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HIDING THE BALL: THE PROPOSED REGULATORY ACCOUNTABILITY ACT & RESTRICTING AGENCY 'PROPAGANDA'

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The Senate's Regulatory Accountability Act (RAA) seeks to substantially amend the Administrative Procedure Act, the law governing federal agency processes. The bill's sponsors argue, in part, that the RAA would improve administrative transparency and accountability. One of the least-discussed provisions, § 3(c)(6), "Prohibition on Certain Communications," would prohibit agencies from advocating for or against a proposed regulation during the comment period, an indispensable component of notice-and-comment rulemaking that affords the public a voice in the rulemaking process. This Note recommends that agencies should be able to exhibit their preferences at all stages of rulemaking, because, as policymakers, agencies should inform the public of their goals, purposes, and methods, as well as defend their reasoning in the face of the potentially dominating narratives of regulated industries. If left uncensored, agencies could also use the Internet to mitigate some of the public participation costs of commenting and increase public participation in the rulemaking process. This Note suggests that § 3(c)(6) runs counter to the RAA's broad justifications of increasing administrative transparency and accountability.

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I. INTRODUCTION

On April 26th, 2017, the Regulatory Accountability Act of 2017 (RAA) was introduced in the Senate.[1] Amid a swelling sea of administrative governance, the Act aims to substantially amend the Administrative Procedure Act of 1946 (APA)[2]—the "quasi-constitution" governing federal agencies.[3] In the twenty-first century, this administrative "fourth branch" of government has become increasingly difficult to reconcile with an already at-capacity three-branch system, frustrating elemental schemes like separation of powers and checks and balances.[4] What's more, the Supreme Court has been left to its own devices in interpreting the APA and has been forced by congressional silence to devise a repertoire of administrative common law.[5] But within two weeks of the 115th Congress's first session, Congress signaled the coming end of its dormancy.[6]

The RAA would make several controversial changes to the administrative framework. Advocates say it would "result in a more transparent, accountable regulatory process that would yield more effective regulatory outcomes for American businesses, workers, and their families," specifically by: (1) compelling more cost-benefit analyses in promulgating regulations; (2) improving transparency and accountability; (3) providing certainty for businesses and

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[1] *See generally* Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

[2] 5 U.S.C. §§ 551-59, 701-06 (2012).

[3] John Conyers, Jr., Henry Johnson, Jr. & David N. Cicilline, *The Dangers of Legislating Based on Mythology: The Serious Risks Presented by the Anti-Regulatory Agenda of the 115th Congress and the Trump Administration*, 54 HARV. J. ON LEGIS. 365, 383 (2017) ("Title I of H.R. 5, the Regulatory Accountability Act (RAA), substantially amends the APA . . . ."). For a discussion of the historical role of the APA, see JOHN M. ROGERS, MICHAEL P. HEALY & RONALD J. KROTOSZYNSKI, JR., ADMINISTRATIVE LAW, 109–10 (3d ed. 2012).

[4] Elizabeth A. Snodgrass, *Foreign Affairs in the Twilight Zone: The Foreign Affairs Powers of the Federal Communications Commission*, 83 VA. L. REV. 207, 207–08 (1997) ("The phrase 'fourth branch' highlights the inconsistency of the administrative state with the tripartite structure of the constitutional text, a problem that has generated a steady stream of controversy between constitutional 'formalists' and 'functionalists.'").

[5] *See* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 638 (2017) ("[W]e can safely conclude that the judicial branch, not Congress, has played the predominant role in shaping the contours of the APA.").

[6] *See* Conyers, Johnson & Cicilline, *supra* note 3, at 383 ("Within two weeks of commencing the new 115th Congress, the House of Representatives passed a comprehensive package of anti-regulatory measures in the form of H.R. 5, the 'Regulatory Accountability Act,' by a vote of 238 to 183.").

consumers; and (4) creating an automatic review process for major regulations.[7] Senator Heidi Heitkamp, the bill's co-sponsor, argues "there are good programs that can get bogged down in unnecessary red tape, burdening small business owners or farmers,"[8] and that the RAA would help to cut that tape.

But not everyone is convinced the RAA would liberate agencies from unnecessary red tape. Some allege it would establish *more* superfluous stipulations for agency rulemaking.[9] For example, when faced with an earlier version of the RAA, the Obama Administration threatened to veto it, warning the law would "impose layers of additional procedural requirements that would undermine the ability of agencies to execute their statutory mandates and that these unnecessary procedural steps seemed designed simply to impede the regulatory development process."[10] Fears about the RAA's superfluity seem well-founded. In particular, the Senate's version of the bill would require agencies to adopt the *most* cost-effective approach of a proposed rule, to disclose all information relied upon in promulgating rules, and it would create an automatic review process for major rules and compel formal hearing procedures for "high-impact" rules.[11]

Of the agency-shackling provisions in the RAA, one of the least-discussed is Section 3(c)(6), "Prohibition on Certain Communications." This provision would prohibit agencies from advocating for or against a proposed regulation during the comment period for that regulation.[12] The comment period is an indispensable component of notice-and-comment rulemaking, which is the least-encumbered method for agencies to promulgate regulations.[13] The process for notice-and-comment rulemaking is simple. An agency must merely provide notice of the proposed rule and implement a

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[7] Press Release, Sen. Heidi Heitkamp, Heitkamp, Portman Bipartisan Regulatory Accountability Act Passes U.S. Senate Committee, Vote Smart (May 17, 2017), https://votesmart.org/public-statement/1160050/heitkamp-portman-bipartisan-regulatory-accountability-act-passes-us-senate-committee#.XD0z9RNKg9c.

[8] *Id.*

[9] *See* Conyers, Johnson & Cicilline, *supra* note 3, at 383–84 (noting the RAA "impose[s] more than sixty additional procedural and analytical requirements to the process that agencies use to promulgate regulations").

[10] *Id.* at 384 (citations omitted).

[11] *See generally* Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

[12] *Id.* § 3(c)(6) (2017).

[13] 5 U.S.C. § 553 (2012).

period whereby "interested persons" (basically anybody) can comment on the proposed regulation.[14] In implementing a rule's final version, the agency must consider all relevant comments.[15] But there is a significant disparity in the number of meaningful comments produced by regulated entities (i.e. large industries) and regulatory beneficiaries (i.e. the general public). As will be discussed, this is partly due to the high costs of discovering the mere existence of agency regulations, understanding the complex administrative rulemaking framework, and generating meaningful comments.

In the wake of the social media revolution, some federal agencies, like the Environmental Protection Agency (EPA), have become increasingly active during a rule's comment period. These agencies appear to be motivated to educate and inform the public on the agency's stance regarding proposed regulations and to combat social media assaults from regulated industries. For example, the EPA recently engaged in a social media skirmish instigated by the American Farm Bureau. The Bureau had urged its followers to #DitchTheRule—an attack against the EPA's proposed Clean Water Rule limiting water pollution.[16] Section 3(c)(6) of the RAA would prevent the EPA from responding to such attacks, rendering it silent in the face of campaigns waged by regulated industries. Additionally, by prohibiting agencies from advocating during a rule's comment period, § 3(c)(6) would foreclose avenues for ordinary citizens to explore the agency's side of the debate, suppressing their ability to come to a fully-informed decision in generating comments. Censoring agencies during the notice-and-comment period undermines the RAA's dual objectives of increasing agency transparency and giving the public a greater voice in rulemaking.

II. THE CURRENT LANDSCAPE

To consider the implications of § 3(c)(6) of the RAA, it is first necessary to place it within the context of the APA. More

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[14] *Id.*

[15] *Id.*

[16] Coral Davenport, *Obama Announces New Rule Limiting Water Pollution*, N.Y. TIMES (May 27, 2015), https://www.nytimes.com/2015/05/28/us/obama-epa-clean-water-pollution.html.

specifically, it is important to understand the interplay between notice-and-comment rulemaking under the APA, the Senate's RAA, and recent trends in information dissemination by agencies in the digital era.

A. THE APA AND SECTION 3(C)(6) OF THE REGULATORY ACCOUNTABILITY ACT

The Founders could not have foreseen the rise of the administrative state, and did not plan for it.[17] The APA was thus Congress's *post hoc* attempt to safeguard federally regulated industries from "poorly conceived agency policies," while protecting those agencies from "judicial usurpation."[18] Over the past seven decades, the APA has attained a quasi-constitutional status, amended only sixteen times and necessitating frequent judicial interpretation in the absence of congressional clarification.[19] Lacking Congress's guiding hand, the Supreme Court brought forth a capacious body of administrative common law, which included doctrines like *Vermont Yankee* and *Chevron*.[20] But, as the late Justice Scalia noted, *Chevron* failed to cite the APA at all, advancing the suspicion that the judiciary unfaithfully commandeered the administrative state.[21] One scholar even opined that "when courts impose rules of administrative law that stretch the APA's text beyond its breaking point, those rules . . . cannot be considered legitimate."[22] To make matters worse, it was unclear whether

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[17] *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1077 (2004) ("The Founders did not foresee the rise of the bureaucratic state, and it was only during the last half-century that Congress and the courts responded to creatively fill the gap.").

[18] JOHN M. ROGERS, MICHAEL P. HEALY, & RONALD J. KROTOSZYNSKI JR., ADMINISTRATIVE LAW 109–10 (3rd ed. 2012).

[19] *See* Walker, *supra* note 5, at 630–31.

[20] *See* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843–44 (1984) (holding that reviewing courts must grant deference to agency decision-making when: (1) congressional intent was ambiguous; and (2) that agency's interpretation was reasonable); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978) (holding that reviewing courts are not permitted to impose their own procedures on agencies upon remand).

[21] United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite." (citations omitted)).

[22] Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1260 (2015).

congressional silence amounted to congressional acquiescence of the Supreme Court's administrative jurisprudence.[23]

But Congress broke its silence. On January 11th, 2017, just two weeks into the 115th Congress's first session, the House of Representatives indicated its stance by passing its Regulatory Accountability Act in an effort to "substantially amend[] the APA."[24] And on April 26th, 2017, another iteration of the Act was introduced into the Senate.[25] The Senate's RAA would be the most significant reform of the APA since its inception in 1946.[26] Among its most notable changes, the RAA would instruct agencies to follow more than sixty new procedures in promulgating regulations and would compel formal trial-like hearings for "high-impact" rules, even amid the prevailing perception that formal rulemaking "has been all but relegated to the dustbin of history."[27]

Senator Rob Portman, the bill's co-architect, announced on his website that the RAA would "create[] more jobs [and] raise[] wages" by: (1) promoting greater transparency by inviting the public to comment on rules *before* the rulemaking process even begins; (2) requiring agencies to adopt the *most* cost effective regulatory alternative; and (3) requiring more process for high-impact rules.[28] While the Senator touts the support of several workers, farmers, ranchers, and "small businesses,"[29] his website nearly exclusively cites the support of nationalized regulated entities.[30] Dissenters fear that the RAA is just another cog in the larger effort to "bog

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[23] *See id*. at 1252 ("Mere congressional silence is not likely to reflect sufficient deliberation to legitimize administrative common law that contradicts . . . Congress's intent." (citations omitted)).

[24] *See* Conyers, Johnson & Cicilline, *supra* note 3, at 383.

[25] *See generally* Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

[26] *See* Walker, *supra* note 5, at 632.

[27] *See* Conyers, Johnson & Cicilline, *supra* note 3, at 383–84 (internal citations omitted).

[28] Press Release, Sen. Rob Portman, Senator Portman's Regulatory Reform Bill Ready for Committee Markup (May 15, 2017), https://www.portman.senate.gov/public/index.cfm/press-releases?ID=E2E94B5F-7783-4B0E-9F83-9354EAADDA08.

[29] *Id.*

[30] Press Release, Sen. Rob Portman, What They Are Saying About Senator Portman's Regulatory Reform Bill (May 5, 2017), https://www.portman.senate.gov/public/index.cfm?p=press-releases&id=470AF3AC-48BA-42AB-BF6E-AB6308B909F8 (citing the support of the American Farm Bureau Federation, the National Association of Manufacturers, the National Association of Homebuilders, the American Forest & Paper Association, the American Wood Council, the National Association of Wheat Growers, and the Associated General Contractors of America).

down" agency operations, tipping the regulatory scales in favor of big industry at the expense of administrative health, safety, and welfare oversight mechanisms.[31] Whatever support the RAA enjoys from regulated entities, it is met with equal disdain from regulatory beneficiaries.[32]

B. NOTICE AND COMMENT RULEMAKING

Regardless of the genuine motivation behind the RAA, it is certain that the Act would substantially alter notice-and-comment rulemaking.[33] Under the APA, the rulemaking process bifurcates depending on whether the rulemaking is informal or formal.[34] But agencies rarely subject themselves to the protracted requirements of formal rulemaking, electing instead to accomplish their objectives via informal notice-and-comment rulemaking.[35] This makes sense: why would an agency voluntarily use a less-efficient procedure regarded as "relegated to the dustbin of history"?[36] On the other hand, notice-and-comment rulemaking merely requires: (1) general notice of the proposed rule and (2) that "the agency . . . give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[37] Put simply, notice-and-comment rulemaking merely requires notice and comment.

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[31] *See* Rhea Suh, *The Senate Bill that Puts the Public at Risk*, CNN (July 6, 2017, 3:16 PM) ("Portman's bill, by design, would paralyze our ability to keep up with changing times and respond to emerging threats like financial scams and toxic chemicals that harm consumers, or industrial practices that endanger workers."), http://www.cnn.com/2017/07/06/opinions/regulatory-accountability-act-opinion-suh/index.html; *see also* Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (2017), 2017 WL 446312 (Pres.) (requiring that agencies repeal two existing regulations for every new regulation).

[32] *See* Conyers, Johnson & Cicilline, *supra* note 3, at 383 n.112–15 (citing the opposition of groups such as the Consumer Federation of America, the National Parks Conservation Association, the American Federation of Teachers, the United Food and Commercial Workers Union, and the National Women's Law Center).

[33] *See generally* Regulatory Accountability Act of 2017, S. 951, 115th Cong. § 3(c) (2017).

[34] *Compare* 5 U.S.C. § 553 (2012) *with* 5 U.S.C. § 556(a) (2012).

[35] *See* Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 10 (2017) ("[B]ecause agencies almost never voluntarily choose formal rulemaking, formal rulemaking has become a null set." (citations omitted)).

[36] *Id.* at 21 ("[T]he increasingly shared consensus that formal rulemaking was too inefficient for a modern regulatory state may have led to its decline without the Court's intervention."); *see* Conyers, Johnson & Cicilline, *supra* note 3, at 383–84.

[37] 5 U.S.C. §§ 553(b)-(c) (2012).

At the heart of notice-and-comment rulemaking is the "opportunity it affords agencies to interface freely with the public."[38] Indeed, *all* "interested persons" are theoretically given the opportunity to participate by submitting comments, and an agency must consider all relevant matter presented when issuing its final rule.[39] But the comment process is far less inclusive in practice. As some scholars maintain, "large corporations, professional and trade associations, [and] national advocacy groups" dominate the comment process, while consumers and members of the public lack the leverage and resources to generate meaningful comments.[40] Regulated entities (i.e. large industries) are overrepresented in the comment process when compared to regulatory beneficiaries—as documented in one instance where "business groups *substantially dominated* comments in a[n EPA] rulemaking on hazardous air pollutants."[41] The inability of the general public to produce meaningful comments stems from a lack of awareness of proposed rules, information overload, low literacy regarding administrative participation ability, and motivational issues.[42] Whatever the particular reason, individual voices of citizens are drowned out in a chorus comprised largely of business entities.

The legislature has not ignored this disparity. In 2002, Congress passed the E-Government Act, which established the website regulations.gov.[43] Internet-savvy citizens were thus able to generate comments from the comfort of their living rooms, and ushering the comment process into the twenty-first century seemed feasible.[44]

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[38] Daniel E. Walters, *Ditch the Flawed Legislative Proposal to Police Agency Communications*, REG. REV. (May 10, 2017), https://www.theregreview.org/2017/05/10/walters-proposal-agency-communications/.

[39] 5 U.S.C. § 553(c) (2012).

[40] Cynthia Farina, Hoi Kong, Cheryl Blake, Mary Newhart & Nik Luka, *Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project*, 41 FORDHAM URB. L.J. 1527, 1538 (2014).

[41] Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1357–58 (2011) (emphasis added). Mendelson also notes that business groups dominate the comment process because "[i]t takes resources to uncover the existence of a rulemaking, to understand the issues at stake, and to prepare persuasive comments." *Id.* Members of the public may lack such resources.

[42] *See* Farina, Kong, Blake, Newhart & Luka, *supra* note 40, at 1550.

[43] *See generally* E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915–16 (2002).

[44] *See* Jeffery S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451, 454 (2010) ("Others have focused on the possibilities of

But it remained unclear whether "[e]lectronic rulemaking [would] transform the process fundamentally or . . . simply digitize established paper-based processes."[45] Would the Internet actually revolutionize notice-and-comment rulemaking by facilitating greater public participation? Some scholars say it has not.[46]

More recently, some agencies have begun experimenting with the Internet in other ways, using social media platforms to generate public comments.[47] At the forefront of that experiment is the EPA.[48] For example, the EPA used YouTube to educate would-be commenters on proposed rules and their underlying policies and to direct citizens to their websites to "be a part of the conversation."[49] In 2015, the EPA employed its controversial "#DitchTheMyth" social media campaign to combat the American Farm Bureau's #DitchTheRule assault against the EPA's proposed Clean Water Rule.[50] While the EPA was criticized for walking the razor's edge surrounding federal anti-lobbying laws, fierce debate ensued as to whether the agency *should* be able to combat the American Farm Bureau on social media, and if so, how far it could go.[51] Federal agencies have not been alone in their efforts to utilize the Internet to increase public comments. For example, President Obama

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using . . . electronic tools for more *interactive* rulemaking. Suggestions for deliberative dialogue[s], online chat rooms, or electronic negotiated rulemaking concerning proposed regulations have proliferated, but so far their potential is untapped." (citations omitted)).

45 *Id.* (citation omitted).

46 *See* Farina, Kong, Blake, Newhart & Luka, *supra* note 40 at 1529–30 ("[N]ot everyone has been persuaded . . . . Much online political engagement has been dismissed as low value slacktivism, or click-through democracy." (citations omitted)).

47 *See* Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1187 (2016) (arguing "visual tools have the potential to democratize public participation and to enable greater dialogue between agencies and the public").

48 *Id.*

49 *See generally* 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, *Clean Power Plan Explained*, YOUTUBE (June 2, 2014), https://www.youtube.com/watch?v=AcNTGX_d8mY.

50 *See* Porter & Watts, *supra* note 47 at 1229–30 ("The [American Farm Bureau's] video has more than 140,000 views, and the family [in the video] was interviewed by Fox News. Thus, the Farm Bureau successfully used the video to call public attention to their opposition to EPA's proposed rule.").

51 *See* Coral Davenport & Eric Lipton, *Critics Hear E.P.A.'s Voice in 'Public Comments'*, N.Y. TIMES (May 18, 2015), https://www.nytimes.com/2015/05/19/us/critics-hear-epas-voice-in-public-comments.html?module=inline (chronicling this debate). This note does not advocate the *circumvention* of federal anti-lobbying laws, but rather that federal agencies should be able to educate regulatory beneficiaries to the extent legally permissible.

published several videos advocating his stance on various agency regulations,[52] and a segment posted by late-night host John Oliver inspired tens of thousands of commenters on the Federal Communications Commission's (FCC) proposed rule curbing net neutrality.[53] While it may not be easy, *it is possible* to elicit more public comments using the Internet, as demonstrated by the EPA, the Obama Administration, John Oliver, and the American Farm Bureau, among others.[54]

The RAA would stifle one side of the conversation. One provision of the RAA, the "Prohibition on Certain Communications," would muzzle agencies during the comment period of informal rulemaking.[55] The provision would ban "the agency, and any individual acting in an official capacity on behalf of the agency" from communicating to the public with respect to a proposed rule, during the comment period.[56] Specifically, an agency would not be allowed to make communications regarding its rule in a manner that: (i) "directly advocates, in support of or against the proposed rule, for the submission of information that will form part of the record for the proposed rule;" (ii) "appeals to the public, or solicits a third party, to undertake advocacy in support of or against the proposed rule;" or (iii) "is directly or indirectly for the purposes of publicity or propaganda within the United States in a manner that Congress has not authorized."[57] Notably, an exception is carved out for communications "that request comments on, or provide[] information regarding, a proposed rule in an *impartial manner*."[58]

Practically speaking, the RAA would prevent agencies like the EPA from posting anything on the Internet which disclosed or advanced its position on a proposed rule during the comment period.

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[52] *See* Porter & Watts, *supra* note 47, at 1185–87 n.1 (citing videos published in response to proposed regulations by the FCC, the Department of Labor, and the EPA).

[53] *Id.* at 1184–85.

[54] *Id.* at 1198 ("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.").

[55] Regulatory Accountability Act of 2017, S. 951, 115th Cong. § 3(c)(6) (2017).

[56] *Id.* § 3(c)(6)(A) (2017).

[57] *Id.* §§ 3(c)(6)(A)(i)–(iii) (2017).

[58] *Id.* § 3(c)(6)(B) (2017) (emphasis added).

III. AGENCIES SHOULD BE ABLE TO EXHIBIT THEIR PREFERENCES DURING A RULE'S COMMENT PERIOD

Facially, prohibiting agencies from engaging in advocacy during a rule's comment period seems reasonable. As one scholar has noted, "[t]he agency gets the first word in its notice of proposed rulemaking and the final word in its final rule."[59] After all, the comment period is "for the public, not the agency," right?[60]

The undoubted answer to that question is "yes." But the very purpose of the comment period—to elicit public input on a proposed government rule—warrants further consideration of § 3(c)(6) in light of the RAA's broad goals of increasing transparency and public participation. What policy considerations justify imposing such restrictions on federal agencies?

The RAA's justifications for restricting federal agencies are problematically broad. Senator Portman's website says the RAA "would bring our outdated federal regulatory process into the 21st Century by requiring agencies to . . . give[] the public a voice in the process,"[61] and that it "would result in a more *transparent*, accountable regulatory process that would yield more effective regulatory outcomes."[62] But, if the RAA seeks to promote agency transparency while at the same time advocating for increased public participation during the comment period, § 3(c)(6) actually undermines these goals.

Fundamentally, any prohibition on communication, especially one restricting a politically oriented body, is inconsistent with the goal of increasing transparency or public participation. Federal agencies are inescapably steeped in politics, in part because they *create policy*.[63] Precluding an agency's advocacy for or against a

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[59] *See* Walker, *supra* note 5, at 665.

[60] *Id.*

[61] Press Release, Senator Rob Portman, Portman, Heitkamp Introduce the Bipartisan Senate Regulatory Accountability Act (Apr. 16, 2017), https://www.portman.senate.gov/public/index.cfm/press-releases?ID=8AF7F04B-E0EC-4D45-84F9-9BF57D48050C.

[62] *Id.* (emphasis added).

[63] *See* Walters, *supra* note 38 ("Agencies are not courts; they are inescapably immersed in political decision making."); Bernard W. Bell, *Proposed Section 553(c)(6) of the Regulatory Accountability Act and Soliciting Grassroots Support*, YALE J. ON REG. (May 31, 2017), http://yalejreg.com/nc/proposed-section-553c6-of-the-regulatory-accountability-act-and-soliciting-grassroots-support-by-bernard-w-bell/ ("[Agencies] make policy decisions, but under the constraints of both the parameters set forth by Congress and judicial review.").

proposed regulation would force agencies to hide the ball during the public comment period, arguably decreasing their candor and certainly suppressing their side of the debate. With regard to policy making, this is significant given that "rulemaking is supposed to be an exercise of judgement informed by Congress' and the *agency's policy preferences*."[64] On the other hand, the scheme outlined in § 3(c)(6) would "envision a world where agencies engaged in rulemaking act more like courts than policymakers—that is, as passive observers and neutral arbiters."[65] But, the administrative framework as it exists indeed contemplates and supports the consideration of underlying policy rationales of federal agencies, instead of suppressing of their policy preferences.

Although § 3(c)(6)(B) forges an exception for agencies to make impartial communications regarding proposed rules, it still requires agencies to censor themselves, directly contradicting the RAA's broad justification of increasing administrative transparency. To the contrary, allowing agencies to defend their rules increases transparency because the public can hear the agencies' goals, purposes, and methods. If agencies are policymakers, they should have the chance to defend their policies before the public. Despite the RAA drafters' talismanic use of the buzzword "transparent," it should go without saying that the term means "characterized by visibility or *accessibility of information*."[66] Given an agency's mandate to create policy based on its preferences, the best argument supporting § 3(c)(6) is probably that the comment period is not for the agency, it is for the public. But considering the RAA's parallel aim of "giving the public a voice" in the rulemaking process, that purpose is frustrated because in practice, § 3(c)(6) deprives the public of digital primary sources that are helpful for learning about

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Agencies are also tied to politics because their prevalence has often drawn attention at the highest levels of government. *See* Press Release, The White House Office of the Press Secretary, Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling (announcing the Trump administration's requirement that agencies identify at least two existing regulations to be repealed for each new regulation).

[64] *See* Bell, *supra* note 63 (emphasis added).

[65] *See* Walters, *supra* note 38.

[66] *Transparent*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/transparent (last visited Jan. 15, 2019) (emphasis added).

regulations and their purported benefits, as well as yielding meaningful comments.

Public participation during the comment period is not cost-free. Scholars have noted that "[i]t takes resources to uncover the existence of a rulemaking, to understand the issues at stake, and to prepare persuasive comments."[67] For regulatory beneficiaries (i.e. the general public), the high participation costs of commenting often outweigh the immediate individual benefits. Perhaps most fundamentally, some citizens cannot contemplate that cost-benefit analysis at all because they are unaware of their ability to participate in the first place. Whether due to information overload, ignorance of the administrative state, or lack of awareness regarding a particular rule, public participation in the comment process is sorely underwhelming.[68]

Federal agencies could attempt to mitigate some of the public participation costs by using the Internet and social media, which provide an accessible forum for agencies to discuss their means and ends as well as increase public awareness. The RAA undercuts this promising development because it puts an effective gag order on agency advocacy. For example, the EPA has only just begun to experiment with social media campaigns and YouTube videos, in efforts to generate knowledge of proposed regulations and express the agency's stance.[69] While the EPA's YouTube views are negligible,[70] the social media experiment is still in its infancy and there is always room for growth. As late-night host John Oliver's FCC net neutrality campaign proved, when the public is both informed and motivated, *it will act*. Although the EPA does not enjoy the far reach of late-night television hosts, galvanizing even a modest segment of the public furthers the interest of "giving the public a voice" in the rulemaking process.

Regulated industries dominate the comment period. The costs of generating meaningful comments burden regulated industries less than they burden citizens because businesses have more resources

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[67] *See* Mendelson, *supra* note 41, at 1357–58.

[68] *See* Farina, Kong, Blake, Newhart & Luka, *supra* note 40, at 1550.

[69] *See, e.g.* U.S. Envtl. Prot. Agency, *EPA Proposes 111(b) Revisions to Advance Clean Energy Technology*, YOUTUBE (Dec. 7, 2018), https://www.youtube.com/watch?v=qzyOXHDWLbs&t=; *see also* Porter & Watts, *supra* note 47, at 1229–30.

[70] *See* U.S. Envtl. Prot. Agency, *supra* note 69 (having only 327 views as of January 15, 2019).

to uncover the existence of a rulemaking, to decipher the issues at stake, and to prepare persuasive comments. As one professor notes, "In the absence of *significant agency efforts* to encourage public participation in rulemaking, small groups with similar parochial interests, often the regulated entities, find it much easier to organize and participate than more diffuse groups in which most members have relatively little at stake, often the regulatory beneficiaries."[71] In other words, regulated industries have more to lose (or to gain) in the immediate aftermath of increased or decreased regulation,[72] and they can do more about it.

In a natural response to the prospect of increased oversight, industries can—and will—launch "propaganda" campaigns of their own, as demonstrated by the American Farm Bureau's #DitchTheRule campaign combatting the EPA's proposed Clean Water Act.[73] By preventing an agency from disclosing its stance during the comment process, the RAA allows regulated industries to engage in these "propaganda" campaigns unchecked by any agency efforts. Section 3(c)(6) of the RAA would position agencies at the mercy of their industrial adversaries during the comment period by prohibiting their response to such attacks, distorting the public's opportunity to read fully informed comments from both sides of a debate. Such a regime would be counterproductive to any effort to increase administrative transparency or public participation during the comment period. Agencies should be able to compete with the narratives of institutional stakeholders that already dominate the political dialogue by elucidating their stance on proposed policies, rather than having to conceal their preferences. There are ways to increase public participation during the comment period. Muzzling agencies is not a productive method for achieving that goal.

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[71] *See* Bell, *supra* note 63 (emphasis added).

[72] *See* Jaclyn L. Falk, *The Behind Closed Door Policy: Executive Influence in the Environmental Protection Agency's Informal Rulemaking*, 47 U.S.F. L. REV. 593, 605–06 (2013) ("Private industry is primarily concerned with the economic impact . . . regulation[s] would have on *their business interests*. Environmental interest groups organize for the purpose of influencing environmental policy in the United States . . . .") (emphasis added).

[73] *See* Porter & Watts, *supra* note 47, at 1209.

IV. CONCLUSION

The House and the Senate have demonstrated their dissatisfaction with the current administrative scheme. And for good reason: the APA left considerable room for Supreme Court interpretation, perhaps expanding the APA too far for Congress's liking. The RAA seeks to reclaim the APA by legitimating and streamlining administrative processes, in part by increasing agency transparency and by giving the public a greater voice in the rulemaking process. However, by censoring agencies during a rule's comment period, § 3(c)(6) would not serve those interests. To the contrary, silencing agencies would reduce administrative transparency, eliminate avenues for the public to learn about the rule or the agency's stance, and create space for regulated entities to dominate the public sphere. Needless to say, until the Act is passed agencies will not go down without a fight. Perhaps the EPA expresses their own argument best: "We want to be as transparent as possible. We want to engage diverse constituents in our work. And we want them to be informed. Social media is a powerful tool to do that."[74]

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