NOTE

ENVISIONING THE REGULATORY STATE: TECHNOCRACY, DEMOCRACY, AND INSTITUTIONAL EXPERIMENTATION IN THE 2010 FINANCIAL REFORM AND OIL SPILL STATUTES

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I. INTRODUCTION

Over the last two years, a series of policy crises have brought to the forefront debates about the appropriate role of the regulatory state. The substantive policy issues have varied greatly, from health care reform to consumer protection, financial regulation to the environment. But across all of these different policy domains, the burst of policymaking activity brings to the surface recurring debates about the fundamental structure of the regulatory apparatus itself. How should agency expertise and discretion be balanced with demands for political accountability? In what ways can the threat of regulatory capture[1] be mitigated? How can ideals of democratic self-rule and democratic legitimacy be reconciled with the autonomy and authority of regulatory agencies?

These are long-standing debates in academic scholarship and American political thought. On the one hand, proponents of the regulatory state emphasize its importance in promoting social welfare by setting minimum standards and harnessing expertise to implement overall policy goals set by Congress.[2] On the other hand, critics of the regulatory state raise concerns about the capture of regulatory agencies by powerful special interest

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[1] The term "regulatory capture" refers to the co-opting of regulatory agencies by special interest groups, to the extent that the institution promotes the particular private interest of those groups rather than the overall public good. For classic statements of the theory of regulatory capture, see JAMES BUCHANAN & GORDON TULLOCK, CALCULUS OF CONSENT (1962); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For a good overview of the problem of regulatory capture as a central argument against the regulatory state, see STEVEN CROLEY, REGULATION AND THE PUBLIC INTERESTS 14-25 (2008).

[2] *See, e.g.*, CROLEY, *supra* note 1; CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990).

groups[3]—concerns that are magnified by the anxiety that regulatory agencies are too removed from channels of democratic accountability.[4] Meanwhile, both sides of the debate share a common concern that regulatory agencies may lack effectiveness if paralyzed by ongoing political debate over regulatory policy or excessive external checks on agency actions.[5] Ultimately, the regulatory state raises several fundamental tensions, primarily between technocratic expertise and democratic accountability and between efficient, insulated policymaking and democratic participation.

This Note explores these tensions by examining two contemporaneous pieces of legislation considered by the 111th Congress in the summer of 2010. In the fall of 2008, a series of high-profile financial companies collapsed, provoking a deep financial crisis and triggering one of the worst economic downturns in recent history. By the spring of 2009, the ongoing crisis highlighted persistent failures in the existing system of financial regulation as regulatory agencies such as the Securities and Exchange Commission failed to adequately regulate the risks taken by financial firms, driving a newly inaugurated administration and Congress to consider wide-ranging reforms to the financial regulatory system.[6] A year later, the Deepwater Horizon offshore oil platform in the Gulf of Mexico exploded, dumping oil into the ocean for weeks before finally being capped. Here too, the crisis was partly blamed on lax and ineffective regulatory oversight.[7]

In the summer of 2010, Congress considered legislation responding to both of these crises. In June, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act,[8] dramatically restructuring the federal government's approach to financial regulation. A month later, the House passed the Consolidated Land, Energy, and Aquatic Resources ("CLEAR") Act,[9] which responded to the Deepwater Horizon oil spill through a similar effort to reconstitute the regulatory agencies responsible for overseeing offshore oil exploration, drilling, and safety.[10] These two pieces of legislation,

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[3] *See, e.g.*, CROLEY, *supra* note 1; Jessica Leight, *Public Choice: A Critical Reassessment*, *in* GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 213, 230 (Edward Balleisen & David Moss eds., 2009).

[4] Jodi Short, *The Paranoid Style in Regulatory Reform* 1 (Georgetown Public Law and Legal Theory Research Paper No. 11-10, 2011).

[5] *See, e.g.*, Leight, *supra* note 3, at 213, 230; Short, *supra* note 4.

[6] *See generally* NAT'L CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT (2011), *available at* http://www.fcic.gov/report.

[7] *See generally* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011).

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[9] Consolidated Land, Energy, and Aquatic Resources Act of 2009, H.R. 3534, 111th Cong. (2010).

[10] The Senate ultimately did not vote on the CLEAR Act, although it considered bills that shared a broadly similar approach. *See* S. 3516, 111th Cong. (2010); S. 3597, 111th Cong. (2010). Many substantive regulatory changes were nevertheless implemented through Department of Interior regulatory discretion. MICHAEL R. BROMWICH, BUREAU OF OCEAN ENERGY

responding to two very different sets of substantive concerns, both aim to reform major swaths of the federal regulatory apparatus. As such, both acts grapple with the same basic challenges in their attempt to promote effective and responsive regulatory policymaking: prevent agency capture and promote accountability. Reading these two acts side by side reveals a common underlying vision of the regulatory state and a spectrum of efforts to overcome some of the recurring tensions and anxieties latent in that vision.

This Note argues that both the Dodd-Frank Act and the CLEAR Act exhibit what will be referred to as a "technocratic impulse," a political theory of the regulatory state that emphasizes the expertise, autonomy, and authority of agencies. Under this view, reforms should respond to challenges such as preventing financial crises or oil spills by empowering regulatory agencies with greater authority, ensuring the proper use of that authority by increasing the expertise of agency officials, and, finally, guarding the autonomy of those agencies by insulating them from political debate and interest groups. Problems of agency capture, ineffectiveness, and ossification are overcome in this model by relying on empowered and rationalized agency expertise. To the extent that agencies are subject to checks, this model of regulation prefers ones designed to reaffirm this underlying faith in and deference to expertise and rationality—for example, judicial or congressional review geared towards ensuring that agency decisions are based on technical expertise rather than political influences.[11] As a vision of the regulatory state, the technocratic impulse thus emphasizes goals of good governance and policy rationality by containing political pressures to protect the domain of neutral, expert regulatory authority.

Mgmt., Regulation, and Enforcement, Implementation Plan in Response to the Outer Continental Shelf Oversight Board's September 1, 2010 Report to the Secretary of the Interior (2010), *available at* http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=43676; Press Release, U.S. Dep't of Interior, Salazar Announces Regulations to Strengthen Drilling Safety, Reduce Risk of Human Error on Offshore Oil and Gas Operations (Sept. 30, 2010), *available at* http://www.doi.gov/news/pressreleases/Salazar-Announces-Regulations-to-Strengthen-Drilling-Safety-Reduce-Risk-of-Human-Error-on-Offshore-Oil-and-Gas-Operations.cfm; Press Release, U.S. Dep't of Interior, Fact Sheet: Reforms Within the Bureau of Ocean Energy Management, Regulation, and Enforcement, *available at* http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=101156.

The issue of outer-continental shelf drilling regulatory reform remains a live one, and future legislative action is likely. This Note will primarily examine the CLEAR Act, H.R. 3534, 111th Cong. (2010), which incorporates versions of other bills proposed in the House debate, specifically the Blowout Prevention Act, H.R. 5626, 111th Cong. (2010), from the House Committee on Energy and Commerce, and the Oil Spill Accountability and Environmental Protection Act, H.R. 5629, 111th Cong. (2010), from the House Transportation and Infrastructure Committee.

[11] This technocratic impulse is therefore consistent with canonical cases in contemporary administrative law. *See, e.g.*, Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) (justifying deference to agency interpretations of law by reference to the expertise of agency policymakers); Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Ins. Co., 463 U.S. 29 (1983) (invalidating agency policy change as "arbitrary and capricious" for failure to provide sufficient expertise-based reasons for the policy change).

This appeal to technocratic neutrality and effectiveness, however, must still grapple with persisting concerns about the accountability, legitimacy, and responsiveness of regulatory agencies.[12] Indeed, this anxiety manifested itself during the debates surrounding both pieces of legislation. Much of the debate around the oil spill response was animated by the spectacular failure of the Minerals Management Service to enforce existing regulations, to the point that the agency was largely viewed as unduly favorable to or even captured by the oil industry it was charged with regulating.[13] To a lesser extent, similar concerns about agency capture and effectiveness arose in the context of the financial regulation debate with respect to improving governance at the Federal Reserve and the Securities and Exchange Commission.[14] As a result, both acts also include a number of provisions that step outside the technocratic model and attempt to develop alternative, democratically oriented mechanisms for agency accountability. These limited "experiments" in regulatory reform underline how recourse to a technocratic ideal of regulation cannot escape the fundamental questions of democratic politics—who decides, what interests are represented, and how technical considerations should be balanced with normative values.[15]

This Note explores these tensions between the technocratic impulse and alternative models of democratic regulatory politics, using the Dodd-Frank and CLEAR Acts as case studies. The debates between technocracy and democracy and between expertise and accountability recur throughout administrative law and scholarship. Analyzing these pieces of legislation, however, shows the debates playing out in real time and suggests some possibilities for institutional experimentation that are worth noting. The goals of this Note are thus quite modest.

First, this Note is not intended as an analysis of the policy merits or impacts of the acts as substantive efforts to regulate the financial and offshore oil sectors. Rather, it examines these regulatory reform efforts with the aim of excavating their underlying political theoretical conceptions of the regulatory state. Similarly, this Note says little about the specific intentions of congressional legislators or of particular actors in the policymaking pro-

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[12] *See, e.g.*, Croley, *supra* note 1; Christopher Edley, Jr., Administrative Law: Rethinking Judicial Control of the Bureaucracy (1992); Martin M. Shapiro, Who Guards the Guardians? Judicial Control of Administration (1988).

[13] *See* Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *supra* note 7, at 76-79 (noting that the Minerals Management Service had become lax and unresponsive in its environmental and safety regulatory duties, in part, out of a focus on revenue maximization and pockets of corruption).

[14] *See* Nat'l Crisis Inquiry Comm'n, *supra* note 6, at 125-26.

[15] The use of the term "experiments" here does not necessarily connote a deliberate intentionality on the part of legislators to propose a solution and evaluate its outcomes in the systematic manner of a scientific experiment. Rather, the term indicates that the democratic aspects of both pieces of legislation represent new approaches that can serve as the basis for an ongoing process of debate and social learning, shaping future efforts at regulatory reform. On this conception of democratic policy experimentation, see Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998).

cess. Instead, the focus is on highlighting implicit theoretical frameworks and patterns that emerge from examining the acts and their referent regulatory agencies from a theoretical standpoint.[16]

Second, these tensions between technocracy and democracy are by no means new to these acts or to this Note. Indeed, these tensions have been an ever-present concern in scholarly debates over the regulatory state since the New Deal.[17] At a minimum, this Note explores the ways in which these tensions remain central to ongoing discussions about the regulatory state and the ways in which prevailing frameworks of administrative law, such as an emphasis on judicial review or presidential administration, have neither defused nor eliminated these tensions. By interpreting the acts in light of this debate between technocratic and democratic policymaking structures, this Note highlights some innovative aspects of each piece of legislation.

Third, by exploring the technocratic impulses of the pieces of legislation and their articulations of alternative democratic models of participation, engagement, and accountability, this Note hopes to motivate a larger inquiry into other theories of democratic regulation. Both acts include a range of institutional experiments to enhance participation, interest representation, and other forms of democratic engagement. As such, these experiments are worth noting and evaluating for their normative and institutional desirability in regulatory policymaking. This Note thus hopes to contribute to the ongoing debate over regulatory structure and the balance between technocracy and democracy by emphasizing these democratic experiments in both pieces of legislation.

The democratizing efforts in the Dodd-Frank Act and the CLEAR Act point toward a nascent alternative approach to addressing the continuing tension between technocracy and democracy. Much of the current debate on regulatory agencies focuses on the appropriate balance between agency discretion and constraint, as well as on the ways in which policymaking can (or should) be sterilized of politics. The experiments in both acts, by contrast, suggest that the modern administrative state can be better reconciled with democratic engagement by *embracing* the irreducibly political nature of regulatory policymaking and by exploring ways of *structuring* politics within agencies rather than sterilizing them of it. While a full theory of democratic regulatory politics is beyond the scope of this Note, the beginnings of such an approach will be explored briefly through the experiments in the Dodd-Frank and CLEAR Acts.

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[16] This approach to the analysis and critique of the regulatory state is a familiar one, exemplified in many well-known works. *See, e.g.*, JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

[17] *See, e.g.*, EDLEY, *supra* note 12; MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992); MASHAW, *supra* note 16; SHAPIRO, *supra* note 12; Frug, *supra* note 16; Stewart, *supra* note 16; Cass Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986).

Part II of this Note outlines background approaches for promoting accountability and effectiveness in the regulatory state. Part III then analyzes the technocratic model of regulation exhibited by the Dodd-Frank and CLEAR Acts in their approach to reform. Part IV critiques this technocratic model and suggests that a more democratic approach offers a better response to the challenges of accountable and effective regulatory policymaking, and Part V outlines the various ways in which the Dodd-Frank and CLEAR Acts embody some of these alternative democratic frameworks. Part VI sketches some preliminary thoughts on what a more robust democratic alternative might look like, and Part VII offers conclusions about the regulatory models of the two acts.

II. Theories of Regulation in Administrative Law

Much of the development of modern administrative law can be described as an ongoing effort to reconcile the exercise of regulatory authority with ideals of democratic accountability. As Richard Stewart writes, "The ultimate problem [of administrative law] is to control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election."[18] Historically, this effort motivated a series of different frameworks for limiting agency discretion and ensuring external constraint.[19] The architects of the New Deal sought to neutralize concerns over agency authority by appealing to scientific expertise, while early challengers deployed a language of legal formalism to argue that regulatory bodies were unconstitutional delegations of legislative authority.[20] While this initial phase of the debate over regulatory authority focused on the question of "delegation"—whether Congress could constitutionally delegate its lawmaking authority to regulatory bodies that were distinct and independent from the elected legislature—this line of argument has ultimately proven to be a dead end for critics of the regulatory state.[21] Today, while Congress exercises authority over the regulatory state, broad delegations of power to agencies and deference to agencies themselves are justified by reference to congressional intent.[22] The result is that

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[18] Stewart, *supra* note 16, at 1688.

[19] The history of this evolution is now familiar in the literature on administrative law. *See, e.g.*, Horwitz, *supra* note 17, at 213-46; Frug, *supra* note 16; Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2253-54 (2001); Stewart, *supra* note 16.

[20] *See, e.g.*, Horwitz, *supra* note 17, at 217-40 (recounting a famous debate between James Landis, who argued for an empowered regulatory state staffed by experts, and Roscoe Pound, who raised concerns about unconstitutional delegations of legislative power to agencies).

[21] *See generally* Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002).

[22] *See, e.g.*, Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) (deference to agency interpretations of law as a form of deference to congressional intent); *see also* United States v. Mead Corp., 533 U.S. 218 (2001) (applying *Chevron* deference as a form of deference to implied congressional intent to delegate authority to regulatory agencies).

congressional oversight is honored by reference to implied congressional intent more than by actual exercises of oversight.[23]

The abandonment of the non-delegation doctrine did not settle this fundamental concern about the regulatory state. Instead, it transferred the debate over agency discretion and democratic constraint to other institutional mechanisms of oversight. First, these concerns motivated the effort to establish procedural constraints on agency action. With the passage of the Administrative Procedure Act in 1946,[24] the question of agency legitimacy was subsumed into an ongoing debate about the "morality of process."[25] Second, judicial review of agency action evolved in the 1970s into an effort to promote greater interest representation in regulatory policymaking through developments such as more permissive standing requirements for challenging agency actions and the expansion of "arbitrary and capricious" review.[26] These developing legal doctrines aimed at "the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision."[27] Third, the more recent expansion of "presidential administration" of agency policymaking—through mechanisms such as executive branch review of agency proposals by groups like the Office of Information and Regulatory Affairs ("OIRA")—seems to promote transparency of decisionmaking, values of expertise, and agency accountability to the elected executive.[28]

These various conceptions of the regulatory state—the assertion of agency expertise, the ideal of congressional control, procedural requirements for agency actions, judicial review and interest representation, and presidential administration—have resulted in an overlapping and multi-layered administrative law regime where agencies are subject to a range of constraints episodically reasserted by courts.[29] However, the very imposition of constraints and channels of accountability implicitly acknowledges and legitimizes the fact that much agency action extends beyond matters of simple technical detail to considerations of social policy and normative values.

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[23] *See, e.g.*, Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

[24] Administrative Procedure Act, Pub. L. No. 79-404, §§ 500-596, 60 Stat. 237 (1946).

[25] HORWITZ, *supra* note 17, at 253 (describing the turn to proceduralism as a substitute morality to justify the authority of the administrative state).

[26] *See generally* Stewart, *supra* note 16 (describing interest representation as a new dominant paradigm for administrative law doctrine). For examples of the interest representation approach, see, for example, Fed. Commc'ns Comm'n v. WNCN Listeners Guild, 450 U.S. 582 (1981); Nat'l Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970); Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

[27] Stewart, *supra* note 16, at 1670.

[28] *See* Kagan, *supra* note 19 (describing the paradigm of expanded presidential oversight of regulatory agencies as a way of defusing anxieties over the authority of regulatory agencies).

[29] *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1750-51 (2007).

Yet these mechanisms of accountability are themselves consistent with the technocratic impulse, which turns once again to the skill and expertise of the agency to resolve political and policy disputes. Because external constraints on agency action seem to be insufficient guarantors of legitimate and effective policymaking, there is renewed attention on optimizing the internal functioning of agencies through expanded expertise and professionalism.[30] Rational and expert regulatory decisionmaking seems to offer a preferable response to rampant interest group politics and the threat of agency capture.[31] To the extent that agency policymaking involves normative and value considerations, the agency administrator emerges as the preferred deliberator, who can neutrally and rationally engage with and weigh all the relevant interests before choosing a course of action.[32] This effort to defuse the dangers of politics and promote the rationality of policy through an expansion of the authority and expertise of agency officials is the technocratic impulse as defined by this Note. And, as the next Part will argue, the technocratic impulse animates much of the recent attempts at regulatory reform in response to both the financial crisis and the Deepwater Horizon oil spill.

III. Technocratic Regulation in Financial Reform and the Oil Spill Response

A. *The Dodd-Frank Act*

The primary animating ethic of the recently enacted financial reform is to promote economic stability by vastly expanding the authority, expertise, and autonomy of financial regulatory agencies, giving them broad discretion to issue rules and regulations regarding financial transactions and banking activities. By focusing its efforts on expanding the authority and rationality of agencies rather than providing specific policies to be enacted, Dodd-Frank exemplifies what can be termed the technocratic approach to regulation.

The centerpiece of the efforts in Dodd-Frank to prevent future financial crises is the creation of a Financial Stability Oversight Council ("FSOC").[33] Established by Title I of the legislation, the FSOC is designed to be a powerful body with broad statutory directives that outline two primary functions.[34] First, the FSOC is charged with consolidating and coordinating financial

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[30] *See, e.g.*, Mashaw, *supra* note 16 (arguing for the need to turn to internal checks on agency actions, such as through enhanced expertise, professionalism, and rationality of regulatory policymakers).

[31] *See, e.g.*, Shapiro, *supra* note 12, at 14-15.

[32] *See id.* at 33; Sunstein, *supra* note 17, at 282; *see also* Robert Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 Yale L.J. 1617 (1984).

[33] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 111-123, 124 Stat. 1376 (2010).

[34] Dodd-Frank Act § 112(a)(1) (to be codified at 12 U.S.C. § 5322) (defining FSOC duties and authority, including the focus on identifying risks, promoting market discipline, and responding to threats to financial stability).

regulation across the federal government.[35] Thus, the FSOC can prioritize regulatory initiatives among different financial regulatory agencies, such as the Federal Reserve ("Fed"), the Department of the Treasury, the Securities and Exchange Commission ("SEC"), the Commodity Futures Trading Commission ("CFTC"), the Office of the Comptroller of the Currency ("OCC"), and the newly created Consumer Financial Protection Bureau ("CFPB").[36] The FSOC itself is comprised of the heads of these financial regulatory agencies.[37] Second, the FSOC is charged with observing market trends and deciding on most major efforts to regulate systemically risky financial institutions.[38] The FSOC has the power to determine when a financial institution—either a bank or some other non-bank entity[39]—poses a systemic risk to the financial system[40] and to then impose appropriate regulations and constraints on the entity or industry.[41]

The statute provides the FSOC with broad discretion and wide latitude to shape the financial regulatory system. Indeed, many of Dodd-Frank's provisions aimed at preventing future financial crises are left to the discretion of the FSOC to trigger. For example, the 15-1 leverage cap[42] and the option to break up systemically risky institutions[43]—two proposals sought by more aggressive reformers as legislative restrictions on all financial entities—are triggered only by a two-thirds vote in the FSOC and the Board of Governors of the Fed.[44] However, even the vote requirement can be waived if the FSOC determines that there exists an emergency circumstance.[45] The imposition of other provisions, such as those capping bank and non-bank institution size[46]

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[35] Dodd-Frank Act § 112(a).

[36] *Id.* (duties include coordinating agency actions, including by identifying needs for new regulations, recommending new regulatory actions, and reviewing proposals).

[37] Dodd-Frank Act § 111(b)(1) (to be codified at 12 U.S.C. § 5321).

[38] *See* Dodd-Frank Act § 112(a)(2)(A), 112(a)(2)(C) (charging the FSOC with monitoring threats to financial stability); *id.* § 112(a)(2)(H) (requiring FSOC supervision for systemically risky financial institutions).

[39] Generally, "non-bank" entities include financial institutions that do not take deposits, such as broker-dealers.

[40] Dodd-Frank Act § 203 (to be codified at 12 U.S.C. § 5383).

[41] *See, e.g.*, Dodd-Frank Act §§ 115, 120, 165 (to be codified at 12 U.S.C. §§ 5325, 5330, 5365).

[42] Dodd-Frank Act §§ 121, 165(j) (to be codified at 12 U.S.C. §§ 5331, 5365). A "leverage cap" sets a limit on the degree to which a financial institution finances itself through debt rather than equity. In general, higher leverage increases the risk of insolvency should asset values decline, though higher leverage also enables financial institutions to generate more profits out of less initial equity or assets.

[43] *See* Dodd-Frank Act § 171 (to be codified at 12 U.S.C. § 5371). *See generally* Dodd-Frank Act tit. II. "Systemically risky" institutions are financial institutions whose size and interconnectedness to the broader financial system make their failure likely to provoke a deeper crisis in the financial system. However, as noted above, the precise regulatory definition is yet to be determined by the FSOC.

[44] Dodd-Frank Act § 203(a)(1) (to be codified at 12 U.S.C. § 5383).

[45] Dodd-Frank Act § 804(c)(3)(a) (to be codified at 12 U.S.C. § 5463).

[46] Dodd-Frank Act § 123 (to be codified at 12 U.S.C. § 5333).

or prohibiting proprietary trading, can similarly occur only after the FSOC conducts further study and issues a final recommendation.[47]

Other aspects of the act expand the scope of federal regulatory authority over previously unregulated areas of the financial sector. The statute grants the Fed the authority to regulate systemically important financial institutions[48] and expands Fed examinations to cover certain bank holding companies as well as non-bank entities.[49] The act provides the SEC with expansive new powers to regulate derivatives,[50] credit rating agencies,[51] and municipal securities.[52] These new responsibilities are paired with expanded statutory authority for the SEC to issue rulemakings, require recordkeeping, and enforce regulations.[53] The legislation also requires the CFTC to register and regulate hedge fund advisors.[54] Similarly, the legislation establishes a new Federal Insurance Office in the Treasury Department, charged with monitoring the insurance industry in order to advise the FSOC on regulatory gaps and potential systemic risks.[55] By creating a new and independent CFPB housed within the Fed, the statute also broadens regulatory authority over consumer financial products[56] including mortgages.[57] The act vests the CFPB with broad powers to ensure both consumer access to financial services and the fairness and transparency of those services.[58]

What is particularly striking about Dodd-Frank is not so much these grants of broad regulatory authority to federal agencies, but rather the ways in which the act attempts to rationalize—and legitimate—such expanded regulatory authority. First, several provisions of the act explicitly attempt to promote rationality through the coordination of regulatory action. A primary function of the FSOC is to coordinate, prioritize, and thereby rationalize the competing regulatory agendas of its member agencies.[59] Elsewhere, the legislation also requires financial regulatory agencies to coordinate with each other, leaving the FSOC as a final arbiter in the case of agency disputes. Thus, the CFPB is required by statute to consult and coordinate with the

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[47] *See, e.g.*, Dodd-Frank Act tit. II.

[48] *See generally* Dodd-Frank Act tits. I, VIII.

[49] Dodd-Frank Act tit. VI; § 165 (to be codified at 12 U.S.C. § 5365).

[50] Dodd-Frank Act tit. VII.

[51] Dodd-Frank Act tit. IX, subtit. C.

[52] Dodd-Frank Act tit. IX, subtit. H.

[53] Dodd-Frank Act §§ 404-406, 410, 413, 418 (amending 15 U.S.C. §§ 80b-4, 80b-10(c), 80b-11, 80b-3a(a), 77b note, 80b-5(e)) (specifying actions to be undertaken by the SEC, including rulemakings).

[54] Dodd-Frank Act tit. IV; *e.g.*, § 402(a) (amending 15 U.S.C. § 80b-2(a)) (extending CFTC authority to private funds under the Investment Advisors Act of 1940, 15 U.S.C. 80b-2(a)); § 403 (amending 15 U.S.C. § 80b-3(b)) (eliminating the private fund exception to CFTC authority).

[55] Dodd-Frank Act tit. V, subtit. A.

[56] Dodd-Frank Act tit. X.

[57] Dodd-Frank Act tit. XIV.

[58] *See* Dodd-Frank Act § 1021 (to be codified at 12 U.S.C. § 5511).

[59] Dodd-Frank Act § 119 (to be codified at 12 U.S.C. § 5329).

SEC, the CFTC, and the FTC where appropriate.[60] Further, other agencies can petition the FSOC to stay or overturn a CFPB regulation if a conflict with another agency's policies is perceived.[61] Similarly, the SEC and CFTC share regulatory authority over derivatives markets and are charged with coordinating their policies, with the FSOC and possible judicial review arbitrating in the case of inter-agency disputes.[62]

Second, the legislation goes to great lengths to expand the informational and epistemic foundations for expanded regulatory action. While it grants agencies broad discretion in setting specific regulatory policies, the statute also requires a number of research studies to shape and review those regulations. Several grants of regulatory authority in the statute come paired with directives that the agency conduct a study on the issue prior to rulemaking.[63] Other studies are tasked to the Comptroller General and the General Accounting Office ("GAO"), essentially ensuring additional analysis independent of the agencies themselves.[64] The FSOC itself is also empowered to set up technical advisory boards,[65] collect data of its own,[66] and use studies developed by the newly created Office of Financial Research.[67]

Third, where the legislation provides for external checks on agency regulations, these checks seem built primarily to ensure the rationality and expertise of agency actions. For example, although the financial regulatory agencies—except for the OCC—are exempt from the generally applicable requirement of having their regulations reviewed by the Office of Management and Budget ("OMB"),[68] the statute requires the CFPB to conduct its own similar cost-benefit analysis for each major regulatory initiative.[69] The congressional audits of the SEC through the Comptroller General[70] and the GAO audits of the Fed[71] seem structured to evaluate the degree to which

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[60] *See, e.g.*, Dodd-Frank Act §§ 1015, 1025 (to be codified at 12 U.S.C. §§ 5495, 5515).

[61] Dodd-Frank Act § 1023 (to be codified at 12 U.S.C. § 5513).

[62] Dodd-Frank Act tit. VII, subtit. A.

[63] *See, e.g.*, Dodd-Frank Act tits. I-II (requiring FSOC studies on systemic risk); tit. V (requiring Federal Insurance Office to study and monitor the insurance industry to advise the FSOC); § 1013 (to be codified at 12 U.S.C. § 5493) (creating a dedicated research arm for the CFPB to investigate consumer financial products and develop regulatory options); § 417 (SEC studies on short-selling); § 914 (amending 15 U.S.C. § 80b-11) (possible investor advisor certification requirements); § 917 (improvements to investor financial literacy); § 918 (improvements to mutual fund advertising); §§ 1074, 1077 (requiring studies of the desirability of further regulation in areas such as mortgages and private education loans).

[64] *See, e.g.*, Dodd-Frank Act § 416 (requiring GAO studies on appropriate hedge fund regulations).

[65] Dodd-Frank Act § 111(d) (to be codified at 12 U.S.C. § 5321).

[66] Dodd-Frank Act § 112(d)(3) (to be codified at 12 U.S.C. § 5322).

[67] Dodd-Frank Act tit. I, subtit. B.

[68] Executive Order 12,866 requires that agencies submit their regulations to OMB for review, but it generally excludes independent agencies. Exec. Order No. 12,866, §§ 2(b), 3(b), 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see also infra* notes 184-190 and accompanying text. The SEC and the Fed are examples of independent agencies.

[69] Dodd-Frank Act § 1022 (to be codified at 12 U.S.C. § 5512).

[70] Dodd-Frank Act §§ 962-964 (amending 15 U.S.C. §§ 78d-7 to 78d-9).

[71] Dodd-Frank Act § 1109 (to be codified at 12 U.S.C. § 5614).

policies are appropriately justified in technocratic and expert-driven terms. The statute also explicitly subjects many of the regulatory activities it authorizes to judicial arbitrary and capricious review,[72] which itself has evolved to focus on agency reason-giving and technocratic justification.[73] Similarly, Dodd-Frank requires the use of agency inspectors general ("IGs") to prod agencies to action, providing a form of internal accountability with some congressional oversight.[74] The act requires peer review of IG reports and the creation of a list of IG recommendations that remain unimplemented by the agency.[75] In addition, the statute creates a coordinated Council of Inspectors General on Financial Oversight to meet once per quarter and report to Congress on the agencies' progress.[76]

Finally, the statute includes several provisions to promote internal agency restructuring aimed at improving agency expertise, neutrality, and autonomy from the regulated community. Thus, Title IX includes provisions requiring the SEC to commission external consultants to recommend organizational reforms to improve the agency's autonomy and effectiveness at enforcement.[77] Such autonomy-enhancing organizational reform is furthered by congressional oversight through annual SEC reports[78] and a GAO study on revolving door policies.[79] In addition, the statutory grant of federal matching funds for the SEC provides the agency with resources in addition to the fees and fines it collects from regulated industry, potentially expanding the resources and autonomy of the agency.[80] Less significantly, the statute also provides for improvements to the Fed's internal governance, tasking a member of the Board to serve as a vice chairman for supervision dedicated to monitoring and optimizing internal procedures.[81]

Viewed as a whole, Dodd-Frank thus seems animated by a conceptual framework of technocratic regulation. This framework seeks to expand both the authority and the discretion of agencies to address complex social

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[72] *See, e.g.*, Dodd-Frank Act §§ 113(h) (judicial review of Fed regulations of non-bank entities), 202 (judicial review of liquidation authority).

[73] On the expertise-promoting focus of contemporary arbitrary and capricious review doctrine, see Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Kathryn Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009). Watts argues that this narrow focus on technical or expert-based reasons should be broadened to allow for more political and explicitly normative reasons justifying agency actions.

[74] Dodd-Frank Act § 211 (to be codified at 12 U.S.C. § 5391).

[75] Dodd-Frank Act § 989C (amending 5 U.S.C. app. § 5(a)).

[76] Dodd-Frank Act § 989E (to be codified at 5 U.S.C. app. 11 note). The Council is chaired by the IG of the Treasury and composed of the IGs of the Fed, the CFTC, the Department of Housing and Urban Development, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the National Credit Union Administration, the SEC, and the Troubled Asset Relief Program. § 989E(a)(1).

[77] Dodd-Frank Act § 967.

[78] Dodd-Frank Act § 961 (to be codified at 15 U.S.C. § 78d-6).

[79] Dodd-Frank Act § 968.

[80] Dodd-Frank Act § 991 (amending 15 U.S.C. § 78 et seq.).

[81] Dodd-Frank Act § 1108 (amending 12 U.S.C. § 242).

problems—here, financial crises. This expanded authority is legitimated and constrained, not by statutory directive or other forms of political constraint, but rather through a variety of mechanisms aimed at ensuring that agency actions are expert-driven and rational. Thus, provisions that require agency coordination, research, and cost-benefit analysis temper the specter of relatively unaccountable regulatory authority by rationalizing regulatory governance. Similarly, efforts to improve agency organization and promote autonomy from regulated industry aim towards the same goal of rationalizing agency authority.

B. The CLEAR Act

Like the Dodd-Frank Act, the CLEAR Act passed by the House of Representatives[82] responded to a policy crisis by reforming, empowering, and rationalizing the relevant regulatory agencies. Although the CLEAR Act did not become law, failing to pass the Senate, the bill exemplifies many of the same tensions between technocratic and democratic visions of the regulatory state—and how these two approaches to regulation might play out in reference to concrete policy challenges. The CLEAR Act abolishes the Minerals Management Service ("MMS"), the primary regulatory agency in the area of offshore oil exploration and drilling, and in its place creates three new agencies charged with overseeing such activities: the Bureau of Energy and Resource Management ("BERM"), the Bureau of Safety and Environmental Enforcement ("BSEE"), and the Office of Natural Resources Revenue ("ONRR").[83] These agencies are empowered to engage in aggressive oversight of oil and gas companies. For example, the act requires oil companies to submit additional detailed plans for exploration methods, safety and environmental protections, and responses to worst-case-scenario oil spills for agency review prior to securing exploration and drilling licenses.[84] The act also empowers the agencies to promulgate regulations providing for more invasive on-site inspections than those conducted by the MMS and periodic audits of company compliance with regulations.[85]

As with the Dodd-Frank Act, the CLEAR Act attempts to render this expanded authority effective and legitimate by securing the autonomy and expertise of the agencies themselves. As Congressman Nick Rahall (D-W. Va.), the Chairman of the House Committee on Natural Resources and chief sponsor of the bill, explained, a robust regulatory system requires "professional, highly trained" staff that no longer "rubberstamp" industry practices,

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[82] Consolidated Land, Energy, and Aquatic Resources Act, H.R. 3534, 111th Cong. (2010).

[83] CLEAR Act §§ 101-103 (establishing the three new agencies).

[84] *See* CLEAR Act §§ 208, 215.

[85] *See, e.g.*, CLEAR Act § 212.

but instead hold regulated entities accountable.[86] These efforts to promote agency autonomy are exemplified in the legislation through revolving door provisions that limit regulator conflicts of interest by preventing the hiring of regulators who recently worked for oil companies and barring regulators from seeking jobs in the regulated community within two years of leaving their posts in the agency.[87] Similarly, the bill charges the Secretary of the Interior with issuing new ethics requirements for all three new agencies.[88]

More broadly, numerous provisions in the CLEAR Act bolster the expertise of the new regulatory agencies by requiring studies, research, and consultations with expert bodies. As part of the organic statute for the BERM, the legislation empowers the agency to generate data and analysis, requiring that such research "shall inform the management functions of the Bureau," based on the "best available science."[89] Similarly, the BSEE is specifically authorized to conduct data analysis and research in addition to its environmental and safety oversight duties.[90] The bill establishes an academy for training and supporting the BSEE's staff.[91] The BERM and the BSEE are charged with conducting their own research to close gaps in knowledge and inform future regulations, particularly with respect to safety and environmental regulations.[92] Meanwhile, the agencies are tasked with periodically reviewing their own regulations and licensing rates, but they must consult outside experts from academia, industry, and non-governmental organizations in the process.[93] In addition, the Secretary of the Interior must establish a long-term system of environmental monitoring and research using peer-reviewed scientific data.[94]

The CLEAR Act's emphasis on objective expertise manifests itself further in its creation of various supplementary bodies for the agencies to consult. For instance, the bill creates an Outer Continental Shelf Safety and Environmental Advisory Board ("Board"), comprised of membership from the National Academies of Science and Engineering, to provide agencies with "independent scientific and technical advice."[95] The Board is meant to not only shape regulations with cutting edge science, but also help agencies identify the best available technologies to require of companies engaging in offshore exploration and drilling.[96] Further, the act creates an extensive role

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[86] Press Release, Comm. on Natural Res., House Approves Landmark Energy Bill to Respond to Crisis in the Gulf, Increase Oil Rig Safety (July 30, 2010), http://www.oceanleadership.org/2010/house-approves-landmark-energy-bill-to-respond-to-crisis-in-gulf-increase-oil-rig-safety.

[87] *See* CLEAR Act § 218.

[88] CLEAR Act § 104.

[89] CLEAR Act § 101(d)(1).

[90] CLEAR Act § 102(c).

[91] CLEAR Act § 102(d).

[92] CLEAR Act §§ 209-210.

[93] CLEAR Act §§ 206(a), 211.

[94] CLEAR Act § 502.

[95] CLEAR Act § 108(a).

[96] *See* CLEAR Act § 211.

for third-party experts, whom the agency must commission to provide independent certifications for company drilling and exploration technologies and designs, including recertifications for major changes initiated by companies.[97] Other implementing bodies created by the legislation, such as the Regional Coordination Councils,[98] are also required to make use of the "best available data" and research for developing their own contingency plans for possible environmental and safety crises.[99] Similarly, the Gulf of Mexico Restoration Task Force ("Task Force") is required to monitor the recovery of the Gulf through peer-reviewed data, independent research, and expert consultations.[100] The Task Force can also establish advisory committees as necessary.[101]

Finally, the CLEAR Act attempts to rationalize these various new regulatory initiatives through coordination across agencies, as well as between agencies and the regulated entities. Formalizing such coordinating mechanisms transforms the fragmented patchwork of regulatory authorities into a more rational and coherent system. Accordingly, the bill not only requires oil companies to develop contingency plans drawing on their expertise, but also requires that these plans be registered with and approved by the agencies.[102] Similarly, the Regional Coordination Councils and the Task Force are comprised of representatives from multiple federal agencies, state and local governments, and other stakeholders to ensure coordinated emergency response planning and rational strategies for managing natural resources.[103]

As with the financial reform legislation, the response to the oil spill indicates a similar clear underlying conception of the regulatory state. Again, the dangers of agency capture, ineffectiveness, and failure are mitigated and controlled by granting broad authority to regulatory agencies. In this approach, such authority is tempered by provisions aimed at securing the autonomy, insulation, and expertise of those agencies. Further, regulatory policy is rationalized by the creation of various interagency coordination mechanisms. Both pieces of legislation thus envision regulation as a highly apolitical, fundamentally rational, and expert-driven process.

In this technocratic model, the task of regulatory reform is largely to enhance the rationality of regulation—to promote the familiar ideal of good governance. Under this view, these reforms prevent the danger of regulatory

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[97] *See* CLEAR Act §§ 205, 212.

[98] Regional Coordination Councils are established by the Act to facilitate planning and emergency response across state and local jurisdictions. CLEAR Act § 601; *see also infra* notes 173-179 and accompanying text.

[99] CLEAR Act § 603.

[100] CLEAR Act § 502.

[101] CLEAR Act § 501(b)(3).

[102] *See, e.g.*, CLEAR Act § 208.

[103] *See, e.g.*, CLEAR Act §§ 502, 603, 806. It should also be noted that the new Interior agencies—BERM, BSEE, and ONRR—are all subject to review by the OMB and the Office of Information and Regulatory Affairs ("OIRA"), providing an additional mechanism through which their policies can be coordinated and rationalized according to cost-benefit analysis under Executive Order 12,866. *See infra* notes 184-190 and accompanying text.

agency capture and ensure that agencies act to further an objective common good by enhancing the expertise, insulation, and autonomy of agencies. As a result, these bodies can be granted broader authority to deploy their knowledge to overcome social challenges and resolve complex policy problems.

IV. The Technocratic Impulse's Limits and the Democratic Alternative

If both the Dodd-Frank Act and the CLEAR Act share a common framework of technocratic regulation, is this model in fact an optimal one for the regulatory state? The attractive elements of this approach are apparent. In light of increasingly complex challenges, from financial crisis to oil drilling technology, the emphasis that technocratic regulation places on expertise seems vital for effective policymaking. Technocracy offers a promise of neutral, objective, rational, and ultimately dependable policy—the very ideal of good governance. Expanding agency authority, expertise, and knowledge offers a way to better respond to social problems while preventing agency capture or ineffectiveness. Yet, these contemporary efforts face the same recurring tensions that have persisted in debates over the regulatory state since its inception.[104]

First, technocratic regulation ultimately cannot resolve either the underlying anxiety of agency legitimacy or the risk of agency capture. Deference to agency expertise seems unavoidable due to the increasing complexity of the social, economic, and technological phenomena subject to regulation, but agency deference is inevitably in tension with values of political accountability and democratic legitimacy. Expanding the autonomy and expertise of agencies may improve their policymaking abilities and the likelihood that policies will be grounded in independent analysis. This effort can to some degree bolster agency legitimacy by grounding agency policy in neutral, expert analysis, but it cannot fully resolve the underlying concerns of democratic accountability. Greater insulation from politics often serves to screen out the countervailing influence of affected stakeholders, while more powerful and politically savvy interest groups remain able to influence agency rulemaking. Indeed, even where agencies emphasize scientific knowledge, sophisticated interest groups are able to provide agencies with data and information more favorable to their interests.[105]

Arguably, agency autonomy and responsiveness can be better achieved not through insulation and recourse to expertise, but through dynamic en-

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[104] *See, e.g.*, Horwitz, *supra* note 17; Shapiro, *supra* note 12; Frug, *supra* note 16.

[105] This risk of "epistemic capture" is a danger noted by a range of advocacy groups active in financial reform. Industry lobbyists have already hired scores of staff to develop reports and data that can justify regulatory decisions more favorable to industry, leaving countervailing advocacy groups, like the AARP, scrambling to keep up. *See, e.g.*, Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulations*, N.Y. Times, June 27, 2010, at A1.

gagement with a broader set of all affected social interests.[106] While existing mechanisms attempt to address this concern—such as by mandating notice-and-comment procedures when agencies initiate new rules[107] or by relying on presidential review of agency actions to incorporate and appropriately balance the range of social interests at stake[108]—these mechanisms by themselves seem insufficient to adequately defuse the concern of agency capture.

This disparity in participatory engagement points to the second key danger of the technocratic model of regulation: it obscures the reality of the normative disputes underlying seemingly technical policy questions. Research, data, and expertise certainly are valuable tools for improving policymaking. But, as even contemporary defenders of the regulatory state have noted, no regulatory policy can be stripped entirely of its normative commitments.[109] By obscuring or ignoring the value considerations that implicate how raw data is interpreted and evaluated, an overly zealous recourse to expertise may have two outcomes. At worst, it risks consolidating a deeper form of "ideological capture," in which regulators share a common worldview with regulated interests but have sufficient evidence to justify decisions that are nevertheless contestable on normative grounds.[110] At best, it creates a dynamic where the real sources of legitimate disagreement are obscured. This avoidance of normative debate in turn has a chilling effect on broader political contests: the underlying sources of political debate and disagreement are obscured, leaving many affected social groups either unaware of the key implications of regulatory debates or unable to engage in the debate itself, which has retreated behind a smokescreen of technocratic discourse.[111] The reliance on "administrative deliberation" to address the nor-

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[106] For a version of this argument, see DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES 1862-1928 (2001).

[107] 5 U.S.C. § 553 (2006).

[108] *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see also* Kagan, *supra* note 19.

[109] *See, e.g.*, Sunstein, *supra* note 17.

[110] *See, e.g.*, Simon Johnson, *The Quiet Coup*, ATLANTIC, May 2009, at 47. Johnson, the former chief economist of the International Monetary Fund, argues that the finance sector had over time shaped the worldviews of top policymakers such that their conceptions of socially optimal policies tracked and supported the interests of the financial sector itself. Thus, banks "benefited from the fact that Washington insiders already believed that large financial institutions and free-flowing capital markets were crucial to America's position in the world." *Id.* at 50. This ideological capture of Washington by Wall Street effectively "gives the financial sector a veto over public policy, even as that sector loses popular support, or the policies prove to be less than ideal." *Id.*

[111] *See* Daniel Carpenter & Gisela Sin, *Policy Tragedy and the Emergence of Regulation: The Food, Drug, and Cosmetic Act of 1938*, 21 STUD. AM. POL. DEV. 149 (2007) (describing one case study of the links between narrative, normative argument, and political mobilization). More generally, political theorists have noted that for political engagement to take place, "what is needed is some *articulation* of the general threat or, more precisely, an account of the phenomenon *and* a ground on which it can be seen as politically salient." MIKA LAVAQUE-MANTY, ARGUMENTS WITH FISTS: POLITICAL AGENCY AND JUSTIFICATION IN LIBERAL THEORY 18 (2002). "Who says what is . . . always tells a story, and in this story the particular facts lose their contingency and acquire some humanly comprehensible meaning." Hannah Arendt, *Truth*

mative value considerations latent in regulatory policymaking cannot by itself resolve this concern, for agency administrators will continually face incentives to retreat from, rather than embrace, potentially damaging political disagreement in order to secure their own policy and institution-building goals through seemingly more broadly acceptable technocratic language.

Third, by limiting the range of political contestability—whether through insulation or technocratic discourse—the technocratic model of regulation undermines its own ability to be responsive to changing conditions and social needs, ironically increasing the risk of ossification, blockage, or misdirected policy. The technocratic model relies largely on its expert officials to generate initiative, adapt to changing conditions and needs, and make the "right" decisions. To this end, technocratic regulation draws on the public as a source of information to facilitate the authority of the agency. This narrow form of public engagement not only mischaracterizes the normative value of participation in a democracy; it also risks undermining the very practice of participation itself, contributing to a wider demobilization of civic engagement.[112] Moreover, as the run-up to both the financial crisis and the oil spill indicate, regulatory agencies, like all human creations, do not function optimally. Redoubling our single-minded faith in technocracy and expertise seems a misguided approach to creating a more responsive, adaptable, and ultimately effective regulatory regime. By contrast, regulation that better blends expertise with various forms of public engagement, debate, and initiative may fare better than administrative policy that embraces only the technocratic impulse.[113]

These weaknesses of the technocratic model create a fundamental challenge for the modern regulatory state. One response to this challenge might be to abandon the project of regulatory public policy altogether. This is the familiar response from laissez-faire ideologies and anti-government conservatism.[114] Yet the social goals that regulation aims to advance remain vital, even if the technocratic model itself proves problematic. As a society, we still need some form of accountability for the actions of powerful private entities like oil and financial corporations. We also require systems to pro-

and Politics, *in* BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 223, 257 (2006).

[112] *See* Patchen Markell, *Insufficiency of Non-Domination*, 36 POL. THEORY 9 (2008) (arguing that narrowing the space for meaningful democratic participation undervalues the normative importance of such participation and creates a dynamic where participation actually decreases as citizens come to view it as ineffectual); *see also* Patchen Markell, *Rule of the People: Arendt, Arche, and Democracy*, 100 AM. POL. SCI. REV. 1 (2006).

[113] For a general form of this argument that broader democratic debate and policy experimentation may actually produce better policy outcomes, see Dorf & Sabel, *supra* note 15.

[114] For an account of the academic and theoretical literature contributing to the rise of public choice theory and its delegitimization of state action, see S. M. AMADAE, RATIONALIZING CAPITALIST DEMOCRACY: THE COLD WAR ORIGINS OF RATIONAL CHOICE LIBERALISM (2003); GOVERNMENT AND MARKETS, *supra* note 3. For a broader conceptual analysis of the key aspects of anti-government rhetoric, see generally ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991).

tect against broad social risks like financial crisis and ecological disaster. In short, we require a form of collective self-rule against crises and social evils. Rather than rejecting the goal of mitigating these challenges, the weaknesses of technocratic regulation drive us towards the need to develop an alternative democratic paradigm of regulation.[115]

Indeed, these weaknesses of the technocratic impulse—disparities in interest representation, obfuscation of normative debates, demobilization of engagement—share three key features that suggest the need for and viability of a more democratic framework for regulatory politics. First, each of these weaknesses can be overcome through a more democratic regulatory structure. Second, this turn to democracy need not involve a rejection of expertise; rather, some form of democratic politics can coexist with a role for technical expertise. Third, each of these weaknesses arises out of an effort to *rationalize* regulatory policy. This rationalization effort aims to protect policymaking from the influence of politics, subsuming questions of values and interests into a more coherent process of regulatory policymaking. This good governance ideal is attractive, but the effort to sterilize policy of politics threatens deeper ideals of democracy, responsiveness, and legitimacy.

Further, as critics of the modern regulatory state have noted, the involvement of politics is inescapable;[116] regulatory agencies should be structured not to avoid politics but rather to engage with the reality of political disagreement openly.[117] Instead of focusing on the narrow question of agency discretion and constraint with an eye towards promoting rationality of policymaking, the central question should be bringing the foci of political debate to the forefront and engaging in those debates in a democratic manner.[118] Rather than attempting to sterilize policy of politics, this approach looks for ways to constitute a dynamic political process, one that leaves ample room for the representation and engagement of different values.

To the extent that the technocratic impulse already offers a response to this approach, it is to subsume the task of structuring political debate into the duties and responsibilities of officials themselves, who are then charged with balancing not only technical considerations but also political and normative ones.[119] Yet there may be other, more democratic modes of constituting regulatory politics—efforts that engage more broadly with the wide range of stakeholders and social actors.

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[115] On this democratic response to the problems of technocracy, see generally K. Sabeel Rahman, *Conceptualizing the Economic Role of the State: Laissez-Faire, Technocracy, and the Democratic Alternative*, Polity Advance Online Publication (Jan. 17, 2011), *available at* http://dx.doi.org/10.1057/pol.2010.29.

[116] *See, e.g.*, Edley, *supra* note 12; Shapiro, *supra* note 12; Frug, *supra* note 16; Sunstein, *supra* note 17; Watts, *supra* note 73.

[117] *See, e.g.*, Edley, *supra* note 12; Shapiro, *supra* note 12; Frug, *supra* note 16; Sunstein, *supra* note 17; Watts, *supra* note 73.

[118] *See, e.g.*, Edley, *supra* note 12, at 190-99; Shapiro, *supra* note 12, at 142-46.

[119] *See* Sunstein, *supra* note 17.

To many, the prospect of democratizing regulatory policymaking seems problematic. Democratic politics raises the specter of chaotic debate, political deadlock, policy incoherence, and the danger of capture.[120] The technocratic impulse itself is often justified as an alternative to the pathologies of democratic policymaking.[121] Yet these concerns about democratic politics, while valid, are ultimately a function not of democracy itself, but of the *structure* of democratic politics. Rather than rejecting democratic engagement altogether, the challenge is to structure democratic engagement such that its benefits in promoting accountability, legitimacy, and effectiveness can be harnessed. Indeed, the administrative state already incorporates some forms of democratic participation—such as notice and comment—that would seem to serve these goals. Both the Dodd-Frank and CLEAR Acts provide for a range of legislative experiments with more democratic approaches to regulatory policymaking, building on existing institutional structures such as notice and comment and explicit interest representation. Each of these attempts has its own limitations and flaws, but all exhibit a common effort to develop a more democratic approach to the politics of regulation than is embraced by the current system. The next Part explores each of these experiments.

V. Experiments in Democratic Regulation

Both the Dodd-Frank and CLEAR Acts include a number of disparate provisions that, to varying degrees, imply a tentatively democratic vision of regulation that departs from the overarching technocratic model. While these provisions are for the most part haphazard elements within the legislation, they nevertheless point to a nascent, as yet under-theorized, alternative vision for the regulatory state. Specifically, each of these experimental provisions attempts in a different way to use the ideal of democratic politics and an empowered public to check and direct agencies.

Each also attempts to generate new initiative and action that can promote the social goals sought by the legislation. These more democratic institutional arrangements can be grouped into four different categories. First, there are provisions for public participation and transparency in regulatory policymaking. Second, other provisions provide for more explicit representation of relevant interests and stakeholders within the regulatory state. Third, this interest representation function may be enhanced by statutory attempts to articulate more explicit normative directives to guide the agency's actions. Fourth, the acts map out new modes of federal and local interaction in policymaking, creating alternative spaces for political accountability, policy innovation, and initiative. Each of these reformist impulses invokes a different conception of democracy and a different view of the ways in which

[120] *See, e.g.*, Edley, *supra* note 12, at 190-99; Shapiro, *supra* note 12, at 142-46.
[121] *See, e.g.*, Philip Pettit, *Depoliticizing Democracy*, 17 Ratio Juris. 52 (2004).

democracy can overcome some of the weaknesses of technocratic regulation outlined above. However, these distinct approaches to democratizing the regulatory state all share common conceptual elements as well.

A. Participation and Transparency

In addition to standard APA notice-and-comment requirements, a number of provisions in both the Dodd-Frank Act and the CLEAR Act provide for participation and transparency in agency rulemaking. For example, the CLEAR Act explicitly requires all rulemaking dockets to be made public[122] and provides for additional public comment processes, such as periodic retrospective reviews of agency rulemaking[123] and Regional Coordination Committee plans.[124] The bill also requires that all audits compiled by the agencies and the regulated companies be made public.[125] In keeping with the new statutory requirements, the financial regulatory agencies have publicly committed to implement rules pursuant to the Dodd-Frank Act in a transparent fashion, publishing lists of lobbyists and outside experts consulted during the rulemaking process and establishing dedicated online portals for public comments and for posting internal deliberation documents.[126]

These provisions represent a relatively uncontroversial approach to harnessing democratic engagement to improve the accountability, legitimacy, and responsiveness of the regulatory state. The provisions rest on a familiar theory of democracy as interest group pluralism.[127] Under this model, providing information, transparency, and open access to policymaking bodies enables groups with sufficient interests at stake to mobilize and articulate their claims effectively. This public participation in turn can provide agencies with more information and a better understanding of the likely consequences and the interests at stake.

However, this model does little to account for imbalances of power, mobilizational resources, and political savvy among different social and political groups. Perhaps more problematic is the fact that reliance on this sort

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[122] Consolidated Land, Energy, and Aquatic Resources Act, H.R. 3534, 111th Cong. § 205 (2010).

[123] CLEAR Act § 206(a). Retrospective reviews of agency decisions are generally pursued in a more ad hoc fashion. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS (2007). This idea of participatory retrospective review of regulations may be gaining new vitality in the current administration. *See* Exec. Order No. 13,563, § 6, 76 Fed. Reg. 3821 (Jan. 18, 2011) (calling for more systematic retrospective review of regulations).

[124] CLEAR Act § 603.

[125] CLEAR Act § 212.

[126] Sewell Chan, *New Rules on Finance to Be Done in the Open*, N.Y. TIMES, Aug. 14, 2010, at B2.

[127] For classic statements of the interest group pluralist theory, see generally THE FEDERALIST NO. 10, at 47-53 (James Madison) (Ian Shapiro, ed., 2009); ROBERT A. DAHL, PREFACE TO DEMOCRATIC THEORY (1990); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1962).

of transparency and notice-and-comment-style participation actually preserves the key weaknesses of the technocratic model. Regulators are under no legal obligation to respond to issues raised through public comment. Indeed, while there is often a range of comments from different stakeholders on notice-and-comment dockets, in practice, the most influential comments are those that provide regulators with data and more sophisticated analysis that can be used to justify regulatory policies.[128] The result is that notice and comment functions in a manner consistent with the technocratic model, facilitating the spread of information to regulators and improving policymaking, but doing little to achieve meaningful democratic engagement, dialogue, or accountability. While such a passive way of engaging the democratic public may help provide additional information to regulators and establish some checks on agency actions, the impact on agency accountability, legitimacy, and responsiveness is likely to be small.

The problem with this approach, ultimately, is not the idea of participation itself; rather, it is the limitations of notice and comment as an effective vehicle for democratic voice, engagement, and responsiveness. Transparency can sometimes lead to partisan deadlock by eliminating protected enclaves in which meaningful deliberation can take place, a concern that has led to various limitations on the reach of transparency statutes such as the Federal Advisory Committee Act ("FACA") and the Freedom of Information Act ("FOIA").[129] Furthermore, mechanisms like notice-and-comment rulemaking by themselves are unable to accommodate challenges like diffused but disorganized social interests or disparities in political organizational capacity and resources. These challenges are better addressed by some of the other experiments in the statutes.

B. *Interest Representation*

A more aggressive form of democratic voice can be found in efforts to ensure more balanced representation of affected interests and stakeholders.

[128] *See generally* Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005). In responding to public comments, financial "regulators crave data that can be used to justify decisions," while, "historically, industry groups have dominated these information wars, plying regulators with exhaustive studies and detailed analyses of the options at hand. Trade groups have more money and more people, and they often produce and control the relevant information about business and customers." Appelbaum, *supra* note 105, at A1.

[129] *See, e.g.*, *In re* Cheney, 406 F.3d 723 (D.C. Cir. 2005) (declining to extend FACA to cover Vice President Cheney's Energy Task Force meetings); Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993) (declining to apply FACA to Clinton White House deliberations over health care reform). The Dodd-Frank Act specifically exempts the FSOC and other bodies from the provisions of the Federal Advisory Committee Act. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 111(g), 124 Stat. 1376 (2010) (to be codified in scattered sections of 15 U.S.C.).

Engaging all affected interests is a core value in most democratic theories,[130] and securing representation of all affected interests is a key route through which democratic political systems ensure responsiveness to their citizens.[131] The concept of interest representation was once seen as the driving goal of administrative law, and it remains central to designs of regulatory institutions and stakeholder forums.[132] Interest representation has also been viewed as a way to counteract the threat of agency capture.[133] In the Dodd-Frank and CLEAR Acts, this goal of balanced representation animates several of the more innovative aspects of the reforms proposed.

The starkest example of this approach is in the Dodd-Frank Act's creation of an Investor Advisory Committee, which is tasked with advising the FSOC on regulatory reforms to protect investors.[134] The Committee is comprised of a mix of representatives of various stakeholder interests, such as state governments, senior citizens, and pension funds, in addition to relevant experts.[135] Further, the Committee includes an Investor Advocate, who is explicitly empowered to head an advocacy unit within the network of financial regulatory agencies.[136] The office of the Investor Advocate lobbies the SEC to promote policies favorable to investor interests,[137] and also provides a forum for individual investors to lodge complaints and report lapses in compliance with financial regulations.[138]

Other provisions in the pieces of legislation attempt to achieve balanced representation of interests by requiring stakeholder membership on rulemaking or advisory boards. For example, the financial reform act includes a provision to establish a Municipal Securities Rulemaking Board, comprised of experts and representatives of brokers, investors, and the general public, to set standards for municipal securities advisors.[139] In the CLEAR Act, the goal of balanced interest representation is apparent in the constitution of the Outer Continental Shelf Advisory Board.[140] Initially, the Board was envisioned as a purely expert body to advise the new regulatory agencies on the technical and scientific aspects of oil drilling, safety, and environmental con-

[130] *See* Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 40 (2007).

[131] *See* HANNAH PITKIN, THE CONCEPT OF REPRESENTATION 233-34 (1972).

[132] *See* Stewart, *supra* note 16.

[133] *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997).

[134] Dodd-Frank Act §§ 901-911 (to be codified at 15 U.S.C. § 78).

[135] *Id.*

[136] *Id.*

[137] Dodd-Frank Act § 915 (to be codified at 15 U.S.C. § 80b-11 note).

[138] Dodd-Frank Act § 919D (to be codified at 15 U.S.C. § 78d).

[139] Dodd-Frank Act §§ 973-976 (to be codified at 15 U.S.C. § 78).

[140] Consolidated Land, Energy, and Aquatic Resources Act, H.R. 3534, 111th Cong. § 108(b) (2010).

cerns.[141] However, later drafts of the provision were amended to include "balanced representation" of all stakeholders in the Board's membership.[142]

This explicit empowerment of specific interests within regulatory agencies, while not systematically deployed across either act, represents a powerful alternative democratic theory that goes further than the passive interest group pluralism of the transparency approach and can counter some of the weaknesses of technocratic regulation. Under this framework, the primary challenge to agency accountability, responsiveness, and effectiveness is the disparity in representation among different stakeholder groups. Agencies go awry not because of a lack of power or expertise, but because of an imbalance in the political pressures they face from different stakeholder interests. Rather than relying passively on interest groups to mobilize on their own, the interest representation approach creates dedicated representatives for important interests within the governmental arena.

This institutionalized representation of key interests remedies the default disparities through two mechanisms. First, it builds advocacy of underrepresented interests into the agency structure. This involves more than simply voicing the needs of the selected demographic; it can also involve presenting "raw" concerns and interests as more sophisticated—and thus more influential—policy proposals, analyses, and arguments. Second, by creating an office dedicated to a particular social interest—such as in the case of the Investor Advocate—this approach can create a focal point or channel through which other civil society and stakeholder groups can organize, mobilize, and voice their views.[143]

Yet the democratic potential of the interest representation approach brings with it renewed anxiety about the appropriate structure of regulatory agencies, as it directly challenges aspirations to agency neutrality and objectivity. Interest representation singles out particular values and demographics to the exclusion of others. As a result, it highlights the specter of "politics" skewing agency decisionmaking. Institutionalizing representation for particular interests raises questions of which interests deserve privileged treatment, how these interests should be selected, and whether institutional representation is too rigid and inflexible for potentially changing interests and social needs.

In practice, these concerns can be defused by the way in which interest representation is institutionalized. Which interests to highlight can be specified by Congress in legislation, as is the case in the financial reform legislation and the proposed CLEAR Act. As such, these decisions are appropriate outcomes of legislative debate. Alternatively, the concerns over neutrality can be mitigated to the extent that the institutional representatives are not government-wide policymakers, but rather act as advocates for the given

[141] CLEAR Act § 108.
[142] *Id.*
[143] *See infra* notes 149-153 and accompanying text.

social interest within a broader ecology of governmental bodies. Thus, creating an institutional representative for a particular interest assures voice for that interest without necessarily prejudging the ultimate policy outcome in favor of that particular group. The kind of direct interest representation and advocacy exemplified by the Investor Advocate is a relatively unusual occurrence in the regulatory system.[144] Instead, both the Dodd-Frank and CLEAR Acts experiment with other mechanisms to provide balanced representation in ways that seem less threatening to the ideal of a neutral regulatory agency.

One set of provisions attempts to achieve interest representation by modifying the appointments process to ensure the presence of particular views among regulatory officials. The CLEAR Act requires that Regional Coordination Committees be appointed by the Council on Environmental Quality ("CEQ").[145] While this does little to explicitly challenge the ideal of regulatory neutrality, it implicitly privileges environmental interests because of the CEQ's likely institutional bias in favor of environmental concerns. In a weaker form, the financial reform act shifts the process of electing Federal Reserve Bank presidents, requiring that they be appointed by Class B and C directors in order to better "represent the public."[146]

Both acts achieve another form of interest representation through a more indirect—and perhaps, to some degree, unintentional—strategy of establishing agencies dedicated to furthering narrow substantive interests. Thus, as described above, one of the central achievements of the CLEAR Act is to abolish the old Minerals Management Service (a sub-agency of the Department of the Interior) and allocate its old responsibilities to three independent agencies: the Bureau of Energy and Resource Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resource Revenue.[147] This fragmentation separates leasing and licensing functions from safety and environmental review and royalty collection.

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[144] Another notable example of open interest-based representation and advocacy in the regulatory state is the Small Business Administration's Office of Advocacy. *See Office of Advocacy*, U.S. SMALL BUS. ADMIN., http://www.sba.gov/advocacy. This office is charged with combing federal regulations, congressional legislation, and proposals, and with making recommendations that promote the interests of small business owners, while also acting as a coordinating focal point to assemble and articulate concerns of small business owners. *Id.*

[145] CLEAR Act § 602(b)(1).

[146] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1107, 124 Stat. 1376 (2010) (to be codified at 12 U.S.C. § 5613). Each Federal Reserve Bank is governed by a Board of Directors comprised of three types of directors: Class A directors elected by member banks to represent member banks; Class B directors elected by member banks to represent the public interest; and Class C directors selected by the Board to represent the public interest. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 10 (2005). This change is a relatively weak one. Because they are selected by member banks and a board comprised of other directors selected by member banks, there is little reason to think that Class B and C directors in the Federal Reserve system are in fact more representative of the needs, interests, and values of the broader public at large.

[147] CLEAR Act, tit. I.

While this split is largely justified in technocratic terms as improving agency autonomy and neutrality,[148] in practice it is also likely to function as a form of indirect interest representation. Like all institutions, agencies vary in their internal composition, culture, and overarching ethic. By separating out different functions, the bill opens up the possibility that each dedicated agency will take on an informal culture and ethic built around its more tailored goals. Just as the Environmental Protection Agency acts as a de facto voice for environmental interests within the federal government, so too may the new BSEE become a de facto advocate for environmental and safety concerns within the Department of the Interior.

Similarly, the Consumer Financial Protection Bureau established by the Dodd-Frank Act is characterized in familiar technocratic language as an independent agency,[149] charged with making policies on the basis of cost-benefit analysis.[150] However, its core directives suggest its broader role as a dedicated body promoting consumer interests within the financial regulatory arena. For example, the statute creates subunits charged with protecting underserved communities and older Americans[151] and gives directives to ensure fair lending and equal access to credit.[152] Indeed, the realization that the CFPB may develop into a powerful advocate on behalf of consumers within the federal government likely animated much of the vociferous opposition to it on the part of banks and some conservatives.[153]

C. Normative Directives

The degree to which agencies focus on particular social interests is also enhanced by explicit statutory articulation of the normative goals that agencies are meant to realize. Binding agencies to a "statutory duty" can bring the central values promoted by legislation to the forefront, providing not only a constraint on agencies but, more importantly, a constructive and constitutive direction for agency action.[154] For example, language in the Dodd-Frank Act gives a clear directive to the CFPB to promote particular norma-

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[148] For example, Congressman Rahall justified splitting up MMS as a way to resolve agency conflicts of interest, thereby promoting more effective agency actions driven by professionalism and expertise. *See* Press Release, Comm. on Natural Res., *supra* note 86.

[149] *See* Dodd-Frank Act, tit. X.

[150] Dodd-Frank Act § 1022.

[151] *See* Dodd-Frank Act § 1013.

[152] *See* Dodd-Frank Act § 1021.

[153] It is worth noting that several Republican legislative efforts sought to strip the CFPB of its independence in an effort to undermine its potential power. *See, e.g.*, Shelby Amendment, S. Amdt. 3826, 111th Cong. (2010) (proposing CFPB be housed within the FDIC with diminished powers). The final placement of the CFPB within the Fed rather than as its own independent agency was a compromise measure in response to these efforts, but which largely seems to have preserved the independence of the CFPB. *See* Dodd-Frank Act §§ 1012, 1024, 1025 (to be codified at 12 U.S.C. §§ 5492, 5514, 5515).

[154] For a broader treatment of this "statutory duty" approach, see SHAPIRO, *supra* note 12, at 116-21.

tive social interests, such as minority, veteran, and senior citizen access to financial services.[155] As a result, the CFPB has specific functional units to further these goals, including an Office of Fair Lending and Equal Opportunity,[156] an Office of Service Member Affairs,[157] and an Office of Financial Protection for Older Americans.[158] A further statutory purpose of the CFPB is to further the interests of consumers, such as by protecting them from "unfair, deceptive, or abusive acts and practices."[159] Similarly, several provisions in the CLEAR Act involve discrete rephrasing of existing statutes to more explicitly articulate goals of safety and environmental protection alongside the mandates promoting natural resource extraction.[160] These provisions may help create an active agency ethic to promote particular substantive interests.[161]

However, as with other experiments in interest representation in the acts, this approach of specifying substantive normative purposes for agency action is not consistently employed throughout. As noted earlier, most of the statutory expansions of authority in the Dodd-Frank Act provide broad guidelines and wide agency discretion.[162] Other provisions in the CLEAR Act provide specific directives to agencies, but they do so in more technocratic language that avoids discussion of the substantive values at stake. For example, several provisions direct agencies to identify, employ, and mandate that companies use the "best available technology,"[163] without specifying what criteria should be used to determine whether a technology is "best."[164] The use of more explicit normative directives thus represents a viable but as

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[155] Dodd-Frank Act § 1013(c) (to be codified at 12 U.S.C. § 5493).

[156] *Id.*

[157] Dodd-Frank Act § 1013(e) (to be codified at 12 U.S.C. § 5493).

[158] Dodd-Frank Act § 1013(g) (to be codified at 12 U.S.C. § 5493).

[159] Dodd-Frank Act § 1021(b)(2) (to be codified at 12 U.S.C. § 5511). See generally § 1021 for an articulation of the CFPB's purposes and objectives.

[160] *See, e.g.*, Consolidated Land, Energy, and Aquatic Resources Act, H.R. 3534, 111th Cong. § 209(1)-(2) (2010) (amending the Outer Continental Shelf Lands Act to indicate a broader purpose of "balanc[ing] energy needs and the protection of the marine and coastal environment" as equal considerations in policymaking).

[161] It is unclear to what degree such language is likely to change the underlying ethic of agencies—or whether or not such language opens agencies to potential judicial review if they are seen as insufficiently promoting these directives. On a recent proposal that such political considerations should be amenable to judicial review, see generally Watts, *supra* note 73.

[162] *See supra* Part II.A.

[163] *See* CLEAR Act §§ 208, 211, 718.

[164] Indeed, this silence, while perhaps meant to defer to agency expertise, can create undesirable results. For example, "best available technology" with respect to safety and environmental concerns may mean technology that reduces the risk of harmful oil spills to near zero, no matter the cost of the technology. On the contrary, the standard may mean technology that is "best" in terms of maximizing oil production. Additionally, some case law has interpreted this vague standard as meaning "cost-effective" technology. *See* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 (2009). But even if that is the case, how should costs and benefits be calculated? Should it only include financial costs? How much of a reduction in the probability of a harmful oil spill is sufficient to justify the higher cost of a technology? In other words, does "cost-effective" mean reducing the risk of an oil spill to below fifty percent? Or to below ninety-nine percent?

yet under-utilized approach to facilitating interest representation within regulatory agencies.

D. Democratic Counterpublics

A fourth approach to democratizing the regulatory apparatus relies on the creation of alternative arenas for democratic contest and participation. Such "counterpublics" can provide additional forums where citizens can participate, new ideas or experiments can be initiated, and problematic agency actions can be challenged.[165] Multiplying the arenas for policymaking and debate may help overcome blockage or capture of the regulatory process by providing alternative sources of initiative or experimentation.[166]

The obvious avenue for this approach is to modify federal preemption requirements to enable greater experimentation at the state and local level and thus change the structure of interactions between federal, state, and local policymakers.[167] In this vein, both acts have elements that draw on state-level political arenas to help make regulation more dynamic and responsive. The financial reform act provides for federal and state interaction on mortgage, insurance, and municipal securities regulations, enabling states to go beyond the minimum standards established by federal regulators.[168] In addition, after extensive debate over the degree of the CFPB's preemption power,[169] the final statute allows states to experiment with consumer protections beyond the minimum standards established by the CFPB. While the CFPB has independent rulemaking authority, it is required to commence a proposed rulemaking when a majority of states pass resolutions in favor of additional consumer protection.[170] The CLEAR Act also allows states to go beyond federal minimum standards, as authorized by the Secretary of the Interior

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[165] *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992).

[166] *Id.*

[167] *See generally* GERALD FRUG & DAVID BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008); David Barron, *Blue State Federalism at the Crossroads*, 3 HARV. L. & POL'Y REV. 1 (2009); David Barron, *The Promise of Cooley's City: Trace of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999).

[168] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. V, subtits. A-B, 124 Stat. 1376 (2010) (to be codified in scattered sections of 15 U.S.C.).

[169] For example, Senators Tom Carper (D-Del.), Mark Warner (D-Va.), Tim Johnson (D-S.D.), and Evan Bayh (D-Ind.) pushed for greater federal preemption power over states on consumer regulation. *See* Silla Brush, *Centrist Senators Push for Greater Federal Power in Consumer Regulations*, THE HILL (May 11, 2010, 9:42 PM ET), http://thehill.com/homenews/senate/97353-centrists-push-for-more-federal-power-in-consumer-regulation. By contrast, Republicans like Senator Bob Corker (R-Tenn.) attempted to bar state attorneys general from enforcing CFPB rules, but his amendment was rejected 43-55. S. Amdt. 4034, 111th Cong. (2010).

[170] Dodd-Frank Act § 1041 (to be codified at 12 U.S.C. § 5551).

following notice-and-comment rulemaking.[171] Further, states can propose specific alternatives to federal rules that better balance local needs and national interests, again subject to Secretary approval.[172]

Counterpublics do not have to take the form of state-level politics or revised federal-state interactions. The CLEAR Act creates a number of alternative *regional* forums. Most notably, the Regional Coordination Councils are empowered to develop long-term resource extraction and environmental protection strategies that cut across jurisdictions.[173] In addition to the familiar technocratic provisions requiring expert consultation and investment in greater research, monitoring, and technological innovation,[174] the Councils also must include representatives from states, local governments, tribes, and federal agencies.[175] Further, the Councils must establish an advisory board that includes key stakeholder interests, including environmental groups, industry, and scientific experts.[176] The coordination plans developed by the Councils must also solicit public input and participation and are subject to notice and comment before final approval.[177]

The CLEAR Act creates a similar coordination body in the Gulf Reconstruction Task Force, but the degree to which this regional body can serve as a viable democratic counterpublic will depend on how it interacts with the public at large. The Task Force is charged with coordinating an environmental restoration program among federal agencies and state governments.[178] This regional body is structured as a rationalizing, coordinating body, involving only high-level state and agency officials and expert advisors. Yet, by offering another venue for policymaking, the Task Force could potentially emerge as an alternative arena where policies are debated and where citizens and stakeholders can mobilize to assert their views directly within the Task Force itself.

Both the Task Force and the Regional Coordination Councils could evolve into public arenas layered between the federal, state, and local policymaking levels, multiplying the opportunities for citizen participation and policy experimentation. However, the degree to which these regional structures achieve their democratic potential will depend greatly on how existing federal, state, and local authorities engage, empower, and interact with them. The Councils, charged with increasing public participation and comprised of broader stakeholder representation than the Task Force, have greater democratic potential in this regard, though the Task Force may come to engage with stakeholder groups over time as well if these groups mobilize effec-

[171] Consolidated Land, Energy, and Aquatic Resources Act, H.R. 3534, 111th Cong. § 205(a)(8) (2010).

[172] CLEAR Act § 222.

[173] CLEAR Act § 601(a)-(b) (outlining the goals of the Regional Coordination Councils).

[174] CLEAR Act §§ 601, 603.

[175] CLEAR Act § 602(c).

[176] *Id.*

[177] CLEAR Act § 603(a)(3), (b)(4), (d)(2).

[178] CLEAR Act §§ 501-502.

tively. At the same time, as these regional bodies become more active, they will raise questions about the overall coherence of policymaking. The ideal of counterpublics harnesses a diversity of policy arenas to overcome the limitations of any one policymaking arena. While defenders of a centralized, rationalized regulatory system are likely to bristle at this sacrifice of coordination and coherence in favor of multiplicity and experimentation, increased interaction across multiple policymaking domains could also facilitate the gradual emergence of common standards and practices over time.[179]

VI. Towards a Theory of Democratic Regulation

As argued above, the technocratic vision of the regulatory state suffers from three key weaknesses. First, the recourse to technocracy and agency autonomy cannot reconcile the fundamental anxiety over agency legitimacy and the risk of agency capture. Second, technocratic regulation risks submerging debates over normative values and appropriate political considerations beneath the language of expertise. Third, relying on technocratic regulation does not necessarily enhance agency effectiveness and responsiveness.

All three of these pathologies stem from a common impulse to sterilize regulatory policymaking of politics—to rationalize regulatory action and remove the seemingly parochial, fickle, and misguided influences of political debate. While political contest can be unpredictable and contentious, this vision of rational good governance ultimately cannot eliminate political questions of interests, values, and accountability. Nor is it clear that "politics" and normative values are so undesirable in policymaking. Many of the dangers of politics are actually problems of poorly structured political dynamics. The influence of interest groups and the risk of capture, for example, are less flaws of democracy itself and more the results of institutional structures that permit excess influence for certain groups or that facilitate disparities in political representation. Politics, at its heart, is the domain where social disagreements are debated and where normative values are contested. As such, politics is not only indelible but also necessary to legitimate policymaking and to ensuring that policy outcomes are responsive and accountable to the democratic public.

The real challenge lies not in cordoning off political debates, but rather in achieving an appropriate balance between political and technical considerations. The various experiments with democratic accountability present in the Dodd-Frank and CLEAR Acts share a common conceptual core of attempting to reconcile regulatory policymaking with some form of specifically *democratic* politics. But neither act fully achieves this goal. This final Part suggests the basic elements of a more fully developed alternative democratic model of regulation. This alternative model of regulation would accept

[179] *See, e.g.*, Dorf & Sabel, *supra* note 15.

that political contest is inevitable, and, rather than attempting to expunge it, seek to better integrate it with agency expertise. Such a combination would promote greater representation of all affected interests, greater normative dialogue, and greater agency responsiveness.

The experiments in both acts, as outlined in Part V, *supra*, all work to promote the ability of citizens and political associations to voice their views, participate in debates over policy and values, and initiate actions. Indeed, the acts' democratic reform efforts draw on a range of conceptions of the role of democracy and participation in promoting the accountability, legitimacy, and responsiveness of regulatory agencies.[180] Expanding the scope of participation rests on a theory of automatic interest group pluralism wherein citizens can mobilize to assert their views, whereas interest representation and normatively explicit agency directives more aggressively promote equality of representation for different social interests and values identified as important ex ante. Establishing rival public arenas for policymaking, debate, and dialogue creates greater space for citizens to organize and engage with state policymakers, multiplying the vectors for policy debate and overcoming blockages in other arenas.

While each of these democratizing reforms is distinct, the reforms share common underlying principles. Taken together, they point towards a radically different vision of the modern regulatory state. First, instead of realizing the common good through powerful, autonomous, expert-driven regulatory bodies, the rival threads in these two pieces of legislation suggest the beginnings of an alternative model where the common good is promoted through democratic voice and contest. In all of these innovations, democratic engagement offers an alternative approach to constraining, directing, and shaping regulatory action. Pushed further, this approach recasts democracy as vital for constituting the common good. Democratic politics thus becomes more than a form of agency constraint; it also becomes a productive and constructive guide for agency initiative and action. Second, this democratic approach sees regulation as dynamic and adaptable, harnessing democratic politics to generate debate, innovation, and experimentation.

The experiments in both the Dodd-Frank and CLEAR Acts point to the beginnings of a more compelling vision of imbuing the regulatory state with robust democratic politics. The various approaches proposed in the acts—enhancing participation, promoting balanced interest representation, provid-

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[180] The intramural tensions of these conceptions of democracy suggest a variety of different specific approaches to democratic regulatory politics; however, a full evaluation of these theories is beyond the scope of this Note. For present purposes, it is sufficient to note that there exists a family of theoretical approaches that, though diverse, share a common element of embedding regulatory policymaking in a broader framework of specifically *democratic* politics. *See, e.g.*, Hannah Arendt, On Revolution (1963); Philip Pettit, Republicanism (1997); Nancy L. Rosenblum, On the Side of Angels: A Defense of Parties and Partisanship (2008); Michael J. Sandel, Democracy's Discontents (1996); Dana R. Villa, Public Freedom (2008); Markell, *Rule of the People: Arendt, Arche, and Democracy*, *supra* note 112.

ing clearer normative directives for agency action, and empowering counterpublic spaces for democratic debate and policy innovation—all share a common thread of enlivening democratic politics as well as the regulatory state by ideally promoting the ability of citizens and associations to mobilize, engage, and have a meaningful voice. As such, these innovations have the potential to realize a thicker conception of democratic self-rule of the sort articulated by a range of political theorists.[181]

This vision of democratic self-rule views democracy not as the mere registering of voter preferences, but rather as the realization of equal voice and political empowerment. Such equality of voice increases the democratic accountability of policymakers (including agencies), prevents policy capture by powerful interest groups, promotes open normative debate, and improves the responsiveness of policymakers to social needs and debates. Democracy inheres, then, not in the sovereignty of the atomized voter as a bearer of preferences and values, but in the organization of individuals into groups of shared values, interests, and aspirations. Nor is democracy realized in agencies solely through indirect channels of accountability to elected representatives in the legislature or executive. Instead, this alternative emphasis on democratic self-rule calls for more direct participatory engagement by citizens in the regulatory process. On this view, both individuals and organized groups of citizens can engage more effectively with regulatory policymaking—so long as there exist institutional channels to enable and facilitate such engagement.

This view of active democracy resonates with several recent moves in political theory and political sociology: a number of political theorists of democratic vibrancy have argued that this kind of mobilized citizen engagement and robust associational life are central to achieving genuine political voice.[182] Macro-sociological accounts of democracy and democratization suggest that it is this kind of dynamic state-society interaction, where groups of citizens mobilize and pressure state officials, that gives rise over time to more effective democracy and state capacity.[183]

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[181] *See, e.g.*, Arendt, *supra* note 180; Pettit, *supra* note 180; Rosenblum, *supra* note 180; Sandel, *supra* note 180; Villa, *supra* note 180; Markell, *Rule of the People: Arendt, Arche, and Democracy*, *supra* note 112.

[182] *See, e.g.*, Arendt, *supra* note 180. Public freedom for Arendt requires more than the protection of private interests; instead, it requires participation in politics. For Arendt, part of the tragedy of modern politics is the ways in which bureaucratic structures and increased focus on individual, negative liberties have gradually emaciated this concept of public freedom and genuine democratic self-rule. Similarly, contemporary thinkers have built on Arendt's theories to emphasize the ways in which modern state structures can erode the ability of democratic citizens to initiate action and respond to changing events. *See, e.g.*, Markell, *Rule of the People: Arendt, Arche, and Democracy*, *supra* note 112, at 1-14. Similarly, Dana Villa argues that political association and citizen engagement is vital to ensuring democratic empowerment and effective response to social challenges—but such engagement is continually threatened by the depoliticizing effects of free markets and bureaucracy. Villa, *supra* note 180.

[183] Empirically, this state-society linkage features prominently in some influential accounts of state formation and institutional development. *See generally, e.g.*, Carpenter, *supra*

This vision of democracy as equality of voice suggests that institutional innovations, such as the interest representation and counterpublic aspects of the Dodd-Frank and CLEAR Acts, might provide a more fruitful direction for theoretical and practical responses to the problems of regulation and democracy than avowedly technocratic efforts. These experiments may help direct agencies and ensure responsiveness and policy effectiveness, while embedding agency action in thicker contexts of democratic legitimacy. In fact, this alternative vision of the regulatory state problematizes a number of common assumptions about what makes for an ideal regulatory and policymaking apparatus. This approach challenges scholars and reformers to think of participation as more than a generic and automatic process, achievable solely through mechanisms like notice and comment. Instead, genuine democratic voice requires more empowered and sustained engagement from the full range of affected groups, as well as a greater sensitivity on behalf of policymakers to disparities in representation. Similarly, participation is valuable for more than its epistemic or informational input; rather, it is the core of democratic politics.

Additionally, this new approach to securing democratic voice and equal representation challenges long-standing assumptions about the importance of agency neutrality and consolidation. It may be desirable to give some agencies specific substantive goals that promote particular demographic interests or social values. However, doing so may require tempering the ideal of fully coordinated and coherent regulatory governance, creating a tension between the impulse towards consolidation and the possible benefits of fragmentation of policymaking bodies.

Similarly, the ideal of democratic voice is in conflict with the ideal of policy coherence. Empowering counterpublics as alternative forums for democratic engagement and experimentation undermines the aspiration to uniformity and order, but in so doing, achieves important gains in policy adaptability, experimentation, and legitimacy. Finally, democratic voice brings to the forefront the normative nature of policy debate, challenging the ethic of technical, neutral policymaking.

This vision of democracy and the regulatory state extends beyond both the technocratic model of regulation and existing mechanisms for embedding regulation in structures of political accountability. Indeed, while the technocratic model of regulation emphasizes the neutrality, insulation, and expertise of regulatory agencies, it still locates regulatory policymaking alongside other mechanisms for political accountability and decisionmaking: congressional oversight, procedural requirements for notice and comment, judicial review, and executive review. However, it is unclear whether either presidential review or congressional oversight can fully realize this alternative vision of democratic voice and engagement.

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note 106; THEDA SKOCPOL, DIMINISHED DEMOCRACY (1992); CHARLES TILLY, DEMOCRACY (2007); CHARLES TILLY & SIDNEY TARROW, CONTENTIOUS POLITICS (2004).

The use of presidential administration, where agency policy is coordinated and shaped by the White House, seems to offer a mechanism for making regulatory policymaking subordinate and accountable to normative value considerations and democratic pressures reflected through the democratically elected executive.[184] There are, however, two main limitations to presidential administration as a means of reconciling politics with regulation. First, not all agencies are subject to the presidential administration review process.[185] Most regulatory agencies must secure clearance from the Office of Management and Budget and its Office of Information and Regulatory Affairs ("OIRA") for significant regulatory actions.[186] OIRA clearance in accordance with Executive Order 12,866, in particular, is predicated on whether agencies have engaged in sufficient cost-benefit analysis of proposed rules and whether the rules are consistent with the priorities of the administration.[187]

Second, while OIRA review provides a mechanism for the White House to coordinate and influence regulatory policymaking, leaving ample room for agencies to articulate the more qualitative and redistributive impacts of regulation, predicating clearance on the provision of cost-benefit analysis, as is most often the case, perpetuates a hallmark of the rationalizing good governance model.[188] At best, such regulatory review promotes the kind of expertise-driven policymaking sought by the model of technocratic governance outlined above.[189] At worst, this incentivizes agencies to cloak fundamentally political or normatively driven policies in misleadingly technocratic and neutral discourse in order to secure clearance.[190] Indeed, OMB and OIRA review embodies the technocratic ideal of good governance, rather than embedding technocratic considerations in a broader framework of political, normative, and democratic decisionmaking. Presidential administration, in other words, helps rationalize and coordinate regulatory policymaking within the executive branch, but, as currently constituted, it is unlikely to promote a fuller form of democratic representation and dialogue.

Another familiar mechanism for linking politics and regulatory policymaking is through congressional oversight and control of agencies. As the central body for raising and resolving political and normative disputes, the legislature seems the appropriate forum for political debate. In some sections of the Dodd-Frank and CLEAR Acts, Congress did attempt to articulate more explicitly normative or political considerations to direct agency ac-

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[184] *See* Kagan, *supra* note 19.

[185] Exec. Order No. 12,866, § 3(12)(b), 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[186] *Id.*

[187] *Id.*

[188] *See* Office of Mgmt. and Budget, Circular A-4 (2003), *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4/.

[189] *See, e.g.*, Richard Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1 (1995).

[190] *See, e.g.*, Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 Harv. J.L. & Pub. Pol'y 228 (1999); Watts, *supra* note 73.

tions[191] and set up mechanisms for congressional review of agency actions, such as IG reviews of agency actions.[192] Nevertheless, these provisions were relatively few, and for the most part Congress has seemed uncomfortable with setting too-specific requirements for agencies.[193] Indeed, early drafts of the CLEAR Act included very specific prescriptive requirements for the kinds of safety technology that would be required for offshore oil wells, but these provisions were removed in later drafts, replaced by more deferential language creating broad performance standards but leaving specific policies to agency discretion.[194] Similarly, many specific financial regulations were ultimately dropped in favor of provisions deferring to agency discretion.[195]

While presidential and congressional controls offer avenues for reconciling politics with regulatory policymaking, they are imperfect mechanisms of oversight. Further, it is not clear that the presidency and Congress, as institutions, succeed as channels for sufficient democratic voice in light of the wide latitude that elected officials enjoy after elections and the limitations of elections as a mechanism for transmitting citizen views.[196] Indeed, the technocratic model of the regulatory state is problematic not only because it attempts to remove politics from policymaking and thereby generates pathologies in agency policymaking, but also because of the degree to which it narrows the scope for meaningful democratic engagement.[197]

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[191] *See supra* Part V.

[192] *See supra* notes 74-76 and accompanying text.

[193] This is apparent in the broad delegations of regulatory authority in both the Dodd-Frank and CLEAR Acts. *See supra* Part III.

[194] *Compare* Blowout Prevention Act ("BPA"), H.R. 5626, 111th Cong. §§ 3-4 (2010), *with* Consolidated Land, Energy, and Aquatic Resources Act, H.R. 3534, 111th Cong. § 205 (2010). The BPA called for specific named technologies, such as mandating two blind shear rams to prevent blowouts, BPA § 3, and requiring two barriers in addition to cement in underwater wells, BPA § 4. By contrast, the CLEAR Act adopts these specific requirements, but adds a provision allowing the Secretary of the Interior to change these requirements if they are deemed to be less effective than other technologies available. CLEAR Act § 205.

[195] *See supra* Part III.A.

[196] On the limits of elected executives and legislatures in achieving democratic voice, see, for example, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29-97 (Adam Przeworksi, Susan C. Stokes & Bernard Manin eds., 1999).

[197] As Richard Stewart argued in his seminal 1975 critique of administrative law, "our received models of social choice—the elected legislature and the market—seem entirely incapable of effectively controlling the expanded machinery of government or of securing an adequate sphere for individual self-determination." Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1813 (1975). Stewart's observation and his critique of the limits of administrative proceduralism as a response, while dated, still ring true today. Stewart ends his critique on a pessimistic note, arguing that judicially-mandated procedures for interest representation are flawed, and that the only other alternatives of direct election of regulatory officials or government-selected representatives from different class groups are also problematic. *Id.* Stewart ultimately concludes that there must be a grand rethinking of the meaning of justice and democracy in the context of the administrative state; barring such a paradigm shift, he saw no choice but to settle for minor ad hoc reforms. *Id.* As this Note suggests, there may be alternative democratic structures available to reconcile aspirations to democratic self-rule with the realities of the modern regulatory state.

VII. Conclusion

The Dodd-Frank and CLEAR Acts highlight a deep and recurring set of debates over democracy, politics, and the structure of the regulatory state. On the one hand, both acts are animated by a common framework of technocratic regulation, which attempts to resolve social challenges and the danger of agency capture or ineffectiveness by expanding the authority, autonomy, and expertise of regulatory agencies. Yet this technocratic model cannot escape recurring tensions inherent in the regulatory state as it currently exists—the anxiety over agency authority and accountability, the risk of regulatory capture, the submergence of normative value debates, and the risk of agency ineffectiveness. These tensions drove a number of institutional reform experiments in both pieces of legislation, all of which in different ways seek to harness democratic engagement as a palliative force. These experiments, though somewhat disparate and relatively marginal to the statutory structure, point in the direction of a broader alternative vision for the regulatory state, one that emphasizes democratic voice and contest as central values.

Limited though these efforts are, they demonstrate a potentially rich domain for institutional reform and innovation. Rather than focusing on the perennial question of the domains of agency discretion and external constraint, this analysis of the Dodd-Frank and CLEAR Acts suggests that the real task for the future of the regulatory state is focusing on our broader visions of politics. Instead of attempting to sterilize policy of politics through an appeal to technocratic neutrality, order, and rationality, this approach would recognize the centrality of politics and examine ways in which political debate can be channeled for the good in regulatory policymaking. At the institutional level, this approach would require going beyond established features of regulatory agencies—such as notice and comment, presidential coordination, or judicial review—to achieve greater democratic engagement, representation of affected interests, agency responsiveness, and legitimacy. While this alternative approach remains relatively nascent, the experiments in both the Dodd-Frank and CLEAR Acts help sketch a rough vision of a regulatory state built more explicitly around the value of democratic voice.