU, REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU PURSUANT TO SECTION 1017(E)(4) OF THE DODD-FRANK ACT 12–13 (2015) (describing funding mechanism for CFPB).

These statutes fall into two basic categories. The first category includes anti-publicity and anti-propaganda laws aimed at limiting agencies' messaging to the American public. The second targets lobbying of Congress by agencies. The laws in this second category primarily seek to restrict what is known as "grassroots lobbying," which occurs when agencies contact interest groups or members of the public and encourage them to contact legislators to support or oppose a congressional measure.[415] Notably, the laws in both categories are very broadly worded, so that on their faces they might cover a sizeable swath of agency conduct; yet despite that strong language, they have been largely ineffective. The Government Accountability Office (GAO), Congress's investigative wing, left with the task of interpreting these provisions,[416] has chiseled away at the broad wording, leaving very little agency conduct within their ambit.

We believe there are good reasons for GAO's cautious and narrow approach. It is difficult, if not impossible, to draw a principled line between agencies' informational and their political activities. Moreover, even politically tinged agency communications serve a valuable purpose, by letting the public know what agencies are doing. Nevertheless, congressional outrage over EPA's use of visual media in its recent clean water rulemaking appears to have breathed some new life into these laws. This Section analyzes the possibility that this renewed attention may create risks for visually adventurous agencies—especially in an era of intense partisan conflicts between the legislative branch and the executive branch.

a. Anti-Publicity Provisions

Perhaps the ultimate symbol of ineffective congressional hostility to agency communications with the public is 5 U.S.C. § 3107, a statute from 1913—still theoretically in effect today—that purports to bar agencies from using appropriated funds to "pay a publicity expert."[417] Passed in reaction to a job posting by the U.S. Department of Agriculture Bureau of Roads seeking a "publicity expert," the provision embodied congressional irritation with the perceived tendency of

415 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-188 (3d ed. 2004) (defining "direct lobbying" as opposed to "grassroots" or "indirect" lobbying).

416 *See* Kevin R. Kosar, CONG. RESEARCH SERV., R42406, CONGRESSIONAL OVERSIGHT OF AGENCY PUBLIC COMMUNICATIONS: IMPLICATIONS OF AGENCY NEW MEDIA USE 4 (2012) (noting that no agency is responsible for reviewing agency communications, and that DOJ has never enforced these statutes); *see also* THE LOBBYING MANUAL, *supra* note 414, at 340 (GAO has authority "to investigate all matters relating to the use of appropriated funds").

417 5 U.S.C. § 3107 (2015); LEE, *supra* note 413, at 89 (noting passage in 1913).

agencies to market themselves to the public in order to gain both public approval and political power.[418] Even before it passed, the bill's sponsor recognized that the provision could not be applied to agencies' dissemination of factual or mission-related information.[419]

That loophole swallowed the law. Over the decades, GAO has called the law "ineffective,"[420] "vague," and "difficult to apply."[421] Although it remains on the books, its main practical impact has been the permanent elimination of the job title "publicity expert."[422]

Congress has tried other approaches, with similarly lackluster results. Beginning in 1951, it has routinely inserted into its annual appropriations acts prohibitions on agency "publicity or propaganda." As a typical example, Section 718 of the Financial Services and General Government Appropriations Act of 2015 provides: "No part of any appropriation contained in this or any other Act shall be used directly or indirectly . . . for publicity or propaganda purposes" unless "authorized by Congress."[423]

Like the "publicity expert" ban, anti-propaganda appropriations bans use broad language that might in theory capture significant agency activity, including many uses of visual "outflow" and "overflow" that we have described. Yet in practice, these bans have had a narrow reach. GAO gives substantial deference to an agency's justification for spending appropriated funds on publicity,[424] and it identifies only three categories of activities that constitute prohibited publicity or propaganda: 1) purely partisan materials; 2) agency self-aggrandizement or puffery; and 3) covert propaganda.[425] Each of these has been narrowly defined or ignored. For example, GAO has never found agency communications to constitute "purely partisan" materials.[426]

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418 LEE, *supra* note 413, at 85–86.

419 *Id.* at 87.

420 *Id.* at 91.

421 John E. Moss, B-181254, 1975 WL 9464 (Comp. Gen. Feb. 28, 1975) (letter from deputy comptroller general).

422 LEE, *supra* note 413, at 90.

423 Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-235, § 718, 128 Stat. 2332, 2383.

424 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-198 (3d ed. 2004) (noting that "the agency gets the benefit of any legitimate doubt").

425 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-303SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-26 (3d ed. supp. 2015).

426 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-199 (3d ed. 2004) (noting "the important proposition" that an anti-propaganda provision "does not prohibit an agency's legitimate informational activities").

GAO has also declined to find "self-aggrandizement" provided that an agency communication contains at least some legitimate information-providing function.[427] As recently as last December, for example, GAO found that EPA had not committed self-aggrandizement in the course of its extensive and highly visual #CleanWaterRules campaign. GAO concluded that while the campaign did emphasize the benefits of the proposed rule, "engendering praise for the agency was not the goal."[428] Despite this recent finding, some agency visuals do risk being characterized as self-aggrandizement. For example, in August 2015, just as EPA was finalizing its Clean Power Plan, it sent out a tweet of EPA Administrator Gina McCarthy as Rosie the Riveter, a picture framed behind her featuring a smiling President Obama flashing a thumbs-up sign:

[427] *See, e.g.*, U.S. Gov't Accountability Office, GAO B-302504, Opinion Letter on Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements 9 (Mar. 10, 2004) (reasoning that materials produced by HHS to publicize new Medicare provisions were not self-aggrandizement despite notable factual omissions, because they did not attribute enactment of new benefits to HHS); U.S. Gov't Accountability Office, GAO B-303495, Opinion Letter on Video News Release from the Office of National Drug Control Policy 2 (Jan. 4, 2005) (finding that the use of term "Drug Czar" to refer to the director of Office of National Drug Control Policy was not self-aggrandizement).

[428] U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21.

CURRENT MOOD . . . #CLEANPOWERPLAN, 2015[429]

This parody humorously lauds EPA's hard work finalizing the Clean Power Plan under McCarthy's leadership. It also showcases Obama's approval of and influence over the plan. Other than the patch of blue sky out the window, however, the image contains no

[429] U.S. EPA (@EPA), TWITTER (Aug. 3, 2015), https://twitter.com/epa/status/628247752284205056. Image available at http://www.nyulawreview.org/media/1437.

factual information about the Plan itself. Rather, its emphasis is on the success and diligence of the agency. Taken on its own, this tweet may plausibly be characterized as self-aggrandizement, although it is likely that the practical effect of such a ruling would be nil, because of the de minimis cost of creating a single tweet.

In applying anti-propaganda provisions such as Section 718, only the third category identified by the GAO—prohibiting "covert propaganda"[430]—has provided any real limits thus far on agency publicity. GAO has interpreted the "covert propaganda" prohibition essentially as a disclosure requirement, explaining: "The critical element of covert propaganda is the agency's concealment from the target audience of its role in creating the material."[431] Occasionally agencies have run afoul of this disclosure requirement, as noted above in regard to video news releases during the George W. Bush administration.[432]

Most recently, GAO found that EPA had distributed "covert propaganda" during its #CleanWaterRules campaign.[433] As part of that campaign, EPA used Thunderclap—a social media platform designed to create an "online flash mob" in favor of a particular concept or organization.[434] EPA created a Thunderclap page titled "I Choose Clean Water" and used social media to sign up supporters:

[430] *See* Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-235, § 718, 128 Stat. 2332, 2383 (barring use of appropriations for "propaganda").

[431] U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21, at 12.

[432] *See supra* notes 56–57 and accompanying text (describing GAO investigation of video news releases); *see also* U.S. Gov't Accountability Office, GAO B-304272, Letter to Heads of Departments, Agencies, and Others Concerned Regarding Prepackaged News Stories (Feb. 17, 2005) (GAO circular letter instructing agencies on how to avoid violating prohibition on covert propaganda).

[433] U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21, at 12.

[434] *Frequently Asked Questions*, THUNDERCLAP, https://www.thunderclap.it/faq [https://perma.cc/4634-NMVP] (last visited July 10, 2016).

EPA "I CHOOSE CLEAN WATER" FACEBOOK POST, 2014[435]

At 2 p.m. on September 29, 2014, the social media sites of every registered supporter displayed the following message: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community."[436] The message also contained a hyperlink connected to EPA's web page on the Clean Water Rule.[437]

[435] U.S. EPA, *EPA—Water Is Worth It*, FACEBOOK (Sept. 13, 2014), https://www.facebook.com/EPAWaterIsWorthIt/posts/10152446114118337 [https://perma.cc/FFA2-43BW]. Image available at http://www.nyulawreview.org/media/1443.

[436] U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21, at 4 n.10 (quoting from *Thunderclap*).

[437] *Id.*

According to Thunderclap, this "online flash mob" reached over 1.8 million people.[438]

GAO found that EPA's Thunderclap campaign constituted "covert propaganda" because, while original Thunderclap supporters were aware that EPA was the campaign's sponsor, the Thunderclap message itself did not identify EPA; rather, it made the message appear to have been written by the person on whose social media site it appeared. As GAO stated, "EPA deliberately disassociates itself as the writer, when the message was in fact written, and its posting solicited, by EPA."[439] The agency, GAO found, had failed to identify its authorship of the message to its target audience.[440]

In contrast to that finding of violation, GAO found no "covert propaganda" in the agency's extensive #DitchTheMyth campaign, which was intended to counter messages sent by outside groups attempting to derail the clean water rulemaking. As found by GAO, "[t]he graphics used in the #DitchTheMyth campaign contained the EPA logo, and the prewritten tweets contained the '#DitchTheMyth | @EPAWater' ascription at the end."[441] Affirming that the "covert propaganda" bar is essentially a disclosure requirement, GAO found this identification sufficient.

b. Anti-Lobbying Provisions

In addition to concerns over agency propagandizing, Congress has long sought to prevent its own funds from being used against it in the form of agency lobbying. Here too, congressional frustration dates back almost a century.[442] And here too, congressional efforts have generally failed.

The Anti-Lobbying Act of 1919, which is still in effect, provides that no federal funds may be used:

> directly or indirectly to pay for any personal service, advertisement, . . . printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, . . . to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the

438 U.S. Envtl. Prot. Agency, *I Choose Clean Water*, THUNDERCLAP, https://www.thunderclap .it/projects/16052-i-choose-clean-water [https://perma.cc/H7C6-7UUF] (last visited July 11, 2016).

439 U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21, at 13.

440 *Id.*

441 *Id.* at 15.

442 *See* THE LOBBYING MANUAL, *supra* note 414, at 337 (describing Congress's historical rationale).

> introduction of any bill, measure, or resolution proposing such legislation.[443]

In addition to this targeted statute, Congress has also used its appropriation power. As a current and typical example, appropriations bill Section 715 states that:

> No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.[444]

Together these provisions represent congressional efforts to restrict two forms of lobbying: "direct" lobbying, which involves direct contact with legislators, and indirect or "grassroots" lobbying, in which the lobbyist urges third-party intermediaries, such as citizens or special interest groups, to contact their legislators about a pending legislative measure.[445] But as with the anti-publicity laws discussed above, a lack of enforcement combined with narrowing interpretations by GAO have rendered these provisions more aspirational than actual.[446]

For example, these laws have been found not to apply to speeches, appearances, or writings by executive branch officials—and, as a result, they do not apply to direct lobbying in any real sense.[447] The Department of Justice never prosecuted anyone for violating the Anti-Lobbying Act.[448] In their current form, these somewhat overlapping provisions primarily work to prevent certain grassroots lobbying efforts by agencies.[449] Although there is no monetary limit specified in either law, the Office of Legal Counsel (OLC) has suggested that in order for a campaign to violate the Anti-Lobbying Act, it must be

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443 18 U.S.C. § 1913 (2012).

444 Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-235, § 715, 128 Stat. 2332, 2382–83.

445 *See supra* note 415 and accompanying text (explaining the difference between direct and indirect or grassroots lobbying).

446 *See* LEE, *supra* note 413, at 196 (noting that narrow GAO decisions made Section 715 and its analogous statutory predecessors "largely . . . impotent in practical effect").

447 *See* THE LOBBYING MANUAL, *supra* note 414, at 339–40 (describing how both the Department of Justice and the White House have interpreted the Act very narrowly).

448 *See id.* at 338 (noting that "although the Act has been on the books for almost 90 years, the Department of Justice has yet to initiate a single prosecution under it").

449 *See id.* at 340 (describing how little substance remains of the Act so long as officials refrain from "grossly obvious" grassroots efforts).

"substantial," by which OLC meant it must have cost over $50,000.[450] Given the relatively low cost of social media dissemination, that monetary requirement—if respected by GAO—could further limit the provision's reach. No such limit exists in the text, however, and GAO has not interpreted anti-lobbying appropriations provisions to contain such a limit.[451]

Limits on grassroots lobbying may take on new significance in the era of social media. In its investigation of the clean water rulemaking campaign, GAO found that EPA's use of hyperlinks to outside organizations violated Section 715's prohibition on grassroots lobbying.[452] Its analysis focused on a blog post, *Tell Us Why #CleanWaterRules*, in which an EPA communications director used a series of images to show how clean water is "central to who I am as a person,"[453] including photos of him with his children in the ocean and a snapshot of his beloved microbrew beer.[454] The post's text contains embedded hyperlinks to organizations that support his hobbies and that also support the Clean Water Rule. For example, the blog post says: "I am a surfer. When I'm catching waves . . . I don't want to get sick from pollution."[455] A hyperlink takes interested viewers to a page on the Surfrider Foundation's website listing "[f]ive reasons why surfers are more likely to get sick from polluted ocean water than beach goers,"[456] and which at one time had a link button that said, "Take action . . . . Tell Congress to stop interfering with your right to clean water!"[457]

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450 *See id.* at 339 (describing OLC opinion defining "substantial" as an expenditure over $50,000).

451 For example, in its recent decisions finding that EPA violated the FY 2014 and 2015 anti-lobbying appropriations provisions in its Thunderclap campaign and by embedding hyperlinks to advocacy organizations lobbying on behalf of the Clean Water Rule, GAO ordered the agency to "determine the cost associated with the prohibited conduct," without specifying that its finding of a violation was dependent on a minimum agency expenditure. U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21, at 2 (noting that while the agency specified that it spent over $64,000 on video and graphic assets to raise awareness of its proposed rule, it seemed unlikely that the hyperlinks and Thunderclap activity that led to the anti-lobbying violations would be related to those costs).

452 *Id.* at 17–20.

453 Travis Loop, *Tell Us Why #CleanWaterRules*, EPA BLOG: OUR PLANET, OUR HOME (Apr. 7, 2015), https://blog.epa.gov/blog/2015/04/tell-us-why-cleanwaterrules/ [https://perma.cc/VXV7-LJR8].

454 *Id.*

455 *Id.*

456 Chad Nelsen, *Surf Protection, Surf Economics*, SURFRIDER FOUND. (July 30, 2010), http://www.surfrider.org/coastal-blog/entry/five-reasons-why-surfers-are-more-likely-to-get-sick-from-polluted-ocean-wa [https://perma.cc/WT45-PPU5].

457 *See* U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21, at 8 (describing link button, which has since been removed from Surfrider page).

Similarly, another hyperlink accompanying the beer photo takes viewers from the EPA blog post to the Natural Resources Defense Council (NRDC) "Brewers for Clean Water" site. Although the site's content changed once the #CleanWaterRules campaign ended, during the campaign the site asked breweries to take a pledge to "stand up for clean water and to enforce the Clean Water Act."[458] The NRDC page contained a prominent orange button leading to a form letter addressed to members of Congress, stating: "I urge you to support the Army Corps of Engineers and Environmental Protection Agency in finalizing the proposed Clean Water Protection Rule as soon as possible. The proposed rule is based on overwhelming scientific evidence that shows how water bodies are interconnected."[459]

GAO found that these hyperlinks were a form of grassroots lobbying under Section 715. According to GAO, the provision is violated when there is evidence of a "clear appeal by [an agency] to the public to contact Members of Congress in support of or in opposition to pending legislation."[460] GAO found that standard met because members of Congress contacted through either Surfrider Foundation or through the NRDC "could fairly perceive the contact as encouragement to vote against pending legislation that would prevent implementation of" the Clean Water Rule.[461] At the time of the blog's posting, there were several bills before Congress that sought to repeal the rule.[462] Notwithstanding EPA's inability to control external websites, GAO found that EPA had responsibility for its own message, and that message included hyperlinks.[463]

In sum, while congressional prohibitions on agency publicity, propaganda, and lobbying have thus far been rather anemic, GAO's recent report provides some indication that in a hostile political environment, these provisions may be used against adventurous agencies. But as the law now stands, agencies can take practical, relatively simple steps to prevent a finding of violation. For example, agencies that are using digital media to disseminate informational "outflow"

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458 *See id.* at 10 (depicting screenshot of the since updated page).

459 *Don't Let Polluters Poison Our Water*, NAT. RES. DEF. COUNCIL, https://secure.nrdconline.org/site/Advocacy?cmd=display&page=UserAction&id=3591 (last visited Aug. 17, 2016).

460 *Id.* at 17.

461 *Id.* at 19.

462 *See, e.g.*, Regulatory Integrity Protection Act of 2015, H.R. 1732, 114th Cong. (2015) (bill seeking to withdraw the proposed rule); *see also* U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21, at 18 (listing proposed anti-WOTUS legislation).

463 U.S. Gov't Accountability Office, GAO B-326944, Opinion Letter, *supra* note 21, at 23–24 ("EPA's choice of hyperlinks formed its own expressive act for which the agency is responsible.").

should be cautious in their use of hyperlinks. Agencies should also ensure that their messages about rulemaking are not so agency-focused that they approach self-aggrandizement.

Most importantly, agencies' use of visual tools for "overflow" purposes—that is, to advocate for broad issues beyond their rulemaking power, such as DOL's Batgirl video on equal pay—has the potential to veer into the territory of grassroots lobbying. Notably, in the examples we discuss, the relevant agencies appear to have been very careful to: 1) identify themselves, so as to avoid a designation of "covert propaganda"; and 2) refrain from overtly exhorting viewers to contact their legislators. Yet the clear import of their messages is just that, and it seems possible that GAO, or Congress, might zero in on this emerging category of political messaging.

On balance, however, the rise of visual media is likely to render anti-publicity and anti-lobbying laws weaker rather than stronger. There is an ever-increasing quantity of agency communications—far too much for GAO or Congress to effectively monitor.[464] Moreover, because digital media is both instantaneous and inexpensive, post-hoc findings of violation may have only a limited effect. For example, by the time GAO issued its decision, EPA's Thunderclap message was #cleanwater under the bridge.

As the highly politicized GAO investigation of the #CleanWaterRules campaign amply demonstrates, these laws' main impact lies more in the political sphere, and in their potential chilling effect on agencies. Particularly when Congress and the President are from different political parties, anti-lobbying and anti-propaganda provisions offer a convenient tool for Congress to seek to control, or push back against, the agenda of agencies and the President. Notably, both sides may have something to gain from such a political battle. EPA, for instance, has not taken down external hyperlinks, although there is now a tiny "exit" symbol next to the hyperlinks indicating to viewers that they are connected to a non-government website.[465] In fact, it has used GAO's finding to garner renewed support for its mission. In a blog post entitled *We Won't Back Down from Our Mission*, an EPA official stated: "It's almost 2016. One of the most effective ways to share information is via the Internet and social media. Though

[464] *See* Kosar, *supra* note 416, at 8 ("More communications may provide for more opportunities for an agency to transgress (inadvertently or otherwise) the statutory prohibitions against unauthorized publicity and propaganda and lobbying with appropriated funds.").

[465] *See, e.g.*, Jim Jones, *Endorsing a Path to Healthier Schools*, EPA BLOG: EPA CONNECT (July 8, 2016), https://blog.epa.gov/blog/2016/07/endorsing-a-path-to-healthier-schools/ (showing "exit" symbols next to external links to other organizations).

backward-thinkers might prefer it, we won't operate as if we live in the Stone Age."[466] It then continued: "We want to be as transparent as possible. We want to engage diverse constituents in our work. And we want them to be informed."[467] We think EPA is right.

CONCLUSION

Visual rulemaking is a new and dynamic phenomenon, so it is not possible to predict with certainty how it will unfold over time. At this early stage, however, we are optimistic that visual rulemaking will advance important interests. Visuals can make the President's involvement in the regulatory state more transparent, shedding technicolor light on what has always been true but often hidden from plain sight: There is no hermetic seal between the technocratic and the political, between science and values, between fact and spin. Visual rulemaking also provides agencies with a powerful, more dialogic means of responding to narratives that unfold during rulemaking proceedings. Even more importantly, visual rulemaking promises to raise public awareness of rulemakings and to empower participation by more diverse stakeholders, not merely those who are well-equipped to navigate dense, textual NPRMs. In light of these benefits, we believe that administrative law doctrine and theory should welcome, rather than simply ignore, this growing and influential phenomenon.

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466 Liz Purchia, *We Won't Back Down from Our Mission*, EPA BLOG: EPA CONNECT (Dec. 17, 2015), https://blog.epa.gov/blog/2015/12/we-wont-back-down-from-our-mission/ [https://perma.cc/8HG5-J6FY].

467 *Id.*