Two-Track E-Commenting

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Since the passage of the Administrative Procedure Act (APA), administrative agencies have been permitted—and sometimes required—to engage in "notice-and-comment rulemaking" when promulgating regulations. In its present form, "notice and comment" requires agencies to give public notice of proposed regulations, allow citizens to comment on such proposals, and respond to the concerns offered in such comments (even if agencies do not ultimately act on these concerns).

In recent years, the notice-and-comment process has gone digital. Via the Regulations.gov interface, citizens can view the text of proposed rules, comment on each proposed regulation, view the online comments of others, and, in theory, have their concerns read and addressed by agencies.

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1 Yale Law School, J.D. expected 2016. Thanks to Professor Christine Jolls for introducing me to administrative law, for inspiring this Comment, and for thoughtful feedback throughout this project. Thanks as well to Min Keun Woo for superlative suggestions and editing, to Emily A. Rosenberg, Jaclyn Harris, and Benjamin Woodring for their support and guidance during the publication process, and to all of the other editors of the Yale Journal on Regulation whose hard work made this piece possible. All errors are my own.
2 See Administrative Procedure Act, 5 U.S.C. § 553(b)-(c) (2012) (“General notice of proposed rule making shall be published in the Federal Register . . . . After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”).
Waxing eloquent, some claim that such e-rulemaking might fundamentally transform the participatory process. For now, however, the process is defined by a more pedestrian phenomenon: spam. In typical e-rulemakings, agencies receive thousands of comments that are short, identical statements of support or opposition to a proposal.

Given this deluge, some deride the current system as “notice and spam” rulemaking, treating identical posts as wasteful annoyances. By contrast, some might see the posting of such messages as simply another way to “participate directly in the rulemaking process”—expression at the core of the APA’s purposes.

This Comment suggests a novel, middle course: a “two-track” e-comment system that would distinguish substantive, unique messages on one hand and bare expressions of preference on the other. This bifurcation, in turn, would yield significant benefits for the notice-and-comment process.

The remainder of this Comment proceeds as follows: Part I outlines the mechanics of how this proposal would operate. Part II discusses the benefits that this system would have over both the status quo and previous reform proposals. Part III then addresses possible critiques of this approach, while Part IV offers a brief conclusion.

I. Mechanics of the Two-Track System

The two-track system would operate as follows: when viewing a proposed rule online, would-be posters would have two options: (1) a “comment track,” and (2) a “preference track.”

The first option, the comment track, would essentially use the current system: on this track, posters with substantive, unique messages could offer full written statements on any proposed rule. However, in a departure from the
current system, agencies would be empowered and instructed to delete from the comment track any comments deemed to be mass-mail “spam.”

Classification as spam or non-spam could be conducted through several content-neutral methods. The simplest possibility would be to screen for characteristics like linguistic similarities, deleting any comments that have more than a critical percentage of language identical to a previously-posted comment.11 Alternatively, agencies could set a numerical threshold—for example, deleting all additional copies of any comment if it receives ten or more identical or highly similar copies and leaving just one version of the posting on the comment track.12

However, even as the comment track would be closed to mass postings, the agencies’ online interface would offer a new, second option: a preference track. This preference track would be reserved for propositions that had received (or would likely receive) substantial identical support. Using this track, would-be commenters could register their preferences for or against propositions via simple online opinion polls or other response instruments.

The items that would be given preference polls might be selected in several ways. One possibility would be for agencies themselves to select the questions based on the propositions anticipated to receive public support (or opposition). Alternatively, poll items could be “crowdsourced” based on input from relevant stakeholders, such as regulated entities, other government entities, or public interest groups. Perhaps the most effective approach, however, would be to create poll items based on those comments previously rejected as spam. For example, if an animal rights group had many members copy and paste an identical, one paragraph message, the agency might both (1) delete additional copies of that message in the comment track as spam, and also (2) turn the message into a poll item in the preference track, allowing users to check a box if they agreed with the paragraph at issue.13 Turning rejected spam comments into

11. As was used by innovative systems like Docket Wrench, the Sunlight Foundation’s online tool for monitoring spam participation in administrative rulemaking. See, e.g., Comment Similarity for Docket FDA-2014-N-0189, supra note 7.
12. This process will be increasingly feasible as spam-detection software improves. For a discussion of anti-spam-artificial-intelligence developments in the private sector, see Cade Metz, Google Says Its AI Catches 99.9 Percent of Gmail Spam, WIRED (July 9, 2015, 2:00 PM), http://www.wired.com/2015/07/google-says-ai-catches-99-9-percent-gmail-spam. For an example of the academic literature around spam and artificial intelligence, see Enrico Blanzieri & Anton Bryl, A Survey of Learning-based Techniques of Email Spam Filtering, 29 ARTIFICIAL INTELLIGENCE REV. 63 (2008). Crucially, even “spam” comments would retain at least one posting on the new comment track. Then, malign actors could not post copies of a legitimate comment solely to remove it from agency consideration nor could agencies manipulate the “spam” classification to exclude comments they disagreed with. Indeed, a key benefit of such content-neutral criteria would be that—insofar as they would be based on technical characteristics and measures of similarity—they would not involve substantive agency discretion in deciding what constituted spam. Hence, content-neutral methods would mitigate any perverse incentives for agencies to abuse their discretion to delete or minimize comments unfavorable to their preferences by misidentifying substantive comments as spam (or vice versa).
13. Building on this mechanism, one might imagine that if a “spam” comment consisted of multiple paragraphs, each paragraph might be separately turned into a poll item—allowing users to
viable poll items would have the crucial advantage of allowing users to express
support for propositions that might be more complex or nuanced than a mere yes-
or-no vote on a question. Accordingly, the agency could even create an automatic
system whereby comments that received a certain number of identical copies
would be automatically converted into poll items.

Finally, upon issuing their ultimate rules, agencies would be required to
address the poll results from the preference track, explaining why such
preferences were or were not needed.14

II. Benefits of the Two-Track System

Taken together, these changes offer a novel set of benefits.15 First, the two-
track comment system might allow agency personnel to save valuable time and
resources.16 By removing all spam from the comment track (likely through automated processes), the system would allow agencies to more quickly “find the useful comments.”17

check a box for each paragraph they support. This might allow users to show support for a particular paragraph as opposed to the entire message, enabling the system to capture even more nuance in how users support or oppose propositions.

14. In light of Vermont Yankee’s bar on judge-made procedures, Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978), this requirement may need to be legislatively created. See William S. Jordan, III, Osification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 NW. U. L. REV. 393, 398 (2000). However, at least one court has already suggested that agencies should take into account comment volume in assessing the appropriateness of agency actions. See, e.g., Sierra Club v. Bosworth, 510 F.3d 1016, 1032 (9th Cir. 2007) (“Given the large number of comments, close to 39,000... we cannot summarily conclude that the effects of the fuels CE are not controversial.”).

15. One other commentator, Beth Noveck, has made a thoughtful attempt to address the spam challenge as well. In The Future of Citizen Participation in the Electronic State, Noveck suggested—among other proposals—that e-rulemaking should be modified to allow commenters to “join” the comments of others, explaining that “[t]ools could be employed to allow citizens to ‘sign onto’ a comment by endorsing its content without necessarily suggesting any affiliation with the author.” Noveck, supra note 10, at 14. In some ways, this concept is similar to the two-track system advanced in this Comment. However, by giving would-be commenters the option of affiliating themselves with a comment, Noveck’s idea would not achieve the spam reduction benefits of requiring posters to either develop a unique idea or support a pre-existing poll item. See infra Part II. In addition, Gregory D. Jones has suggested a form of comment bifurcation in which established interest groups and organizations would need to supply Regulations.gov with more comprehensive information than ordinary citizen posters. See Jones, supra note 5, at 1268 (arguing that such a “voluntary two-tiered registration system that acknowledges the role of interest groups in rulemaking is best suited to meet the Administration’s goals for open government”). Once again, however, this solution would not substantially address the spam challenge.

16. See Johnson, supra note 7, at 103 (“Processing, reviewing, and responding to [spam] comments requires substantial agency resources.”).

17. Stuart W. Shulman, Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking, 3 J. E-GOV’R 41, 58 (2006). That said, this potential benefit would need to be weighed against potential administrative costs. One such cost, the need to develop effective anti-spam technology, does not appear especially onerous, especially given the rapid evolution of such products. See Metz, supra note 12. A second set of costs, namely, creating and administering a polling process, may prove more formidable. Even here though, the challenge of devising a practical, rough-and-ready polling system may be overstated. See infra text accompanying notes 32-33.
At the same time, the organizers of mass mailings would have strong incentives to post less spam in the first place. Because voting for a posted proposition would take less effort than writing out a comment (even when simply copied and pasted), a group seeking to maximize its total showing would realistically urge supporters to “vote” instead of writing comments.\(^{18}\) Second, since all spam posts beyond the first would be deleted from the comment track, risk-averse organizations presumably would not want to risk their campaigns being “filtered out,” and so would turn to the preference poll instead.\(^{19}\) Moreover, individuals independent from mass-mailing organizations, who happened to share the organizations’ preferences, would also be able to vote in the existing poll rather than write merely to express a simple preference, further streamlining the process and saving agency resources.

Freed from spam, posters remaining on the comment track would be able to engage in a far more substantive and interactive dialogue about the rules in question. A much-heralded feature of e-rulemaking is its capacity to create a more participatory, dialogic rulemaking process.\(^{20}\) Thus far, however, the transformation of e-rulemaking into a revolutionary participatory medium has simply not yet occurred.\(^{21}\) One possible explanation is that the current system, in which thoughtful and substantive statements are drowned out by rapid spam postings, deters thoughtful participants from investing substantial time or energy into the e-rulemaking process.

Were such spam filtered out, however, the remaining conversation around proposed rules would be peopled by a far more concentrated pool of posters: experts, citizen-advocates, and interested observers who could more readily engage in a deeper discourse both with agencies and with each other. In time, such a refocused comment track could provide an ideal forum for unveiling some of the proposed procedural changes aimed at revolutionizing e-rulemaking, such as “policy juries,” in which groups of interested citizens engage in informed,

\(^{18}\) Of course, one might argue that a two-track system would, if poorly designed, increase the margin amount of time per participation. This is because users would now have to first identify the track they want to participate on (preference or comment) and then vote (or write a comment). However, to the extent that search results could be designed to display both the most relevant polls and the most relevant comments, this problem should be minimal. Accordingly, it is unclear why a “search” for poll items would necessarily be any more time consuming than the present searches (and, of course, once the poll item is reached, participation would remain much faster than posting a spam comment under the present system).

\(^{19}\) Crucially, if the spam filter at issue used measures of linguistic similarity, then it would also screen out posts that were “close” to a spam post (i.e., sharing 80% of the same characteristics). This means that advocacy groups would not be able to safely instruct members to simply “change a few sentences” on an otherwise generic posting—they would have to either inspire members to each write unique messages or else direct them to the preference track. For an example of an already-existing software that can distinguish rulemaking comments based on their degree of similarity to one another, see supra text accompanying note 11.

\(^{20}\) See, e.g., Noveck, supra note 6, at 438.

\(^{21}\) See Johnson, supra note 7, at 92 (noting that, notwithstanding its future potential, “e-rulemaking efforts so far have been evolutionary rather than revolutionary”).
A structured discussion about a regulation, or a policy "wiki," in which regulations are crafted by the simultaneous contributions of many online users. Thus, a spam-free comment track could allow e-rulemaking to finally realize its potential.

Meanwhile, on the preference side of the equation, the two-track system could empower more individuals to have a say in policies that impact their lives. In analyzing such expressive benefits, one must consider (1) how many individuals would be able to express themselves, (2) how meaningful an expressive act each individual could perform, and (3) the amount of time such an act requires. In terms of sheer numbers, a polling system could, by (marginally) reducing the time commitment of commenting, potentially encourage more individuals to publicly register their feelings. At the same time, the expressive meaning an individual derives in voting for a preference would not seem meaningfully different from the meaning of posting a "copy-and-paste" comment. Finally, however, insofar as a poll vote takes less time than entering even a basic comment— even if no additional commenters were to participate—the creation of a preference track would still allow commenters to more quickly achieve the same level of satisfaction. When aggregated over hundreds of thousands of participants, such small savings could generate sizable benefits for both spammers and society.

As a final benefit, the two-track system would foster far greater transparency and accountability. Some believe public preferences should play little role in shaping administrative rulemaking. Others, in contrast, believe

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22. See Noveck, supra note 6, at 495-510 (discussing and outlining the advantages of policy juries at length).

23. See Stuart M. Benjamin, Evaluating E-Rulemaking: Public Participation and Political Institutions, 55 DUKE L.J. 893, 901 (2006) ("Individuals could work together toward a jointly produced submission to an agency. Agencies (or private entities) could allow individuals to post their concerns and solicit interest from others who might want to draft a shared comment..." there is a well-known existing model that allows any and all interested individuals to participate in a shared project—wikis. A wiki is an online collaboration to which anyone can contribute. The basic characteristic of wikis is that anyone can add or edit existing content. The best known, and probably the most successful wiki is Wikipedia.org, an open encyclopedia available on the Web.) (footnote omitted).


26. See, e.g., Nat'l Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987) ("The substantial-evidence standard has never been taken to mean that an agency rulemaking is a democratic process by which the majority of commenters prevail by sheer weight of numbers. Regardless of majority sentiment within the community of commenters, the issue is whether the rules are supported
such preferences to be an important component of administrative rulemaking—at least in some contexts.27 Yet regardless of one’s position on the question, the status quo—in which nuanced, substantive comments share a common platform with mass-spam campaigns—would intuitively seem to make it difficult to know how agencies weigh raw public preference compared with other factors. The two-track comment system would obviate this concern because it commits agencies to distinguishing public preferences from more nuanced commentary and to explaining why the former was or was not accounted for. Thus, our polity would be far better able to learn what significance public opinion actually enjoys in the administrative process and to advocate for change if such valuation differs from our ideals.

III. Possible Objections

Despite these advantages, two-track e-rulemaking is subject to three primary potential critiques.28 First, the creation of a preference track could create a perception that rulemaking is, in fact, a plebiscite. This perception might lead to irate public responses whenever a “popular vote” was not heeded,29 which in turn might cow agencies into adopting inferior but popular policies.

Of course, agencies could diffuse this misperception by expressly referring to the polling instrument as a “survey” and reminding users that the poll is not a “vote.”30 Yet on a more basic level, perhaps it would be beneficial for the two-track system to focus public attention on the undemocratic aspects of rulemaking. By creating an intuitive record of public opinion and requiring agencies to explain why it was or was not heeded, the two-track system could play a valuable role in educating the public about the “difficult choices involved in

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28. An objection that will not be considered at length is the claim that agencies in general, and preference voting systems in particular, might be the subject of a hacking attack. For general discussions on the concern that administrative agencies, in other contexts, may be vulnerable to such hacking, see Harry Cole, GAO Report: In Wake of Successful Hack of FCC Computer Systems, $10 Million Fix Ineffective, COMM.LAW.BLOG (Feb. 7, 2013), http://www.commlawblog.com/2013/02/articles/broadcast/gao-report-in-wake-of-successful-hack-of-fcc-computer-systems-10-million-fix-ineffective; and Elise Viebeck & Julian Hattem, HealthCare.gov Was Hacked in July, Feds Say, THE HILL (Sept. 4, 2014, 4:27 PM), http://thehill.com/policy/healthcare/216700-report-healthcaregov-was-hacked-in-july. However, this Comment assumes for present purposes that the polls can be made secure.

29. See, e.g., Katherine Q. Seelye, Flooded with Comments, Officials Plug Their Ears, N.Y. TIMES, Nov. 17, 2002.

30. This is a current agency practice for at least some agencies. See Tips for Submitting Effective Comments, supra note 5.
rulemaking”—including the need to balance public input with expertise. And insofar as the public disliked what it saw, it might create a deeper and more informed discussion around just how much power agencies should have. Thus, while public ire about “undemocratic” actions might sometimes reduce policy quality, this cost would have to be weighed against important gains in democratic deliberation around agency accountability.

The second challenge facing the two-track system would be deciding what exactly should become a poll item and how such items should be worded. These are deeply contentious issues, since the wording and format of a poll question frequently have a substantial impact on its outcome. Thus, it would be vital to ensure that agencies could create “legitimate” and accurate polling that remained useful.

Yet, while the process of defining poll questions is thorny, it might be less daunting than it initially appears. First, many of the most salient propositions would be relatively easy and uncontroversial to craft and publish (e.g., “Do you support Rule 56’s plan to permit snowmobile access?”). Indeed, as agencies have strong incentives to reduce spam, they would be likely to design items that accurately captured as wide a population as possible. Second, agencies could rely on key stakeholders, such as relevant industry groups, to help develop effective poll questions. Third, agencies might modify the comment process such that any comment that received a certain number of copies or near copies (say, 100) would be granted a poll item. Such an approach would help ensure that the polling items remained “neutrally chosen.” Finally, unlike votes in binding referenda, preferences expressed through the two-track system would be nonbinding and advisory; thus, a higher degree of imperfect poll items might be tolerable so long as the polling instrument itself was generally effective.

The final objection involves equity concerns. Empirical evidence suggests that certain groups, such as low-income individuals, would be less likely to possess the resources to engage in e-rulemaking. Therefore, some might fear that the results of an online preference poll would be similarly nonrepresentative, leading to policies skewed towards interest groups with greater access to technology.

31. Noveck, supra note 6, at 438.
32. For discussions of the impact that such wording can have on poll results, see, for example, Stephen A. Borrelli & Brad Lockerbie, Framing Effects on Public Opinion During Prewar and Major Combat Phases of the U.S. Wars with Iraq, 89 SOC. SCI. Q. 502 (2008); and Carl Bialik, When Wording Skews Results in Polls, WALL STREET J., Sept. 25, 2010.
33. Of course, such a change would imply a modification to the “ten copies maximum” described above. See supra text accompanying note 12.
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This is an important concern. However, from an equity perspective, a “one-click” voting track might actually reduce barriers to participation and improve equity. And even if a skew persisted, agencies would be free to acknowledge such inequities in explaining why a particular poll was not followed. For instance, in a rulemaking on poverty policy, an agency might assign less weight to the results of any online polling that cut against the interests of low-income individuals.

IV. Conclusion

E-rulemaking currently holds out the promise of producing meaningful change in how the administrative state works. Creating two discrete streams of online input—comments and preferences—would be an important step toward unlocking that potential. Such a shift would allow agencies to make better policies more efficiently. It would improve the incentives for public participation, and would make that participation more meaningful. It would ensure that we know more about what our agencies prioritize. In sum, the two-track comment system would allow our agencies to harness the benefits of allowing citizens to voice their preferences while enhancing and deepening online participation.