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A R T I C L E

Visual Rulemaking

by Elizabeth G. Porter & Kathryn A. Watts

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I. Introduction

This Article uncovers 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, and sometimes virulently controversial, federal rulemakings. Visuals have played little historical role in rulemaking. 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, a visual transformation in rulemaking has resulted in what might at first appear to be two separate universes: on 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 these universes are not in fact distinct. Visual rulemaking—even when it is outside the four corners of official rulemaking proceedings—is seeping into the technocracy.

This has significant theoretical implications for administrative law. We conclude that agencies' use of visuals to market their regulatory agendas—often in direct coordination with President Barack Obama's sophisticated exploitation of digital media—further two fundamental theoretical justifications underpinning the regulatory state: transparency and political accountability. In addition, visual tools have the potential to democratize public participation and to enable greater dialogue between agencies and the public. Despite these theoretical advantages, visual rulemaking raises serious risks. Visuals may oversimplify

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complexities, appeal to emotions over intellect, and fuel partisan politics.

Visual rulemaking also implicates significant doctrinal questions, including fundamental provisions of the Administrative Procedure Act (APA) and prohibitions on agency lobbying. While none of these doctrinal issues threaten to obstruct visual rulemaking entirely, they do suggest that agencies' use of visuals may need to change some around the margins. Ultimately, we conclude that administrative law doctrine and theory can and should welcome the arrival of visual rulemaking.

II. The Ad Hoc Emergence of Visual Rulemaking

Until recently, visual communication played little role in the rulemaking realm, even among e-rulemaking scholars.¹ However, beginning in the Obama Administration, 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.

A. Agencies

An evolving group of 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), Department of Transportation (DOT), Department of Labor (DOL), and Environmental Protection Agency (EPA)—are not monolithic in their use of visuals. Nonetheless, their collective visual exploits show that rulemaking is no longer a solely textual endeavor.

1. See, e.g., Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers*, Final Report to the Administrative Conference of the United States 24 (Nov. 21, 2013), <https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf> (“[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.”).

The most prominent way in which agencies are deploying visuals in the rulemaking context involves what we call the “outflow” of information from agencies. Outflow-oriented visuals enable agencies to tell—and to sell—their rulemaking stories to the American people, and to counter narratives offered by any opposing institutional stakeholders. At the forefront of this emerging trend, EPA has leveraged visual media to promote high-profile rulemakings, particularly its Clean Power Plan² and Clean Water Rule.³

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, just as it released its notice of proposed rulemaking,⁴ EPA posted a video titled “Clean Power Plan Explained” to its *YouTube* channel,⁵ illustrating how the proposed rule will “boost our economy, protect our health and environment and fight climate change.”⁶ EPA also used social media to dis-

seminate colorful photographs,⁷ videos,⁸ and infographics about its plan:

EPA Tweets About Proposed Clean Power Plan, 2014



Source: See EPA (@EPA), *Twitter* (June 2, 2014), <https://twitter.com/EPA/status/473528421201752064>; EPA (@EPA), *Twitter* (Sept. 24, 2014), <https://twitter.com/EPA/status/514806567141908481>.

When EPA announced in August 2015 that it was finalizing the Clean Power Plan, a slew of additional visuals followed.⁹ These visuals did not seek participation in the rulemaking. Instead, they marketed the benefits of EPA’s proposal to the American people.

EPA’s clean water rulemaking (also referred to as the “Waters of the U.S.” or “WOTUS” rulemaking) offers a second example of visual rulemaking.¹⁰ Visuals, ranging from videos¹¹ to infographics¹² to a social media *Thunder-*

2. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Sources, 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. § 60).

3. See generally *Clean Water Rule*, U.S. Env’t Protection Agency (U.S. EPA), <http://www.epa.gov/cleanwaterrule> (last visited Feb. 15, 2016).

4. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Sources, 79 Fed. Reg. 34830 (proposed June 18, 2014) (to be codified at 40 C.F.R. § 60).

5. See U.S. EPA, *Clean Power Explained*, *YouTube* (June 2, 2014), https://www.youtube.com/watch?v=AcNTGX_d8mY.

6. *Id.*

7. See, e.g., U.S. EPA (@EPA), *Twitter* (June 10, 2014), <https://twitter.com/EPA/status/476402164169191424> (tweeting the photo of EPA Administrator talking with reporters about proposed rule).

8. See U.S. EPA (@EPA), *Twitter* (June 4, 2014), <https://twitter.com/EPA/status/474169813607383041> (tweeting video of EPA Administrator announcing proposed Clean Power Plan).

9. See, e.g., U.S. EPA (@EPA), *Twitter* (Jan. 13, 2016), <https://twitter.com/EPA/status/687278131208712192>.

10. The WOTUS rulemaking was a joint rulemaking between EPA and the U.S. Army Corps of Engineers. See *Clean Water Rule*, 80 Fed. Reg. 37054 (June 29, 2015).

11. See, e.g., U.S. EPA, *EPA White Board: Clean Water Act Rule Proposal Explained*, *YouTube* (Mar. 25, 2014), https://www.youtube.com/watch?v=fOUESH_JmA0.

12. See, e.g., EPA Water (@EPWater), *Twitter* (May 26, 2015), <https://twitter.com/EPWater/status/603300591113216000>; EPA Water (@EPWater), *Twitter* (June 4, 2015), <https://twitter.com/EPWater/status/606515913077215233>.

clap campaign,¹³ represented a highly coordinated effort to convince America that #CleanWaterRules, featuring everything from a fly fisherman¹⁴ to local beer:

EPA #CleanWaterRules Tweet, 2015



Source: EPA Water (@EPAwater), TWITTER (May 26, 2015), <https://twitter.com/EPAwater/status/603303236456558592>.

Interestingly, many of the visuals that EPA circulated during its Clean Water Act rulemaking were *responses* to public feedback on its proposed rule.¹⁵ Furthermore, when faced with a vehement #DitchTheRule campaign unleashed by the American Farm Bureau—an organization that advocates on behalf of farmers and ranchers—EPA fired back with its own #DitchTheMyth campaign, using a variety of infographics¹⁶ and videos¹⁷ to counter the 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 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.

13. See *infra* at notes 75–78 and accompanying text (discussing the EPA’s *Thunderclap* campaign).

14. See EPA Water (@EPAwater), TWITTER (Apr. 27, 2015), <https://twitter.com/EPAwater/status/592688337489649665>.

15. See, e.g., EPA Water (@EPAwater), TWITTER (Aug. 27, 2014), <https://twitter.com/EPAwater/status/504640273713205248>.

16. See, e.g., EPA Water (@EPAwater), TWITTER (Sept. 11, 2014), <https://twitter.com/EPAwater/status/510098078398152704> (#ditchthemyth infographic).

17. See, e.g., U.S. EPA, *Waters of the U.S.: Ordinary High Water Mark & Tributaries Explained*, YOUTUBE (Sept. 26, 2014), <https://www.youtube.com/watch?v=hpiTnAYy-I>.

In contrast to their embrace of outflow-oriented visuals, agencies have been much less adept at—or perhaps 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. There are exceptions. This tweet from the Consumer Financial Protection Bureau (CFPB)—the only non-executive agency experimenting with any frequency with visual rulemaking—provides one example:

CFPB Tweet, “Let us know what you think,” 2014



cfpb Consumer Financial Protection Bureau

We’re developing a rule to make comparing prepaid cards easier than ever. Learn more at consumerfinance.gov/blog/prepaid.

Source: CFPB (@CFPB), TWITTER (Nov. 19, 2014), <https://twitter.com/CFPB/status/535123637582708736>.

The tweet includes a link that takes viewers directly to a CFPB blog post stating: “If you want to influence the design of a new prepaid card fee disclosure, let us know what you think. Submit a comment at Regulations.gov,” followed by the appropriate hyperlink.¹⁸ Overall, however, agencies have eschewed using visuals in this fashion.

A third and final way in which agencies are using visuals is to nudge Congress to take legislative action that would advance agencies’ and the president’s political agenda. We call this “overflow” because it spills over the edges of specific rulemaking proceedings and into the legislative arena.¹⁹ Consider, for example, DOL’s #RaiseTheWage campaign. DOL lacks regulatory authority to raise the minimum wage for all workers nationwide.²⁰ Consistent with President Obama’s minimum wage campaign,²¹ however, DOL

18. Eric Goldberg, *Prepaid Products: New Disclosures to Help You Compare Options*, CFPB Blog (Nov. 13, 2014), <http://go.usa.gov/srZA>.

19. See, e.g., *Grow America*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/grow-america> (last visited Feb. 25, 2016) (linking to video on DOT’s “Grow America” campaign, which pushed for six-year funding bill).

20. *Questions and Answers About the Minimum Wage*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/minwage/q-a.htm> (last visited Feb. 25, 2016).

21. See, e.g., The White House, (@whitehouse), INSTAGRAM (Aug. 12, 2014), <https://www.instagram.com/p/rnIEKmqI/> (infographic asking Congress to raise minimum wage to \$10.10).

posted an entire page of colorful “shareables” to its website, visually advocating for a higher national minimum wage²²:

**Shareables From DOL's
#RaiseTheWage Campaign**



Source: *Shareables*, U.S. DEP'T OF LABOR, <http://www.dol.gov/featured/minimum-wage/infographics> (last visited Feb. 25, 2016).

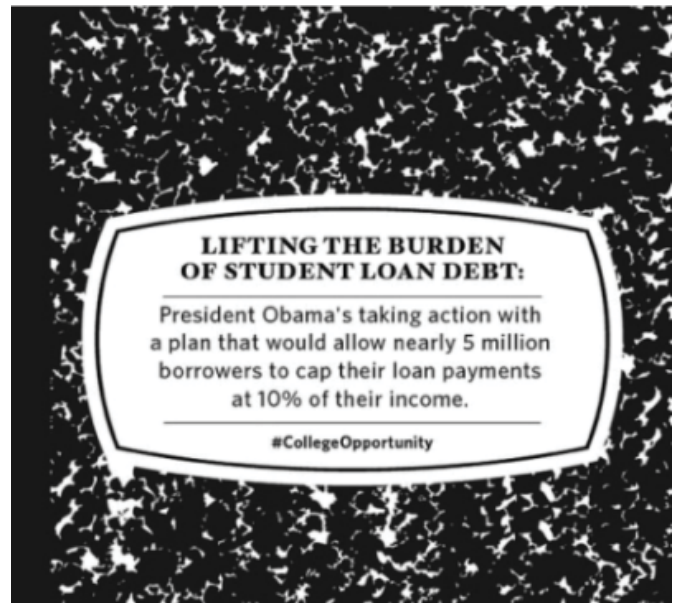
This is one example of how agencies are leveraging visual communications even beyond the confines of their delegated authority.

B. The President

Like agencies, Obama leveraged visuals to control and shape the regulatory state. First, he used visuals to show his influence on the initiation and substance of rulemakings and to publicly throw his political capital behind proposed rules. This can be seen in a variety of high-stakes

rulemakings, including DOL's fiduciary duty rule,²³ DOL's overtime rule,²⁴ and EPA's and DOT's fuel efficiency standards.²⁵ Perhaps the best example, however, is Obama's effort to tackle student debt.²⁶ In June 2014, Obama signed a memorandum directing the Department of Education (DOE) to propose student debt regulations.²⁷ Simultaneously, the White House issued a steady stream of visual communications designed to spread the president's message of regulatory action, including a photo of Obama signing the memorandum while flanked by student borrowers,²⁸ and an *Instagram* image of a school notebook highlighting key points of Obama's plan²⁹:

**Visuals Accompanying Obama's Directive
to DOE Regarding Student Debt, 2014**



23. See *Weekly Address: Ensuring Hardworking Americans Retire With Dignity*, THE WHITE HOUSE (Feb. 28, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/28/weekly-address-ensuring-hardworking-americans-retire-dignity>.
24. See The White House, *Weekly Address: Rewarding Hard Work by Strengthening Overtime Pay Protections*, YOUTUBE (March 15, 2014), <https://youtu.be/HGqFQxEtX5k?list=UUYxRlFDqcWM4y7FfpIAN3KQ> (showing Obama explaining that he directed DOL to update its overtime rules).
25. See The White House, FACEBOOK (Feb. 18, 2014), <https://www.facebook.com/WhiteHouse/photos/a.158628314237.115142.63811549237/10152290509134238/?type=3&theater> (infographic explaining how Obama directed formulation of new fuel efficiency standards).
26. See *generally Making College Affordable*, THE WHITE HOUSE, <https://www.whitehouse.gov/issues/education/higher-education/making-college-affordable> (last visited Feb. 25, 2016).
27. See Barack Obama, *Student Loan Repayments*, THE WHITE HOUSE (June 9, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments> (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).
28. See David Hudson, *President Obama on Student Loan Debt: “No Hard-Working Young Person Should Be Priced Out of a Higher Education,”* WHITE HOUSE BLOG (June 9, 2014), <https://perma.cc/TU2C-EHR6>; see also The White House, (@whitehouse), INSTAGRAM, <https://www.instagram.com/p/pCvCwBQisI/>.
29. See The White House, (@whitehouse), INSTAGRAM (June 9, 2014), <https://www.instagram.com/p/pCBHrSQisT/?taken-by-whitehouse>.

22. See *Shareables*, U.S. DEP'T OF LABOR, <http://www.dol.gov/featured/minimum-wage/infographics> (last visited Feb. 25, 2016).



Source: The White House, (@whitehouse), INSTAGRAM, <https://www.instagram.com/p/pCBHrSQisT/?taken-by=whitehouse>

The White House also posted a video to its blog and to *YouTube* in which Obama spoke passionately about his personal student debt experiences.³⁰ These visuals highlighted the president's involvement in prompting DOE to address the issue of student debt. Ultimately, DOE listened.³¹

President Obama also used visuals as a mechanism for claiming credit for and asserting ownership over final rules. One illustration is in the “memo to America”—a modern fireside chat—that Obama issued just one day before EPA announced its final version of the Clean Power Plan³²:

Obama's Memo to America on Clean Power Plan, 2015



Source: The White House, President Obama on America's Clean Power Plan, *YouTube* (Aug. 2, 2015), <https://youtu.be/uYXyYFzP4Lc>

The video, with a voiceover by Obama, illustrates why his “administration” is releasing “[t]he biggest, most impor-

tant step we've ever taken to combat climate change.”³³ Notably, the video does not mention that the Clean Power Plan was the product of a long and highly technical rule-making process led by EPA.³⁴

C. Stakeholders Outside of the Executive Branch

Rulemaking stakeholders outside the executive branch—industry insiders, members of Congress, the media, and everyday Americans—also are using visuals to create a public dialogue about rulemaking. Members of Congress, for example, frequently disseminate visuals about rulemaking,³⁵ sometimes directing constituents to the official rulemaking process,³⁶ other times simply encouraging a political dialogue on social media.

A tweet from Sen. Ted Cruz, opposing a proposed Internal Revenue Service (IRS) rule involving tax-exempt social welfare organizations, falls into the latter category:

Tweet From Senator Ted Cruz, 2014



Source: Ted Cruz (@tedcruz), *Twitter* (Feb. 18, 2014), <https://twitter.com/tedcruz/status/435870573051121664>

30. See The White House, *President Obama Speaks on Student Loan Debt*, *YouTube* (June 9, 2014), <https://youtu.be/Mz5prW9iw14>.

31. See Student Assistance General Provisions, 80 Fed. Reg. 67204 (Oct. 13, 2015).

32. See *Clean Power Plan for Existing Power Plants*, U.S. EPA, <http://www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants> (last visited Feb. 25, 2016) (noting that EPA announced its final Clean Power Plan on August 3, 2015).

33. The White House, *President Obama on America's Clean Power Plan*, *YouTube* (Aug. 2, 2015), <https://youtu.be/uYXyYFzP4Lc>.

34. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Sources, 80 Fed. Reg. at 64662, 64663 (noting the “unprecedented outreach and engagement with states, tribes, utilities, and other stakeholders” that led to promulgation of the rule).

35. See, e.g., Senator Pat Toomey, *Pushing Back on Out-of-Control EPA Regulations*, *YouTube* (April 9, 2014), <https://www.youtube.com/watch?v=8VX-wiMGUEg> (responding to proposed Clean Water Rule).

36. See, e.g., Senator Chuck Grassley, *Supporting the Renewable Fuel Standard*, *YouTube* (Jan. 16, 2014), https://www.youtube.com/watch?v=r_oLk5e-7dI (encouraging Iowans to file comments with EPA on its proposed renewable fuel standard).

This tweet was not designed to prompt constituents to file official comments during the public comment period, which had already closed.³⁷ Rather, it linked to a page that expressly requested viewers to “[s]pread the word about this proposed rule change with your *Facebook* friends and *Twitter* followers.”³⁸

Sometimes, the media uses visuals to put a spotlight on proposed regulations and encourage public comments on the rules. No better example of this exists than John Oliver’s late-night comedy spot on the Federal Communications Commission’s (FCC) net neutrality rulemaking, which called upon viewers to speak up and gave them the web address for the agency’s official commenting platform.³⁹ This proved tremendously effective, ultimately prompting 45,000 new comments to flood into FCC’s comment system.⁴⁰ Interest groups have deployed similar tactics.⁴¹

At other times, visuals seem designed primarily to drum up unofficial political support. Consider again the American Farm Bureau’s #DitchTheRule campaign.⁴² A centerpiece of the campaign was a video parody set to the musical score “Let It Go” from the movie *Frozen*.⁴³ In the video, children pretend to canoe, fish, and swim in dry ditches on their farm:

#DitchTheRule Video Parody, 2014



Source: See Missouri Farm Bureau, *That’s Enough—“Let It Go” Parody*, YOUTUBE (May 23, 2014), <https://youtu.be/9U0OqJqNbbs>

37. See *Stop the IRS’s Abuse of Power*, Senator Ted Cruz, <http://www.cruz.senate.gov/irs/> (last visited Feb. 25, 2016) (“The public commenting period may have ended, but you can still make your voice heard.”).

38. *Id.*

39. HBO, *Last Week Tonight With John Oliver: Net Neutrality* (June 1, 2014), YOUTUBE, <https://www.youtube.com/watch?v=fpbOEOrrHyU>, at 11:07.

40. See Ben Brody, *How John Oliver Transformed the Net Neutrality Debate Once and for All*, BLOOMBERG (Feb. 26, 2015), <http://www.bloomberg.com/politics/articles/2015-02-26/how-john-oliver-transformed-the-net-neutrality-debate-once-and-for-all>.

41. See, e.g., *Healthcare Professionals’ Perspectives: FDA Proposed Rule on Generic Drug Labeling*, GPHA ONLINE, http://www.gphaonline.org/media/cms/GPhA5886_infographic_v5_a_.pdf (last visited Feb. 25, 2016); see also Victor Villegas, *You Need to Comment on the #NPRM*, YOUTUBE (March 6, 2015), <https://www.youtube.com/watch?v=Cyr8oNhNZlo&app=desktop> (music parody set to tune of famous “YMCA” song designed to encourage comments on proposed drone rules).

42. See, e.g., Nebraska Farm Bureau, *Waters of the U.S. Rule Explained*, YOUTUBE (June 30, 2014), <https://www.youtube.com/watch?v=SF9u2696gg&app=desktop>; #DitchTheRule, FARM BUREAU, <http://wamc.org/post/farmers-fight-epa-over-proposed-water-rule#stream/0> (last visited Feb. 25, 2016); *It’s Time to Ditch the Rule*, American Farm Bureau, <http://ditchtherule.fb.org/> (last visited Feb. 26, 2016).

43. See Missouri Farm Bureau, *That’s Enough—“Let It Go” Parody*, YOUTUBE (May 23, 2014), <https://youtu.be/9U0OqJqNbbs>.

The video has more than 140,000 views,⁴⁴ and the family was interviewed by Fox News.⁴⁵ Thus, the Farm Bureau successfully used the video to call public attention to its opposition to EPA’s proposed rule.

III. Implications for the Future of Rulemaking

As we have demonstrated, rulemaking is no longer a solely textual affair. Below, we begin the yet-uncharted inquiry into the theoretical and doctrinal implications of this emerging phenomenon.

A. Theoretical Implications

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. Notably, reliance on political accountability rests on a big but often unstated assumption: that the electorate will indeed know whom to blame—or whom to credit—for regulatory action or inaction. However, agencies routinely strip the rulemaking record of any references to political influences.⁴⁶ This lack of transparency has serious consequences for administrative law’s reliance on theories of political control and accountability.⁴⁷ Visual rulemaking enhances political accountability by raising the visibility of agencies’ regulatory activities and the president’s tight control over executive agencies.

A second—and somewhat conflicting—justification frequently offered in support of agency rulemaking turns on notions of agency expertise. Administrative law today veers between acknowledging the important role that politics plays in justifying agency action, and demanding that agencies act in a technocratic, expert-driven manner. Not surprisingly, visual rulemaking reflects—indeed, heightens—this longstanding, simmering tension, making clear what often goes unspoken: there is no perfectly clean demarcation between expert-driven decisions and policy-driven decisions.

For example, the American Farm Bureau’s #DitchtheRule campaign—and EPA’s corresponding #DitchtheMyth campaign—highlights how politics, and not merely science, influence regulations. In the competing campaigns, the Farm Bureau unleashed a variety of visuals designed to establish as “fact” various takes on EPA’s rule that EPA

44. *Id.*

45. See *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>.

46. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 23 (2009) (“[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.”).

47. 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”).

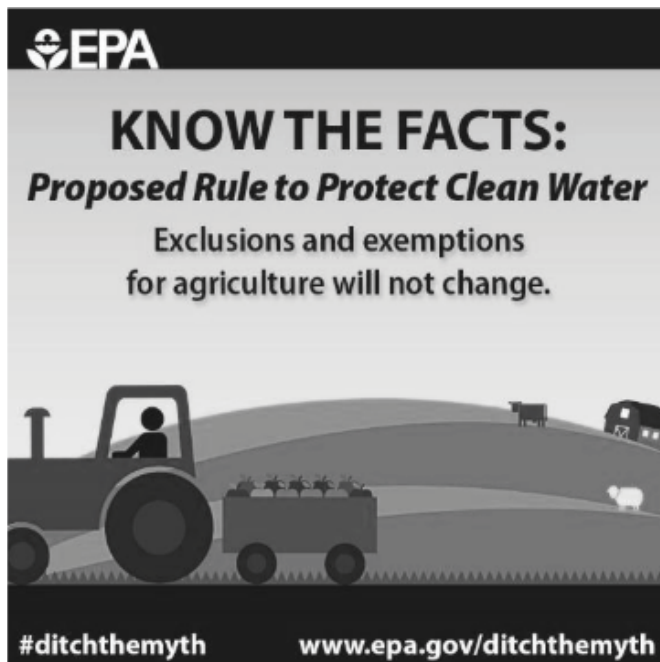
countered by deeming them “myths.”⁴⁸ For example, see this visual battle about the scope of the rule:

Image of Agricultural Land, #DitchTheRule Campaign, 2014



Source: See #DitchTheRule, http://ditchtherule.fb.org/custom_page/stop-epa-overreach-farm-bureaus-stallman-tells-congress/

EPA's Response, #ditchthemyth, 2014



Source: EPA Water (@EPAwater), TWITTER (Sept. 11, 2014), <https://twitter.com/EPAwater/status/510098078398152704>

48. Compare American Farm Bureau, #DitchTheRule, http://ditchtherule.fb.org/custom_page/stop-epa-overreach-farm-bureaus-stallman-tells-congress/ (last visited Feb. 26, 2016), with EPA, *Ditch the Myth*, U.S. EPA,

Lost in this tussle was the complexity of the rulemaking proceeding, which resulted in a 74-page final rule.⁴⁹ Instead, simplified “facts” and “myths” were visually slung back and forth in what looked more like a political campaign than a technocratic process.

Thus, when it comes to the expertise rationale for agency rulemaking, visual communications present a mixed bag. On one hand, visuals threaten to oversimplify, obscure, and twist facts; on the other hand, visuals demonstrate that even purportedly technocratic rulemakings involve policy calls, thereby enhancing transparency in the process.

Finally, a third justification frequently offered in support of the legitimacy of rulemaking is that agencies must allow significant public participation when promulgating rules. Visuals may help overcome barriers to public participation in the rulemaking process. For example, EPA's video explaining the Clean Power Plan has been viewed more than 28,000 times.⁵⁰ Similarly, Obama's video message to FCC on net neutrality has been viewed nearly one million times.⁵¹ Visuals circulated by parties outside of the executive branch also play a role.

In sum, visual rulemaking has the potential to strengthen and further democratize public participation, and 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.

B. Doctrinal Implications

The use of visuals in the rulemaking realm raises significant doctrinal issues in key areas. We discuss two here: (1) the APA; and (2) anti-lobbying and anti-propaganda laws.⁵²

I. The APA

Nothing in the APA, enacted in 1946,⁵³ expressly speaks to agencies' or others' use of visuals in the rulemaking realm. Nonetheless, agencies' treatment of visuals could run afoul of the APA's notice-and-comment, record, and open mind requirements.

The APA requires that agencies' notices of proposed rulemakings include “a statement of the time, place, and nature of public rulemaking proceedings.”⁵⁴ This notice requirement is designed to “afford interested parties a

http://www.epa.gov/sites/production/files/201407/documents/ditch_the_myth_wotus.pdf (last visited Feb. 26, 2016).

49. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37054.

50. EPA, *Clean Power Explained*, YouTube (June 2, 2014), https://www.youtube.com/watch?v=AcNTGX_d8mY.

51. See The White House, *President Obama's Statement on Keeping the Internet Free and Open*, YouTube (Nov. 10, 2014), <https://www.youtube.com/watch?v=uKcJQPvWfDk>

52. The full-length version of this Article also discusses the First Amendment. Other legal issues might surface as well, including those concerning copyright and *ex parte* contacts between agencies and stakeholders.

53. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-706 (2012)).

54. 5 U.S.C. §§ 553(b)(1), (3).

reasonable opportunity to participate in the rulemaking process.”⁵⁵ Agencies deploying online visuals seeking feedback routinely fail to clarify whether or not that feedback will be considered an official “comment,” thus triggering agencies’ obligation to consider and to respond to all significant comments received.⁵⁶ To the extent this ambiguity prevents the public from understanding the proper channel for participating in the rulemaking process, it undermines the central purpose of the APA’s notice requirement.⁵⁷

For example, consider this 2015 *Facebook* post by FDA:

FDA’s Visual Announcement Inviting Comments on Use of Term “Natural,” 2015



Source: U.S. Food & Drug Admin., FACEBOOK (Nov. 10, 2015), <https://www.facebook.com/FDA/photos/a.411715387298.184452.94399502298/10153709622187299/?type=3&theater>

Text accompanying the graphic question does contain a link to an FDA webpage, which prominently and clearly notifies interested stakeholders how and where they can file official comments.⁵⁸ Nonetheless, because *Facebook* allows users to “comment,” viewers might reasonably conclude that they could participate in FDA’s proceeding simply by commenting on *Facebook*.

Whether an agency will only consider feedback filed on Regulations.gov as official comments, or includes feedback solicited in social media as part of the official rulemaking record, it should clearly notify public stakeholders.⁵⁹ Ultimately, we believe the latter approach is required. When justifying a final rule, an agency may not rely upon materials that are not in the rulemaking record.⁶⁰ 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.

More broadly, agencies’ use of visuals to campaign for proposed rules could also call into question the legitimacy of agencies’ consideration of public comments. 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.”⁶¹ Thus, agencies should ensure that their visuals do not turn into what appear to be uncompromising advocacy campaigns.⁶²

Visual rulemaking also raises questions relating to the APA’s record requirement.⁶³ For judicial review, the administrative record must contain materials that are directly or indirectly considered by the agency, not just those materials that the agency actually relied upon.⁶⁴ An agency may not, for example, “skew the record by excluding unfavorable information” that was before it at the time the decision was made.⁶⁵ Notably, however, courts grant agencies “a presumption that [they] properly designated the administrative record absent clear evidence to the contrary.”⁶⁶ An agency’s failure to include its videos in the administrative record—or an agency’s omission of textual feedback submitted by the public in response to an agency communication—might lead to disputes over the sufficiency of the record.

2. Anti-Lobbying and Anti-Propaganda Statutes

For nearly as long as agencies have existed, Congress has been uncomfortable with agencies’ power.⁶⁷ 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.⁶⁸ Thus, for over a century, Congress has passed statutes that attempt to circumscribe agency communications in two ways.

The first includes anti-publicity and anti-propaganda provisions in annual appropriations bills aimed at limiting agencies’ messaging to the American public.⁶⁹ The

55. *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.”).

56. *See, e.g., Reyblatt v. 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.”).

57. *Cf. Herz, supra* note 1, 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.”).

58. “*Natural*” on Food Labeling, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm456090.htm> (updated Dec. 24, 2015).

59. *Cf. Recommendation 2011-8, Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2257, 2265 (Jan. 17, 2012) (asserting that agencies should “provide clear notice as to whether and how it will use [a social media] discussion in the rulemaking proceeding”).

60. *See Herz, supra* note 1, at 73 (“Material that is not put into the rulemaking docket . . . cannot be relied on to justify the final rule.”).

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

62. *See, e.g., Complaint for Declaratory and Injunctive Relief* at 3, 23, 28, *Am. Farm Bureau v. EPA*, No. 3:15-cv-00165 (S.D. Tex. July 2, 2015).

63. 5 U.S.C. § 706.

64. *See, e.g., Tafas v. Dudas*, 530 F. Supp. 2d 786, 793-94 (E.D. Va. 2008) (“[A]n agency may not exclude information on the ground that it did not ‘rely’ on that information in its final decision.”).

65. *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 118 F. Supp. 3d 244 (D.D.C. 2015).

66. *Lee Memorial Hosp. v. Burwell*, 109 F. Supp. 3d 40, 47 (D.D.C. 2015).

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

68. *See* WILLIAM V. LUNEBURG, THE LOBBYING MANUAL 338 (Thomas M. Susman and Rebecca H. Gordon, Eds., 4th ed. 2009) (“Congress does not want to fund anyone who tries to influence its actions.”).

69. Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-235, div. E, Section 718.

second targets lobbying of Congress by agencies, particularly “grassroots lobbying,” which occurs when agencies encourage the public to contact legislators to support or oppose a congressional measure.⁷⁰ In general, the laws in both categories have been woefully ineffective. The Government Accountability Office (GAO), left with the task of interpreting these provisions,⁷¹ has chiseled away at the laws’ broad wording, leaving little agency conduct within their ambit. Nevertheless, congressional outrage over EPA’s use of visual media in its clean water rulemaking appears to have breathed some new life into these laws.

For example, in 2015, GAO found that EPA violated the propaganda ban by disseminating “covert propaganda”⁷² during its #CleanWaterRules campaign. GAO has interpreted the prohibition on “covert propaganda” as essentially a disclosure requirement.⁷³ As part of its campaign, EPA used *Thunderclap*—a social media platform designed to create an “online flash mob.”⁷⁴ EPA created a *Thunderclap* page titled “I Choose Clean Water” and used social media to sign up supporters:

EPA “I Choose Clean Water” Facebook Post, 2014



Source: U.S. EPA, *EPA Water Is Worth It*, FACEBOOK (Sept. 13, 2014), <https://www.facebook.com/EPAWaterIsWorthIt/posts/10152446114118337>.

70. U.S. GOV’T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 4 GAO-RB pt. C s. 11 at 1, 2004 WL 5661385 (2015).
71. See LUNEBURG, *supra* note 68, at 340 (GAO has authority “to investigate all matters relating to the use of appropriated funds”).
72. See, e.g., Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-235, div. E, Section 718 (barring use of appropriations for “propaganda”).
73. See Letter From Susan A. Poling, General Counsel, Gov’t Accountability Off., to James M. Inhofe, Chairman, Comm. on Env’t & Pub. Works (Dec. 14, 2015), <http://www.gao.gov/assets/680/674/674163.pdf>.
74. See *Frequently Asked Questions*, THUNDERCLAP, <https://www.thunderclap.it/faq> (last visited Feb. 20, 2016).

At 2 p.m. on September 29, 2014, the social media sites of every registered supporter stated: “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family, and my community.”⁷⁵ The message, which contained a hyperlink connected to EPA’s web page on the Clean Water Rule,⁷⁶ reached over 1.8 million people.⁷⁷

GAO found that this campaign constituted “covert propaganda” because, while original supporters were aware of EPA’s sponsorship, the *Thunderclap* message itself did not identify EPA; rather, it appeared have been written by the person on whose social media site it appeared.⁷⁸

GAO also found that EPA violated the prohibition on grassroots lobbying.⁷⁹ GAO’s finding focused on an EPA blog post, *Tell Us Why #CleanWaterRules*,⁸⁰ which contained embedded hyperlinks to organizations supporting the Clean Water Rule. One such organization’s website contained a button that said, “Tell Congress to stop interfering with your right to clean water!”⁸¹ Notwithstanding EPA’s inability to control external websites, GAO found that EPA had responsibility for its own message, including hyperlinks.⁸²

GAO’s 2015 report indicates that in a hostile political environment, these provisions may be used against adventurous agencies. On balance, however, the rise of visual media is likely to weaken rather than strengthen anti-publicity and anti-lobbying laws. There is an ever-increasing quantity of agency communications—far too much for GAO or Congress to monitor. Moreover, 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.

IV. Conclusion

Visual rulemaking is a new and dynamic phenomenon. Visuals shed 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. Even more importantly, visual rulemaking promises to raise public awareness of rulemakings and to empower participation by more diverse stakeholders. In light of these benefits, we believe that administrative law doctrine and theory should welcome, rather than simply ignore, this growing and influential phenomenon.

75. See Poling, *supra* note 73, at 4.

76. *Id.* (noting that hyperlink has since been disabled).

77. See U.S. EPA, *I Choose Clean Water*, THUNDERCLAP, <https://www.thunderclap.it/projects/16052-i-choose-clean-water> (last visited Feb. 20, 2016).

78. See Poling, *supra* note 73, at 13. Notably, GAO found no “covert propaganda” in the agency’s extensive #DitchTheMyth campaign, because “the graphics used in the #DitchTheMyth campaign contained the EPA logo, and the prewritten tweets contained the ‘#DitchTheMyth/@EPA water’ ascription at the end.” See *id.* at 15.

79. *Id.* at 17-20.

80. Travis Loop, *Tell Us Why #CleanWaterRules*, THE EPA BLOG (Apr. 7, 2015), <https://blog.epa.gov/blog/?s=tell+us+why+%23cleanwaterrules>.

81. See Poling, *supra* note 73, at 8.

82. *Id.* at 23-24.