

Michigan Law Review

Volume 119 | Issue 6

2021

The Limits of Deliberation About the Public's Values

Mark Seidenfeld

Florida State University College of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Law and Philosophy Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Mark Seidenfeld, *The Limits of Deliberation About the Public's Values*, 119 MICH. L. REV. 1111 (2021).
Available at: <https://repository.law.umich.edu/mlr/vol119/iss6/5>

<https://doi.org/10.36644/mlr.119.6.limits>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE LIMITS OF DELIBERATION ABOUT THE PUBLIC'S VALUES

Mark Seidenfeld*

THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY. By *Blake Emerson*. New York: Oxford University Press. 2019. Pp. xii, 276. \$90.

INTRODUCTION

In *The Public's Law: Origins and Architecture of Progressive Democracy*, Blake Emerson¹ provides a new intellectual history of the administrative state and uses this history to develop a justification for it. Emerson's project revolves around the work of American Progressive thinkers, especially as they were influenced by the German philosopher G.W.F. Hegel.² Emerson plumbs the Hegelian roots of these various Progressives' understanding of the state to suggest how the administrative state of today can best be structured to implement democratic governance that reflects Hegel's belief that the state should foster freedom via rational deliberative processes.³

At the outset, I must confess that I am enamored of efforts to justify and improve the current administrative apparatus of the United States. I myself have engaged in that enterprise.⁴ Although I am skeptical that any coherent theoretical justification will ever be free from objections,⁵ such endeavors are useful to identify shortcomings in the structure of the administrative state

* Patricia A. Dore Professor of Administrative Law, Florida State University College of Law. Thanks to my colleague Rob Atkinson, without whose help I would have found Hegel's philosophy impenetrable.

1. Assistant Professor of Law, UCLA School of Law. [Editor's note: Professor Emerson offers a response to Professor Seidenfeld at Blake Emerson, *The Values of the Administrative State: A Reply to Seidenfeld*, 119 Mich. L. Rev. Online 61 (2021).]

2. I am a scholar of neither Hegel's philosophy nor the works of American Progressives. Hence, in this Review I accept Emerson's description of the philosophies of these thinkers. My Review focuses instead on a critique of Emerson's use of these philosophies as they are described in *The Public's Law*.

3. See pp. 11–12.

4. See, e.g., Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397 (2013) [hereinafter Seidenfeld, *Role of Politics*]; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) [hereinafter Seidenfeld, *Civic Republican Justification*].

5. See Mark Seidenfeld, *The Quixotic Quest for a "Unified" Theory of the Administrative State*, 5 ISSUES LEGAL SCHOLARSHIP, no. 1, 2005, at 1, 14–15, <https://doi.org/10.2202/1539-8323.1056> [<https://perma.cc/3L4F-XGGU>].

and the administrative law doctrines that govern it. Often those shortcomings stem from attempts to implement previously accepted justifications for the administrative state, and questioning those prior justifications is therefore an important means to update administrative law to reflect acceptable bases for legitimating American bureaucracy.

In *The Public's Law* Emerson presents some inviting, albeit provocative, ideas about the appropriate role of the bureaucracy in our democracy. That said, overall the book did not live up to my initial expectations. Specifically, Emerson seems to harbor an unrealistic notion of the capacity for the public to engage in deliberation about abstract values. Perhaps more disappointingly, Emerson's attempt to modify administrative law to bring democratic values to Hegel's political philosophy is spelled out only with the broadest of brush strokes. Thus, my initial enthusiasm that *The Public's Law* would lead to concrete suggestions about how administrative law might be structured to deliver the Progressive democracy that Emerson desires proved overly optimistic.

To best develop my critique of *The Public's Law*, it is helpful to first summarize Emerson's view of the Hegelian theory of the state, and the attempts of various thinkers to borrow from that philosophy to build a Progressive democratic state. Following this description, I lay out Emerson's vision for a Progressive administrative state. Finally, I explain why I am unpersuaded by Emerson's vision for restructuring our understanding of the administrative state and the administrative law that governs it, suggesting along the way legal doctrines that I think would better serve the goals of Emerson's Progressive vision.

I. HEGEL'S THEORY OF THE STATE

According to Emerson, Hegel understood "the modern state as an ethical community committed to the norm of individual freedom" (p. 25). For Hegel, freedom entailed a life of "self-determination, the process of the human will 'giving itself content.'"⁶ But the content of human will was not simply the autonomy to pursue one's individual preferences. Rather, because people are social beings, it required a society in which "individuals form bonds of solidarity on the basis of their common interests" (p. 26). The state was necessary because "[w]hen individuals are subjected to powerful and antagonistic social forces that cannot be understood, engaged, or countered by means of property and contract, their self-determination requires a public authority that implements their shared interests and redresses their collective harms" (p. 30).

Therefore, the state had an obligation to promote freedom, and this obligation was composed of two components. The state had to ensure that each

6. P. 25 (quoting GEORG WILHELM FRIEDRICH HEGEL, ENZYKLOPÄDIE DER PHILOSOPHISCHEN WISSENSCHAFTEN IM GRUNDRISSE (1830): DRITTER TEIL; DIE PHILOSOPHIE DES GEISTES § 469, at 288 (Eva Moldenhauer & Karl Markus Michel eds., Suhrkamp 1970) (1830) (Emerson's translation)).

person had what Emerson terms the “requisites” to live freely (p. 65). Essentially the state was to guarantee each person sufficient resources to allow them to participate in society by exercise of their dominion over property and by entering into contractual relationships. But also the state had an obligation to promote the society that allowed individuals to “relate their own isolated actions and interests to those of similarly situated persons and to act with them to achieve shared purposes” (p. 26). Thus, the state was responsible for facilitating the creation of a society that reflected people’s shared communal interests.

For Hegel, the state was to fulfill its dual obligations by creating law, which Hegel indicated is done in two ways. Statutes enacted by the legislature reflected universal law, which was binding on those who implemented the law. But equally important was the translation of the universal into the particular. What today we would call administration was responsible for “arbitrat[ing] ‘the conflict between private interests and particular concerns of the community, and between both of these together and the higher viewpoints and ordinances of the state.’”⁷ Thus the executive was responsible for regulating to protect the public’s rights to freedom both in terms of provision of requisites and maintenance of a society that reflects the public’s common interest (p. 30). As Emerson summarizes Hegel’s notion of law: “Legislation . . . must have some determinacy in order to retain its status as a norm that guides state action. But it must leave sufficient room for administrative adaptation in order to retain its generality and uniformity over time and across various realms of application” (p. 29).

Hegel posited that government bureaucracy was the proper institution to translate the universal to meet particular circumstances in a manner that, by focusing on the public good, would still be universal in nature (p. 32). Hegel recognized two particular attributes of administrators that render them especially well suited to this task. First, Hegel believed that rational thought and deliberation were crucial to translating statutory universal law into particular regulatory rules. Hegel thought public officials were educated in the process of discourse and deliberation as well as in training in the particulars of their fields, which would predispose them to utilize what Emerson characterizes as “practical reason that can effectively grapple with the values at stake” (p. 32). Second, the role of public officials puts them above the competition of interest groups for their preferred regulatory outcomes. In essence, they seek to further the common interests that characterize the public’s interest. “[D]ealing with matters of common concern has the effect of educating public officials to think from the perspective of the community as a whole rather than from the self-interested perspective of market actors” (p. 31).

7. P. 30 (quoting G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 289A (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820)).

II. PROGRESSIVE ATTEMPTS TO DEMOCRATIZE HEGEL'S ADMINISTRATIVE STATE

Progressive scholars and politicians were responsible for creating much of the foundation for the current federal administrative state beginning just after Reconstruction and culminating in President Franklin Delano Roosevelt's New Deal.⁸ Emerson notes that many of the Progressive thinkers had studied and were significantly influenced by Hegel's political philosophy (pp. 61–62). According to Emerson, however, American Progressives did not merely adopt Hegel. *The Public's Law* shows that these thinkers democratized Hegel's thinking in the course of borrowing from it (p. 19).

By tracing this lineage, Emerson attempts to rehabilitate Hegel's influence on the origins of administrative law. Rather than "odious" and "un-American," as conservative critics have argued, the Progressives recast Hegel's theory in a democratic mold more fitting with the United States Constitution.⁹ Emerson's history also shows that "[t]he usual story, that participatory forms of administration were latecomers to American public law, is . . . myopic" (p. 66). A vision of a democratic administrative state in fact dates to the earliest American thinking about the bureaucracy (p. 2).

A major conundrum for Progressives, working in the shadow of Hegel, was that the United States Constitution clearly located national sovereignty in "the people" and provided mechanisms for democratic input to influence, if not necessarily control, the operation of government.¹⁰ But Hegel's theory of the state located sovereignty in the monarch and was anything but democratic.¹¹ Hegel was skeptical of public opinion as the foundation for law-defining societal norms. As Emerson summarizes Hegel's view, "public opinions . . . arise from experience within civil society [that] are accidental forms of knowledge, as likely to lead to error as to truth" (p. 28). In addition, Hegel's reliance on the public-spirited nature of government officials suggests that he would view private individuals, who have personal interests and desires that might not be shared universally, likely as biased on their evaluation of common interests, which for Hegel were the basis for civil society. For Hegel, the purpose of political representation in the legislature was "not to give voice to public opinion, but to educate the people about their common interests" (p. 28). Through debate, rational deliberation, and the pursuit of framing laws to reflect generally valid norms, the legislature could channel public opinion to find "true thoughts and insight" (p. 28; emphasis omitted).

The Public's Law explores how five Progressive thinkers incorporated different aspects of Hegel's theory into a more democratic vision of the administrative state.¹² W.E.B. Du Bois, who "would have been familiar with

8. See pp. 61–112.

9. See p. 62.

10. See p. 115.

11. See p. 24.

12. See p. 64.

[Hegel's] statist perspective on liberty from his study at Humboldt University in Berlin," focused on the state's obligation to provide the requisites for individuals to live free lives in society (p. 68). In a democracy, such equality would require that African Americans be empowered to participate as equals in the American democratic process. Du Bois not only interpreted the Hegelian principle that the state should guarantee equal opportunity to apply to participation in American democracy but also essentially elevated that principle over the rule of law and recognition of the society envisioned by public opinion at the time.¹³

Woodrow Wilson's attempt to democratize Hegel's administrative state took precisely the opposite position from that of Du Bois's. In true Hegelian fashion, he viewed administration as channeling current social understandings into the implementation of the law (p. 80). Moreover, although he recognized that the Constitution assigned the responsibility that the law be faithfully executed to the president, and the president, like Congress, was accountable to the electorate, he did not see the president's job as controlling the exercise of administrative discretion. Rather, "Wilson pioneered the 'rhetorical presidency,' using his speeches to influence legislation and national public discourse" (p. 83). But, he placed sovereignty solidly in the people themselves and therefore believed that "the 'conscience of administration' must be shaped by public opinion."¹⁴ Notoriously, in stark contrast to the Progressive views of Du Bois, Wilson segregated the federal government, essentially elevating the public's racism over political and social empowerment of African Americans (p. 72).

Other Progressives avoided the tension between the positions of Du Bois and Wilson by conceiving of public opinion as something that good administration needed to cultivate as well as reflect. Early on in his writing, John Dewey clearly subscribed to the Hegelian notion that "[i]n the realization of individuality there is found also the needed realization of some community of persons of which the individual is a member; and conversely, the agent who duly satisfies the community in which he shares, by that same conduct satisfies himself."¹⁵ Dewey later labeled that community as the public, which in some sense reflected the "collective voice of citizens" (p. 89). But for Dew-

13. Later, during the New Deal, Du Bois would make this focus more explicit. He would call for "a suspension of ordinary political accountability and judicial process in order to achieve the egalitarian social conditions under which a future democracy could flourish." P. 71 (citing W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, at 219 (Free Press 1998) (1935)).

14. P. 74. Emerson quotes Wilson asserting: "The ideal for us is a civil service cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with the popular thought, by means of election and constant public counsel, as to find arbitrariness or class spirit quite out of the question." Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197, 217 (1887).

15. P. 86 (quoting JOHN DEWEY, *OUTLINES OF A CRITICAL THEORY OF ETHICS* (1891), reprinted in 3 *JOHN DEWEY, THE EARLY WORKS, 1882-1892*, at 237, 322 (Jo Ann Boydston ed., 1969)).

ey individuals' shared values were insufficiently formed to guide administration. The formation of the public required "free and full discussion[,] which mean[t], in the case of social problems, the maximum use of the capacities of citizens for proposing courses of action, for testing them, and for evaluating the results."¹⁶

Dewey thus sought to democratize administration by requiring public officials to seek out the input from those who would be affected by their regulatory actions, and to take that input into account in evaluating what is in the public's interest. As Emerson reports, Dewey posited that "in the absence of an informed voice on the part of the masses, the wise cease to be wise."¹⁷ He further asserted:

No government by experts in which the masses do not have a chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And the enlightenment must proceed in a way which forces the administrative specialist to take account of the needs.¹⁸

Of particular significance to my evaluation of Emerson's proposed reinvigoration of the Progressives' Hegelian thought, it is crucial to note that Dewey did not envision the general citizenry actually debating regulatory issues and reaching some resolution that would bind an administrative agency. In fact, Dewey and his disciples "saw the need for centralized administrative control as arising from the insufficient knowledge and capacity of individuals to remedy harms" imposed by corporations and other large private institutions in their use of their property.¹⁹ Dewey even expected that providing input about the effects of various private activities that might be regulated was to be done by what today we would call interest groups. "Such bodies could synthesize individual interests into an organized institutional apparatus and so enable the state to reconcile and harmonize the conflicting values within society" (p. 88). Interest groups would help provide feedback of information and deliberation by administrators into individual's values and perceptions of their interests.²⁰ But even the act of providing information was too costly or informationally challenging to expect private individuals to participate directly in the administrative regulatory function.

Mary Follett, for her part, placed interest groups at the center of her vision of a democratic administrative state. She advocated for participatory

16. P. 87 (quoting Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1682 (1990)).

17. See p. 169 (quoting JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 206 (Swallow Press 1954) (1927)).

18. P. 94 (quoting DEWEY, *supra* note 17, at 208.)

19. P. 92 (citing JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 13 (1927)).

20. P. 88 (noting that the para-state and the administrative apparatus "shared organizational logics, professional orientations, collective purposes, and subject matter emphases that facilitated private communication between private persons and officers of the state").

democracy more directly premised on individual membership in interest groups, and the interaction of these groups with the state's administrative apparatus. She formulated her theory as a Hegelian response to pluralism, which viewed the state as providing a forum for interest groups to compete for desired regulatory outcomes in terms of their political power.²¹ Follett embraced interest groups not as adversaries in a zero-sum competition, which she feared would eventually lead to domination by particular groups to the detriment of society as a whole. Rather, Follett viewed the centralized state, and law, as a means of finding ways to unite the interests of various groups to create cooperative solutions to social problems.²² For Follett, administrative agencies held the promise of fulfilling this role because they enjoyed "a certain situational flexibility, which allowed them to restructure social conflict . . . to produce the possibility of broader forms of public power" (p. 101). Moreover, administration also strengthened democracy because it could be structured to require that exercises of regulatory power "arise from a deliberative interchange between the people—already disaggregated into groups with internally legitimate power—and the administration."²³

Frank Goodnow attempted to justify the Progressive administrative state by locating it within the Constitution's assignment of the powers of government. Goodnow saw "in the Constitution a framework in which administration might lawfully proceed—governed by statute, specified by the executive official, and policed by the courts" (p. 104). For Goodnow, the rule of law required that administration be subordinate to legislation, because the legislature was elected by the people and granted the legislative power by the Constitution.²⁴ But the president too was elected by the people, and there-

21. Pp. 96–97. American pluralists in the 1950s supported broad administrative policy-making discretion because they believed the administrative process encouraged agencies to reward regulatory outcomes to those groups whose members most value the expected value of a favorable outcome, which in turn hinged on the number of citizens whose preferences for regulatory outcomes aligned with the outcome the group advocated and the intensity with which those citizens valued those outcomes. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 36–39 (1957) (modelling how competition between groups can allocate government benefits to those groups that value them most); Mark Seidenfeld, *Pyrrhic Political Penalties: Why the Public Would Lose Under the "Penalty Default Canon,"* 72 *GEO. WASH. L. REV.* 724, 726 (2004) ("Pluralists liken the legislative process to a competitive market that leads to an equilibrium outcome that maximizes some version of political wealth . . . [that] reflects both the preferences of each voter and the strengths of those preferences.").

22. P. 101; see also p. 97–98 (discussing Follett's notion that the power of interest groups should be "power-with" rather than "power-over").

23. P. 99. To this end, Follett suggested that agencies hold "experience meetings" before regulating. This would allow all stakeholders to interact with each other and with the experts at the agency. "[T]he experience of the people may change the conclusions of the expert while the conclusions of the expert are changing the experience of the people . . ." P. 100 (quoting M. P. FOLLETT, *CREATIVE EXPERIENCE* 218 (1924)).

24. "Popular government requires that it is the executing authority which shall be subordinate to the expressing authority [i.e., legislature], since the latter in the nature of things can be made much more representative of the people than can executive authority." P. 105 (quot-

fore he believed that the Constitution allowed Congress to give the executive authority to express the will of the state in the details of regulation (p. 106).

Goodnow accepted that the Constitution demanded judicial-type constraints on exercises of administrative power that were quasi-judicial in the sense of applying law to facts in a nonpolitical fashion (pp. 109–10). But he also recognized that administrative actions involved matters that affected the public interest and therefore implemented policy choices (p. 109). The need for judicial-type constraints, however, could be accomplished by insulating administrative decisionmakers from political pressures, and demanding that agencies provide sufficient procedure and explanation for their actions (p. 110). With such protections in place, the appropriate responsibility for regulatory decisions could constitutionally be left to administrative agencies, and should be left to them to decide in accordance with the will of the state rather than allowing judicial countermand that often seemed to reflect judicial rejection of the political will of the nation.²⁵

III. EMERSON'S PROGRESSIVE ADMINISTRATIVE STATE

Emerson's intellectual history intimates at his normative vision of the bureaucracy. But in *The Public's Law's* final chapter, Emerson states his prescriptions directly (p. 151). At the core of Emerson's vision of the Progressive administrative state lies what he characterizes as a deeply democratic deliberative government.²⁶ Emerson argues that a Progressive state has to engage in “[d]eliberative problem-solving,” requiring “the enactment and implementation of laws and regulations that are not completely justified *ex ante* but rather will help to guide future discussion” (p. 164). Prior to this passage, Emerson cites Dewey and Follett to suggest that the debate must be about tangible outcomes not principles (pp. 163–64). But Emerson seems to require more than that when he states:

When officials consider particular regulatory problems, such as pollution, labor market discrimination, or financial regulation, they must use their discretion to rectify asymmetrical social relationships that leave certain social groups with arbitrary and unaccountable authority over others. . . . The officialdom should actively institute the general interest by remedying the maldistribution of power in the existing pattern of social organization. Administrative policies that reduce inequalities of resources, information,

ing FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* 24 (1900)).

25. Goodnow wrote during the infamous *Lochner* era, during which courts invoked property and contract rights to strike down much regulation that reflected the political will at the time. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1388 (2001) (reporting that “contemporary critics criticized the judiciary for failing to defer to the majority legislative will, as embodied in legislative judgments”).

26. For example, Emerson titles a section of his chapter describing his vision of the Progressive state as “Deepening Democratic Rule-Making.” Pp. 172–76.

and access to the political process are therefore to be favored over those that worsen such inequalities or merely perpetuate the status quo. (p. 173)

Emerson thus addresses the tension between Wilson's fidelity to public opinion and Du Bois's focus on enabling those whose contributions to sculpting society are ignored or irrationally discounted by demanding that his Progressive state pay attention to both goals while formulating policy that governs society. Moreover, Emerson demands that administration favor a focus on ensuring a future deep democracy over satisfaction of current public preferences and values.

Emerson also demands that public involvement and deliberation occur at the level where law becomes operational. He criticizes theories of "republican moments," which posit that there are unusual times in the history of the United States when circumstances are extreme enough to induce the polity to debate societal values, and in the process change our understanding about the way the Constitution structures government.²⁷ Provisions of the Constitution and even statutes, he claims, leave too much of the law undetermined and do no good if those who implement the law do not agree with the people on the details of what the Constitution or statutes mean (pp. 166–67). Thus, democracy must occur with respect to the day-to-day operation of law that confronts government administration (pp. 166–67). Thus, consistent with Hegel, who saw government bureaucracy playing a special role in tying law to the norms of society, Emerson sees the key to a Progressive state as the operation of administrative agencies, which are responsible for translating the broad principles of constitutional and statutory law into the rules that govern particular circumstances.²⁸

In structuring government to be deeply democratic, Emerson mentions how the participatory democracy of the Progressives influenced the Administrative Procedure Act's notice-and-comment requirements for rulemaking (pp. 127–28). While Emerson sees this as salutary, again he demands more of agencies than merely providing opportunities for public comment. To involve everyday people in the deliberative process, "[t]he organizational advantages of the more powerful must be kept in view, and efforts made to solicit and foster participation of the groups who are equally affected, but are prevented by their social condition from full participation in administrative procedures" (p. 173). In his later discussion of the Obama Administration's adoption of the "Clean Power Plan," Emerson applauds the Environmental Protection Agency for consulting with states and tribal leaders prior to issuing its notice of proposed rulemaking, and for holding regional public hearings to receive comments on the proposal (p. 202). Thus, he seems to believe

27. P. 166 (rejecting deliberative democracy, advocated by Jürgen Habermas and Bruce Ackerman, as insufficient to allow the people to govern).

28. P. 168. This is also required by Hegel's theory of the state, which held the bureaucracy responsible for translating the broad universal laws adopted by the legislature to particular circumstances, and then adopting narrower universal laws (i.e., regulations) to fit these particular circumstances. Pp. 31–32.

that agencies should use something akin to the experience meetings proposed by Follett²⁹ when adopting controversial rules. Beyond outreach, Emerson calls for “[a]gencies [to] experiment with the ‘co-production’ of public services by beneficiaries, as such persons could participate in designing, implementing, and monitoring welfare programs” (p. 173). More radically, Emerson suggests that “[a]gencies should . . . be sensitive to differences in the participatory quality of public interest groups and private associations, giving greater weight to collective commenters who convey the deliberative judgment of a large numbers [sic] of citizens” (p. 173).

Emerson is realistic in understanding that the use of the participatory procedures he has in mind would be very expensive and time consuming.³⁰ He therefore is willing to allow an agency to skip them, and in fact even skip currently mandated notice-and-comment procedures, to come up with workable current rules. But he would require that if an agency does skip these procedures, it does so by issuing what have come to be known as interim final rules, and that the agency commit to remaining open-minded about changing the interim rule after subsequent deeply democratic procedures used to evaluate how the interim rule has operated to achieve the dual Hegelian goals of reducing the exclusion of those without power from the regulatory process and reflecting deliberatively formed public values (pp. 175–76).

Emerson’s views also spring from Goodnow’s attempt to situate the administrative state in our constitutional system. Today, agencies create policy primarily by rulemaking rather than adjudication of particular cases. Therefore, Emerson expands on Goodnow’s requirement of judicially reviewable “notice and a hearing, in exchange for judicial deference to administrative judgements” (p. 176). He relies on Wilson, Dewey, and Follett for the proposition that requiring agencies to engage in an adequate decisionmaking process and to give reasons for their decisions “could discipline administrative action by public opinion, while at the same time articulating social interests in a more rational form” (p. 176). He thus supports judicial review of agencies’ reasons for exercises of their policymaking discretion.

Emerson, however, finds the current standards of judicial review wanting because they focus on technical explanations of agency decisions, which “are often extremely costly for agencies to offer, beyond courts’ institutional competency to assess, and inscrutable to any member of the public without a graduate degree in the relevant subject matter” (pp. 177–78). He claims that this sort of review is “not deliberative, but rather instrumental,” by which he appears to suggest that it aims only at efficiency and evaluation of how well the agency is meeting statutory goals (p. 177). The agency’s “rationality is . . . judged by means-ends convergence, not by cogent argument concerning the rightness of the ends pursued.”³¹ He advocates that agency explana-

29. See *supra* note 23.

30. See p. 175.

31. P. 177 (quoting Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 32 (2001)).

tions for their actions address “[t]he profound value questions [that] these regulatory actions raise” (p. 179). Demanding such explanations will prevent agencies from hiding the value judgments that inhere in their actions behind technocratic justifications.

Having described his conception of a Progressive deeply democratic administrative state, Emerson turns finally to address the relationship of the agencies to the president. Emerson alludes to the fact that the Constitution provides that “[t]he executive Power shall be vested in [the] President,”³² and that the president has the responsibility to “take Care that the Laws be faithfully executed.”³³ The president also is the sole officer of the United States who is elected by the people of the entire nation and who lays claim to a role in the implementation of every regulatory program. Thus, one could reason, as Goodnow did, that the legitimacy of congressional delegation of policymaking discretion to the executive branch rested on its supervision by the president.³⁴

Emerson, however, resists reliance on this point to view the rise of the administrative state as necessarily accreting the president's power (p. 181). Emerson notes that the policymaking of the executive branch is vastly too great a task for the president to be able “to achieve full and pervasive control over administrative decision-making and behavior” (p. 182). More significantly, Emerson fears that congressional control over the executive branch and the necessity of some administrative independence due to the size of the administrative task means presidents are likely to engage in exercises of arbitrary personal power, rather than democratically informed judgment (pp. 183, 194). This threat has been exacerbated by extreme partisanship preventing Congress from checking such exercises of the president's power, as well as institutionalization of greater White House control over regulatory decisionmaking (p. 194). For Emerson, the justification for congressional power to delegate rulemaking authority to agencies is the requirement that agencies exercise this power to further the implementation of the will of the people as revealed through a properly deeply democratic and deliberative process (p. 184). And, once a rule is established, the executive branch, including the president, must abide by it unless and until it is either overruled by statute or changed by the same deliberative process by which it was adopted.³⁵

32. U.S. CONST. art. II, § 1, cl. 1.

33. U.S. CONST. art. II, § 3; *see* p. 181 (noting that under the Constitution, the president is “ultimately responsible for the execution of the laws” and that “agencies that implement statutory provisions usually fall under his supervision”).

34. *See* pp. 106–07.

35. Thus, Emerson opined that it would be difficult for the Trump Administration to reverse the Obama Administration Clean Power Plan because any amendment or repeal would have to go through notice-and-comment proceedings and, upon challenge, be determined to be adequately reasoned. P. 203.

IV. A CRITICAL EVALUATION OF EMERSON'S PROGRESSIVE ADMINISTRATIVE STATE

One might challenge Emerson's administrative state by questioning the Hegelian premise that the purpose of the state is to enable individual freedom, where freedom means a person's capability of living a fulfilling life in a society that both reflects their personal values and defines who they are as a social being. I, however, find the Hegelian notion of the purpose of the state attractive at least insofar as it recognizes that human beings are social animals who define themselves in large part based on their interactions with others in their social community. Therefore, in critiquing *The Public's Law*, I will refrain from questioning Hegel's understanding of the role of the state. I turn instead to a detailed evaluation of Emerson's attempt to describe the structure and processes for implementing such a state consistent with the democracy laid out in the United States Constitution. I begin by reviewing the problems of the capacity of the general public to engage in deliberation about regulation, and how Emerson's ideas do not alleviate, and in fact might exacerbate, those problems. I then proceed to describe what I perceive as a mismatch between the institutional structures envisioned by Emerson and the role he would ask the institutions of government to play, as well as the lack of sufficient checks and balances in Emerson's system to ensure against the administrative state abusing the power with which Emerson would invest it.

A. *The General Public Is Not Well Suited to Deliberate About Regulations*

Certainly Emerson is correct that people may know what outcomes would help or hurt their interests. But, frequently regulations do not directly apply to the public. Rather the public is the putative beneficiary of regulation that restricts those directly regulated from conduct that the agency finds to undermine the public interest. Even when regulations do directly constrain the conduct of the general public, people often will not understand the benefits that inure from coordinated action.³⁶ Thus, for members of the public to understand whether a regulation is good for them, they need to understand how the regulation is likely to affect the behavior of those regulated, and how the changed behavior of those regulated will affect them. Furthermore, usu-

36. For example, individuals ordered to wear masks in public to prevent the spread of COVID-19 appreciate the discomfort that wearing a mask entails, but many do not accept that having everyone wear a mask decreases their risk of contracting the disease. See *Majority Agree Masks Have a Role in US Response to COVID-19*, PURDUE UNIV. NEWS (July 22, 2020), <https://www.purdue.edu/newsroom/releases/2020/Q3/majority-agree-masks-have-a-role-in-us-response-to-covid-19.html> [<https://perma.cc/R4QA-D58R>] (reporting that although 83 percent of Americans agree that "masks have a role in the COVID-19 response" only 53 percent believe that wearing a mask helps prevent them from getting the virus, and 64 percent believe that it helped prevent them from spreading the virus).

ally when an agency regulates, it considers an array of possible regulations.³⁷ Hence, in order to deliberate about what regulation to adopt, the public would have to understand the likely effects of alternative regulations as well. But the public is notoriously ill informed in general about matters that might help them understand these effects.³⁸ Rarely will the public be able to meaningfully suggest alternatives to regulation and know the likely effects of those alternatives.

One might propose obligating the agency first to analyze the various possible regulatory actions and identify their likely effect on the public. Having done so, the agency could *then* ask members of the public for input about which alternative they prefer. I would venture that the real sticking point to such an approach is not that the agency might fail to understand how various segments of the public would react to the outcomes from each regulatory possibility that the agency analyzes. It is much more likely to be questions about whether the public accepts that the agency analysis is accurate and performed in a good-faith manner, without conscious or unconscious bias.³⁹ In fact, that is precisely what the “hard look” doctrine that Emerson finds problematically technical is supposed to force the agency to do (pp. 177–78). In essence, Emerson specifies what agencies should do, but he provides no systematic structure that ensures that agencies will act in accordance with Progressive principles.

I can illustrate my point using a rulemaking that Emerson himself relies on for empirical support that his deeply democratic deliberative process is good—Obama’s Clean Power Plan.⁴⁰ Emerson emphasized that because of the careful vetting of this rule with members of the public, the Trump Administration would find it difficult to rescind the plan (pp. 201–03). But, the objection of many people opposed to the Clean Power Rule—in particular Appalachian coal miners—was primarily that it would raise the cost of coal to prohibitive levels and put many coal miners out of work, a prediction of

37. Under current administrative law principles, an agency has to consider plausible alternatives to its proposed regulation. See Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 878 (2020) (“[J]udicial review is not meaningful without some kind of reasoned explanation that includes, among other things, . . . deliberation about policy alternatives.”).

38. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 447–48 (2010) (“[T]he American public generally knows little about even those regulatory initiatives that most directly affect their interests.”); see also ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 1–2 (2d ed. 2016) (claiming generally that the American public is ignorant about specifics of policy and government).

39. For example, Donald Trump has manipulated outlandish claims that government bureaucrats are part of a deep-state conspiracy to gain support among his base. See Bobby Allyn, *Deep, Dark Conspiracy Theories’ Hound Some Civil Servants in Trump Era*, NPR (Nov. 14, 2019, 2:51 PM), <https://www.npr.org/2019/11/14/779035797/deep-dark-conspiracy-theories-hound-some-civil-servants-in-trump-era> [<https://perma.cc/EKJ4-SQZC>].

40. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

fact that depended on the type of technical analysis to which Emerson objects.⁴¹ In fact, economists and policy analysts virtually all agree that the impact of the rule on the coal industry would not be great because coal is no longer economically competitive with other sources of power, most significantly natural gas.⁴² But the agency appears to have been unable to convince coal miners of the truth of this “technical” proposition. If those opposed to the rule understood this technical detail, they would have realized that their efforts would have been better spent petitioning Congress and the White House to commit to investing some of the money saved by reducing coal output in creating jobs in “coal country” geared toward producing other forms of energy, such as renewable wind and solar power.⁴³

Emerson compares the Clean Power Rule with the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) program (pp. 198–201). DACA was announced as a matter of the secretary of homeland security’s “prosecutorial” discretion to choose to defer action on deportation of individuals who were brought to the United States as children and who met other criteria that would make them low priorities for use of deportation resources.⁴⁴ Emerson criticizes this action because it was taken without any

41. Coral Davenport & Peter Baker, *Taking Page from Health Care Act, Obama Climate Plan Relies on States*, N.Y. TIMES (June 2, 2014), <https://www.nytimes.com/2014/06/03/us/politics/obama-epa-rule-coal-carbon-pollution-power-plants.html> [<https://perma.cc/EJ6P-W27B>].

42. Joshua Rhodes, *Is the US Coal Industry Completely Burned Out?*, FORBES (Feb. 12, 2020, 11:25 AM), <https://www.forbes.com/sites/joshuarhodes/2020/02/12/is-the-us-coal-industry-almost-completely-burned-out/> [<https://perma.cc/22DF-Q96P>] (“[C]oal has largely fallen out of favor for electricity production as price declines in natural gas and, to a lesser extent, renewables have made it harder for coal plants to make money in electricity markets. The average US coal plant is now over 40 years old, and there is not a single commercial coal plant under construction in the country. Some scenarios have coal generation remaining flat for the next couple of decades, but most market fundamentals and societal goals indicate further declines.”); *The Clean Power Plan*, UNION CONCERNED SCIENTISTS (Dec. 19, 2019), <https://www.ucsusa.org/resources/clean-power-plan> [<https://perma.cc/CUX4-ZZBG>].

43. Emerson’s assertion that the Trump Administration would have difficulty repealing the Clean Power Plan warrants some criticism. The assertion was not premised on Emerson’s underlying argument that deeply deliberative rulemaking processes are more likely to accurately reveal the public’s will. Instead, it was predicated on the fact that the rule would have to go through drawn out notice-and-comment procedures to be reversed, which says nothing about the superiority of his deeply deliberative procedures for ascertaining the public’s will. In fact, that the Trump Administration was willing and able to overcome the barriers to amending the Plan provides some indication that the deliberative procedures used to adopt it initially did not indicate overwhelming public support for the plan. See *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

44. The precise criteria laid out in Secretary of Homeland Security Janet Napolitano’s DACA memorandum specified that

individuals could apply for deferred action if they had come to the U.S. before their 16th birthday; were under age 31; had continuously resided in the United States since June 15, 2007; and were in school, graduated or had obtained a certificate of completion

public participatory procedures. Emerson noted that President Trump could easily repeal the program simply by having the secretary announce a change in prosecutorial priorities (p. 201). But DACA proved somewhat resilient to President Trump's efforts to undo it. Emerson is correct that Trump's secretary of homeland security could have rescinded the program if she gave adequate reasons for doing so. By many accounts, Trump did not want his administration to go on record as seeking to deport undocumented immigrants who were brought to the United States as children because polls showed that far more Americans favored DACA than opposed it.⁴⁵ So instead of simply disagreeing with the value judgment—that providing DACA recipients security against deportation for three years was the best use of agency resources—Acting Secretary Elaine Duke reasoned that the original DACA policy was beyond Secretary Napolitano's legal authority.⁴⁶ In June of 2020, the Supreme Court reversed Secretary Duke's termination of the program, holding that the secretary's decision was arbitrary and capricious because it failed to adequately consider options other than rescission of the entire program and the reliance interests of DACA recipients.⁴⁷ In essence, contrary to Emerson's suggestion, DACA currently remains operational precisely because the Obama Administration assessed the will of the people accurately enough that the Trump Administration decided against taking responsibility for making a contrary value judgment. Thus, despite the lack of deep deliberatively democratic processes, it seems that the Obama Administration did accurately assess the public's will.

Even if the agency presents the trade-offs of various potential regulations fairly and accurately, it is unlikely that general members of the public will take the time and effort to get involved in debating whether those trade-offs are good or bad. If a regulatory outcome would hurt many people in a manner that is not great, but would benefit a few people to a momentous extent, then those few people have a much greater incentive to get involved in the burdensome regulatory procedure that Emerson advocates than do the

from high school, obtained a General Educational Development (GED) certificate, or were an honorably discharged veteran of the Coast Guard or Armed Forces of the United States. Significantly, individuals were ineligible if they had been convicted of a felony or a significant misdemeanor, but were considered eligible even if they had been convicted of up to two other misdemeanors.

Fact Sheet: Rescission of Deferred Action for Childhood Arrivals (DACA), U.S. DEP'T HOMELAND SEC. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/fact-sheet-rescission-deferred-action-childhood-arrivals-daca> [<https://perma.cc/7HKT-U73T>].

45. See Karlyn Bowman & Eleanor O'Neil, *Public Opinion and DACA: What Do the Polls Say?*, AM. ENTER. INST.: AEIDEAS (Sept. 12, 2017), <https://www.aei.org/politics-and-public-opinion/polls/public-opinion-and-daca-what-do-the-polls-say/> [<https://perma.cc/6L7A-AWCF>].

46. *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP'T HOMELAND SEC. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/WG7M-87A3>].

47. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911–13 (2020).

multitudes who are marginally affected.⁴⁸ In addition, because they are fewer in number, each of those few who stand to benefit are less likely to be free riders on the efforts of others, and the direct costs of coordinating a campaign to promote the regulation in a coordinated fashion is much smaller than the cost of trying to coordinate the efforts of the millions who would be hurt by the regulation.⁴⁹ In this scenario, those with a concentrated interest will be much more willing and often more able to participate in the kind of proceeding Emerson has in mind than are those with diffuse interests. The likely outcome, if the agency is to defer to expressions of support by the public, is that those with diffuse interests will not get their preferred regulatory outcome, even though that outcome might better comport with the desires of a supermajority of the public.

Emerson seems well aware of this well-known problem that plagues any approach that requires collective action by groups of individuals. His response is that administrators should therefore give more weight to the voice of the larger group of individuals who are affected but may not have had the incentives or means to participate in the rulemaking in a meaningful fashion (p. 173). Emerson, however, never explains what it means to give more weight to some comments over others: he never specifies how much more weight to add, or even a mechanism that would instruct the agency how to go about figuring how much weight to add in any particular context. This is clearly a recipe for arbitrary decisionmaking. To illustrate why, think of the agency, open-mindedly considering the input from all stakeholders, trying to come up with a regulation that works better for all than proposals currently on the table. As I already argued, the input of the general public is unlikely to lead to suggestion of a creative new regulatory possibility.⁵⁰ The agency is left to balance the interests in the various regulatory approaches. Giving more weight to the interests of the larger group essentially means choosing its preferred regulation even if, on balance, the arguments show that the other approach is better for the public interest. There is no way, however, for the agency to explain how much weight it should add, because if there were, this would be part of the calculation of which choice best serves the public interest. The agency is then left with *carte blanche* to decide how much weight to add to this group's preferred outcome. One might read Emerson as merely calling for the agency not to ignore the comments of the masses just because they may be less well crafted or sophisticated. That is, the agency should give serious consideration to the relevant input from all groups. But this already

48. Cf. Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127, 190 (“[E]normous potential compliance costs of regulation provide greater incentives to business for lobbying activities than the diffuse benefits of regulation provide to the general public.”).

49. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 66–97 (1965) (discussing various impediments to collective action).

50. See *supra* notes 36–43 and accompanying text.

is a requirement of hard-look review's focus on technical considerations, which Emerson finds problematic.⁵¹

Interest groups provide a potential institutional means of enabling public deliberation. Dewey in particular viewed "'para-state' institutions, such as trade and professional associations, unions, universities, charitable foundations, religious organizations, advocacy groups and research centers . . . [as mediators] between the interests of the isolated individual and the broader national community" (p. 88). Such interest groups might refine the presentation of the interests of their members and communicate members' concerns to the agency in a sophisticated manner.⁵² Because they aggregate the interests of their members, they have a greater incentive to participate actively in agency proceedings and even might invest in the expertise to question agency analyses and hence more effectively represent members' interests in the regulatory process.⁵³ Reciprocally, interest groups can generate and focus discussion among members, essentially communicating to them the likely effects of regulation and generating discussion among members about their regulatory preferences. Interest-group representatives also may be less directly affected by regulatory action.⁵⁴ Such distance might make these representatives more open-minded to considering others' perspectives on a regulatory issue. Emerson does not unequivocally endorse this use of interest groups, but his precise words regarding giving more weight to diffuse interests suggest that he sees such groups as the means by which the public will participate in his deliberative process.⁵⁵

Interest groups, however, are not a panacea for the ills of the regulatory process. Some groups may represent extreme views that they know the agency will not condone via its regulatory choices. These groups often participate merely to disrupt the rulemaking process.⁵⁶ Interest groups may be structured in various ways, and that structure can have a profound impact on how accurately the group represents its members' interests.⁵⁷ Public interest groups tend to be created by policy entrepreneurs, who must overcome the barriers to collective action faced by groups whose members share a diffuse

51. P. 177–78; see *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (concluding that a court reviewing agency action must consider “whether the decision was based on a consideration of the relevant factors”).

52. See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 476–85 (2005) (reporting that agencies are more likely to respond to sophisticated comments).

53. Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1315–16 (2016).

54. See *id.* at 1331.

55. Pp. 172–76.

56. See Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 442 (2000) (“[U]nreasonable action by an extreme group can work to its advantage by undermining the collaborative process on which more mainstream groups rely to deliver material benefits.”).

57. See generally Seifter, *supra* note 53.

interest. These entrepreneurs maximize the groups' influence by creating mass-membership groups with many passive but dues-paying members.⁵⁸ Members join such a group because they agree with the positions espoused in literature distributed by the group. But they do not expect to change those positions by discussion with other members. They may get a newsletter describing group activity, but they are unlikely to deliberate about the regulatory positions the group takes in the administrative process, much less influence those positions. If a member does not like the action a group takes, they simply let their membership lapse.⁵⁹ The interest of the entrepreneur who formed the group may diverge from those of its members because the group leader will have an interest in maximizing their personal power by ensuring that they remain the leader of the group and that the group attracts a large number of members. For instance, to attract members to join a group, a leader may have the group take extreme salient actions that are almost certain not to result in agency policies that benefit its members, but that will attract attention to the group and thereby increase membership.⁶⁰ On the whole, public-interest groups may make some public deliberation about regulatory issues tractable, but the deliberation they generate is unlikely to be the deeply democratic process that Emerson envisions.

Emerson might object that my critique of the general public's ability to deliberate about regulatory actions reflects agencies' focus on technical arguments, about which the general public can add little. Rather, Emerson asserts, agencies should focus on the *values* of the public,⁶¹ and base those on the experiences of various members of the public as revealed via deep-deliberative processes. But this argument ignores one of Hegel's basic premises for giving administrators discretion—which is that administrators are in a position to translate the broad universal prescriptions of statutes into the context-specific universal regulations that take into account the particular circumstances within which regulations operate.⁶² This is a crucial point because individuals do not simply act in accordance with a single value. Rather, they hold multiple values that often compete with each other to determine their preferences regarding outcomes in particular circumstances. What Judge Frank Easterbrook said of statutes is just as true of the preferences of regulatory stakeholders: they are vectors, not rays.⁶³ Stakeholders do not

58. See Mark Seidenfeld & Janna Satz Nugent, "The Friendship of the People": Citizen Participation in Environmental Enforcement, 73 GEO. WASH. L. REV. 269, 307 (2005).

59. See Seifter, *supra* note 53, at 1338–46 (discussing how different structures for interaction between group leaders and members may undermine group representation of members' interests); Seidenfeld, *supra* note 56, at 427–39 (discussing "[p]athologies in [p]ublic [i]nterest [g]roup [d]ynamics" that can affect the efficacy and legitimacy of interest group participation in regulatory proceedings).

60. Seidenfeld, *Role of Politics*, *supra* note 4, at 1438.

61. See *supra* text accompanying notes 31–32.

62. See *supra* text accompanying note 28.

63. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988).

pursue one value at the expense of all others but rather pursue a value until the trade-off with other values they hold becomes more important than further pursuit of the value that, in the abstract, the regulation seeks to advance.

Let's return to the secretary of homeland security's adoption of the DACA program to illustrate this point. Undoubtedly there is a large segment of the American population that believes that undocumented immigrants should not be allowed to remain in the United States.⁶⁴ Given Trump's electoral victory based in large part on his stance on limiting immigration,⁶⁵ perhaps one can ascribe to this large segment of the population a belief that that immigrants compete for jobs that otherwise would be given to Americans and a value judgment that Americans should come first. One might conclude that a person harboring that value would oppose DACA. But, there is a potentially countervailing value at play—that individuals should be treated fairly and not penalized for actions beyond their control. Undocumented children brought to this country illegally almost without exception were not responsible for the decision to enter the United States. Some DACA recipients have really known only the United States as their country and, based on the DACA criteria, have been lawful and contributing members of their community. Thus, merely specifying an individual's values will not indicate whether the individual is likely to support or oppose DACA.

Moreover, common experience of how individuals decide which regulatory provisions they support or oppose suggest that individuals do not identify all of their values, try to put a measure of importance on each, and then balance them to determine what outcomes they prefer. Rather, in everyday matters individuals evaluate how various outcomes would affect their lives and base their regulatory preferences on that experiential evaluation. In other words, for most regulatory debates, outcome preferences reveal individuals' values; abstract values do not explicitly drive preferences. I do not mean to suggest that a person's values do not influence their choices.⁶⁶ In fact, people may adopt values to simplify having to figure out "the right thing to do" when making everyday decisions.⁶⁷ But values don't determine regulato-

64. *Immigration*, GALLUP, <https://news.gallup.com/poll/1660/immigration.aspx> [<https://perma.cc/SZ62-GYTK>].

65. See Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html> [<https://perma.cc/Q9FW-MJCE>]; Philip Klinkner, *Opinion, Yes, Trump's Hard-Line Immigration Stance Helped Him Win the Election—But It Could Be His Undoing*, L.A. TIMES (Apr. 17, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-klinker-immigration-election-20170417-story.html> [<https://perma.cc/35AC-65QS>].

66. See, e.g., Rebecca Hollander-Blumoff, *Social Value Orientation and the Law*, 59 WM. & MARY L. REV. 475, 479 (2017) ("Values play a critical role in influencing actions and in shaping the structure and content of the law.").

67. The term "values" is often associated with notions of morality and virtue. See, e.g., Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1119–23 (1999).

ry preferences in any exact predictable manner,⁶⁸ and treating individual's identification of their values, even after deliberation, as a basis for resolving regulatory questions therefore is likely to lead to *outcomes* that do not truly reflect the public's will.⁶⁹

I need to be clear here that I am not claiming that regulatory decisions are value neutral. The outcomes chosen by regulators certainly reflect a judgement about how to balance particular distinct values. My point is that the best way to reveal the precise values inherent in regulation in a manner that can be understood and evaluated by the public is for the agency to clearly identify the effects of various policies and thereby the trade-offs in outcomes from choosing one regulation over alternatives. And once understood, individuals can factor agency value judgements into their political choices.⁷⁰

B. *Agency Staff Are Not Appropriate for the Role Emerson Asks Them to Fill*

This can lead to potential agency abuse of its administrative power. Recall that Hegel posited that government bureaucrats were well suited for adopting regulations that would secure his notion of freedom, which was the obligation of the state. He reasoned that, by virtue of working for the government, they were public spirited and did not have a personal stake in the matters they decided. They also were part of the educated class, and thus were trained to think rationally and deliberate when making decisions.⁷¹ Progressives such as Dewey and Follett added the requirement that staff obtain direct public input of information as a key to the democratic bona fides of the administrative state.⁷² It is crucial to recognize that Emerson sees the bureaucracy playing a role of facilitating deliberation by the general public, rather than engaging in deliberation itself (p. 151).

Who are these staff members that Emerson expects can facilitate public deliberation? They are chemists, biologists, health scientists, engineers, accountants, and other individuals who are trained in particular disciplines that may bear on finding facts and predicting the outcomes from regulatory

68. Cf. Thomas M. Madden, *Law and Strategy and Ethics?*, 32 GEO. J. LEGAL ETHICS 181, 187 (2019) (“[M]any, if not all, ethical decisions are made at least first nonconsciously or pre-rationally.”).

69. I do not mean to suggest that there are never questions that require a discussion of values in choosing appropriate regulatory outcomes. There are some determinations of outcomes that are inherently uncertain, and for which the best prediction of outcomes will not be determinable based on technical reasoning. If the agency has no objective basis to believe one prediction is better than the other, it ultimately will have to make a determination based on underlying values. Even then, however, the need to explicitly reveal the value choice is driven by the need to make a prediction of regulatory outcomes, not because the agency should choose which values best reflect those shared by the public.

70. See Seidenfeld, *Role of Politics*, *supra* note 4, at 1413–14 (describing criteria people use when voting for president).

71. See *supra* text following note 7.

72. See *supra* notes 15–23 and accompanying text.

alternatives.⁷³ They generally have no special skill in encouraging deliberation or in evaluating inputs from the public to divine some overarching public value to guide regulation. They certainly lay no special claim to understanding how agency regulation is likely to rectify asymmetrical social relationships to empower participation by those marginalized by society, let alone how to balance that consideration against the will of the public.⁷⁴ Yet Emerson trusts that they will be capable of such encouragement, divination, and empowerment.

One might believe that agencies' relationships to the politically accountable branches can ensure sufficient incentive for the agency bureaucrats to take the concerns of various stakeholders seriously. Although this is not the position Emerson takes, it is one that has motivated other justifications for the administrative state.⁷⁵ The Constitution makes it clear that outside the few powers directly bestowed on the president by that document, the executive branch is subject to limitation by Congress through the enactment of limiting statutes and by budgetary constraints that flow from Congress's power of the purse. But, scholars conventionally have agreed that "once Congress made [broad] delegations [to the executive], it could not, or at the least did not, exercise any effective control over administrative policymaking."⁷⁶ The inability of Congress to sufficiently monitor and correct administrative missteps has gotten even worse recently due to the extreme partisanship of the political branches.⁷⁷

The other politically accountable institution specified by the Constitution is the president. Emerson, however, seems to reject granting the president a role in reviewing agency regulations. He notes: "[T]he president's constitutional prerogatives and budgetary supervision [already] allow him or her to direct, constrain, and otherwise influence agency action to a greater extent than Congress" (p. 194). In addition, unlike Congress, the president does not "face the same costs of reaching binding decisions" (p. 183). Thus, the president has enormous power to influence regulation, even the power to

73. See Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 303–04 (2009) (noting that for substantial rulemaking efforts, a team of agency staff is usually responsible for developing regulations); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP. PROBS., Autumn 1991, at 57, 92–94 (describing the team model of rulemaking).

74. See Seidenfeld, *Role of Politics*, *supra* note 4, at 1443–44 ("[A]s apolitical experts, agencies are not trained in sorting out and evaluating the strength of the values of different groups within the polity . . .").

75. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–45 (2001) (arguing that presidential control of administration is justified by effectiveness and accountability); Seidenfeld, *Civic Republican Justification*, *supra* note 4, at 1550–54.

76. Kagan, *supra* note 75, at 2256.

77. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 12 (2006); see also Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1748 (2015) (asserting that extreme political polarization has rendered "Congress . . . unable to direct agencies through enactment of substantive legislation").

control the substance of administrative action. The president, however, is a political being, and it is not in the nature of the president to act deliberatively. Rather, the president has every incentive to aggrandize his or her personal power. Thus, by Emerson's account, "calls to bolster presidential control, and the strong proclivity of presidents to do so . . . represent a real threat to the deliberative integrity of the American administrative state" (p. 183).

While Emerson's skepticism about calls to aggrandize presidential power over agency action may be justified, he seems to have gone to the opposite extreme of eliminating the president entirely from the administrative process. The role of the president in Emerson's administrative state, other than vetoing legislation, would primarily be in selecting the heads of agencies responsible for making the ultimate regulatory decisions.⁷⁸ But election of the president surely must have more significance than just choosing who appoints agency heads. In particular, suppose that the agency has engaged in a truly deliberative process and decided to adopt a regulation that the president believes does not accurately reflect the will of the people. It would seem that, once deliberation occurs to identify the values at stake, the decision about what values to promote over others is uniquely political and that the president is the most legitimate entity to make that decision.⁷⁹

The institution to which Emerson turns to constrain administrative policymaking discretion is the courts. But recall that Emerson proposes that administrators explicitly discuss the values of those affected by regulation and determine some common values of the public in order to reach regulatory decisions. Values, however, are often impossible to argue in a logical sense.⁸⁰ One can try to convince individuals that they should modify their values in light of the outcomes to which those values lead or the experiences that others in the community can describe. But often there will be no right or wrong answers.⁸¹ In short, how values play out in influencing regulation is often a political question rather than one that can be derived by logical argument from accepted legal sources and principles. This is the reason it seems perverse for Emerson to call for a group of technical experts to determine the essence of the public's values. But, it is even more bizarre to turn to the courts—the branch of government intentionally shielded to the greatest extent from political influence—to check the agency determination of the will of the public.

*Rust v. Sullivan*⁸² is a Supreme Court decision that reveals the problems with having courts review agency appeals of decisions predicated on abstract values to justify regulatory actions. *Rust* involved a challenge to the Reagan Administration's regulations reinterpreting Title X of the Public Health Ser-

78. See pp. 181–83.

79. See Seidenfeld, *Role of Politics*, *supra* note 4, at 1443–44.

80. See, e.g., ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969) (describing irreducible tensions among various values).

81. *Id.*

82. 500 U.S. 173 (1991).

vice Act, which provides funds for family-planning services.⁸³ Title X provided that none of the funds allocated for such services “shall be used in programs where abortion is a method of family planning.”⁸⁴ For the first seventeen years after Title X was enacted, it was interpreted to allow a family-planning clinic receiving federal funds to discuss abortion as an option for a pregnant woman who did not want to have a child and to refer a woman who chose to terminate their pregnancy to a facility that would perform the abortion.⁸⁵ The new interpretation, euphemistically known as the “gag rule,” prohibited family planning clinics receiving Title X funds from counseling anyone about abortion as an option for a pregnant woman.⁸⁶

The Court applied the *Chevron* doctrine and found that the statute was ambiguous at step one.⁸⁷ At step two, it upheld the secretary of health and human services’ reasoning that “the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the ‘elimination of unborn children by abortion.’”⁸⁸ Essentially, at step two, the court deferred to the secretary’s determination that the values held by the public had moved to oppose abortion.

This is problematic for several reasons. First, indicative of the problems with relying on values, there was no objective means for the agency to support this assertion. Second, even if the agency determination about the values held by the American polity was correct, it ignored the fact that many poor pregnant women do not have any source of medical care other than Title X clinics and that women for whom carrying a pregnancy to term posed a significant risk of death would never be informed that they were risking their lives by not terminating their pregnancies. Commenters noted that under the gag rule Title X programs could not even mention that delaying having an abortion raises the health risks for the pregnant women.⁸⁹ In terms of predicted outcomes, the new regulation almost certainly would have decreased the number of abortions, but also almost certainly would have increased the number of women who died in childbirth or from delaying termination of their pregnancies. In terms of values, this changes the picture because many individuals who oppose abortion generally also believe that a woman should be able to obtain an abortion when her life or subsequent

83. *Rust*, 500 U.S. at 178.

84. *Id.*

85. *Id.* at 186 (accepting the contention in petitioner’s brief that prior regulations allowed nondirective counseling and referral for abortion).

86. *Id.* at 179–80.

87. *Id.* at 184–86.

88. *Id.* at 187 (emphasis added).

89. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 110 (1994).

health are at stake.⁹⁰ The agency did not try to find the balance between these two values, which in light of the nature of values left the Court no option but to find the agency determination of values to be reasonable.

By reviewing what Emerson calls the technicalities of agency action, courts would force the agency to make abundantly clear the value judgments inherent in its actions.⁹¹ For example, as I see the purpose of judicial review, the *Rust* Court should have remanded for the secretary of health and human services to estimate the decrease in the number of abortions likely to result from the gag order, but also the increase in deaths from at-risk women carrying their pregnancies to term or delaying termination of their pregnancies. The agency should also have discussed the psychological impact on a woman of choosing to terminate her pregnancy and also the likely effect of an unwanted child on the future life of the mother. This would render explicit the balance of values that the agency decision reflected and would facilitate efforts by various interest groups to keep the agency honest about the trade-offs that it considers beneficial to society.

Judicial review that forces the agency to reveal the policy trade-offs inherent in its regulatory judgment—that is, the value judgment underlying its regulatory decision—therefore would facilitate public evaluation of whether the agency action was justified. Such review would make transparent any attempt by an administration to “spin” the facts and predicted outcomes to induce the public inappropriately to favor regulation that the president might prefer for purely political reasons.⁹² Once the regulatory trade-offs are accurately identified, Congress or the president—the democratically accountable institutions of government—have incentives to step in to constrain the agency if either feels sufficiently concerned by the public reaction to the agency’s choice of values. Were the president to order or otherwise express a clear desire that an agency take a specific regulatory action before the agency identifies the regulatory trade-offs, communication of the president’s preferred regulatory action is likely to bias the agency factfinding and predictions in favor of the president’s preferred regulation,⁹³ essentially undermining deliberation about the predicted effects of such regulation. Hence, in such a

90. See Maria Caspani, *Support for Abortion Rights Grows as Some U.S. States Curb Access*, REUTERS (May 26, 2019, 12:20 PM), <https://www.reuters.com/article/us-usa-abortion-poll/support-for-abortion-rights-grows-as-some-us-states-curb-access-reuters-ipsos-poll-idUSKCN1SW0CD> [<https://perma.cc/L8U2-86R3>].

91. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 160 (2012) (arguing that hard look “allow[s] those interested in the decision to understand the trade-offs inherent in the agency’s value choices without having to invest greatly in educating themselves about the technical details of the subject of regulation”).

92. *Id.*

93. Agency staff would be biased toward the regulation suggested by the president by failing to credit or even look for evidence disconfirming the benefits of that regulation, as well as evaluating the hypothetical benefits in contexts that might mask effects of other factors. See Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 504 (2002) (discussing how confirmation bias might affect agency evaluation of proposed rules).

situation, a reviewing court should look especially carefully at the record and the agency reasoning to ensure that it truly can reasonably justify the action.

Emerson seems to doubt that courts are capable of reviewing technical aspects of agency decisions because those decisions depend on very specialized knowledge and experience that judges do not have.⁹⁴ Hard-look review, however, does not call for judges to make technical decisions. Judges only need to decide whether the agency has adequately identified policy trade-offs sufficiently to show that the agency considered all factors bearing on, and perspectives raised by, the regulatory issue.⁹⁵ As one who studied physics before going to law school, my experience leads me to believe that someone who really understands the technical basis for a decision can explain that basis in terms that are accessible to intelligent and motivated individuals even if those individuals are not trained in the technical field. And courts provide the ideal institution to perform such review. First, judges are trained in law, and virtually everyone in the legal academy acknowledges that law schools focus on teaching their students to think critically.⁹⁶ What that means is that lawyers often excel in finding gaps in reasoning and weaknesses in support for arguments. And agency explanations for their actions are really arguments for why the agency acted as it did. Moreover, if under hard-look review (or step two of *Chevron*) a court issues a decision that the agency believes demonstrates that the court did not understand the agency justifications, the agency can take the same action and explain precisely what the court did not understand.⁹⁷ I feel much more comfortable having the courts review technical arguments than I do having them decide whether the values of the public coincide with those the agency credited. In fact, I would advocate that courts should not give extra deference to an agency determination that the agency claims to be predicated upon technicalities that the courts cannot hope to fully understand. Such invocations seem more likely to be an

94. Emerson criticizes the approach to judicial review as “extremely costly for agencies to offer, beyond courts’ institutional competency to assess, and inscrutable to any member of the public without a graduate degree in the relevant subject matter.” Pp. 177–78.

95. See Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1752 (2019) (describing aggressive review under the arbitrary-and-capricious standard as requiring courts to carefully scrutinize agency action to ensure the agency “adequately considered all relevant factors, and provided thoroughly reasoned explanations to support their actions”).

96. See, e.g., Kevin Yamamoto, *Banning Laptops in the Classroom: Is It Worth the Hassles?*, 57 J. LEG. EDUC. 477, 489 (2007) (“In law school we teach a method of thinking, often called ‘thinking like a lawyer’ or critical thinking, that involves looking at a set of facts and applying the law to those facts, putting the rule into a broader construct, and analyzing a problem from start to finish.”).

97. See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 N.W. U. L. REV. 393, 396 (2000) (concluding that hard-look review does not “significantly impede agencies in pursuit of their policy goals”).

attempt to hide predictions and factfinding that the agency cannot justify rather than an accurate description of the reality of judicial competence.⁹⁸

CONCLUSION

The Public's Law recounts a Progressive tradition of administrative law, influenced by Hegel and dedicated to a democratic and participatory administrative state. It goes on to suggest a "normative architecture" by which the government could implement the shared will of the public as determined by deliberative democratic processes in which each person participates as an equal. Although I applaud Emerson's ultimate vision, unfortunately it remains to be demonstrated that public deliberation is capable of performing the task that the Progressive tradition asks of it.

98. Thus, for example, I find problematic the decision in *Baltimore Gas & Electric Co. v. National Resources Defense Council*, 462 U.S. 87 (1983), in which the Court deferred to the Nuclear Regulatory Commission's prediction that a repository for spent nuclear fuel that would isolate the biosphere from release of the radioactive material would be found. *Id.* at 94–95. The NRC admitted the uncertainty of its prediction and gave no explanation for why it believed that such a site could be found, but the Court credited the prediction, noting that the Court will be most deferential to "predictions, within [the agencies] area of special expertise, at the frontiers of science." *Id.* at 103. Today, forty-two years later, no site has yet been found on which to build a long-term storage facility for nuclear waste. See Rob Nikolewski, *Trump Takes Yucca Mountain off the Table. What's that Mean for San Onofre Nuclear Waste?*, L.A. TIMES (Feb. 7, 2020), <https://www.latimes.com/business/story/2020-02-07/trump-yucca-mountain-san-onofre-nuclear-waste> [<https://perma.cc/NYA8-WUVV>].