
NOTES

DEWEYAN DEMOCRACY AND THE ADMINISTRATIVE STATE

Since its modern inception, the administrative state has occupied an embattled position in U.S. constitutional democracy.¹ Though constitutional challenges to the delegation of significant policymaking decisions to unelected bureaucrats² have largely fallen away in the face of national exigencies,³ doubts regarding the democratic legitimacy of the regulatory process remain largely unresolved. Early efforts to accommodate agencies within familiar understandings of U.S. representative democracy presented agencies as mere channels for the specification and implementation of legislative directives.⁴ More recently, acknowledging the significant degree of discretion afforded agencies in policy creation as well as in implementation, scholars and reformers have shifted their attention to accountability in the regulatory process.⁵ Some have suggested that agencies achieve legitimacy through accountability to the President, conceiving of regulators as agents of the only elected principal with a national constituency.⁶ Others have posited a pluralist conception of agencies as surrogate legislative bodies that ought to be held accountable to the interest groups represented in

¹ See James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1044 & n.15 (1975). Though the political branches have relied upon agencies to effectuate policy decisions since the founding, see *id.* at 1044–45, the New Deal administrative state marked a much bolder departure from the existing constitutional structure, see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1055 (1984). Since the New Deal, “criticism of the administrative agencies has been animated by a strong and persisting challenge to the basic legitimacy of the administrative process itself.” JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY* 10 (1978).

² See Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614 (1927) (“The control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures These powers are lodged in a vast congeries of agencies.”).

³ See, e.g., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW* 4–7 (1990) (remarking that “[t]he ‘administrative’ state is now inevitable because of the ever-lengthening agenda of complex public policy problems and the institutional limitations of legislatures,” *id.* at 5).

⁴ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675–78 (1975) (explaining “transmission belt” and “expertise” models of administrative agencies).

⁵ See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4 n.5 (1997) (“Legitimacy is . . . often conflated with the concept of accountability.”); cf. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2097 (2005) (contending that current accountability arguments are inconsistent and grounded in a “hostility to modern administrative government”).

⁶ See *infra* pp. 583–84; see also, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2334–35 (2001).

their regulatory proceedings.⁷ Still others have sought to expand the scope of accountability to the broader public, often otherwise unrepresented in regulatory proceedings, by conceiving of agencies as potential fora for public deliberation.⁸

Each of these conceptions of the administrative state is premised on contested assumptions about the nature of regulation and the requirements of democratic governance; none satisfactorily counters the multipronged charge that agencies remain “inefficient, ineffective, and undemocratic.”⁹ Thus, despite the staggering “proportion of administrative law scholarship that sets for itself the goal of rethinking, reconstructing, refocusing, or otherwise dramatically reconsidering the field,”¹⁰ there remains room for further effort.¹¹ This Note accordingly offers an alternative conception of the administrative state premised on the democratic theory of John Dewey — one that might prove capable of a multipronged defense against the charge raised above. In highlighting the multiplicity of the public and the problem of its organization,¹² Dewey established a theoretical foundation for a modern administrative state before the current American regulatory regime came into existence. His unique understanding of the dynamic nature of expertise and its role in a well-functioning democracy¹³ lends support to the delegation of substantial policymaking authority to experienced regulators within their respective specializations. The current regulatory process, however, is poorly fitted to the robust justificatory structure revealed in Dewey’s democratic theory. Largely disconnected from their intended beneficiaries,¹⁴ modern agencies lack not only

⁷ See *infra* p. 584; see also, e.g., Stewart, *supra* note 4, at 1683; cf. Freeman, *supra* note 5, at 5 (distinguishing her theory of collaborative governance from the pluralist, interest group representation model).

⁸ See *infra* pp. 584–85; cf. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (exploring implications of republicanism for modern public law, including administrative law, and arguing for reforms to increase opportunities for public deliberation). See generally Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (arguing for broader citizen participation in administrative government).

⁹ Freeman, *supra* note 5, at 3.

¹⁰ Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 561.

¹¹ See Freedman, *supra* note 1, at 1045 (“The failure of the federal administrative agencies to still the recurrent sense of crisis as to their legitimacy . . . presents questions worthy of a serious quest for understanding . . .”).

¹² See section II.A, pp. 587–91. See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

¹³ See DEWEY, *supra* note 12, at 177–79.

¹⁴ See section II.B, pp. 591–94. Even at their most “refreshingly democratic” stage of formal rulemaking, Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, LAW & CONTEMP. PROBS., Winter 1994, at 127, 129, agencies exhibit a merely “passive reliance on waiting for people and groups to realize they have an interest in the regulation,” Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 490 (2005), and exhibit bias toward business interests, see Jason Webb Yackee & Susan Webb Yackee, *A Bias*

meaningful accountability to the public, but also the public's input — a necessary component of their expertise and thus a precondition for their ultimate effectiveness.

In an effort to address the democratic deficiencies of the current administrative state, this Note advocates a realignment of the regulatory process along the framework of Deweyan democracy through the assertion of the public at determinative moments in that process. It proposes an executive order drafted to compel agency engagement with the public at those moments. Following further Deweyan instruction,¹⁵ this Note then explores its hypothesis by examining the possible implementation of the proposed executive order at the Consumer Financial Protection Bureau,¹⁶ a nascent agency exhibiting many of the features — most notably, a mandate to protect the interests of a diffuse national public, a highly technical and complex subject matter, and a politically insulated structure — thought to render meaningful public engagement in the regulatory process impracticable, if not impossible.

I. PREVAILING POSITIONS ON THE DEMOCRATIC LEGITIMACY OF THE ADMINISTRATIVE STATE

The modern administrative state appears trapped between the Scylla of unaccountability and Charybdis of ineffectiveness. Recurrent challenges to the legitimacy of agency regulation have tended to converge around an anxiety, pervasive in U.S. history, over the “exercise of power over private interests by officials not otherwise formally accountable.”¹⁷ Where reformers adopt measures to calm this accountability anxiety, however, they tend to run head on into charges of agency ineffectiveness.¹⁸ Though the body of literature grappling with this

Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, 68 J. POL. 128, 135 (2006) (reporting study findings). In informal rulemaking and guidance settings, agencies operate at a further remove from their respective publics. See, e.g., Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 417, 420–33 (2007) (arguing that “[w]e should see the interests of regulatory beneficiaries in the way an agency carries out its mandate as real interests, and ensure that beneficiaries too are among those that can hold an agency accountable,” *id.* at 417, but detailing the ways in which guidance documents undermine agency accountability to regulatory beneficiaries).

¹⁵ See JOHN DEWEY, *The Need for a Recovery of Philosophy* (1917), reprinted in 10 THE MIDDLE WORKS, 1899–1924, at 3, 46 (Jo Ann Boydston ed., 1980) (“Philosophy recovers itself when it . . . becomes a method . . . for dealing with the problems of men [sic].”).

¹⁶ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code) (creating the agency).

¹⁷ Stewart, *supra* note 4, at 1671. “The subject of legitimacy is concerned with popular attitudes toward the exercise of governmental power. Such attitudes focus upon whether governmental power is being held and exercised in accordance with a nation’s laws, values, traditions, and customs.” FREEDMAN, *supra* note 1, at 10.

¹⁸ See Freeman, *supra* note 5, at 3 (“That the rule-making process is ossified, that implementation is inconsistent, and that enforcement is at best sporadic are by now uncontroversial claims.”).

dilemma is far more extensive and nuanced than the survey below, the following three positions appear to have attained relative prominence in the ongoing debate surrounding the democratic legitimacy of the administrative state. Each of these models embraces a brand of majoritarianism¹⁹ and accepts that agencies exercise wide-ranging discretion in making political decisions as well as technical findings. Each attempts, with varying degrees of success, to address the “two core issues: how to make administration accountable to the public and how to make administration efficient or otherwise effective.”²⁰ Yet none fully reconciles the perceived conflict between those core issues, and therefore none adequately resolves the legitimacy concerns that perpetuate the “enduring sense of crisis”²¹ encumbering the modern administrative state.

The presidential control model of the administrative state, perhaps most definitively expounded by now-Justice Elena Kagan,²² suggests that top-down accountability affords agencies a measure of democratic accountability and assures effective administration. Presidential leadership, the model holds, “enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power,” and it “establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”²³ Furthermore, as a unitary actor responsive to a national constituency, the President is best positioned to overcome the difficulties associated with collective decisionmaking and to suffuse the regulatory process with the technocratic values of “cost-effectiveness, consistency, . . . rational priority-setting,” and a general “dynamism.”²⁴ As critics have argued, however, the presidential control model is “premised upon a fundamentally untenable conception of the consent of the governed.”²⁵ Some have further observed that Presidents often go unrewarded at the polls for what commentators would consider worthy

¹⁹ See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 465–66 (2003).

²⁰ Kagan, *supra* note 6, at 2331.

²¹ Freedman, *supra* note 1, at 1043; see also Edley, *supra* note 10, at 563.

²² See generally Kagan, *supra* note 6.

²³ *Id.* at 2331–32.

²⁴ *Id.* at 2339; see also Bressman, *supra* note 19, at 486–87, 490–91 (summarizing the argument). For an overview of the expansion of presidential control over administration since President Reagan, see Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 180 (1997); and Kagan, *supra* note 6, at 2247–50.

²⁵ Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997) (“The ‘will of the people,’ as invoked in that effort, is artificially bounded in time, homogenized, shorn of ambiguities — in short, fabricated. . . . It slides over vexed questions . . . of how the act of governing becomes a process in which the collective will is formed, rather than merely implemented.” *Id.* at 988.); see also Bressman, *supra* note 19, at 493.

regulatory achievements,²⁶ challenging both the assertions that presidential judgments are truly representative of majoritarian preferences and that presidential incentives are necessarily aligned with dynamic, effective administration.

Acknowledging the limitations of agency accountability to the political branches,²⁷ the interest group representation model of the administrative state redirects the accountability focus to the parties participating directly in the regulatory process. Premised on a pluralist vision of democracy, this model asserts that, like legislation, regulation represents no more than the bargains struck between competing interest groups.²⁸ Agencies thus replicate the political process on a smaller and therefore potentially more effective scale. The greater the representation of varied interests, the greater the legitimacy attained in the regulatory process. Yet “[t]he viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the predominant contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests.”²⁹ Participation alone cannot support democratic legitimacy where structural features of the regulatory process distort agencies’ responsiveness to the interests represented before them. Moreover, the threat of agency bias raises the question: to which, or rather to whose, ends is the agency effective?

Contrary to both the presidential control and interest group representation models of the administrative state, “the civic republican model rejects the pluralistic assertion that government can, at best, implement deals that divide political spoils according to the pre-political preferences of interest groups,” and it relegates the political

²⁶ See Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 856–57 (1996) (“[T]he president’s exercise of power and articulation of public positions often undermine the confidence in and the informal power of his presidency.” *Id.* at 857.).

²⁷ See *id.* at 852 & n.73 (noting that, regardless of the control exercised by the President, “there will and should be extensive delegation to, and exercise of authority by, the agencies,” *id.* at 852).

²⁸ See Stewart, *supra* note 4, at 1712 (explaining the model’s implicit assumption that there is “no ascertainable, transcendent ‘public interest,’ but only the distinct interests of various individuals and groups in society,” and its hypothesis that “if agencies were to function as a forum for all interests affected by agency decisionmaking, bargaining leading to compromises generally acceptable to all might result, thus replicating the process of legislation” and attaining the same legitimacy).

²⁹ *Id.* (footnote omitted). The critique Stewart references remains powerful thirty-five years later. See, e.g., Cuéllar, *supra* note 14, at 463 (finding that “the existing process does next to nothing to remedy gaps in the commenter’s own sophistication” and therefore her influence, or “to involve members of the larger public in discussions about regulations that will shape their lives”); Yackee & Yackee, *supra* note 14, at 135 (finding agencies significantly more responsive to business interests than to other nongovernment groups and individuals in formal rulemaking). Barriers to judicial review such as standing further exacerbate agency bias toward regulated entities. See Mendelson, *supra* note 14, at 415–16 & n.106.

branches to a secondary role in administration.³⁰ Rather, “the hope of civic republicanism” is that “deliberation about a more abstract level of principles will yield consensus. Particular governmental decisions then can, and to be legitimate, must, conform to these principles.”³¹ Contrary to the presidential control model, the civic republican model highlights the threat that “allowing any centralized institution under the direct control of one individual to dictate policy invites decision-makers to rely on backroom discussions and, more generally, to subvert deliberative processes, even if that individual is electorally accountable.”³² Like the interest group representation proponents, civic republicans embrace broad delegations of power to agencies on the contention that “having administrative agencies set government policy provides the best hope of implementing civic republicanism’s call for deliberative decisionmaking informed by the values of the entire polity.”³³ Much rests on the implementation, however. As a sympathetic skeptic has observed, civic republican proposals either “have a utopian quality, or have a general reformist cast that raises doubt about whether the brew is potent enough to address the deeper, thoroughgoing problems of governance.”³⁴ The model offers no satisfactory explanation of how members of a diffuse, national public come together to deliberate over regulatory means and ends; nor does it provide any “reason to believe that deliberation alone is sufficient to generate desirable regulatory outcomes.”³⁵ Regardless of how robust the democratic accountability of the administrative state envisioned in the civic republican model might be, the model has tended to falter before competing demands for administrative effectiveness.

The models outlined above each describe a mechanism for assuring agency accountability to the public while meeting demands for regulatory effectiveness. None of these models, however, has succeeded in that task; consequently, none has succeeded in shoring up the legitimacy of the administrative state. The presidential control model fails to convince detractors that the accountability it provides is the accountability democracy demands. The interest group representation and civic republican models may describe more direct channels of accountability to the public, but they differ on who, or what, comprises the

³⁰ Seidenfeld, *supra* note 8, at 1514. See generally CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990).

³¹ Seidenfeld, *supra* note 8, at 1539.

³² *Id.* at 1552.

³³ *Id.* at 1515; see also Edley, *supra* note 10, at 589–91 (suggesting that civic republicanism’s “deliberative element, and the aspirational focus on the public purpose, . . . can serve as the kernel for rethinking aspects of public law,” *id.* at 591).

³⁴ Edley, *supra* note 10, at 592.

³⁵ Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 *COLUM. L. REV.* 1, 82 (1998).

relevant public. In light of empirical demonstrations, supported by structural explanations, of agency bias toward certain groups, the interest group representation model offers inadequate assurances of meaningful public representation in the regulatory process. The civic republican model attempts to provide more solid guarantees of deliberation and public participation, but in doing so it arrives at a dubious arrangement with little promise for effective regulation.

Ultimately, each of these models fails to produce a regulatory design capable of meeting the competing demands of accountability and effectiveness. Moreover, each elides the questions: accountable to whom, and effective to whose ends? Pointing to a larger issue looming in the literature — that of whose perception counts for purposes of legitimacy — these questions suggest that failures in design may be attributable to weaknesses at a more foundational level. None of the above models rests on an underlying justificatory account of the administrative state sturdy enough to support it. The presidential control and interest group representation models largely operate against a nondelegation baseline, making it difficult to view the legitimacy of the administrative schemes they describe as anything but second order.³⁶ Conversely, rather than employing civic republicanism as a means of addressing the problem of the democratic legitimacy of the administrative state, proponents of that model employ the administrative state as a means of realizing the vision of civic republicanism.³⁷ In contrast to these approaches, the democratic theory of John Dewey provides an explanation of the underlying legitimacy of the administrative state as a general proposition, rather than as an accommodation to the status quo or a vehicle to a grander democratic ideal. In turn, the Deweyan justification serves as the foundation for a better administrative design — one capable of reconciling the demands of agency accountability and effectiveness.

II. RECONCEPTUALIZING THE REGULATORY PROCESS THROUGH THE LENS OF DEWEY'S DEMOCRATIC THEORY

The democratic theory of John Dewey can offer a robust justification for the administrative state.³⁸ Dewey understood the mere existence of national “publics” — defined according to the indirect consequences of associated activity — to support the legitimacy of national

³⁶ See Dan M. Kahan, *Democracy Schmocracy*, 20 CARDOZO L. REV. 795, 800 (1999).

³⁷ See, e.g., Seidenfeld, *supra* note 8, at 1542 (“Administrative agencies . . . fall between the extremes of the politically over-responsive Congress and the over-insulated courts. Agencies are therefore prime candidates to institute a civic republican model of policymaking.”).

³⁸ Though Dewey does not explicitly address modern regulatory governance, the insights he develops with regard to the democratic state in *The Public and Its Problems* apply equally well to the U.S. administrative state in its current form.

institutions designed to identify and address their collective problems. The effective identification and resolution of those problems requires the kind of systematized inquiry agencies purportedly conduct in the process of issuing rules and regulations. And the proliferation of publics over the course of the twentieth century, as well as the increasing complexity of the externalities from which these publics arise, justifies the relatively expansive scope of administrative authority. Yet the prevailing mode of agency regulation runs afoul of the Deweyan justification.³⁹ The disconnect between agencies and the publics they are designed to serve undermines not only the democratic accountability of agencies, but also their claims of expertise and ultimately their effectiveness. To begin to address the Deweyan deficiencies of the current administrative state, the public must be reasserted in the regulatory process. The executive order proposed in section C attempts to create channels through which such an adjustment might occur.

A. *The Deweyan Justification for an Administrative State*

Dewey opens his account of political democracy with the simple premise “that human acts have consequences upon others, that some of these consequences are perceived, and that their perception leads to subsequent effort to control action so as to secure some consequences and avoid others.”⁴⁰ Remarking that “the consequences are of two kinds, those which affect the persons directly engaged in a transaction, and those which affect others beyond those immediately concerned,” he asserts an initial distinction between private and public, suggesting that the latter connotes the presence of externalities.⁴¹ Where the recognition of and desire to address these indirect consequences arises, a public — consisting of “all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for” — emerges.⁴²

The public and the officials charged with representing its interests comprise the state. In Dewey’s view, the state is not all-encompassing;

³⁹ Indeed, despite his progressive leanings, Dewey was a vocal critic of the New Deal administrative state. Though his objections largely focused on the political economy of the New Deal, see Edward J. Bordeau, *John Dewey’s Ideas About the Great Depression*, 32 J. HIST. IDEAS 67, 78–79 (1971), they had separate roots in his democratic theory: “Reiterating [his] critique of paternalistic benevolence . . . Dewey suggested that the difficulties of [the] task [of moral democracy] were most clearly evident in the failure of many social reformers to meet its demands because they were committed to doing good *for* rather than *with* others,” ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 164 (1991).

⁴⁰ DEWEY, *supra* note 12, at 12.

⁴¹ *Id.* at 12–13.

⁴² *Id.* at 15–16. There may be a multiplicity of “publics” under this conception, each concerned with “the indirect consequences of particular forms of associated activity.” WESTBROOK, *supra* note 39, at 305. “The public” is thus a collective noun, used here to designate the collective and overlapping publics of the United States.

rather, it is a “distinctive and secondary form of association, having a specifiable work to do and specified organs of operation.”⁴³ Associations that are truly private in nature, giving rise to no indirect consequences, are not proper sites of state activity.⁴⁴ Despite the consonance between this understanding and pluralist conceptions of the state, however, Dewey prescribes no inherent limits on state activity: “Just as publics and states vary with conditions of time and place, so do the concrete functions which should be carried on by states. . . . Their scope is something to be critically and experimentally determined.”⁴⁵ Ultimately, the worth of a state is measured by two criteria: first, “the degree of organization of the public which is attained”; and second, “the degree in which its officers are so constituted as to perform their function of caring for public interests.”⁴⁶

The first criterion of a “good state,” organization of the public, entails the identification of indirect consequences and the definition of the public’s interests with regard to them.⁴⁷ This criterion provides the foundation of the Deweyan justification for the administrative state.⁴⁸ An agency’s organic statute may represent the preliminary identification of a class of indirect consequences giving rise to a particular public whose interests the agency is created to serve. Subsequent to this preliminary identification, the agency assumes the responsibility of conducting an “effective and organized inquiry”⁴⁹ into these consequences. Herein lies the justificatory role of expertise in agency policymaking, for “genuinely public policy cannot be generated unless it be informed by knowledge, and this knowledge does not exist except when there is systematic, thorough, and well-equipped search and record.”⁵⁰

Dewey’s unique conception of expertise serves to quiet the familiar objection to the expertise justification for the administrative state: that

⁴³ DEWEY, *supra* note 12, at 71.

⁴⁴ See *id.* at 43 (“Whatever is a barrier to the spread of the consequences of associated behavior by that very fact operates to set up political boundaries.”).

⁴⁵ *Id.* at 74; see also *id.* at 72.

⁴⁶ *Id.* at 33. Dewey defines the state in functional terms, as “caring for and regulating the interests which accrue as the result of the complex indirect expansion and radiation of conjoint behavior.” *Id.* at 47. Accordingly, he allows for “[m]ultiplicity and constant transformation in the forms which the state assumes.” *Id.* at 44.

⁴⁷ *Id.* at 33. “An inchoate public is capable of organization only when indirect consequences are perceived, and when it is possible to project agencies which order their occurrence.” *Id.* at 131; see also WESTBROOK, *supra* note 39, at 306.

⁴⁸ Heightening the need for agencies empowered to “canalize the streams of social action and thereby regulate them,” DEWEY, *supra* note 12, at 131, are the “changing modes of associated behavior which often generate[] new, extensive, and enduring indirect consequences and hence new publics,” WESTBROOK, *supra* note 39, at 303.

⁴⁹ DEWEY, *supra* note 12, at 177.

⁵⁰ *Id.* at 178–79. “Inquiry, indeed, is a work which devolves upon experts.” *Id.* at 208.

even the most technical of regulations necessarily involves significant value choices belonging to the elected branches. For Dewey, the regulator's expertise necessarily involves the kind of engagement with the public that otherwise legitimates the assignment of value choices to the public's representatives. It issues from adoption of a "scientific attitude of mind, . . . apparent whenever beliefs [are] not simply taken for granted but established as the conclusions of critical inquiry and testing."⁵¹ Particularly (though not exclusively) within the realm of regulation, critical inquiry begins with an assessment of the public's needs, which are discerned through consultation with the public itself.⁵²

Because "knowledge is communication as well as understanding,"⁵³ the engagement with the public necessary to establish regulatory expertise depends upon "the perfecting of the means and ways of communication of meanings so that genuinely shared interest in the consequences of interdependent activities may inform desire and effort and thereby direct action."⁵⁴ Though the press facilitates the dissemination of information and the attendant formation of public opinion,⁵⁵ it remains incumbent on the agencies to undertake the improvement of their communications with the public, which serve both to inform the public of the findings of agency inquiry and to solicit the public input necessary to guide further such inquiry.⁵⁶ This mutually educational communication facilitates a feedback loop that enhances the effectiveness of the public's organization through the administrative state, thereby satisfying Dewey's first criterion of a good state. The standard

⁵¹ WESTBROOK, *supra* note 39, at 141.

⁵² See DEWEY, *supra* note 12, at 206 ("It is impossible for high-brows to secure a monopoly of such knowledge as must be used for the regulation of common affairs. In the degree in which they become a specialized class, they are shut off from knowledge of the needs which they are supposed to serve."); cf. Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1637 (1985) ("The job of the public administrator is not merely to make decisions on the public's behalf, but to help the public deliberate over the decisions that need to be made."). As Dewey further explains, "[t]he man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied." DEWEY, *supra* note 12, at 207. Moreover, "[o]nly the public [can] define its interests. For experts to define those interests for the public [is] not democratic elitism but elitism pure and simple." WESTBROOK, *supra* note 39, at 312.

⁵³ DEWEY, *supra* note 12, at 176; see also *id.* at 175–76 (arguing that the pursuit of scientific knowledge should be animated by human interests).

⁵⁴ *Id.* at 155.

⁵⁵ See *id.* at 179–82 (discussing the intimate relationship between public consciousness and the dissemination of ideas through widely available media, particularly "the news"); cf. Bordeau, *supra* note 39, at 69 ("Dewey consistently allied himself with every effort to educate the public about the economic and political realities of the times . . . for only as so equipped could collective public intelligence become an operational force in self-determination.").

⁵⁶ Furthermore, the success of agency experts "may profoundly benefit from — and indeed depend on — institutional structures that let them learn how to galvanize public support for their bureaucratic policy innovations, or at least how to palliate potential public opposition." Cuéllar, *supra* note 14, at 495.

of expertise implicated in Dewey's first criterion is more demanding than that of any of the three prevailing models of the administrative state: it encompasses the utmost technical and scientific rigor and further necessitates vigorous fieldwork and thorough follow-up. The presidential control and interest group representation models neglect the latter component, while the civic republican model makes little to no mention of the former component. Indeed, in stark contrast to the civic republican model,⁵⁷ Deweyan administrators play a necessary and independently valuable role in the regulatory process.

Dewey's second criterion of the "good state," official care for public interests, requires a subordination of personal and private interests to the greater public concern that gives rise to the official's status.⁵⁸ Dewey posits that representative government, broadly construed, accomplishes this goal, with the caveat that "[o]nly through constant watchfulness and criticism of public officials by citizens can a state be maintained in integrity and usefulness."⁵⁹ In this way, certain elements of the presidential control model might complement the Deweyan conception of the administrative state; though presidential elections cannot afford the public sufficiently meaningful opportunities to inform the vast majority of regulatory decisions, they do offer an institutional mechanism for expressing dissatisfaction with the status quo writ large. Nonetheless, more is required.⁶⁰ Direct public engagement in the regulatory process not only enhances the effectiveness of the administrative state, but also constitutes a prerequisite for its accountability, for "[n]o government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few."⁶¹

Absent public engagement in the determination of regulatory ends, the administrative state "seeks a common good by methods which for-

⁵⁷ For civic republicans, the "expert administrator" is merely a "person whose superior knowledge facilitates deliberative democratic performance" and "enables [her] . . . to push past . . . unreflective, personal preferences and find consensus" with other participants in the administrative process. Note, *Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401, 1406-07 (1994).

⁵⁸ In contrast to interest group representation theory, this criterion requires "careful measures to ensure that the government serve[s] the public rather than particular private interests." WESTBROOK, *supra* note 39, at 302. As the New Deal progressed, Dewey grew increasingly concerned with what amounted to the capture of public officials by private interests, embodied in the "state capitalism" effectuated in the New Deal. See Bordeau, *supra* note 39, at 78.

⁵⁹ DEWEY, *supra* note 12, at 69.

⁶⁰ In this vein, the Deweyan conception shares more in common with the civic republican model, in which the President, along with Congress and the courts, "play[s] a crucial" — but more limited — "role . . . by reviewing agency policy to ensure that the bureaucracy does not fail to fulfill its civic republican promise." Seidenfeld, *supra* note 8, at 1515.

⁶¹ DEWEY, *supra* note 12, at 208.

bid its being either common or a good,”⁶² thereby failing to meet Dewey’s two criteria of a good state. These criteria unite in the solution to “the primary problem of the public: to achieve such recognition of itself as will give it weight in the selection of official representatives and in the definition of their responsibilities and rights.”⁶³ It is precisely the unresolved problem of public recognition in the regulatory process that perpetuates the administrative state’s legitimacy crisis.⁶⁴

B. The Deweyan Deficiencies of the Current Regulatory Process

At the time Dewey authored *The Public and Its Problems*, the increasing social interdependence resulting from rapid industrialization had produced an explosion of new publics, warranting a corresponding expansion of state intervention in business and other associations.⁶⁵ The “prime difficulty” he confronted was “that of discovering the means by which a scattered, mobile and manifold public may so recognize itself as to define and express its interests.”⁶⁶ That difficulty continues to hamper regulatory reform, only “exacerbated by the changing modes of associated behavior which often generate[] new, extensive, and enduring indirect consequences and hence new publics.”⁶⁷ The formation of an effective, democratically legitimate administrative state has thus become only more difficult over time.

The democratic legitimacy of the current regulatory process relies primarily on two overburdened points of public access: elections and notice-and-comment rulemaking. The sheer breadth of authority delegated to agencies undermines assertions that a unitary actor could be held responsible for all, or even a significant number of, important regulatory decisions in elections.⁶⁸ Even if elected representatives

⁶² JOHN DEWEY & JAMES H. TUFTS, *ETHICS* 304 (1909); *see also id.* at 303–04 (“[T]he vice of the social leader, of the reformer, of the philanthropist and the specialist in every worthy cause of science, or art, or politics, is to seek ends which promote the social welfare in ways which fail to engage the active interest and coöperation of others.”).

⁶³ DEWEY, *supra* note 12, at 77.

⁶⁴ *Cf. supra* note 17 and accompanying text.

⁶⁵ *See* DEWEY, *supra* note 12, at 126. Dewey saw a tension in the technological age between the disintegration of the public into many publics and the homogenization of political culture through increased interconnectedness:

We have inherited . . . local town-meeting practices and ideas. But we live and act and have our being in a continental national state. . . . Our modern state-unity is due to the consequences of technology employed so as to facilitate the rapid and easy circulation of opinions and information, and so as to generate constant and intricate interaction far beyond the limits of face-to-face communities.

Id. at 113–14.

⁶⁶ *Id.* at 146.

⁶⁷ WESTBROOK, *supra* note 39, at 303. Increasing globalization and securitization capture two such changing modes of associated behavior.

⁶⁸ *See* Fitts, *supra* note 26, at 852 & n.73; Kagan, *supra* note 6, at 2250. Though the focus here is on presidential elections, public choice theorists suggest that congressional elections are likely

were to have enough control over a sufficient number of regulatory decisions to render agencies plausibly accountable to them, they are not likely to be held accountable by the public for their exercise of such control. Policy preferences are necessarily bundled in a single vote, “preclud[ing] any facile translation of election results into ‘the people’s will’ on specific policy issues.”⁶⁹ Elected representatives who claim to oversee the regulatory process — when each only exerts an attenuated and diffuse influence over individual regulatory policies — consequently afford the public insufficient “weight” in the “definition of their responsibilities and rights” under the administrative state.⁷⁰

Notice-and-comment rulemaking, optimistically characterized by some as a “‘refreshingly democratic’ means of formulating and implementing public policy,”⁷¹ also fails to provide the public with proper recognition in the regulatory process.⁷² Charges of agency capture by private interests may be overstated, but empirical work demonstrates the disproportionate influence exerted by private interest groups in the rulemaking process.⁷³ Certain critics hold more generally that the notice-and-comment process “functions as charade” and “tends to promote a conception of the regulatory process as a forum for competition among interest groups, rather than a means to further the public interest.”⁷⁴ Along the lines of the Deweyan insight that public participation in the regulatory process is required for regulatory effectiveness, another detractor has noted that the notice-and-comment process “un-

even less capable of legitimating the authority delegated to agencies. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 9–12 (1993) (explaining how broad delegations to agencies allow representatives to privately advocate on behalf of particular interests, while selectively taking credit for or disavowing particular agency decisions). The accountability functions of presidential and congressional elections may also undercut each other in the regulatory context: “The idea of legislative accountability opposes open-ended delegations of authority to administrative agents, but the idea of presidential accountability derives its justification from the existence of such delegations and the need for an elected official to control their exercise.” Rubin, *supra* note 5, at 2076.

⁶⁹ Farina, *supra* note 25, at 998.

⁷⁰ See DEWEY, *supra* note 12, at 77.

⁷¹ Yackee & Yackee, *supra* note 14, at 128 (quoting Asimow, *supra* note 14, at 129).

⁷² See Freeman, *supra* note 5, at 9 n.19 (“There appears to be consensus that the rule-making process is excessively costly, rigid, and cumbersome, and that it creates perverse incentives that conspire to undermine sound public policy.”).

⁷³ See, e.g., Cuéllar, *supra* note 14, at 414–15 (finding that laypeople’s comments tend to be less sophisticated than those of specialized interests and that sophistication of a comment correlates with its positive influence); Yackee & Yackee, *supra* note 14, at 129 (presenting “statistical evidence that business interests enjoy disproportionate influence over rulemaking outputs despite the supposedly equalizing effects of notice and comment procedures”); cf. DEWEY, *supra* note 12, at 207 (“A class of experts is inevitably so removed from common interests as to become a class with private interests and private knowledge, which in social matters is not knowledge at all.”).

⁷⁴ David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32.

dermines the implementation of rules by failing to encourage dialogue and deliberation among the parties most affected by them.”⁷⁵

Part of the problem undermining the legitimating potential of the notice-and-comment process is the insufficient articulation of the relevant public. In the Deweyan account, the public is comprised of those affected by the indirect consequences necessitating the creation of an agency in the first place. The agency’s primary responsibility is to that public — the intended beneficiaries of its regulatory activities. Regulatory beneficiaries, however, are often the most easily excluded parties in the regulatory process.⁷⁶ Even where opportunities for their participation exist, such as in notice-and-comment rulemaking, the passive stance agencies assume with respect to this group minimizes beneficiaries’ awareness of those opportunities and therefore the likelihood that they will take advantage of them.⁷⁷ The effective exclusion of regulatory beneficiaries from the rulemaking process undermines the effectiveness of the entire endeavor by disabling the public feedback loop necessary to develop the agency’s expertise.⁷⁸ Where agency ineffectiveness in serving the ends of the public to which it owes its existence results from the exclusion of that public from regulatory deliberations, threats to agency legitimacy become all the more pronounced.

Finally, even if notice-and-comment rulemaking were to engage the relevant public in the assessment of proposed rules, it would remain unequal to the legitimating task, as the notice-and-comment process itself is largely limited by the agency’s initial definition of the regulatory problem to be addressed.⁷⁹ This limitation amounts to the independent selection of ends by government experts, so decried by Dewey,⁸⁰ relegating to a mere afterthought consideration of public opinions regarding the appropriate means to achieve those ends. Recent literature describing the limited reasoning capabilities of the general public⁸¹

⁷⁵ Freeman, *supra* note 5, at 12. Professor Jody Freeman’s observation, though largely referencing regulated entities, extends to regulatory beneficiaries as well. Agencies encourage even less dialogue and deliberation among regulatory beneficiaries when they adopt less formal means of policymaking, such as guidance documents. See Mendelson, *supra* note 14, at 420–33.

⁷⁶ See, e.g., Mendelson, *supra* note 14, at 420–33.

⁷⁷ See Cuéllar, *supra* note 14, at 490.

⁷⁸ See *supra* pp. 589–90.

⁷⁹ See Freeman, *supra* note 5, at 12–13 (highlighting that, “because the agency must first actually propose a rule in order to invite comment, the definition of the regulatory problem can be frozen at the time of the [Notice of Proposed Rule Making], thus circumscribing at the outset” the relevant information that the public might provide).

⁸⁰ See DEWEY, *supra* note 12, at 208.

⁸¹ See, e.g., CASS R. SUNSTEIN, *RISK AND REASON* 28–52 (2002) (discussing how individual and social thinking distort perceptions of risk, and arguing for limiting public involvement in regulatory decisionmaking on that basis). But see Cuéllar, *supra* note 14, at 487 (countering that the public is diverse, that sophistication in public comments “is endogenous to how one gets involved in participation,” and that regulation is not “entirely about risk”). Dewey viewed the democratic realists of the early twentieth century, who “denounced the irrationality and impracti-

does not undercut the demand for greater public engagement in the determination of agency ends. General apathy and a lack of sophistication on the part of the public are symptoms of, not justifications for, the exclusion of the public from regulatory decisionmaking.⁸² Furthermore, though agency experts might be better positioned to perform detailed cost-benefit analyses, the values initially assigned to those costs and benefits can rarely if ever be empirically deduced.⁸³ Given the fact of broad congressional delegation to agencies,⁸⁴ public involvement in the assignment of values and declaration of ends is a necessary condition for the democratic legitimacy of the administrative state.

C. Deweyan Adjustments to the Current Regulatory Process

In light of this Deweyan critique of the current regulatory process, this Note identifies three possible adjustments that might “achieve such recognition” of the public as to “give it weight” in agency decisionmaking, thereby enhancing the legitimacy of the administrative state.⁸⁵ First, consistent with the purpose underlying its creation, an agency should be required to articulate the relevant public.⁸⁶ That is, it must identify those affected by the indirect consequences it has been charged with addressing — namely, the intended regulatory beneficiaries.⁸⁷ The agency’s organic statute would presumably provide a pre-

cality of democratic government” and “argued that the role of the public in decision making should be severely restricted and power placed in the hands of those few men who *were* rational and intelligent,” as “drain[ing] democracy of its essentials.” WESTBROOK, *supra* note 39, at 285–86.

⁸² See Cuéllar, *supra* note 14, at 470 (“The public’s perception of its stake in regulatory policy depends rather largely on the process through which people are queried.”); *cf.* DEWEY, *supra* note 12, at 123–24, 134–35, 205–06 (“Political apathy . . . ensues from inability to identify one’s self with definite issues.”) *Id.* at 134–35.; Yochai Benkler, *From Greenspan’s Despair to Obama’s Hope: The Scientific Basis of Cooperation as Principles of Regulation*, in NEW PERSPECTIVES ON REGULATION 63, 78 (David Moss & John Cisternino eds., 2009) (explaining the possibility that, “when a government agency takes over a particular social service, people cease to see providing it as a shared social responsibility”).

⁸³ See Cuéllar, *supra* note 14, at 467–68 (insisting that agency analysis “almost ineluctably turns on questions such as . . . how to make judgment calls about the value of particular outcomes (not just their probability)”; Kagan, *supra* note 6, at 2269 (“Most administrative action necessarily entails serious conflict about both the selection of values and the allocation of gains and losses.”). Moreover, public involvement with regard to the determination of regulatory ends would likely operate at a different level of generality than the consideration of means, perhaps one better suited to the collective reasoning capabilities of a diverse body of individuals.

⁸⁴ See Kagan, *supra* note 6, at 2253; Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 4 (1994).

⁸⁵ DEWEY, *supra* note 12, at 77.

⁸⁶ See *id.* at 131.

⁸⁷ Regulatory beneficiaries are the agency’s most important constituency, yet perhaps the most often overlooked in the regulatory process. See Lisa Schultz Bressman & Michael P. Vanden-

liminary identification of the relevant public. From there, however, the agency would be responsible for further inquiry into associated consequences that might implicate a broader, or somehow different, public than that originally conceived.⁸⁸ A clear articulation of the public relevant to the agency's activities need not — indeed, should not — foreclose revision going forward.⁸⁹ Yet that articulation would put the members of that public on notice that resources had been allocated for the protection of their interests and would thus provide grounds upon which the public, the press, or elected representatives might subsequently hold the agency accountable.⁹⁰

Second, the agency should actively engage its public at the agenda-setting stage of the regulatory process. Under current practice, an agency must submit an annual plan encompassing significant proposed regulatory actions to the Office of Information and Regulatory Affairs (OIRA) for purposes of coordinating regulatory plans across agencies.⁹¹ This annual plan ought to be developed through engagement with the relevant public, and it ought to represent the regulatory needs expressed by that public. Following its identification of the relevant public, the agency should develop means of soliciting that public's input and fostering dialogue among its members. Bolstered in this way, public engagement in the determination of ends to be pursued through regulation would reconcile the regulatory process with Dewey's pronounced concerns regarding government by experts.⁹² Absent this kind of public engagement, the regulatory plan submitted annually to OIRA is likely to be of dubious effectiveness and accountability.

Finally, the agency ought to take seriously its responsibility to communicate with its public. It should publicize both the results of its inquiries into the indirect consequences within its jurisdiction and the

bergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 74–75 (2006); Mendelson, *supra* note 14, at 429–30.

⁸⁸ The President or members of Congress might contribute to the identification of the public subsequent to the passage of the agency's organic statute. The continued involvement of elected representatives in the definition of the agency's responsibilities might partially address the concerns associated with political accountability in the administrative state. Yet publicity of the agency's ultimate identification would also curb the ability of representatives to smuggle private interests into the domain of regulatory beneficiaries. See, e.g., SCHOENBROD, *supra* note 68, at 9–12.

⁸⁹ Cf. DEWEY, *supra* note 12, at 167 (“There can be no public without full publicity in respect to all consequences which concern it.”).

⁹⁰ Such an articulation might also provide grounds for standing.

⁹¹ See Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 83–87 (2006).

⁹² See *supra* p. 590; cf. Mendelson, *supra* note 14, at 433 (“Because of [an] inability to have their views heard in the decision-making process, regulatory beneficiaries may perceive a particular policy decision as illegitimate.”). Agency engagement with regulatory beneficiaries at this stage would also help to offset the disproportionate influence exercised by regulated entities in the rulemaking process.

options available to control those consequences. Furthermore, it should do so in plain terms, embracing a “fundamental and ever-operating aim . . . to translate knowledge of the subject-matter of physical conditions into terms which are generally understood, into signs denoting human consequences of services and disservices rendered.”⁹³ A public better educated in the substance of agency regulations is better equipped to hold regulators accountable for their decisions⁹⁴ and to inform them of concerns going forward. If realized, these proposed adjustments would help to create the positive feedback loop necessary for effective and accountable agency decisionmaking.⁹⁵

In order to realign the current regulatory process along the Deweyan justificatory framework, this Note proposes an executive order mandating agency adoption of the adjustments recommended above. The choice of an executive order reflects an acknowledgement of the increase in executive power over the administrative state over the past few decades.⁹⁶ Accepting that the President may be best positioned to effectuate change in the regulatory process,⁹⁷ though mindful of the limitations on the legitimating effects of presidential control, the proposed executive order would continue in the spirit of President Obama’s recent reinvigoration of Executive Order 12,866,⁹⁸ only amending it to include the preceding three provisions.⁹⁹

⁹³ DEWEY, *supra* note 12, at 172–73. Thus, officials must inform the public of the reasons for their actions in a way sufficient for the public to judge them adequately. *See id.* at 208–09.

⁹⁴ *Cf.* Fitts, *supra* note 26, at 850–51 (discussing the connection between a President’s visibility and accountability).

⁹⁵ *Cf.* Kahan, *supra* note 36, at 804–05 (advocating a “bottom up” approach to agency design, asking “not which conception of democracy and corresponding position on delegation are ‘best’ in the abstract, but which make the most sense in a particular regulatory setting, given the values and interests at stake there,” *id.* at 804).

⁹⁶ *See* Farina, *supra* note 24, at 180; Kagan, *supra* note 6, at 2248–50.

⁹⁷ *See* Kagan, *supra* note 6, at 2246 (claiming that the President has “asserted at least a comparative primacy in setting the direction and influencing the outcome of administrative process”).

⁹⁸ Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 83–87 (2006). Issued in its first incarnation by President Carter and adopted, with various revisions, by every subsequent administration, what became Executive Order 12,866 under President Clinton created a channel for centralized direction and review of diverse rulemaking activities.

⁹⁹ Earlier this year, President Obama released an executive order, Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011), which largely reaffirmed Executive Order 12,866 and further endorsed public access to the rulemaking process. Section 2, titled “Public Participation,” directs agencies to solicit input from regulatory beneficiaries as well as regulated entities prior to issuing a notice of proposed rulemaking and to provide opportunities for public comment thereafter. *See id.* § 2(b)–(c), 76 Fed. Reg. at 3821–22. This Note’s proposed amendments would expand the scope of public engagement beyond that envisioned in President Obama’s executive order.

III. "DEALING WITH THE PROBLEMS" OF THE MODERN ADMINISTRATIVE STATE: THE CONSUMER FINANCIAL PROTECTION BUREAU

The implementation of the proposed executive order would necessarily vary by agency, depending on the scope and nature of the publics each agency serves. To illustrate the possible forms implementation might take in a particular context, this Note highlights the newly created Consumer Financial Protection Bureau¹⁰⁰ (CFPB). The CFPB emerged through a process largely mirroring that through which a state originates in Dewey's account.¹⁰¹ Initially introduced in the wake of the 2008 financial collapse,¹⁰² the Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁰³ (Dodd-Frank Act) identified a wide-ranging class of indirect consequences attributable to the associated behavior of financial-market actors across the United States and abroad.¹⁰⁴ Passed along highly partisan lines,¹⁰⁵ the Dodd-Frank Act insulated the CFPB from political control, assigned it an independent director, and granted it the power to enforce numerous existing consumer financial protection laws and to promulgate new regulations.¹⁰⁶ The CFPB thus exercises broad, relatively unchecked authority over an expansive domain of financial activity.

In this way, the CFPB exhibits many of the features that render agencies vulnerable to charges of ineffectiveness and unaccountability. The public it has been charged with protecting is "amorphous" and largely "unarticulated,"¹⁰⁷ ostensibly consisting of consumers of financial services generally.¹⁰⁸ The CFPB's much-denounced insulation from both Congress and the President¹⁰⁹ blocks channels of accounta-

¹⁰⁰ See Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1011–1013, 1017, 12 U.S.C. §§ 5491–5493, 5497 (Supp. 2010).

¹⁰¹ See DEWEY, *supra* note 12, at 27 ("The characteristic of the public as a state springs from the fact that all modes of associated behavior may have extensive and enduring consequences which involve others beyond those directly engaged in them. When these consequences are in turn realized . . . , recognition of them reacts to remake the conditions out of which they arose.").

¹⁰² See Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES, July 22, 2010, at B3 (characterizing the legislation as a "response to the 2008 financial crisis that tipped the nation into the worst recession since the Great Depression"); *Creating the Consumer Bureau*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/creatingthebureau> (last visited Oct. 29, 2011).

¹⁰³ Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

¹⁰⁴ Cf. DEWEY, *supra* note 12, at 27 (discussing the realization of indirect consequences).

¹⁰⁵ See 155 CONG. REC. H14,804 (daily ed. Dec. 11, 2009).

¹⁰⁶ See 12 U.S.C. § 5491 (Supp. 2010).

¹⁰⁷ DEWEY, *supra* note 12, at 131.

¹⁰⁸ See 12 U.S.C. § 5493(b); see also Cooper, *supra* note 102 (including a quotation from President Obama suggesting that the Dodd-Frank Act extends protections to anyone who has "ever applied for a credit card, a student loan or a mortgage").

¹⁰⁹ The Dodd-Frank Act not only created an independent director, removable for cause, see 12 U.S.C. § 5491(c), but also created an independent revenue stream for the CFPB, see 12 U.S.C.

bility to the elected branches, undermining its claims to legitimacy by effectively limiting them to its promises of effective regulation in the interests of the public. The domains under the agency's regulatory authority are complex and highly technical, warranting the intervention of financially expert regulators on behalf of the public. Yet some skeptics have questioned the agency's ability to intervene reliably in such a manner, warning of its susceptibility to capture by business and other specialized interest groups.¹¹⁰ These features and the legitimacy concerns they trigger make the CFPB an appropriate test case for the possible effectiveness of the executive order proposed above.

The CFPB's most difficult task would appear to be the identification of the publics relevant to its legislative mandate, under the first proposed provision. The Dodd-Frank Act offers very little by way of specification of intended regulatory beneficiaries, perhaps because that group not only encompasses a vast proportion of the U.S. population, but also implicates a wide array of activities giving rise to indirect consequences that have yet to be fully ascertained.¹¹¹ The Act does, however, offer some delineation. It defines the overarching purpose of the CFPB as "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."¹¹² This language suggests that the public initially relevant to the CFPB at the outset consists of those persons who might seek access to the market for consumer financial products or services.

The CFPB has already adopted one means of revising its understanding of the publics to whose needs it will be responsive going forward — a means that also serves as a channel to engage such publics in the determination of regulatory ends. A feature on the CFPB website, which launched in February 2011, temporarily allowed members of the public to submit questions, concerns, and suggestions to the

§ 5497(a)(1)–(3). Republicans have continued to demand that the agency be restructured to remove these features. See Edward Wyatt & Ben Protess, *Foes Revise Plan to Curb New Agency*, N.Y. TIMES, May 6, 2011, at B1 (describing Republican demands that the agency be restructured before it considers appointing a director). "This is about accountability," claimed Senator Richard Shelby of Alabama. *Id.*

¹¹⁰ See Ilya Somin, *Political Ignorance and the Case Against Paternalistic Regulation*, THE VOLOKH CONSPIRACY (Sept. 19, 2009, 7:50 PM), http://volokh.com/archives/archive_2009_09_13-2009_09_19.shtml#1253404230 (arguing that, because of the complexity of financial protection regulations, "it will be easy for interest groups and government officials to enact regulations that benefit politically influential businesses [at] the expense of the public under the guise of consumer protection"). This vulnerability raises concerns about the CFPB's potential adoption of an interest group representation mode of decisionmaking.

¹¹¹ See CONSUMER FIN. PROT. BUREAU, BUILDING THE CFPB 8 (2011) ("Even those who avoided the temptations of excessively risky credit were caught in its web. . . . The costs of irresponsible lending were borne by tens of millions of American families.").

¹¹² See 12 U.S.C. § 5511(a).

agency as it began its work.¹¹³ Professor Elizabeth Warren captured the Deweyan spirit of this effort when she explained: “For the first time in many years, we have the opportunity to create a brand new consumer agency from the ground up. We want to make sure that you are with us all the way while we build it.”¹¹⁴ The website was well publicized (perhaps thanks in part to the contested role of the agency itself) and appears to have elicited a wide variety of public comments, to which CFPB staffers responded in online videos. The agency should restore this interactive capability going forward as a means of engaging the relevant publics in the preparation of its annual regulatory agenda.¹¹⁵ To better notify these publics of its authority to act on their behalf, the agency might engage in its own advertising efforts or require providers of financial products and services to append to their consumer agreements a notice alerting consumers to the CFPB website.

Yet this innovation alone does not suffice for purposes of active public engagement in the determination of the CFPB’s regulatory objectives. The broader public implicated in the CFPB’s mandate suggests that, though the internet is an enormously helpful tool in creating channels of access between regulators and the public, it cannot be the only tool used to repair legitimacy gaps in the regulatory process.¹¹⁶ Nor has it been.¹¹⁷ The agency has taken additional steps in a Deweyan direction by affirmatively reaching out to consumers in the financial products and services markets. Warren and the CFPB staff have not only “met with more than 200 consumer, civil rights, and community-based organizations across the country,” but also “visited some of the communities that have been hardest-hit by financial problems.”¹¹⁸

¹¹³ *Open for Suggestions*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/openforsuggestions> (last visited Oct. 29, 2011). CFPB employees read and listened to every submission of the hundreds they received and then recorded videos explaining agency positions or actions the CFPB might take in response. *Id.*

¹¹⁴ *Id.* In a follow-up video, Warren emphasized that “[p]eople are interested in the work we’re going to do . . . and they are willing to invest some time to speak up and tell us about it.” *Id.*

¹¹⁵ Acting in this spirit in a narrower context, the CFPB has begun to implement a “consumer response function” designed to “facilitate the collection and monitoring of and response to consumer complaints regarding certain financial products and services,” which “will help the CFPB identify areas of concern and help CFPB in its supervision and other responsibilities.” CONSUMER FIN. PROT. BUREAU, *supra* note 111, at 18.

¹¹⁶ See Benkler, *supra* note 82, at 80 (“[G]overnment must provide the means, both online and offline, for effective, widespread participation by citizens in the regulatory process, from its inception to its conclusion and subsequent oversight.”).

¹¹⁷ See CONSUMER FIN. PROT. BUREAU, *supra* note 111, at 18 (“To ensure broad access, the CFPB will provide a variety of contact channels, including the Internet, mail, fax, and a toll-free telephone number with English and Spanish language capabilities.”).

¹¹⁸ *Id.* at 16–17 (noting, for example, Warren’s visit to a Miami foreclosure court, meeting with victims of predatory lending in San Antonio and San Francisco, and hosting of a roundtable in Columbus, Ohio).

To engage would-be consumers who are excluded from or underserved by the markets, more sustained, on-the-ground outreach efforts will be necessary; the new “Consumer Engagement and Education” division¹¹⁹ is a proper site for the exploration of such efforts.

The CFPB has also endeavored to inform the public of its regulatory activities and to solicit feedback.¹²⁰ A perfect example of such efforts is the agency’s work in the “Know Before You Owe” project, focused on merging and simplifying federal mortgage disclosure forms.¹²¹ The agency consulted lenders and consumer advocates before designing two alternate forms, which it then proceeded to “test” in one-on-one interviews with consumers in six cities; additionally, it is “soliciting online feedback from consumers and market participants,” seeking input “regarding implementation and usability.”¹²² The CFPB has created lines of communication with the public relevant to a stated problem, thereby enhancing its expertise in the Deweyan sense and enabling its effective resolution of that problem.¹²³ Further communication efforts include the agency’s compilation and publication of “reliable and consistent data that can be analyzed by . . . members of the public to facilitate enforcement of fair lending laws and to identify business and community development needs and opportunities,”¹²⁴ echoing Dewey’s insistence that “what is required is that [the many] have the ability to judge of the bearing of the knowledge supplied by others upon common concerns.”¹²⁵

Despite the structural features of the CFPB that limit its accountability and may make it vulnerable to interest group capture, it has the potential — already demonstrated through measures taken in the spirit of the executive order proposed above — to embrace the ends of the publics it serves and promulgate regulations effective toward those ends. To the extent these Deweyan adjustments to the regulatory

¹¹⁹ See *id.* at 19–20 (describing the division’s financial education objectives and the development of “targeted outreach to groups that face particular challenges,” *id.* at 19). In contrast, the “External Affairs” division appears focused on maintaining “robust dialogue” with “various stakeholders” such as community banks and credit unions, see *id.* at 21–22, as would be expected under an interest group representation model.

¹²⁰ The CFPB website, designed in a highly accessible format, is one such channel. Again, however, the agency cannot rely exclusively on the website in carrying out its duty to communicate with the public regarding its decisions. But it might also employ its regulatory authority over market actors to facilitate the education of their consumers. Though the Surgeon General’s warning on cigarette packages provides consumers with immediate information, an equivalent notice appended to consumer contracts might instead direct financial products consumers elsewhere to information regarding recent regulatory changes pertinent to their present or future exchanges.

¹²¹ See CONSUMER FIN. PROT. BUREAU, *supra* note 111, at 10–11.

¹²² *Id.* at 11.

¹²³ See *supra* pp. 588–90.

¹²⁴ CONSUMER FIN. PROT. BUREAU, *supra* note 111, at 14.

¹²⁵ DEWEY, *supra* note 12, at 209.

process might prove similarly amenable across agencies, they offer a valuable method of dealing with the problems of the modern administrative state.

IV. CONCLUSION

“The old saying that the cure for the ills of democracy is more democracy . . . may [] indicate the need of returning to the idea itself, of clarifying and deepening our apprehension of it, and of employing our sense of its meaning to criticize and re-make its political manifestations.”¹²⁶ Similarly, a cure (however partial) for the ills of the administrative state may come through a reevaluation of the idea of administration itself along with the core justifications for its prominent role in U.S. governance. The democratic theory of John Dewey offers a lens through which the administrative state might be reevaluated, and the resulting conception resolves the tension between accountability and effectiveness in which so many previous attempts at justification appear bound up. Though the presidential control model might afford a kind of regulatory effectiveness, its mechanism of indirect political accountability cannot ensure democratic legitimacy. Nor can the mere inclusion of increasing numbers of interest group representatives in the notice-and-comment process. Conversely, though civic republican accounts of democratic deliberation declare their own legitimacy, their implications for regulatory effectiveness undermine the value of the model as a method for achieving actual reform.

Shifting the emphasis to public participation at the agenda-setting stage minimally disrupts the status quo in notice-and-comment rule-making while significantly enhancing the democratic legitimacy of the overall regulatory endeavor. Such a shift may result in an added procedural layer in agency decisionmaking, but the addition ultimately makes for more effective regulation. It properly channels agency expertise to the selection of means, directed toward ends determined by the public. Consequently, any proposed rulemakings already represent a baseline affording proper “recognition” to the public, mitigating concerns regarding the disproportionate influence of private interests in the notice-and-comment process (as well as in less formal proceedings). Through subsequent communication, the agency enables the public to contribute more meaningfully in the future, thereby generating a productive feedback loop. Thus, the Deweyan conception of the administrative state reconciles accountability and effectiveness concerns. It offers a workable hypothesis for addressing the legitimacy crisis of the regulatory process, and the CFPB offers an opportunity to test that hypothesis.

¹²⁶ *Id.* at 144.