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Blake Emerson
UCLA School of Law

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THE VALUES OF THE ADMINISTRATIVE STATE: A REPLY TO SEIDENFELD[†]

Blake Emerson^{*}

I appreciate the opportunity to continue the conversation on democracy in the administrative state that I hoped *The Public's Law* would inspire.¹ In his review, Mark Seidenfeld critiques some of the book's legal reform proposals. He argues that I am too optimistic about the general public's ability to participate in the administrative process, about administrators' competence to reason about social values, and about courts' capacity to police such reasoning.

The aspects of my argument Seidenfeld criticizes come at the conclusion of the book's broader study of the intellectual and institutional history of the administrative state. This history is meant to challenge the received wisdom about what that state is for and how it ought to operate. *The Public's Law* argues that the legitimacy of the administrative state is not just a matter of technocratic expertise or finding a workable balance between interest groups. And it's certainly not just a matter of carrying out the president's will. Rather, the history of the administrative state shows how the people can use it to reconstruct society in the interest of freedom. I provide a short summary of my book's historical findings and normative arguments before turning to Seidenfeld's critique.

I. FROM HEGEL TO THE PROGRESSIVES' ADMINISTRATIVE STATE

Conservative jurists and scholars today often argue that the administrative state is unconstitutional, either because agencies wield legislative and adjudicatory power, are insulated from the president's supervision, or otherwise threaten liberty or democratic control.² A prominent strand of this critique holds that America's constitutional order was corrupted during the Progressive Era by German theories of law and government, particularly

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^{*} Assistant Professor of Law, UCLA School of Law. The author would like to thank Benjamin Lempert, Julianna St. Onge, and Ahmed Rizk for their editorial input.

1. BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019).

2. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 312–16 (2013) (Roberts, C.J., dissenting); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

those of the philosopher G.W.F. Hegel.³ These scholars argue that the Progressives' adoption of German conceptions of the state has set us on the "road to serfdom."⁴ Only adherence to the classical liberalism of the Framers can vanquish the Teutonic menace.

The Public's Law agrees with these conservative critics that Hegelian ideas influenced many of the Progressives who imagined and constructed our modern administrative state.⁵ But the theory that resulted was not some totalitarian nightmare. It was rather a synthesis of America's democratic-constitutional ideals with the best aspects of German statecraft. This Progressive-Hegelian vision influenced some administrative programs during the New Deal and could also be seen at work in the administration of civil rights laws in the 1960s. This intellectual and institutional history foregrounds the book's normative account of how to restructure the state in the present.

Hegel argued that the purpose of the modern state was to realize human freedom, which the marketplace alone both furthered and undermined.⁶ The capitalist economy furthered people's agency insofar as it enabled them to fulfil their needs by contracting with others. But it undermined people's capacity to pursue their goals by creating social inequality, conflict, and alienation. The state would help to address these problems. Implementing general statutory mandates, civil servants would provide the basic resources and the regulations necessary for people to see themselves and one another as independent, dignified, purposeful agents. To accomplish this task, civil servants would need not only technical training but also "direct education in ethics and in thought."⁷ Providing the conditions for freedom would require more than mechanical fixes to make the exchange more efficient. It would require a critical analysis and transformation of social conditions that stood in the way of equal and reciprocal relationships.

Many Progressives found Hegel's theory of the state very useful in their critiques of laissez-faire economics and their arguments for the reform of American governance.⁸ W.E.B. Du Bois, Woodrow Wilson, John Dewey, Mary Follett, and Frank Johnson Goodnow all embraced different aspects of Hegel's vision for a state that would promote freedom. The great difference between the Progressives and Hegel was that the Progressives were deeply committed to democracy, while Hegel was not. The Progressives therefore sought to reformulate the Hegelian state so that it would be consistent with popular sovereignty. This meant not only electoral supervision of the bu-

3. E.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 441–78 (2014).

4. F.A. HAYEK, THE ROAD TO SERFDOM 65–75 (Bruce Caldwell ed., definitive ed. 2007) (1944).

5. EMERSON, *supra* note 1, at 61–112.

6. EMERSON, *supra* note 1, at 25–33.

7. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 296, at 335 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (emphasis omitted).

8. EMERSON, *supra* note 1, at 61–112.

reaucracy through Congress and the President but also, more fundamentally, public participation in the administrative process. The affected public would have to work with administrators to fill out the content of general statutory norms.

I show how this vision played out in the New Deal and the Civil Rights eras.⁹ In the New Deal era, agricultural agencies implemented Dewey's Hegelian theory through participatory land-use planning, cooperative purchasing programs, and traditional programmatic benefits. In the 1960s, the implementation of the Economic Opportunity Act and Civil Rights Act also had Progressive-Hegelian overtones. The War on Poverty was administered with the "maximum feasible participation" of impoverished communities.¹⁰ Desegregation of schools and the workplace required ethical reasoning by administrators, civil rights constituencies, businesses, and state and local governments over the meaning and social implications of nondiscrimination.¹¹

While there is a great deal to admire in this history, it also reveals some internal dilemmas that the democratic use of administrative power must face. Administrative intervention is often necessary because of deep inequalities in society that make it impossible for individuals to attain their goals without the help of the state. The Progressives' democratic model requires administrators to deliberate with citizens about the kinds of support and regulations the citizens need. But the very same inequalities that make administrative action necessary create the risk that powerful groups will dominate the administrative process to the detriment of the marginalized.¹² Perhaps the most egregious example was the Wilson Administration's racial segregation the federal civil service.¹³ Inegalitarian administration was also a serious problem in agencies like the Tennessee Valley Authority and the Agricultural Adjustment Administration, which white, propertied farmers were better able to participate in and benefit from than minorities and low-income farmers.¹⁴

This history motivates a normative theory of how the administrative state should be structured. Statutory law should direct the government to provide the material goods and regulatory interventions that the people have concluded they need to become free. This might include broad authorities for agencies to support education, public health and welfare, environmental protection, and racial and gender civil rights. But the norms and standards established by such statutes are almost inevitably vague. What does "requi-

9. *Id.* at 113–48.

10. Economic Opportunity Act of 1964, § 202(a)(3), Pub. L. No. 88-452, 78 Stat. 508, 516 (repealed 1967).

11. EMERSON, *supra* note 1, at 131–39.

12. *Id.* at 169.

13. *Id.* at 75–76.

14. *Id.* at 116–22.

site to protect the public health” mean?¹⁵ What does discrimination “because of . . . race”¹⁶ or “on the basis of sex”¹⁷ mean? To help answer those questions, administrative agencies like the Environmental Protection Agency, Equal Employment Opportunity Commission, and Department of Education need to exercise moral, and not merely technical, reasoning. Public laws like the Clean Air Act and Civil Rights Act implicate value judgments about the kind of society we want to create. Agencies therefore should not be designed merely as efficient machines for carrying out statutory objectives. Rather, agencies need to provide forums for the people to work with civil servants to understand and debate contested political questions—not merely in the abstract, but in terms of the consequences of particular regulatory approaches for their lives.

II. CAN THE PUBLIC DELIBERATE ABOUT REGULATIONS?

Seidenfeld argues that “the general public is not well suited to deliberate about regulations.”¹⁸ He notes that ordinary citizens usually don’t understand regulations well enough to assess them.¹⁹ It is no doubt true that administrative policymaking often involves difficult technical, scientific, and economic questions that untrained citizens will have difficulty understanding. Indeed, one of the central tensions *The Public’s Law* explores is between the need for the state to act efficiently to implement policy and the need to engage the affected, but often uninformed and disempowered, public in shaping such policy. The solution is not, however, to keep the general public at bay and let deliberations among professional elites conclude important policy decisions. Rather, the solution is to find feasible ways to engage the people without crippling the regulatory process.

The book recovers several historical examples of how this might be done. One of the earliest comes from the Forest Service, which in 1923 circulated draft regulations concerning grazing on public lands to stockmen.²⁰ As reported in a long-ignored study by John Preston Comer, the Service’s purposes in this process were “setting the live-stock associations to thinking, and provoking criticism on the part of the various forest district officials.”²¹ During a week-long conference, Forest Service officials met with interested parties in ten subcommittees and also in an open “free-for-all” hearing in

15. 42 U.S.C. § 7409(b)(1).

16. *Id.* § 2000e-2(a).

17. 20 U.S.C. § 1681(a).

18. Mark Seidenfeld, *The Limits of Deliberation About the Public’s Values*, 119 MICH. L. REV. *n. n+12* (2021) (cleaned up).

19. *Id.* at 13.

20. EMERSON, *supra* note 1, at 94 & 230 n.204.

21. JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 209 (1927).

which “[q]uestions of principle and policy were discussed freely.”²² Most of the suggestions generated by these hearings were adopted, but disagreement over whether stockmen held a property interest in grazing rights on public lands resulted in further debates in Congress.²³ This early example shows that extensive public deliberation is feasible, can inform final policy judgments, and can motivate continued political contestation about the position an agency takes. Such public participation provides additional contexts, beyond elections, in which people can intervene in and learn about policy and thus become more active and educated citizens.

The agricultural New Deal extended this model further.²⁴ The Department of Agriculture organized hundreds of thousands of representative farmers into local committees with government officials and civil servants to develop and implement reforms in land use, health care, and education.²⁵ The purpose of such efforts was not only to get input from farmers on agricultural reforms but simultaneously to educate them about modern farming techniques. The War on Poverty in the 1960s likewise engaged residents in impoverished communities in designing and implementing antipoverty initiatives, including the ongoing early childhood education program Head Start, and helped to support emerging urban Black political leadership.²⁶

Such examples probably won’t come up in your typical administrative law course, even though they involve the work of federal administrative agencies. We focus too much on questions of judicial review and on a fairly narrow set of agencies that often come before the D.C. Circuit and Supreme Court. We would do better to broaden our horizons and teach students and policymakers the wide variety of institutional forms and purposes the administrative state can pursue.

There are interesting contemporary examples and reform proposals along the lines of the Progressive theory, some of which the book briefly discussed.²⁷ These address Seidenfeld’s concern that people simply aren’t equipped to deliberate about complex regulations. The trick is to find procedures that help the people understand what the experts are doing while informing the experts of the people’s concerns. In a report prepared for the Administrative Conference of the United States (ACUS), Cheryl Blake and I studied how agencies can write regulations and other public-facing documents in “plain language” so that ordinary citizens can participate in making

22. *Id.* at 209–10.

23. *Id.* at 211.

24. EMERSON, *supra* note 1, at 118–22.

25. *Id.* at 121. This part of *The Public’s Law* relies on the excellent work of Jess Gilbert. JESS GILBERT, *PLANNING DEMOCRACY: AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL* (2015). On the election of bureaucrats in agricultural programs, see Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 *GEO. L.J.* 1213 (2020).

26. EMERSON, *supra* note 1, at 142–44. On the War on Poverty and Black political empowerment, see J. DAVID GREENSTONE & PAUL E. PETERSON, *RACE AND AUTHORITY IN URBAN POLITICS: COMMUNITY PARTICIPATION AND THE WAR ON POVERTY* 7, 309 (1973).

27. EMERSON, *supra* note 1, at 175–76.

policy and understand the requirements imposed or benefits conferred.²⁸ We found exemplary processes at the Consumer Financial Protection Bureau, which developed simplified documents to guide specific discussions with small businesses and consumers on various aspects of proposed regulations, above and beyond the basic notice-and-comment process.²⁹ Cynthia Farina and her colleagues have also experimented with an e-rulemaking forum that helps commenters understand and provide meaningful feedback on regulations.³⁰ Michael Sant’Ambrogio and Glen Staszewski have documented and proposed improvements to public participation in the formulation of proposed regulations.³¹ Based on their research for ACUS, they argue that agencies should reach out to “absent stakeholders,” such as “citizens with situated knowledge” about the problem at hand, as well as “ordinary citizens” who are “most likely to convey broad support for or opposition to a rulemaking initiative or recommend strengthening or relaxing a regulatory standard based on value-laden, pre-political policy preferences or priorities.”³²

These sorts of procedures will be essential in addressing major social problems such as climate change. In the book, I gave the example of the Obama Administration’s Clean Power Plan to show how agencies could implement environmental policy in a highly inclusive and deliberative fashion that goes far beyond the notice-and-comment rulemaking requirements.³³ Seidenfeld thinks that subsequent events have proven me wrong because “the agency appears to have been unable to convince coal miners” about the merits of the Plan and the Trump Administration withdrew it.³⁴ The issue, however, is not whether the Clean Power Plan convinced coal miners. It is whether the Plan’s robust participation provisions would give coal miners’ voices and interests, and those of other affected groups, weight in the implementation of the Plan at the state and regional level.³⁵ This scheme was never given a fair chance because of the change in presidential administration. *The Public’s Law* critiques intense presidential control of administration because it may stifle deliberative policy implementation in precisely this way.³⁶ But I readily admit that Progressive administration is no panacea. It

28. BLAKE EMERSON & CHERYL BLAKE, ADMIN. CONF. OF THE U.S., PLAIN LANGUAGE IN REGULATORY DRAFTING (2017), <https://www.acus.gov/report/plain-language-regulatory-drafting-final-report> [https://perma.cc/3EFC-CWEU].

29. *Id.* at 10–12.

30. Cynthia R. Farina, Mary J. Newhart, Claire Cardie, Dan Cosley & Cornell eRulemaking Initiative (CeRI), *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395 (2011).

31. Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021).

32. *Id.* at 836–37.

33. EMERSON, *supra* note 1, at 201–03.

34. Seidenfeld, *supra* note 18, at 14.

35. EMERSON, *supra* note 1, at 202.

36. *Id.* at 181–84, 193–203.

cannot substitute for ordinary electoral politics or the democratic-constitutional rights that enable free and fair elections.

The broader point is that addressing world-historical challenges like climate change will require significant social transformations and dislocations. These kinds of profound, disruptive interventions can be legitimated if the affected public is brought into the administrative decisionmaking process. As Kate Aronoff and her coauthors argue in their proposal for a Green New Deal, public participation in implementing structural changes like a clean-energy grid will be necessary to increase local buy-in and to ensure that marginalized communities have an equal share in the benefits of a green economy.³⁷ Public participation on its own will not be enough, however. If we do not address the inequalities in access and influence that pervade administrative policymaking, regulatory outcomes will favor the already powerful.³⁸ It is not enough to open the doors of the state. We have to make sure there are direct bus routes and smooth ramps to the entryway.

III. CAN ADMINISTRATORS ENGAGE IN MORAL REASONING?

Seidenfeld argues that “agency staff are not appropriate for the role Emerson asks them to fill,” which is to engage in moral deliberation with the affected public in implementing the law.³⁹ He notes that agency staff are “chemists, biologists, health scientists, engineers, accountants, and other individuals who are trained in particular disciplines” and “generally have no special skill in encouraging deliberation or in evaluating inputs from the public to divine some overarching public value to guide regulation.”⁴⁰ The examples *The Public’s Law* recovers from the New Deal, in which agricultural specialists worked with citizens on land-use planning, suggest that scientific experts can indeed deliberate with the affected public.⁴¹ But I take the point that scientists and economists have no special training as facilitators of public deliberation.

It is surprising, however, that Seidenfeld’s list of officials omits another crucial professional category within administrative agencies: *lawyers*. Competent attorneys know how to explain complex legal problems to their clients in ways they can understand and to translate their clients’ needs and inter-

37. See KATE ARONOFF, ALYSSA BATTISTONI, DANIEL ALDANA COHEN & THEA RIOFRANCOS, *A PLANET TO WIN: WHY WE NEED A GREEN NEW DEAL* 25, 111 (2019).

38. EMERSON, *supra* note 1, at 172–73.

39. Seidenfeld, *supra* note 18, at 20 (cleaned up). Seidenfeld says that “Emerson sees the bureaucracy playing a role of facilitating deliberation by the general public, rather than engaging in deliberation itself.” *Id.* That’s not quite right. I envision deliberation between members of the public and the civil service. See EMERSON, *supra* note 1, at 184 (“In consultation with . . . affected parties, administrative officials would exercise their interpretive discretion to dismantle social relationships characterized by servitude, domination, and exclusion, and support in their place equal, integrated, and reciprocal relationships between citizens.”).

40. Seidenfeld, *supra* note 18, at 20–21.

41. EMERSON, *supra* note 1, at 118–26.

ests into legal claims. Lawyers can use the same skills to deliberate with affected parties about the normative and practical consequences of various regulatory proposals and actions. I try to prepare students for these kinds of tasks in law school. In administrative law and torts, I teach students to think about the often-conflicting values that underlie legal rules—values like individual liberty, economic efficiency, and social equality. Many of my colleagues surely do the same. The regulatory impact analysis imposed by the White House’s Office of Management and Budget also permits agencies to consider such values.⁴² Agency lawyers thus should have the professional training, and often the formal authority, to reason with the affected public about the value judgments that are implicated in the agencies’ policies.

The Public’s Law provides several examples of civil servants engaged in this kind of moral reasoning in the New Deal and the Civil Rights eras. Consider, for example, how the Department of Health, Education, and Welfare’s Office for Civil Rights explained the inadequacy of a “free choice” system for dismantling segregated education in the South:

A free choice plan tends to place the burden of desegregation on the Negro or other minority group students and their parents. . . . [T]he very nature of a free choice plan and the effect of long-standing community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.⁴³

Attorneys in the Office for Civil Rights understood that there would be very little freedom for black students in the South if they were left only with a choice among schools to attend. The Office thus instituted numerical quotas which helped make major progress in desegregating the South over the next decade.⁴⁴

While value judgments like these may be most obvious in the administration of civil rights law, they also arise in many other, more technical regulatory arenas. In environmental law, Douglas Kysar has offered a philosophically grounded critique of the use of cost-benefit analysis to assess various environmental regulations.⁴⁵ He argues that this now-standard technique “invites exclusionary, technocratic decision making in the face of grave, uncertain collective choices, precisely the context that . . . instead requires inclusiveness, transparency, and candid acknowledgment that ethical choices are being undertaken.”⁴⁶ Purportedly neutral, scientific decisions about how much to invest in levee construction around New Orleans, for instance, cloaked value choices about the worth of human life and governmen-

42. See Exec. Order No. 13,563, 3 C.F.R. 215, 216 (2012); Memorandum on Modernizing Regulatory Review, 2021 DAILY COMP. PRES. DOC. 1–2 (Jan. 20, 2021).

43. EMERSON, *supra* note 1, at 132–33 (quoting 45 C.F.R. § 181.54(a) (1967)).

44. *Id.* at 133.

45. DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY (2010).

46. *Id.* at 92.

tal responsibility to protect citizens.⁴⁷ Particularly when we are dealing with great empirical uncertainty about the likelihood of disastrous events or toxic harms, even high-quality scientific or economic analysis cannot eliminate the necessity of moral reasoning about how much and what sort of precautions we ought to take. Likewise, the appropriate distribution of benefits and burdens from regulatory action (or inaction) cannot be answered through efficiency analysis alone. We must instead ask and answer the difficult question of what distribution is just.

Given that moral reasoning is required to answer these sorts of administrative questions, we need to ask more of public officials than technical proficiency. We need them to have what Hegel called an “ethical” education—an ability to communicate clearly with ordinary citizens, a familiarity with the normative values that our society holds dear, and a capacity to translate society’s values and citizen’s interests into concrete legal rules.⁴⁸ Law schools can—and, at their best, do—provide such education.

IV. CAN THE COURTS POLICE AGENCIES’ VALUE JUDGMENTS?

Seidenfeld argues that I am overly optimistic about courts’ ability to review and constrain agencies’ value judgments.⁴⁹ My approach would not, as he suggests, have courts “decide whether the values of the public coincide with those the agency credited.”⁵⁰ That would indeed be far beyond the judiciary’s institutional competence. Rather, the question on review should be whether the agency has reasonably explained its value choices and responded to pertinent public comments concerning the values implicated in its decision.

Judicial review at present is unduly focused on the technical aspects of agency decisionmaking. Review focuses on whether there is “rational connection between the facts found and the choice made.”⁵¹ The problem with this approach is that it often distorts agencies’ explanation of their policies. If agencies know they will only survive review if they offer an apparently value-neutral, scientific explanation of their regulations, they will conceal the normative commitments that also underlie their policy choices. This is bad for democratic legitimacy because the people won’t understand why the government does what it does, and they will get an inaccurate picture of the questions government bureaucracies face. *The Public’s Law* proposes instead that courts should “require agencies to state with greater clarity the various values that are at issue in their interpretation and application of statutory

47. *Id.* at 90.

48. EMERSON, *supra* note 1, at 32.

49. Seidenfeld, *supra* note 18, at 21.

50. *Id.* at 26.

51. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

terms, to rank those values where possible, and to explain how those values contribute to the regulatory decisions and plans they have developed.”⁵²

Seidenfeld disagrees with this proposal because he thinks that “[v]alues . . . are often impossible to argue in a logical sense,” and so courts won’t really be able to hold agencies’ value-based arguments up to scrutiny.⁵³ Instead, he endorses a more traditional form of arbitrary-and-capricious review in which agencies must identify “regulatory trade-offs” and courts should “review technical arguments” made by agencies.⁵⁴

While I am indeed more skeptical than Seidenfeld is about generalist courts’ capacity to evaluate the scientific or economic foundations of government policy, our positions are not so different as he thinks. Consider the example he gives of *Rust v. Sullivan*.⁵⁵ In that case, the Supreme Court upheld a regulation of the Department of Health and Human Services (HHS) that prohibited recipients of federal funds from providing abortion counseling and engaging in other abortion-related activities. The Court found that the regulation was reasonable in part because it accepted the agency’s argument that the policy was “supported by a shift in attitude against the ‘elimination of unborn children’”⁵⁶ Seidenfeld justly criticizes the Court for failing to consider the fact that the agency had not responded to a countervailing concern raised by commenters, namely, that the proposed regulation would put women’s health at risk.⁵⁷ I am in complete agreement with Seidenfeld’s position on this point. Given the Court’s prior conclusion that it was constitutional for publicly funded health programs to disfavor abortion,⁵⁸ and given the relevant statutory framework,⁵⁹ it was permissible for HHS to consider the fact that some members of the democratic public have a moral opposition to abortion in crafting family planning policies. But the agency nonetheless had an obligation to balance this position against the value of pregnant women’s health, which commenters had drawn attention to.⁶⁰ Because it failed to engage with a value pertinent to the statutory

52. EMERSON, *supra* note 1, at 180.

53. Seidenfeld, *supra* note 18, at 22.

54. *Id.* at 24, 26.

55. 500 U.S. 173 (1991).

56. *Rust*, 500 U.S. at 187 (quoting Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning, 53 Fed. Reg. 2922, 2944 (Feb. 2, 1988)).

57. Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 110–11 (1994).

58. *Maher v. Roe*, 432 U.S. 464 (1977).

59. 42 U.S.C. § 300a-6 (prohibiting use of Title X funds in “programs where abortion is a method of family planning”).

60. See Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning, 53 Fed. Reg. at 2936, 2938; Seidenfeld, *supra* note 57, at 110.

scheme,⁶¹ the agency's one-sided concern with reducing the incidence of abortion should have been found arbitrary and therefore unlawful.

The case presents a particularly troubling example of an agency failing to adequately account for the normative values implicated by its decision. On the approach to judicial review I have advocated, courts would require agencies to engage explicitly with the conflicting values within the relevant statute's zone of interest and to solicit and respond to public comments on the proper interpretation, application, and relative importance of those values. This approach is not totally foreign to administrative law as it is today.⁶² But the dominance of economic analysis has often withered agencies' and courts' capacity to reason about values in a way that recognizes a plurality of human aims and interests.⁶³

Expertise should certainly remain a component of agencies' reasoning, as officials will have to put forth some plausible account of the concrete benefits and burdens their action is likely to have on the values at issue. But that secondary question cannot even be reached if we aren't first crystal clear on what moral values are in play. Traditional administrative law has difficulty addressing that more fundamental issue. That is why I propose to shift the balance from ever-increasing reliance on often-dubious methods of cost-benefit analysis to a more candid explanation of the value judgments that move the agency to act.⁶⁴ This way, reviewing courts and the public will know what values are at issue, and the agency will be required to contemplate social interests other than those prioritized by the incumbent administration. Although agencies won't have to provide a complete philosophical justification of their decisions, they will be required to offer reasonable responses to value-based arguments made by commenters and explain how they have ranked or weighted the relevant concerns. Members of the public can then hold the administration accountable for its choices about which values to prioritize.

Let me give another example from a famous administrative law case. In *FDA v. Brown & Williamson Tobacco Corp.*,⁶⁵ the Court rejected the Food and Drug Administration's attempt to regulate tobacco products. Part of the Court's reasoning was that the decision to regulate tobacco was one of "economic and political significance" that the legislature was unlikely to have

61. See 42 U.S.C. § 300 (authorizing grants for "family planning methods and services").

62. See, e.g., *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) ("[I]f the judicial review which Congress has thought it important to provide is to be meaningful, the [agencies' regulatory preamble] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.").

63. EMERSON, *supra* note 1, at 187–93. On this issue, see the pathbreaking work of ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993) and, more recently, WENDY BROWN, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 37 (2005).

64. For trenchant criticism of cost-benefit analysis, see, for example, Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 *GEO. L.J.* 2341 (2002).

65. 529 U.S. 120 (2000).

delegated to the agency.⁶⁶ As I've argued elsewhere, this is the wrong approach to cases involving such "major questions."⁶⁷ In order to promote the democratic state the Progressives envisioned, courts should instead only defer to an agency's resolution of a major question if the agency engages in a deliberative process that reasonably addresses the relevant values at issue. In the case of the tobacco regulation, FDA appears to have done just that. In response to comments arguing that the regulations would undermine "free choice for adults," for instance, FDA's regulatory preamble stated:

FDA believes that adults should continue to have the freedom to choose whether or not they will use tobacco products. However, because nicotine is addictive, the choice of continuing to smoke, or use smokeless tobacco, may not be truly voluntary. Because abundant evidence shows that . . . children are not equipped to make a mature choice about using tobacco products, the agency believes children under age 18 must be protected from this addictive substance.⁶⁸

It's this blend of value-based but also consequentialist reasoning that agencies should practice and courts should not only respect but encourage. Traditional hard look review can be quite valuable in requiring agencies to act on the basis of science, as has arguably been demonstrated by the Trump Administration's very poor track record in administrative law cases.⁶⁹ But it would be a mistake to press agencies into explaining policies on major issues like climate change or sexual harassment by relying *only* on an apparently value-neutral assessment of costs and benefits or technological feasibility. We need agencies to conduct sound moral as well as economic and scientific reasoning, and to do so in a way that the public can engage with and understand.

That's a tall order. It won't be fully achieved with minor doctrinal adjustments to standards of judicial review. It will require statutory changes that simultaneously extend the transformative reach of the regulatory state, deepen public participation requirements, and give agencies the significant fiscal and staffing resources necessary to implement the law responsively. But such democratic burdens are justified by the harms they avoid: social domination and arbitrary rule.

66. *Brown & Williamson*, 529 U.S. at 160.

67. See Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018).

68. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,418 (Aug. 28, 1996).

69. See *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY (last updated Feb. 11, 2021), <https://policyintegrity.org/trump-court-roundup> [<https://perma.cc/DTR5-THAR>].

CONCLUSION

I would like to conclude by thanking Seidenfeld for providing such thought-provoking criticism of *The Public's Law*. His research has opened administrative-law scholarship to the questions about political legitimacy my book tackles. It will be an important task for future work to fill out the institutional design *The Public's Law* outlines.

