PERFECTING PARTICIPATION: ARBITRARINESS AND ACCOUNTABILITY IN AGENCY ENFORCEMENT

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Agencies often bring enforcement actions and propose and accept settlements that have significant repercussions for the public and those harmed by the alleged misconduct. However, few meaningful opportunities exist for the public, or for victims, to participate in the decisionmaking process, and no external constraints exist to ensure their interests are adequately considered. Focusing on the Federal Trade Commission and its settlement procedures, this Note asks whether more is needed to preserve administrative legitimacy. To do so, it situates rights of participation within the two dominant schools of thought about the administrative state: the arbitrariness model and the accountability model. It finds that these theories support more expansive, but distinct, participatory rights for the general public and for victims. Criminal law, and the victim participation movement within it, provides guidance for the path forward, and this Note concludes that Congress and agencies should act together to perfect participation rights in agency enforcement actions.

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Introduction

In March 2018, several news outlets broke stories that Facebook, one of the most popular social networking sites in the United States,[1] had been breached by Cambridge Analytica, and the information of fifty million user accounts had been compromised.[2] Though the initial reporting focused on Cambridge Analytica's unauthorized use of the harvested data, the story quickly turned to Facebook itself. The company had already been under increased public scrutiny for its normalization and propagation of "fake news,"[3] and the breach added new fuel to the fire. According to the *New York Times*, Facebook had "downplayed the scope of the leak" and failed to adequately protect private information from third party access.[4]

Less than two weeks after the story broke, the Federal Trade Commission (FTC)—the federal agency tasked with consumer protection[5]—confirmed that it had opened a nonpublic investigation into Facebook's privacy practices.[6] Facebook had been investigated previously by the Commission for similarly deceptive privacy practices that allowed expansive access to user data, which resulted in a consent decree between the company and the agency in 2012.[7] That settlement required Facebook to "clearly and prominently disclose" third-party access to user data prior to sharing users' nonpublic information and to obtain their explicit affirmative consent.[8] But many consumers believed that Facebook failed to live up to this promise, filing more

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1 *See Social Media Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media (noting that, as of April 2021, 69% of United States adults have a Facebook profile, with 70% of those users using the platform on a daily basis).

2 Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. Times (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html.

3 *Id.*

4 *Id.*

5 Specifically, section 5 of the Federal Trade Commission Act provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful and grants the FTC authority to enforce it. 15 U.S.C. § 45(a)(1), (b).

6 Tom Pahl, *Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices*, Fed. Trade Comm'n (Mar. 26, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection.

7 *See In re* Facebook, Inc., 154 F.T.C. 1, 82 (2012). A consent decree, also known as a consent order or settlement, is an agreement between the FTC and the respondent that binds the parties without requiring the respondent to admit liability.

8 *Id.* at 86.

than twenty-six thousand complaints with the FTC between the 2012 order and the Cambridge Analytica breach.[9]

Nearly a year and a half after the agency confirmed its investigation, it announced a settlement with Facebook. It charged the company with violating the 2012 order and "deceiving users about their ability to control the privacy of their personal information."[10] As part of the settlement, Facebook agreed to several remedial components. Most publicized was the five-billion-dollar civil penalty collected by the United States Treasury.[11] As noted by the FTC, this penalty was one of the largest ever assessed by the United States government and the largest penalty ever imposed on a company for data privacy violations.[12] The order also provided for organizational changes and restrictions at Facebook, though the true extent of such transformation was ultimately vague.[13] As notable as the terms were for the Commission, the order was also notable for what it conceded to the global corporation. The settlement released Facebook from liability arising out of all violations of section 5 of the Federal Trade Commission Act—which declares unlawful all "unfair or deceptive acts or practices in or affecting commerce"[14]—that were known by the agency prior to June 12, 2019.[15] Additionally, it resolved all claims that Facebook, its officers, and its directors violated the 2012 settlement.[16] As a result, the vast majority of the approximately twenty-six

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[9] *See Challenge to FTC/Facebook 2019 Settlement*, ELEC. PRIV. INFO. CTR., https://epic.org/privacy/facebook/epic2019-challenge (last visited May 31, 2021) (describing consumer complaints against Facebook since the 2012 consent order, obtained through Freedom of Information Act requests). This data is necessarily imperfect, as it does not distinguish between complaints related to violations of the order and other complaints. Additionally, because complaints were reported on an annual basis, it includes some complaints filed before the 2012 order was finalized and after the agency announced its 2018 investigation.

[10] *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FED. TRADE COMM'N (July 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions.

[11] *See* Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief at 3, United States v. Facebook, Inc., No. 19-cv-2184 (D.D.C. July 24, 2019), ECF No. 2-1 [hereinafter Facebook Stipulated Order].

[12] Lesley Fair, *FTC's $5 Billion Facebook Settlement: Record-Breaking and History-Making*, FED. TRADE COMM'N (July 24, 2019), https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history ("If you've ever wondered what a paradigm shift looks like, you're witnessing one today. The FTC's $5 billion civil penalty against Facebook for violations of an earlier FTC order is record-breaking and history-making.").

[13] *See* Facebook Stipulated Order, *supra* note 11, at 4 (reopening and modifying the 2012 order to include organizational changes at Facebook); *In re* Facebook, Inc., 154 F.T.C. 1, 82 (2012).

[14] 15 U.S.C. § 45(a)(1).

[15] Facebook Stipulated Order, *supra* note 11, at 1–2.

[16] *Id.* at 1.

thousand complaints filed by consumers prior to the proposed settlement were extinguished.[17]

This settlement, unlike the vast majority of agency settlements, received widespread public attention—and criticism. Several federal lawmakers sharply disapproved of the agreement,[18] with Senator Josh Hawley stating that "[i]t utterly fails to penalize Facebook in an effective way."[19] The New York Times Editorial Board noted the "weightlessness of the fine" and immunity for earlier violations as reasons to be dissatisfied with the order.[20] And many consumer groups expressed doubt that the proposed remedies would adequately protect consumers.[21] Despite these misgivings, few individuals and groups formally voiced their opposition to the agreement during the comment period, likely because the FTC is under no obligation to consider such comments when finalizing proposed settlements.[22]

The FTC-Facebook settlement and its public reception illustrate a growing concern that agencies fail to adequately consider the public interest—and the interests of harmed consumers directly affected by malfeasance—when settling claims against corporate entities. Using the FTC and its settlement procedures as examples, this Note argues

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[17] *See Challenge to 2019 FTC/Facebook Settlement*, *supra* note 9. It is unlikely that every complaint was extinguished. The commissioners ultimately disagreed on the extent of the liability release in the order, in part because of ambiguity regarding the scope of section 5. *See* Dissenting Statement of Comm'r Rohit Chopra, *In re* Facebook, Inc., FTC File No. 1823109, at 17–18 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (disagreeing with the majority because section 5 comprises a "vast category" of practices, all of which are released under the agreement). To the extent that filed complaints did not involve section 5 claims, they were not extinguished by the new settlement.

[18] *See, e.g.*, Harper Neidig, *Senators Press FTC over 'Woefully Inadequate' Facebook Settlement*, THE HILL (July 16, 2019, 1:20 PM), https://thehill.com/policy/technology/453316-senators-press-ftc-over-woefully-inadequate-facebook-settlement (describing bipartisan criticism of the settlement); Press Release, Sen. Amy Klobuchar, Klobuchar Statement on Reported Federal Trade Commission Settlement with Facebook (July 13, 2019), https://www.klobuchar.senate.gov/public/index.cfm/2019/7/klobuchar-statement-on-reported-federal-trade-commission-settlement-with-facebook ("A onetime $5 billion fine for a company whose profits are in the tens of billions a year is not enough to deter Facebook and force them to put consumers' privacy before profits.").

[19] Josh Hawley (@HawleyMO), TWITTER (July 24, 2019, 10:36 AM), https://twitter.com/HawleyMO/status/1154037744290557952.

[20] Editorial, *A $5 Billion Fine for Facebook Won't Fix Privacy*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/opinion/facebook-fine-5-billion.html.

[21] *See* Jeff Chester, *Groups Join Legal Battle to Fight Ineffective FTC Privacy Decision on Facebook*, CTR. FOR DIGIT. DEMOCRACY (July 26, 2019), https://www.democraticmedia.org/article/groups-join-legal-battle-fight-ineffective-ftc-privacy-decision-facebook (providing statements from directors of multiple nonprofit entities).

[22] *See* J. THOMAS ROSCH, CONSENT DECREES: IS THE PUBLIC GETTING ITS MONEY'S WORTH? 2–3 (2011), https://www.ftc.gov/sites/default/files/documents/public_statements/consent-decrees-public-getting-its-moneys-worth/110407roschconsentdecrees.pdf.

that the administrative state as a whole lacks the necessary statutory and regulatory procedures to ensure adequate representation of the public interest in agency enforcement actions. It offers a framework, rooted in traditional theories of administrative law, which suggests that procedural rights of participation are necessary for continued legitimacy of the administrative state. In particular, this Note is the first to theorize that victim[23] participatory rights may be necessary for administrative legitimacy and to connect the rights of victims in the criminal law context to rights of participation in agency enforcement.

Part I provides the foundational case study for this Note, reviewing the FTC's enforcement authority and its use of that power. Specifically, it details the various ways in which the Commission may issue orders and seek relief in administrative and judicial courts, as well as its use of settlements. Because most enforcement actions end in settlement, the Note then turns to judicial review of Commission settlements, as well as agency settlements more generally, focusing on the scope of the public interest inquiry. It finds that courts generally fail to police the adequacy of administrative settlements, particularly with respect to agencies' considerations of affected interests. And although the FTC allows for greater public participation than most agencies, the administrative state's governing framework lacks meaningful guarantees of participation for the public—and victims—affected by agency settlement decisions.

Part II discusses the theoretical justifications for the administrative state and their relationships to public participation in enforcement decisionmaking. It begins by reviewing the two prevailing theories of the administrative state: the arbitrariness model and the accountability model. The arbitrariness approach reflects the belief that the Constitution was created to protect individual liberties from arbitrary governmental intrusions, including by the administrative state. By contrast, the accountability approach is premised on the view that all governmental actions must be rooted in majoritarianism.[24] Part II then views rights of public participation in light of these models, finding that some degree of public participation is necessary under either model to give legitimacy to agency enforcement decisions.

Part III then pivots to focus on the rights of victims in administrative enforcement and possible reform. It examines victim participatory

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[23] This Note defines a "victim," for the purposes of administrative enforcement, as any identifiable member of the public who has suffered physical injury or pecuniary loss and possesses a restitutionary interest in the enforcement action. For more details, see *infra* notes 169–70 and accompanying text.

[24] *See infra* Section II.A.

rights through the lenses of accountability and arbitrariness, finding victim participation consistent with both models. Analogizing to victim participatory statutes in the criminal context, Part III closes by offering one possible statutory solution that would elevate participation in administrative enforcement decisionmaking.

I
THE SCOPE OF AGENCY ENFORCEMENT AND SETTLEMENT AUTHORITY

Although agencies across the administrative state have vastly different enforcement authority and settlement requirements, this Part focuses on the FTC as a case study to illustrate general principles about agency enforcement and settlement. The Commission serves as a particularly useful case study for several reasons. First and foremost, it already affords greater public participation rights in its settlements than most other agencies and thus provides a useful metric for understanding the broader administrative landscape. Second, the FTC shares overlapping enforcement authority with other agencies, which makes it simpler to compare settlement procedures across these agencies. Lastly, certain aspects of the agency's enforcement authority, like the lack of a private right of action for section 5 violations,[25] heighten the need for mechanisms to ensure that the public and victims are adequately represented throughout the FTC's settlement processes.

The FTC, like many federal agencies, has long had broad powers to define the breadth and style of its enforcement policy. In 1914, the Federal Trade Commission Act ("FTC Act") established the Commission as an independent agency charged with "protect[ing] consumers and promot[ing] competition."[26] Its authority was expanded in 1938 to prohibit "unfair or deceptive acts or practices," and it uses that power to enforce the law in an array of industries.[27] In addition to enforcing federal laws, the agency has a variety of other obligations, including investigating possible legal violations and rulemaking.[28]

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[25] *See infra* note 174 and accompanying text.

[26] *See Our History*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/our-history (last visited June 2, 2021) (describing the beginnings of the FTC).

[27] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 598 (2014) (quoting Act of Mar. 21, 1938, Pub. L. No. 75-447, 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a)(1))) (reviewing the 1938 amendment and its role in expanding the Commission's power).

[28] *See A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (Oct. 2019) (detailing the Commission's various powers).

The Commission serves consumers across the nation through its enforcement actions. In 2018, consumers filed nearly three million complaints with the FTC alleging illegal business practices.[29] This translated into over sixty consumer protection actions filed by the FTC and more than one hundred orders obtained, the majority of which were for consumer redress, disgorgement, and permanent injunctions.[30] Over two million consumers received $439 million in redress from the FTC itself, and third parties administered additional redress totaling more than $1.3 billion as a result of agency enforcement.[31] The Commission's emphasis on consumer relief reflects that "[a] core part of [its] mission is to return money to consumers who are harmed by illegal business practices."[32]

Because of its expansive authority, the FTC's enforcement decisions take on outsized importance for the public. This Part will explore the relationship between the Commission's broad powers and the internal and external safeguards that attempt to ensure adequate consideration of the public interest. Section I.A discusses the various tools of FTC enforcement, including its power to enter into consent decrees and settlements. Section I.B then describes the role of the public interest in settlement procedures for the FTC and similar agencies, with a focus on the public interest inquiry undertaken by agencies and courts when reviewing such settlements. These checks are found to be largely illusory, suggesting that agency self-regulation and judicial review are inadequate safeguards of the public interest.

A. Tools of FTC Enforcement

The FTC derives much of its enforcement power from section 5 of the FTC Act, which declares unlawful any "unfair or deceptive acts or practices in or affecting commerce."[33] The law provides a broad definition of unfair or deceptive acts or practices,[34] and this language

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[29] *Stats & Data 2018*, FED. TRADE COMM'N, https://www.ftc.gov/reports/annual-highlights-2018/stats-and-data (last visited Nov. 1, 2021). Although it received almost three million complaints, the agency has no mandate to investigate or respond to consumer complaints it receives. *See* 15 U.S.C. § 45(b) (giving the Commission discretion over investigations and filing complaints, with no duty to investigate or respond to consumer complaints).

[30] FED. TRADE COMM'N, *supra* note 29.

[31] *Id.*

[32] *Annual Highlights 2019: Enforcement*, FED. TRADE COMM'N, https://www.ftc.gov/reports/annual-highlights-2019/enforcement (last visited June 3, 2021).

[33] 15 U.S.C. § 45(a)(1).

[34] *See id.* § 45(n) (defining an unfair act or practice as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition").

reflects the legislative choice to provide flexible administrative authority for the agency to define the contours of its power.[35] Consumers have no present right to pursue claims under the FTC Act,[36] leaving the Commission as the sole enforcer and protector of the law.

The agency's otherwise wide discretion under section 5 is cabined by two principles: the "reason to believe" standard and the "public interest" mandate. The FTC Act empowers the Commission to enforce the law only when it has "reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice" and where enforcement "would be to the interest of the public."[37] However, the Supreme Court has long held that the FTC's findings that these requirements have been met cannot be reviewed by courts because they do not constitute final agency actions.[38]

In addition to the FTC Act, the Commission enforces a wide variety of other consumer protection statutes prohibiting specific practices.[39] Most of these laws direct the agency to treat violations as if they are unfair acts or practices under the FTC Act, giving further meaning to and clarifying the scope of section 5.[40] Accordingly, enforcement actions and settlements by the Commission are generally governed by obligations set out in the FTC Act and any rules promulgated by the agency, as well as any statute-specific mandates.

As with other agencies, the FTC has a variety of methods with which it can exercise its enforcement authority. The Commission typically enforces the law through the administrative process, determining in an adjudicative proceeding whether a particular business has vio-

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[35] *See* Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEGIS. 37, 44–45 (2018) (arguing that the law gives rise to the more general "*principle*-based enforcement" rather than the more outlined "*rule*-based enforcement").

[36] *See* Moore v. N.Y. Cotton Exch., 270 U.S. 593, 603 (1926) (noting that cases under the FTC Act must be brought by the Commission in the first instance); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997 (D.C. Cir. 1973) (recognizing that the FTC has exclusive authority to bring claims under section 5).

[37] 15 U.S.C. § 45(b).

[38] *See* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 241–42 (1980) ("[T]he averment of reason to believe is a prerequisite to a definitive agency position on the question whether [defendant] violated the Act, but itself is a determination only that adjudicatory proceedings will commence.").

[39] The Commission also enforces federal antitrust laws under the Clayton Act. *See* 15 U.S.C. §§ 12–27. However, this Note focuses primarily on settlements brought under its unfair-or-deceptive-acts-or-practices authority, except for a discussion of settlement procedures under 15 U.S.C. § 16. *See supra* notes 74–80 and accompanying text.

[40] *See A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 28 (identifying laws enforced by the FTC).

lated the law. However, if the agency seeks to obtain civil penalties or consumer redress for violations of its orders or rules, then it must pursue legal action in the federal court system.

Administrative enforcement is the main avenue through which the Commission determines the legality of a particular practice. When the FTC has reason to believe the law is being violated, it may issue a complaint to initiate an adjudicative proceeding.[41] If the respondent contests the charges, then the complaint is adjudicated before an administrative law judge who issues an initial decision upon conclusion of the hearing.[42] This decision will either dismiss the complaint or recommend entry of a cease and desist order. Once an order becomes final, respondents are liable for a civil penalty if they violate it.[43]

When seeking civil penalties or redress for consumers, the Commission must pursue its claims in federal district court.[44] There are several ways in which the FTC may seek compensation. If a final order is issued by the agency after an adjudicative proceeding, it may then seek consumer redress in federal court for the conduct that led to the order.[45] In such a suit, the Commission must show that "the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent."[46] In suits where the respondent has violated a previously entered order, as was the case in the Facebook enforcement action,[47] the FTC may obtain civil penalties if it shows that respondent had actual knowledge that its action was unfair or deceptive and unlawful.[48] Finally, the Commission may bring a suit directly in federal court, without first issuing an order in an administrative proceeding, where it has reason to believe that respondent "is violating, or is about to violate," any law enforced by the FTC.[49] In such cases, it may seek preliminary and permanent injunctions to the extent

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41 15 U.S.C. § 45(b).

42 *See id.*

43 *Id.* § 45(*l*).

44 *See id.* § 45(m).

45 *Id.* § 57b.

46 *Id.* § 57b(a)(2).

47 *See supra* notes 7–10 and accompanying text.

48 15 U.S.C. § 45(m)(1)(B).

49 *Id.* § 53(b). Known colloquially as section 13(b), this has traditionally been used to seek preliminary injunctions in conjunction with adjudicative proceedings, but it was used more recently to seek permanent injunctions and consumer redress. *See* David M. FitzGerald, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act 1–2 (2004), https://www.ftc.gov/slides/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf (tracing the evolution of the Commission's use of section 13(b)).

that they are "in the interest of the public."[50] Until 2021, the Commission also used its injunctive authority to seek monetary relief; however, the Supreme Court struck down that practice because section 13(b) "as currently written does not grant the Commission authority to obtain equitable monetary relief."[51] But the Court provided expressly that the agency may still use its section 5 and section 19 authority to obtain restitution on behalf of customers.[52]

Notwithstanding these enforcement tools, the vast majority of FTC enforcement actions are resolved through consent orders and settlements. In 2014, for example, the Commission resolved only 4.3% of its section 5 cases through contested resolution.[53] All other cases were resolved by an eventual settlement, the majority of which happened within sixty days of the complaint being filed.[54] This norm of resolution-by-settlement emphasizes the importance of scrutinizing the agency's settlement process and the role the public should play in it.

B. Settlement Procedures and the Public Interest

Agency settlements are governed by a patchwork of federal statutes, each with their own requirements for public participation and consideration of the public interest. In general, these statutes provide only the minimal levels of process and public participation required by administrative law.[55] To the extent that agencies, like the FTC, use sophisticated procedures more closely aligned with administrative rulemaking, they are usually self-imposed regulations.[56] But even these regulations lack the protections provided in criminal and civil settlements, including victim participation rights, independent judicial

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[50] *Id.*; *see also A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, *supra* note 28 (describing the types of injunctive relief sought by the Commission).

[51] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1352 (2021). The opinion emphasized the Commission's ability "to ask Congress to grant it further remedial authority" and also pointed to the Commission's extant authority under sections 5 and 19 to seek restitution in federal court. *Id.*

[52] *Id.*

[53] Cox et al., *supra* note 35, at 63.

[54] *Id.* at 64 fig.3.

[55] *See* Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 527 (2011) (acknowledging that while the SEC permits some "notice and comment" review, many procedures do not include participation by victims, independent judicial review, or coordination with private class actions).

[56] *See, e.g.*, 17 C.F.R. § 201.1103 (2020) (providing notice-and-comment procedures for proposed SEC settlements); 16 C.F.R. § 2.34(c) (2021) (requiring similar procedures for FTC orders).

review, and adequate representation of affected parties.[57] This Section compares the settlement procedures of two agencies with overlapping enforcement authority—the FTC and the Antitrust Division of the Department of Justice (DOJ)—to illustrate the lack of enthusiasm on the part of agencies and courts to adequately incorporate the public and its interests, let alone that of victims.

When the FTC settles enforcement actions brought under its section 5 authority, it has essentially free reign to decide the terms and conditions of the agreement. Unlike the agency's enforcement authority, where the Commission is only authorized to act when the "reason to believe" and "interest of the public" standards are met,[58] the FTC Act provides no general guidance for settling claims. At most, settlements for civil penalties must be accompanied by a public statement describing the Commission's reasoning and must receive approval by the district court.[59] At least one commissioner has argued that settlements should meet the same standards—having a reason to believe and being in the public interest—required of the Commission to bring litigation.[60] However, under current law, the agency is responsible for conducting its own public interest inquiry, which supposedly "operates as a check on the 'wide discretion' that [the FTC] otherwise wield[s]."[61]

The Commission has long disagreed on the extent of its obligation to consider the public interest. For example, over fifty years ago the agency considered a third party's petition to withdraw the acceptance of a proposed consent decree and its motion to intervene in settlement proceedings in *Campbell Soup Company*.[62] The organization—aptly named Students Opposing Unfair Practices, Inc. (SOUP)—petitioned the FTC and wrote comments during the public comment period, arguing that the proposed agreement was inadequate and did not effectively protect the public.[63] In particular, SOUP contended that the proposed settlement, which required Campbell Soup to cease publishing deceptive depictions of its products, did nothing to remedy the harm caused by Campbell's past practices and failed to adequately inform consumers that they had been deceived.[64] As a result, SOUP argued, uninformed consumers would not be able

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57 *See* Zimmerman, *supra* note 55, at 527 (describing the limitations of administrative procedures in agency settlements).

58 *See supra* note 37 and accompanying text.

59 15 U.S.C. § 45(m)(3).

60 *See* ROSCH, *supra* note 22, at 6–7.

61 *Id.* at 22.

62 77 F.T.C. 664, 666–67 (1970).

63 *Id.* at 667, 669.

64 *Id.* at 669.

to protect themselves and their wallets from future deception.[65] The Commission denied SOUP's motions and petition, but two commissioners dissented on public interest grounds. Commissioner Philip Elman argued for greater agency responsiveness to the public, cautioning that important public issues should not be settled by a consent order "whose adequacy has been seriously challenged by responsible representatives of the public interest."[66] Commissioner Mary Gardiner Jones argued for greater public process, stating that the order should not be accepted without a hearing to evaluate the adequacy of the agreement, during which SOUP could present its argument.[67]

Similar disagreements surfaced more recently during the Facebook settlement. In that case, two of the FTC's five commissioners dissented from approving the proposed settlement over concerns about adequate representation of the public interest. Commissioner Rohit Chopra believed the settlement did not go far enough to resolve the core issues that enabled the violations in the first place.[68] Commissioner Rebecca Kelly Slaughter rejected the settlement because she believed the agency should instead bring litigation against Facebook and its Chief Executive Officer, Mark Zuckerberg.[69] Both commissioners emphasized the need for public accountability and the Commission's charge to act in the interest of the American public. Critically, according to Commissioner Slaughter, the order lacked "public transparency and accountability for the company, its leaders, and the Commission."[70] Although commissioners have disagreed about the public's proper role in FTC settlement proceedings for over fifty years, Congress has yet to clarify the issue.

Even though Congress has not taken concrete steps to ensure adequate representation of the public interest in FTC settlements, the Commission has instituted its own rules to encourage public representation. The agency usually publishes proposed consent decrees in the Federal Register and invites public comment for a period of time, typ-

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65 *Id.*

66 *Id.* at 672 (Elman, Comm'r, dissenting).

67 *See id.* at 674 (Jones, Comm'r, dissenting).

68 *See* Dissenting Statement of Commissioner Rohit Chopra at 4, *In re* Facebook, Inc., Matter No. 0923184 (F.T.C. July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf.

69 *See* Dissenting Statement of Commissioner Rebecca Kelly Slaughter at 2, *In re* Facebook, Inc., Matter No. 0923184 (F.T.C. July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf.

70 *Id.* at 7.

ically thirty days.[71] Once the comment period has closed, the Commission may either withdraw the agreement, issue its decision, or reopen and modify a previously entered decision and order. However, there are no rules mandating the consideration or use of public comments, and the FTC has seemingly never withdrawn a proposed consent decree based on comments received during this period.[72] Moreover, the agency retains the discretion to issue complaints, decisions, and orders before seeking public comment.[73]

By contrast, antitrust settlements by the Antitrust Division of the Department of Justice are subject to federal laws that provide clear textual guidance to both the DOJ and courts reviewing such agreements. The Tunney Act, which provides judicial review for DOJ decisions concerning mergers and acquisitions, imposes a set of obligations on federal judges, all of which exist to ensure that "the entry of [the settlement] is in the public interest."[74] When describing his proposal for the Act, Senator John Tunney explained that "[t]he court is not to operate simply as a rubber stamp . . . . Rather it has an independent duty to assure itself that the entry of the decree will serve the interests of the public generally."[75] The law was a rejection of the Supreme Court's then-existing view of DOJ consent decrees, which was highly deferential except in cases of government bad faith or malfeasance.[76]

Nonetheless, much of the Tunney Act's power has been subsequently tempered by the courts. In *United States v. Microsoft* (*Microsoft I*), the D.C. Circuit interpreted the Act's public interest inquiry narrowly, stating that courts need only determine that the settlement is "within the reaches of the public interest."[77] Congress later amended the Tunney Act[78] to explicitly overwrite this deferential standard and make clear that courts must scrutinize antitrust settle-

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[71] 16 C.F.R. § 2.34(c) (2021). The Commission must also provide a public explanation of the order provisions and the proposed relief, as well as any other information it deems helpful for understanding the order. *Id.*

[72] ROSCH, *supra* note 22, at 2–3.

[73] 16 C.F.R. § 2.34(c).

[74] 15 U.S.C. § 16(e).

[75] *The Antitrust Procedures and Penalties Act: Hearings Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93d Cong. 452 (1973) (statement of Sen. John Tunney, Member, Subcomm. on Antitrust & Monopoly).

[76] *See* Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961) ("[S]ound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting.").

[77] 56 F.3d 1448, 1463–65 (D.C. Cir. 1995).

[78] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221, 118 Stat. 661, 668–69 (codified at 15 U.S.C. § 16).

ments to ensure they adequately serve the public interest.[79] However, courts again interpreted the Act as establishing deferential review that prevented them from examining concerns within the four corners of the settlement or beyond it.[80]

This treatment of the Tunney Act is part of a larger reluctance by courts to scrutinize whether an agency settlement is in the public interest or even whether it is fair, adequate, and reasonable.[81] One prominent exception to this rule is Judge Jed Rakoff's rejection of the SEC's proposed settlement with Citigroup during the Great Recession.[82] The agreement contained a number of terms, including disgorgement, a permanent injunction against certain Citigroup behaviors, and other remedial measures. Relying on the belief that settlements invoking the court's injunctive powers must be fair, adequate, reasonable, and in the public interest, Judge Rakoff held that the agency failed to provide sufficient information to assess whether the order met any of these standards.[83] Importantly, he noted that when the court becomes a "partner in enforcement" by wielding its equitable powers, the courts *and the public* need to know the information upon which the agreement was based.[84] The Second Circuit reversed, finding that Judge Rakoff abused his discretion by rejecting the consent agreement.[85] It recognized that courts must determine whether a judgment is fair and reasonable but limited that inquiry to finding that the consent decree is procedurally proper.[86] Finally, it noted that the agency has the sole responsibility to determine whether

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[79] *See* 150 CONG. REC. S3610 (daily ed. Apr. 2, 2004); *see also* Darren Bush, *The Death of the Tunney Act at the Hands of an Activist D.C. Circuit*, 63 ANTITRUST BULL. 113, 122–23 (2018) (detailing Congress's response to courts' interpretations of the Tunney Act over time, which included making a court's consideration of public interest compulsory rather than permissive).

[80] United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 14–15 (D.D.C. 2007); *see also* Bush, *supra* note 79, at 123–26 (analyzing the *SBC* litigation). This ruling has become de facto precedent in the Circuit, although the issue has not been revisited by the D.C. Circuit itself. *See, e.g.*, United States v. Republic Servs., Inc., 723 F. Supp. 2d 157, 159 (D.D.C. 2010).

[81] The "fair, adequate, and reasonable" standard is required for private civil settlements. FED. R. CIV. P. 23(e)(2).

[82] SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011), *rev'd*, 752 F.3d 285 (2d Cir. 2014).

[83] *Id.* at 332.

[84] *Id.* ("[O]therwise, the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.").

[85] SEC v. Citigroup Glob. Mkts., Inc., 752 F.3d 285, 297 (2d Cir. 2014).

[86] *Id.* at 295.

a particular settlement best serves the public interest, because this is ultimately a policy choice that must be left to the political branches.[87]

This view of the judicial role was echoed in Judge Timothy J. Kelly's recent approval of the FTC-Facebook settlement. In his opinion, Judge Kelly emphasized the deference given by district courts to agency settlement agreements.[88] Moreover, he limited the scope of his public interest inquiry to a determination "that the agreement is 'not unlawful, unreasonable, or against public policy.'"[89] Though "the unscrupulous way in which the United States alleges Facebook violated both the law and the administrative order is stunning" and "call[s] into question the adequacy of laws" governing data privacy and security, Judge Kelly stated that the resolution of this concern is Congress's responsibility rather than an issue of settlement adequacy.[90]

The FTC's settlement procedures lack statutory or regulatory constraints to ensure that the public interest—and, for that matter, the interests of harmed consumers who stand to be vindicated by the settlement—is adequately represented. And more often than not, agencies provide far fewer opportunities to participate than the FTC,[91] which at least permits the general public to voice their concerns about a proposed settlement via the notice-and-comment process (although it does not require the agency to listen to these concerns in any meaningful way). More generally, this generates concerns about the power of enforcement agencies: They regularly settle massive claims which significantly impact individuals' interests and legal rights, but they have little obligation to take those rights and interests seriously.

In addition to the illusory protections provided by agency self-regulation, courts have almost uniformly denounced their role in reviewing the adequacy of agency settlements even when Congress has made clear its intentions for judicial review. With no binding obligations on most agencies, including the FTC, to give voice and consideration to the public interest, a growing chorus of scholars believe that

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87 *Id.* at 296 (citing Chevron, Inc. v. NRDC, Inc., 467 U.S. 837, 866 (1984)).

88 *See* United States v. Facebook, Inc., 456 F. Supp. 3d 115, 118 (D.D.C. 2020) ("Mindful of its proper role, and especially considering the deference to which the Executive's enforcement discretion is entitled, the Court will grant the consent motion and enter the order as proposed.").

89 *Id.* at 124.

90 *Id.* at 117.

91 *See* Margaret H. Lemos, *Democratic Enforcement: Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 987 (2017) (noting that, in contrast with agency-specific notice-and-comment requirements, "[t]he overwhelming majority of enforcement actions . . . have no such requirements for public participation").

constitutional requirements are being sidestepped.[92] However, these efforts have largely ignored traditional theories of administrative law and the ways in which participation by the general public and harmed consumers in administrative decisionmaking may fit within these frameworks.

II
Participation as a Principle of Administrative Law

As a general matter, agencies lack statutory and regulatory requirements to provide for meaningful public participation in agency enforcement decisions. Many scholars have argued that further participation is warranted, but none has considered whether such participation comports with prevailing theories of administrative law. Beyond this, there are further questions surrounding who should have the right to participate and why, and how these considerations may advance or hinder administrative legitimacy. As set forth below, two competing models of the administrative state have emerged since the beginning of the administrative state, and both have significant implications for public participation.

This Part contextualizes scholars' concerns about public participation within the traditional constitutional frameworks relied upon to legitimize the administrative state. Section II.A describes the evolution of these theories and scholars' transitions from focusing on arbitrariness to accountability, as well as the possible resurrection of concerns about arbitrary agency enforcement. Because arbitrariness and accountability are the two prevailing theories that legitimize the administrative state, their histories are important for understanding how participation may fit into each framework. Section II.B then analyzes the concept of public participation in agency enforcement in light of these principles, finding that both theories necessitate some degree of public participation as a means to ensure accountability, limit arbitrariness, and provide legitimacy. But neither theory demands mass participation, and Section II.C attempts to discern from these theories an appropriate balance.

A. The Tale of Two Models of Administrative Law

The modern regulatory state emerged during the Great Recession, and increasingly it has come to dominate much of the nation's policymaking. However, critics have suggested since its incep-

[92] *See, e.g.*, *id.* at 951–52 (categorizing public enforcement as a type of policymaking that demands some degree of public participation); Zimmerman, *supra* note 55, at 546 ("[A]gencies lack rules to ensure victims have adequate voice in the restitution process.").

tion that it is an illegitimate child of the United States's constitutional framework, in large part because the Constitution lacks any mention of the administrative state.[93] At the same time, scholars have just as forcefully advanced theories seeking to legitimize its existence.

These theories mostly can be categorized into two dominant camps: the arbitrariness model and the accountability model. The arbitrariness model holds governmental action, including agency enforcement, to be legitimate so long as it does not intrude arbitrarily upon individual liberties. The approaches under this model emphasize clarity, rationality, and reasoned decisionmaking. By contrast, the accountability model holds governmental action to be legitimate so long as it is tied to majority rule. This connection to the masses may be direct, via public input, or it may be indirect, via control by nationally elected officials. The distinction between these models is a simplification for ease of argument; in reality, these theories fall on a spectrum with accountability and arbitrariness on opposite, though not necessarily conflicting, ends. Nevertheless, the distinction is helpful to identify and to analyze the clear shift over time toward accountability and away from arbitrariness, which has been used by scholars to justify the existence of the administrative state—that history is explored below.[94]

1. The Arbitrariness Model

Early administrative law models focused on the risk that government action could arbitrarily deprive individuals of their liberties. Legal scholars believed that the creation of the administrative state, crafted out of the blank spaces in the Constitution, raised particular risks of arbitrariness that were not explicitly accounted for by the Founders.[95] As a result, agency legitimacy was understood to rely on actions taken by the government to protect against those risks.[96]

In line with this principle, the administrative state was originally justified under the "transmission belt" theory, named as such because it understood agencies as mere implementers of clear legislative direc-

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[93] *E.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

[94] For a more complete recounting of the history of constitutional administrative law, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

[95] *See id.* at 467.

[96] *See id.* at 468.

tives.[97] By relying on the statutory text's specific instructions, agencies reduced the risk of arbitrariness. This theory was bolstered by administrative procedures and robust judicial review that acted as internal and external controls on agency power.[98] While it emphasized arbitrariness, this theory also relied, in part, on agencies' relationships to Congress, which legitimized the administrative power agencies had over individuals because the people had already consented, through the political process, to this exercise of legislative authority.[99]

However, this theory did not adequately describe the realities of the administrative state during the 1930s and soon fell to the wayside. The statutes that cropped up during the Great Depression provided "broad grants of legislative authority with little guidance or limits on the administrative exercise of such authority,"[100] which directly contradicted the transmission belt theory of agencies. Thus, this theory on its own could not legitimize the administrative state as it existed—legislative directives were practically nonexistent,[101] and the judiciary quickly backed off its attempts at striking down legislation on these grounds.[102] The animating theory would need to be modified.

Scholars responded by instead focusing on internal constraints that could prevent arbitrary agency actions, categorizing the administrative state as a collection of "experts" with specialized experience and knowledge. Under this "expertise" theory, agency policymaking was considered totally nondiscretionary; instead, it was "simply a function of the goal to be achieved and the state of the world."[103] Because agencies were experts making policy choices based on science and economics, the theory went, there was no risk of arbitrariness. In fact, distance from political actors like Congress and the President was preferred, since political judgment would only serve to skew otherwise sound, pragmatic judgment.[104]

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97 Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

98 *See* Bressman, *supra* note 94, at 470.

99 Stewart, *supra* note 97, at 1672–73.

100 Bressman, *supra* note 94, at 471.

101 *See id.*

102 After *Schechter Poultry* in 1935, the Court largely stopped invalidating statutes on the basis of the nondelegation doctrine. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *see* Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 780 (2016) ("[C]onventional wisdom holds that the nondelegation doctrine is dead, or at least unenforceable.").

103 Stewart, *supra* note 97, at 1678.

104 Bressman, *supra* note 94, at 472 (citing Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90 n.34 (1994)).

In practice, the expertise theory promoted knowledge and specialization at the expense of agency procedures aimed at preventing arbitrary restrictions of individual liberties, which ultimately led to administrative reform. Commentators recognized that rational policymaking in the abstract could nevertheless impermissibly deny individual rights because of agencies' failures to recognize their limitations and partialities.[105] This led to the creation of the 1946 Administrative Procedure Act (APA),[106] which sought to prevent arbitrary agency decisionmaking by injecting additional procedural guarantees, such as increased hearing and participation rights in rulemaking.[107] Even with these reforms, criticism of the administrative state remained, particularly surrounding the arbitrariness of agency adjudication and the lack of procedural safeguards attending it.[108] The Court responded in step, strengthening judicial review and the procedures designed to prevent arbitrary administrative procedures.[109] In doing so, it sent a clear message: The administrative state must ensure that individual rights are treated fairly and predictably.

2. The Accountability Model

As scholars began to question the ability of agencies to lean on their expertise to guide decisionmaking, a model with a new focus came to the forefront of administrative law: public accountability. Instead of understanding the Constitution merely as a protector of individual liberties against arbitrary governmental interference, the accountability model recognized in the Constitution a fundamental premise that the people and their representatives legitimize governmental action.[110] In response, new theories were developed that placed accountability to the public at the forefront of administrative law.

The "interest group representation" theory of the 1970s was the first to legitimize agency decisionmaking by increasing public access to the process. It was built on the belief that, absent a clearly objective basis for agency action, such decisions should reflect the collective wisdom of all affected parties.[111] This change in thinking caused a sim-

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105 Bressman, *supra* note 94, at 472.

106 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706).

107 5 U.S.C. § 553.

108 Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1286 (1986).

109 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40–41 (1983) (establishing the standard for judicial review).

110 Bressman, *supra* note 94, at 478.

111 *Id.* at 475.

ilar shift in agency policymaking, moving from the use of formal, case-by-case adjudication to notice-and-comment rulemaking.[112] Lower courts reacted by further expanding public access to agency rulemaking, morphing it into a type of "hybrid process somewhere between informal rulemaking and formal adjudication."[113] However, the Supreme Court rejected these measures as improper judicial activism and made clear that only Congress or the agencies themselves could require more procedures than those already mandated by the APA.[114]

Though the Court rejected judicial creation of procedural safeguards, it nevertheless adopted an expansive reading of the APA's existing public-accountability protections in notice-and-comment rulemaking. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Court read the APA's "arbitrary-and-capricious" standard of review to require courts to engage in a "hard look" review of agency notice-and-comment rulemaking procedures.[115] Other rulings had already expanded the rights of parties to seek judicial review of administrative actions and not all were tied to the language of the APA.[116] Taken as a whole, these cases reflected the Court's understanding of the importance of public participation in agency decisionmaking.[117] But these decisions reached no further than the APA itself, which covers only notice-and-comment rulemaking. As a result, these values were never demanded when agencies engaged in policymaking via enforcement actions and settlements.

However, the interest group representation model proved too burdensome for its justifications when taken to its logical extreme.

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112 *Cf. id.* at 476 (describing courts' responses to the shift from adjudication to notice-and-comment rulemaking).

113 *Id.* (internal quotations omitted).

114 *See* Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 525 (1978) (cautioning courts against "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress").

115 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Corp., 463 U.S. 29, 41 (1983) (establishing "hard look" review, which sets aside standards found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (quoting 5 U.S.C. § 706(2)(A))); Bressman, *supra* note 94, at 476–77 (stating the Supreme Court endorsed "hard look" doctrine as early as 1971 but offically adopted it for notice-and-comment rulemaking in 1983).

116 *See, e.g.*, Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153–55 (1970) (identifying the statutory trend towards the "enlargement of the class of people who may protest administrative action"); Abbott Lab'ys v. Gardner, 387 U.S. 136, 139–41 (1967) (noting Congress's intent to have a mechanism of review for a person suffering legal wrong because of agency action).

117 *See generally* Bressman, *supra* note 94, at 476–77 (describing judicial evolution under the accountability model of administrative law).

Providing expansive participation rights to the general public is costly for the administrative process. Though valuable in the abstract, scholars believed that it was not worth the benefit, particularly because certain voices were elevated in the process to the diminution of others.[118] In addition, because there were no limits to participation, agency decisionmaking was vulnerable to some groups having too much power. For example, the Consumer Product Safety Act of 1972[119] included several provisions that required the Consumer Product Safety Commission (CPSC) to maximize public participation.[120] Such provisions included a requirement that the CPSC must respond to all petitions requesting a rule setting product safety standards within 120 days, and a requirement that any resulting rulemakings first be developed by groups outside the agency—including by the groups the rule purportedly was created to regulate.[121] This vision of participation destroyed the agency's ability to set its own regulatory agenda and perversely made it captive to the industries it was tasked with regulating. The interest group representation theory crumbled under the weight of its need for maximalist rights of participation, and it was accordingly dismissed as the grounding theory of the administrative state.

More recently, the "presidential control" theory, which builds on earlier theories seeking legitimacy through public accountability, has reigned supreme in administrative law. It seeks to legitimize the administrative state by placing it under the authority of the President, thereby bringing it under political (and popular) control.[122] In theory, placing administrative policymaking under the command of one elected individual also ensures agency decisions themselves are responsive to and reflective of majoritarian preferences.[123] This model survives constitutional scrutiny under the accountability approach without the costs of broad public participation in agency decisionmaking, suggesting that this paradigm is likely to have the longest staying power. Even so, then-Professor Elena Kagan, building on this model of presidential control, called for increased responsiveness to

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118 *See, e.g.*, Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1498 (1983) (noting that "self-interests [were] deeply entangled with narrow private interests").

119 Pub. L. No. 92-573, 86 Stat. 1207 (codified at 15 U.S.C. §§ 2051–2089).

120 *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. REV. 173, 181–82 (1997) (providing examples of failures of mass participation in agency rulemaking).

121 *Id.*

122 Bressman, *supra* note 94, at 490.

123 *Id.*

public preferences.[124] She suggested that the President should issue official directives for policymaking to agency heads, further tying agency action to elected power and thus to majoritarian control.[125] Her approach balanced the concern for arbitrariness by refusing to give deference to administrative interpretations not traced to a presidential directive and subjecting all presidential involvement to judicial review.[126] Kagan emphasized transparency as the means to prevent arbitrariness and promote accountability, laying bare any presidential control over administrative decisionmaking and allowing courts, as well as the public, to scrutinize it.[127]

Unfortunately, this arbitrariness model assumes a connection between agencies and the President that often does not exist in reality. For independent agencies like the FTC, Presidents have far less than full control over appointment decisions: They are often constrained by bipartisanship requirements and staggered terms for commissioners,[128] and their authority is further diluted because appointment requires the advice and consent of the Senate.[129] Moreover, high-ranking officials in independent agencies are typically removable only for cause, meaning the President cannot remove an official merely because of policymaking disagreements.[130] But more fundamentally, most day-to-day work is handled by civil servants who have substantial autonomy over many decisions that add up to make policy.[131] As a result, even this supposed steady-state model of administrative legitimacy will likely recede over time, and a new model—perhaps rooted in accountability, arbitrariness, or a combination of the two—will take its place.

Historically, these theories have been advanced to legitimize the administrative state and its regulations. There was great concern over agency usurpation of legislative power, and these theories sought to fit agency policymaking within the constitutional scheme. It was largely assumed that agencies created policy through regulations, and procedural reform and scholarly attention accordingly focused on con-

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124 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001).

125 *Id.* at 2290–99.

126 *See id.* at 2376–80.

127 *Id.* at 2337; *see also* Bressman, *supra* note 94, at 505–06 (describing Kagan's approach to administrative law).

128 *See* Lemos, *supra* note 91, at 969 (detailing the limited connection between independent agencies and the President).

129 *See* U.S. CONST. art. II, § 2.

130 *See* Lemos, *supra* note 91, at 970.

131 *See id.* at 971.

straining rulemaking authority.[132] By contrast, agency enforcement was largely ignored as a method of policymaking, at least in the context of administrative legal theory. Enforcement and settlement actions were mostly understood, until recently, to fall within the realm of discretionary executive power that was beyond the reach of Congress, courts, and the public.[133]

However, scholars have recently expanded these understandings of agency legitimacy to also encompass enforcement decisionmaking. The functional similarities between regulation and enforcement are abundantly clear: enforcement, and the practice of discretionary nonenforcement, shapes the law in action; agencies craft policy when making general decisions about the types of offenses to prioritize; and some agencies, like the FTC, engage in policymaking almost exclusively through case-by-case enforcement, rather than notice-and-comment rulemaking.[134] In short, regulation and enforcement are "alternate means to the same end,"[135] and, so the argument goes, enforcement must also be justified under traditional theories of administrative law. As a result, Professor Margaret Lemos, channeling Kagan, argues that agency enforcement must be accountable to the public but not so beholden to majoritarian preferences that its decisions cut against the true public interest.[136] Ultimately, genuine representation—and, as a corollary, democratic legitimacy—means that agencies "will not lightly depart from their constituents' wishes" in making enforcement decisions, and any such departure will be "capable of justification in terms of the public interest."[137]

Underlying both models of agency legitimacy is a preference for fairness, rationality, and predictability. The next Section expands upon Lemos's scholarship and asks whether these principles can be

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132 *E.g.*, Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003) (tracing the evolution of administrative law as a function of regulatory policymaking).

133 *See* Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 229 n.2, 230 (2006) (noting the "nearly unfettered discretion" that executive decisions receive because "review remains either unavailable or fairly cursory for a massive range of discretionary decisions").

134 *See* Lemos, *supra* note 91, at 946–49 (laying out the analogy between enforcement and regulation).

135 *Id.* at 949.

136 In the abstract, majoritarian preferences should reflect the true public interest. In practice, however, Professor Lemos believes that public opinion may be misinformed, uninformed, or otherwise lack the careful weighing of factors that enforcers must take into account. *Id.* at 963. Moreover, Lemos recognizes that majority rule may create arbitrary policy by failing to adequately protect individuals from majority rule. *See id.* at 963–64. In so doing, she implicitly recognizes preventing arbitrariness as a necessary element of administrative legitimacy.

137 *Id.* at 967.

squared with public participation rights in agency enforcement decisionmaking. It also explores the benefits of such participation and how participation rights may further administrative legitimacy under these frameworks by promoting accountability and restricting arbitrary agency enforcement.

B. Public Participation and Agency Enforcement

When agencies enact policies via rulemaking, the value of public participation is widely acknowledged and even statutorily embedded in the policymaking process. Depending on the agency, the public may petition for new rules, participate directly in the rulemaking process (through the notice-and-comment process or otherwise), and challenge the resulting regulations in court.[138] In this setting, it traditionally goes without question that "public participation generates useful information for regulators, facilitates public deliberation over administrative policy, and helps ensure that regulation is responsive to the needs of diverse stakeholders."[139] The passage of the APA—the crown jewel of public participation in rulemaking—was motivated by and interpreted in light of the arbitrariness and accountability models of the administrative state.[140] These models' theories demand just as much from administrative enforcement, but the law does not reflect this.

In the enforcement context, public participation holds agencies accountable when other checks have failed. Though there is widespread recognition that agencies must act in the public interest, there are typically few controls ensuring this mandate is met. Courts have largely abdicated their role in reviewing agency enforcement decisions, and the President and Congress provide imperfect, reactive oversight at best.[141] By contrast, direct public participation creates a type of informal oversight and provides a direct link to majoritarian, democratic processes. And historically, participation has successfully deterred agencies from "straying too far from their assigned missions" even when the agency ultimately does not follow the majority-preferred approach.[142]

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[138] *Id.* at 986.

[139] *Id.* (citing Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. Rev. 1300, 1318–31 (2016)).

[140] *See supra* notes 105–07, 115–17 and accompanying text (discussing the creation of the APA and the Court's interpretation of the statute, respectively).

[141] *See* Rossi, *supra* note 120, at 182–84 (describing the imperfect oversight of agencies by political actors); *see also supra* notes 82–87 and accompanying text (rejecting federal court oversight for agency settlements).

[142] Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 253, 263 (1986).

For independent agencies like the FTC, some connection to the public—through direct participation or otherwise—is crucial for accountability. Independent agencies are so named because they are insulated, in some way or another, from presidential control. Presidential power over appointment may be restricted by partisanship requirements and term limits that span single administrations, and removal power may be limited to removal only for cause.[143] Then-Professor Elena Kagan recognized the hollowness of the presidential control model in such circumstances and called for reform to strengthen the connection between independent agencies and accountability.[144] Public participation in agency decisionmaking is one way to achieve these ends under an accountability-based framework for the administrative state.

Participation also safeguards against arbitrary enforcement actions by serving an information-production role. Decisionmaking is arbitrary when it treats the public unfairly or unpredictably. Agencies are not simply technocratic institutions that make enforcement decisions as a matter of scientific judgment; instead, their decisions are inextricably tied to value judgments.[145] When enforcement decisions give rise to competing values, agencies are staking out political positions that must be legitimized by adequate consideration of information held by the public. By providing agencies information about the affected interests at play in a given enforcement proceeding, public participation contributes to the rationality of the final decision by enabling more robust and thoughtful decisions.[146] Just as importantly, information sharing also contributes to the appearance of fair and predictable—in other words, rational—decisionmaking. Agency decisions that demonstrate consideration of the public's concerns will foster greater understanding and support for enforcement actions, and the public itself will be more likely to come to a common acceptance as information is exchanged between affected interests and the

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143 *See supra* notes 127–31 and accompanying text (listing indicia of agency independence).

144 *See* Kagan, *supra* note 124, at 2376–77 ("[C]ourts could apply *Chevron* when, but only when, presidential involvement rises to a certain level of substantiality as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes.").

145 *See supra* Section II.A.1 (chronicling the demise of the expertise model of administrative law).

146 *See* Rossi, *supra* note 120, at 185–87 (relating participation to the informational exchange between decisionmakers and the public).

agency.[147] Participation thus provides administrative legitimacy by limiting the likelihood of arbitrary enforcement decisions.

C. Cabining Public Participation

At the same time, neither accountability-based nor arbitrariness-based theories demand a maximalist conception of public participation. As noted, broad participation has been rejected by agencies and scholars as unworkable.[148] The public does not have a core collective interest that is readily advanced by agency action, and there is no feasible way to aggregate the diffuse and conflicting interests of every individual. There is also the risk that broad participation rights will enable decisionmaking to be coopted by narrow private interests that are well-funded or well-connected, diverting enforcement actions away from the public interest.[149] Finally, majoritarian interests may sometimes impermissibly invade upon minority rights,[150] and such input must be rejected as an unconstitutional—and arbitrary—agency action against individual liberties. This all suggests that public participation should not, and cannot, be followed blindly by enforcement officials. Such a requirement would place too much emphasis on accountability at the risk of giving rise to arbitrary enforcement decisions.

Expansive public participation likewise imposes informational costs that threaten to debilitate agency decisionmaking. If there are too many participants, and agencies are required to thoroughly consider any information they present, agencies may be paralyzed from moving forward with politically charged or publicly salient enforcement decisions. Moreover, it may overwhelm the ability of decisionmakers to properly assess information, which could lead to vague, sloppy, and ultimately heuristic analysis[151]—the very type of decisionmaking that risks arbitrariness. It may also lead to obfuscation of issues or delay in enforcement, and it creates opportunities for participation channels to be coopted and used for strategic behavior unrelated to the enforcement action.[152] Most fundamentally, unworkability may lead policymakers and scholars to shift away from democratic

147 *See id.* at 187–88 (explaining the proceduralist values of public participation in agency decisionmaking).

148 *See supra* note 118 and accompanying text; *see also* Rossi, *supra* note 120, at 180–82 (describing specific administrative failures of mass participation).

149 *See* Lemos, *supra* note 91, at 957–61 (discussing the concern that public participation may be used as a vehicle for undue private influence).

150 *See id.* at 961–62.

151 *See* Rossi, *supra* note 120, at 215–16 (listing drawbacks of mass public participation in agency decisionmaking).

152 *See id.* at 214–16.

accountability as a touchstone of administrative law. Absent another theory to take its place, such a move could threaten the legitimacy of the administrative state as a whole.[153] Taken together, these concerns demonstrate that neither theory demands being stretched to its logical extreme. Too much emphasis on public participation may be disastrous for the administrative decisionmaking from both accountability and arbitrariness perspectives, but each theory nonetheless suggests that some participation is warranted. It is ultimately a matter of degree.

Under either framework, there are obvious benefits to at least *some* form of public input. Agencies face a variety of internal and external forces that may skew decisionmaking away from being in the public interest. Enforcement officials, like everyone else, are influenced by self-interested motivations. Consciously or not, they are more likely to pursue cases that they believe will advance their personal or professional interests, and it is difficult to predict, and thus counteract, how those interests will affect enforcement decisionmaking.[154] Externally, scholars have written extensively about the risks of agency "capture," where agency decisionmaking is systemically skewed away from the public interest and toward the interests of the regulated industry.[155] Capture is especially difficult to detect in the enforcement context, in part because of the inherent ambiguity of the public interest and the challenge of ascertaining when the agency is not representing it.[156] Direct public participation in some capacity mitigates many of these risks by ensuring that the agency, and its enforcement decisions, are accountable to the public and not an arbitrary exercise of power.

This all suggests that agencies like the FTC already strike a decent balance between overly expansive and insufficient participation rights, though some issues remain. The FTC does not, and should not, require submission to the public will, but it should still promise consideration of it. Instead of merely collecting comments on pro-

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153 This is not to suggest that there are no other theories to take up the mantle. It is only to argue that accountability and arbitrariness, the two prevailing theories of the administrative state up to this point, would no longer be sufficient to legitimize the administrative state. *But see* Bressman, *supra* note 94 (advocating for a return to the arbitrariness approach and arguing that it remains a functional theory of administrative law).

154 *See* Lemos, *supra* note 91, at 952 ("Like other government functions, public enforcement may be diverted by enforcement officials' own self-interest, or by narrow private interests.").

155 *See* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 13 (Daniel Carpenter & David A. Moss eds., 2014).

156 Lemos, *supra* note 91, at 954.

posed settlements, the agency should be required to publish responses to each comment. Current agency regulations require the Commission to announce proposed settlements, but its decisionmaking process on remedies, the scope of liability, and other issues often remains unclear to the general public. And because these requirements are self-imposed, there is always the possibility that they will be revoked—and there is no guarantee that the agency will rigorously follow them anyway. But this imperfect solution nonetheless recognizes the need for some external check on enforcement decisionmaking, and it places public participation squarely in the role that courts have long rejected.[157]

However, most agencies do not approach this degree of public participation and transparency,[158] even though both of the leading models of administrative legitimacy support it. As a result, "interested members of the public have scant opportunities to learn about, much less participate in, the government's ongoing enforcement efforts."[159] Instead, many enforcement efforts are kept confidential and out of the public eye until the settlement has been finalized,[160] with no meaningful check to ensure the public interest is being represented. Even when statutory or regulatory requirements allow for public comment on proposed settlements, the public may only address the agency decisions explicitly reflected in the proposed settlement.[161] They are unable to discuss paths—causes of action, remedies, and more—that are not within the four corners of the settlement.[162] This creates a shield from meaningful accountability, especially for independent agencies. There is a clear need for reform, but the above discussion evinces a need for external constraints beyond agency self-regulation. Courts have rejected Congress's prior calls for judicial review,[163] which leaves Congress to craft a statutory solution that ensures ade-

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157 *See supra* text accompanying note 81 (describing the failure of courts to meaningfully review agency enforcement decisions for their representation of the public interest).

158 *See, e.g.*, *ASA Challenges SEC's Regulation by Enforcement*, Am. Sec. Ass'n (Apr. 29, 2020), https://www.americansecurities.org/post/asa-challenges-sec-s-regulation-by-enforcement (accusing the SEC of promulgating backdoor regulations through enforcement actions without the public participation required of rulemaking); Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 Law & Soc'y Rev. 735, 758 (1996) (noting that normally, members of the public "are left out of the nonpublic litigation process").

159 Lemos, *supra* note 91, at 987.

160 *Id.*

161 *Id.* at 988.

162 This effect is particularly concerning in the case of restitution for harmed consumers. *See infra* Section III.B.

163 *See supra* Section I.B (detailing courts' refusal to review agency settlements for adequate consideration of the public interest).

quate consideration of affected interests before settlements seek the judicial rubber-stamp. Part III proposes one such solution, building upon statutes that grant participatory rights to victims in the criminal law setting while distinguishing between participatory rights for the general public and for victims of the alleged wrongdoing.

III
Victim Participation and Administrative Law

Beyond general discussion around rights of public participation, the rights of harmed consumers in agency enforcement decision-making have received very little scholarly attention. This is possibly for good reason: It may be the case that those harmed by the conduct of corporate entities in government enforcement actions have no unique rights beyond those granted to the general public. However, this Part argues that harmed consumers, or any identifiable victim with a restitutionary interest, are due heightened participation rights in administrative enforcement.[164] At the very least, agencies stand to gain substantial benefits—echoing those provided by public participation more generally—from granting additional participatory rights to harmed consumers in certain circumstances.

The FTC's 2019 settlement with Facebook exemplifies the risks of disillusionment and illegitimacy that arise when harmed consumers are denied meaningful participatory rights. Although the FTC repeatedly touted its five-billion-dollar settlement, none of that money went directly to harmed consumers; instead, it was routed to the U.S. Treasury.[165] And even when the FTC seeks public compensation, it obtains settlement money to "distribute in its sole discretion," rather than taking a public stance on how victims will be compensated.[166] Agencies do not have to operate so detached from harmed consumers. Some, like the Consumer Financial Protection Bureau (CFPB), prefer in the vast majority of cases to distribute relief to all affected consumers.[167] The FTC's failure to provide restitution to harmed consumers may explain the severity of the public outcry to the Facebook

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164 In this Note, "participation rights" is used as shorthand for an array of participatory interests that are or could be available to private individuals. While these include formal participation in enforcement actions, they represent all opportunities for private voices to be heard by the agency—via notice-and-comment, administrative complaints, or any other mechanism.

165 *See* Fair, *supra* note 12 ("[T]he penalty—which, by law, goes to the U.S. Treasury (not the FTC)—is one of the largest penalties ever assessed by the U.S. government for any violation.").

166 Cox et al., *supra* note 35, at 76.

167 *See id.* (noting that the CFPB used this method for relief distribution in nine of ten cases resolved in 2014).

settlement; alternatively, the outcry may have been caused by the way in which the FTC extinguished the restitutionary interests of over twenty-five thousand consumers.[168] But it is simply impossible to know, in part because harmed consumers were not provided a legitimate seat at the table during the agency's decisionmaking process, and also because the FTC was not obligated to adequately explain the decisions it made. This lack of process regarding harmed consumers' interests loosens the tie between participation and agency accountability and risks arbitrary decisionmaking, suggesting that greater participation rights for victims may be required under both accountability-based and arbitrariness-based conceptions of agencies, at least in certain circumstances.

It is important to note, as an initial matter, the limited scope of this discussion. In an abstract sense, all members of the public are affected by enforcement decisions. But the harmed consumers, or victims, of concern are those members of the public who have suffered physical injury or pecuniary loss.[169] Moreover, these victims only have a restitutionary interest in administrative enforcement where Congress has provided an agency authority to seek restitution or other equitable remedies.[170] Thus, this Note is concerned only with victim participatory rights when an agency has authority to seek restitution for a physical or pecuniary harm suffered by the victim.

A. Placing Victims Within Administrative Law

This Note is the first to consider victims' rights as a matter of administrative law, though the call for victim participation in administrative decisionmaking is not entirely new. In recent years, scholars have raised concerns that agencies act as "public class counsel"—connoting the similarities between agencies seeking victim compensation and private attorneys representing a class of victims in civil litigation—but lack the procedural safeguards that align the interests of counsel and the class.[171] These arguments are rooted in due process:

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[168] *See supra* note 9 and accompanying text.

[169] This raises additional questions of causation that are beyond the scope of this Note. However, it is assumed that the relevant "class" of victims affected by an agency enforcement decision is sufficiently determinable.

[170] The Supreme Court recently ruled that the SEC, Liu v. SEC, 140 S. Ct. 1936 (2020), and the FTC, *see supra* notes 51–52, lack authority to seek restitution under certain statutory provisions.

[171] *See* Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1109 (2008) (defining "public class counsel" as any governmental actor that undertakes actions on behalf of consumers or employees); *see also* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 491 (2012) (arguing that "the principal critiques of class actions

They contend that, because agency restitution may preclude subsequent private litigation and recovery, agencies must adequately represent victims' interests, and accordingly they advocate for the adoption of rules similar to those in the class action setting.[172] Whether or not these theories are persuasive,[173] they are simply inapplicable to FTC enforcement. There is no private right of action under the FTC Act,[174] so harmed consumers have no other way to seek compensation—they must rely entirely on the agency to vindicate their interests. However, the legitimacy, or even necessity, of victim participatory rights largely has been unexplored as a matter of administrative law.

The public's general right to participation, without more, is insufficient to ensure that agencies adequately represent the interests of harmed consumers. In the current administrative system, victims are peripheral players at best.[175] Agencies have a public mission and must take into consideration the collective public interest, which requires balancing the interests of clearly opposed forces: the harmed consumer and the defendant who engaged in the harm. Because government enforcers are charged with representing the public interest, they are ethically unable to become representatives of private interests, including those of victims.[176] However, it is understood in criminal law that prosecutors may create space for victim interests without contradicting their charge to seek justice on behalf of the broader public

translate readily into the public realm"); Zimmerman, *supra* note 55 (arguing that agencies afford few safeguards for the victims they serve and compensate, and proposing solutions to give victims more voice in their own redress).

172 *See* Verity Winship, *Policing Compensatory Relief in Agency Settlements*, 82 U. CIN. L. REV. 551, 552 (2013) (arguing that class action-like protections "should be triggered when the right of absent represented parties to their day in court is compromised").

173 There is considerable debate surrounding the legitimacy of due process concerns in this setting. For an empirical study of the preclusive effects of agency litigation, see Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331 (2015).

174 *See* Stephanie L. Kroeze, *The FTC Won't Let Me Be: The Need for a Private Right of Action Under Section 5 of the FTC Act*, 50 VAL. U. L. REV. 227, 228 (2015) (noting the lack of a private right of action).

175 *See* Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 976 (2001) (describing the limited role that victims are allowed under criminal and administrative law).

176 *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 889 n.158 (2014) ("[Government] lawyers . . . have ethical obligations not present for other employees. . . . For those who see the agency itself as the client, maximizing penalties in accordance with the agency's wishes is generally consistent with a lawyer's ethical obligations.").

interest.[177] As a result, it is legitimate and even beneficial to seek victim input at various stages in the criminal legal process. Agencies similarly cannot ignore the interests of victims when enforcing laws on behalf of the public and should instead make more room for them. The legitimacy of the administrative state may even depend on it.

Agency enforcement is accountable to the public interest only when it takes adequate account of consideration of victim interests. In some ways, this is obvious: victims are one aspect of the public interest, and the public ends sought by agency enforcement accordingly must incorporate some measure of victim well-being.[178] If the public interest purportedly represented by the agency does not adequately take account of victims, then it is not truly accountable to the public interest. In this sense, agencies are not accountable to the public, not because they do not take into consideration the public interest at all, but because they do not correctly balance the competing interests that comprise it.[179] Creating opportunities for victim input is an important way to ensure this balancing takes place.

Judge Rakoff recognized this when he rejected the SEC's proposed settlement with Citigroup. When assessing whether the settlement was "unfair, unreasonable, inadequate, or in contravention of the public interest," he noted the inadequacy of the proposed relief for investors defrauded by the Bank.[180] In particular, the proposed agreement failed to "commit the S.E.C. to returning any of the total of $285 million obtained from Citigroup to the defrauded investors" and would, in any event, "leave[] the defrauded investors substantially short-changed."[181] This lack of consideration for victims' interests, he believed, demonstrated "that the parties' successful resolution of their competing interests cannot be automatically equated with the public

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[177] *See* Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 326–32 (2007) (explaining how procedural justice for victims can further public interests).

[178] *See id.* at 329 ("[W]e should not forget that while public ends are indeed paramount in criminal justice, those public ends also encompass some measure of solicitude for victim well-being per se.").

[179] *See* Douglas E. Beloof, *Dignity, Equality, and Public Interest for Defendants and Crime Victims in Plea Bargains: A Response to Professor Michael O'Hear*, 91 MARQ. L. REV. 349, 352 (2007) (noting in the criminal context "that a substantial part of the public's distrust of plea bargaining is that victims' interests and harm have not been valued in the public interest function"); *see also* Bennett L. Gershman, *Prosecutorial Ethics and Victim's Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 561 (2005) (detailing the tripartite responsibility of government lawyers to the public, the victim, and the defendant).

[180] SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *rev'd*, 752 F.3d 285 (2d Cir. 2014).

[181] *Id.* at 334.

interest."[182] In short, he recognized that the failure to provide adequate relief to victims may itself signal that agencies are not accountable to the public interest. While his decision was overturned by the Second Circuit, it was reversed because he overstepped his role as a judge—not because his analysis was incorrect.[183] Because of this limit on judicial review, judges are unlikely to police settlements for accountability to victims' (and the public's) interests, and instead Congress and agencies must enact measures that grant participatory rights to victims and ensure meaningful accountability.

Opportunities for victim participation, just like for the general public,[184] are important to prevent arbitrary enforcement decisions. The need for victim participation stems from an uncontroversial idea: those potentially affected by a collective decision should have opportunities and capacities to influence that decision. Victims, knowing the full extent of their harms, are in the best position to provide remedy-relevant information to agencies. Without consultation, there is no way of knowing whether and how agencies account for victim harm throughout the enforcement decisionmaking process. Without such information, the agency risks arbitrariness. Returning again to Judge Rakoff, he found the SEC settlement to be neither fair nor reasonable—two elements of rationality—because the agency did not "provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified."[185] This suggests that the information flow between victims and agencies must run in both directions: victims supply the agency with an evidentiary basis upon which they can craft a rational remedy, and agencies provide victims and the public with "the truth in a matter of obvious public importance."[186] This exchange of information ensures that agency decisionmaking, particularly in its choice of remedy, will be rational and legitimate.

Even the mere appearance of arbitrariness, caused by inattentiveness to victims, may harm long-term administrative legitimacy. As a general matter, an individual's perception of agency decisionmaking goes beyond the mere resolution of the claims and distribution of remedies; it is also affected by the kinds of process used to reach the outcome.[187] Perceptions of voice, neutrality, trustworthiness, and respect

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[182] *Id.* at 335.

[183] *See supra* notes 85–87 and accompanying text (describing the Second Circuit's reversal).

[184] *See supra* notes 145–47 and accompanying text (connecting public participation to rational agency decisionmaking).

[185] *Citigroup Glob. Mkts., Inc.*, 827 F. Supp. 2d at 332.

[186] *Id.*

[187] *See* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 196 (2002); *see also* O'Hear, *supra* note

may alter an individual's view of the legitimacy of administrative enforcement, potentially even more so than the outcome itself.[188] These perceptions of fairness and legitimacy extend beyond particular cases and settlements, shaping beliefs about the legitimacy of government enforcement powers more broadly.[189] And this does not solely affect victims, as "perceptions of fair treatment and acceptance of outcomes may also spread from victims to the broader public" and threaten to undermine the public view of the administrative state.[190] Over time, this erosion of public support may lead many to question the existence of the administrative state entirely.

Beyond the administrative law models, participatory rights for victims serve important dignitary interests. When the government, via agency settlement, disposes of individuals' restitutionary interests without seeking their input, it diminishes their personhood by withholding from them the opportunity to validate their harms.[191] Moreover, there is dignitary significance in providing notice and explanation to victims. To avoid the objectification and commodification of victims in the settlement process, agencies should be required to provide victims "adequate notice of the issues to be decided, of the evidence that is relevant to those issues, and of how the decisional process itself works."[192] This is particularly concerning in the context of the FTC, where the agency can, and does, seek restitution for harm against consumers only to distribute it—or not—on an entirely discretionary basis.[193] Agencies should meaningfully involve victims in this process, giving voice to their harms and mitigating the perception that agencies seek monetary rewards for their own benefit, and not for the public.

Meaningful victim input likewise provides agency enforcement decisions a number of prudential benefits. As noted in other contexts, government attorneys are frequently balancing divergent interests

177, at 326 (applying procedural justice principles to victim participation in the criminal process).

188 *See* O'Hear, *supra* note 177, at 327. Social psychology research categorizes voice, neutrality, trustworthiness, and respect as follows: whether the victims had an opportunity to tell their experience (voice); whether the government was seen as unbiased, honest, and principled (neutrality); whether the government was seen as benevolent (trustworthiness); and whether the victims were treated with dignity and respect (respect). Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 380 (2003).

189 *See* O'Hear, *supra* note 177, at 327.

190 *Id.* at 328.

191 *See* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 178, 200 (1985).

192 *Id.* at 175–76.

193 *See supra* note 166 and accompanying text.

with limited information about victims' damages.[194] Without input from victims, "some interest groups may be ignored in the restitution process, rendering the calculation and method of distribution ineffective."[195] In addition to third party interests, the agency and its attorneys may have self-interested motivations for seeking a particular financial award that is not tethered to the public interest.[196] While it is difficult to predict how these motivations affect restitutionary awards—in some cases, it may actually increase them[197]—it is nonetheless an illegitimate exercise of power when awards are unexplainable as a matter of public concern.[198] Moreover, incomplete information may lead to gross miscalculations of damages, potentially rendering arbitrary the restitution amount sought by the agency. Victim voice is particularly important for informational exchange *before* a proposed settlement is reached, because such agreements likely have "unstoppable momentum" and will not be modified based on new information.[199]

Some scholars have pushed back on the theory that victims should have participatory rights in agency settlements. Most of these critiques reject participation as a due process requirement, arguing that administrative enforcement actions do not implicate victims' due process rights because they do not preclude victims from pursuing their private interests in subsequent litigation.[200] However, at least one such scholar, Professor Verity Winship, has identified the peculiar situation where "agency-obtained compensation is potentially the only source of compensation."[201] In this situation, Professor Winship contends that Congress and agencies should make a normative judgment about the appropriate balance between the broad public interest and identifiable, compensable victims.[202] The next Section begins this con-

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194 *See* Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1426 (2011) (discussing criminal restitution funds).

195 *Id.*

196 *See* Lemos & Minzner, *supra* note 176, at 853 (describing the reputational and institutional incentives that underlie financial awards in public enforcement actions).

197 *See id.* at 863 (contending that "public enforcers have self-interested reasons to maximize financial awards" independent of the purpose of the monetary recoveries).

198 *See supra* text accompanying notes 141–42 (arguing that administrative law requires administrative enforcement to be in the public interest).

199 *See* O'Hear, *supra* note 177, at 328–29 (discussing victim input before plea deal agreements); *see also supra* note 72 and accompanying text (noting the infrequency of FTC modifications of proposed settlements).

200 *E.g.*, Cox, Widman & Totten, *supra* note 35; Velikonja, *supra* note 173; Winship, *supra* note 172.

201 Winship, *supra* note 172, at 558.

202 *See id.* At least one agency has taken up that charge: Recent SEC settlements suggest that the agency has, at the very least, made efforts to identify victims during the settlement process. *See* Velikonja, *supra* note 173, at 390.

versation and suggests a path forward for Congress and agencies to strike this balance.

B. Perfecting Participation

Remaining is the question of what victim participation should look like in an administrative state legitimized by theories of accountability and arbitrariness. At the outset, at least one thing is clear: neither framework demands that victim interests be so elevated as to usurp the public interest. But that does not mean that participatory rights of victims must be tethered to the rights of the public at large. Victims have elevated stakes in agency decisionmaking because those decisions directly affect their abilities to receive relief for their harms, and victims occupy a unique informational position that may prove valuable to government enforcers. Perhaps most importantly, victim input may legitimize agency enforcement in the eyes of the public. Although traditional avenues for participation are unavailable to victims, especially in the consumer protection context, criminal procedure and its recognition of victim participation rights provide a roadmap for the administrative state.

Harmed consumers are frequently unable to seek adequate relief, or any relief at all, through private litigation. As previously noted, there is no private right of action under the FTC Act, which prevents individuals from seeking relief under the same cause of action as the agency.[203] And, more generally, there has been a shift, observed by Judge Jack Weinstein, in how victims may seek relief: "While criminal and administrative law have moved towards victim compensation as one of their goals . . . concurrently there has been a recent marked attempt to limit the power of recovery through the civil system."[204] In rare instances, some courts have even rejected consumer class attempts to seek restitution through comparable state laws—often referred to as mini-FTC Acts—because of the superiority of a uniform FTC action that does not require the application of fifty different state laws.[205] The key difference, of course, is that consumers have no voice in the "superior" administrative action, if it is ever litigated at all.

As a result of these same barriers, victims typically are unable to intervene as third parties in agency enforcement proceedings. To intervene as a matter of right and pursue relief separate from the original plaintiff, the Supreme Court has held that parties must indepen-

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[203] *See* Kroeze, *supra* note 174, at 227–28.

[204] Weinstein, *supra* note 175, at 966.

[205] *See, e.g.*, Ramirez v. Dollar Phone Corp., 668 F. Supp. 2d 448, 450 (E.D.N.Y. 2009) (denying class certification in the hopes that the FTC or another federal agency would step in).

dently possess Article III standing.[206] This clearly prevents harmed consumers from intervening in FTC actions because federal consumer protection laws contain no analogous private right of action. And congressional intervention to provide victims a cause of action would not necessarily allow victims to intervene in agency proceedings either. In recent years, federal courts have undertaken a concerted effort to narrow standing doctrine and limit access to the legal system. For example, the Supreme Court recently ratcheted up standing requirements by holding that allegations of future possible injury are insufficient to satisfy the injury-in-fact requirement.[207] This requirement is especially damning for victims of data breaches, like those in the Facebook saga, where financial loss, identity theft, and other injuries are often not felt immediately. Moreover, these are often relatively small-dollar claims that require aggregation to make litigation economically feasible. However, members of the Court have recently signaled that each class member in a class action may require individualized standing,[208] which would effectively prevent most data breach classes from being certified.

Left without opportunities to seek relief on their own or ensure adequate relief in agency proceedings via intervention, victims only have hope to lean on when seeking restitution for their harms. They must rely entirely on government attorneys to decide that compensation is warranted in a given case without any procedures to ensure their interests are adequately represented or even considered. This runs counter to common sense: When individuals have interests they are unable to litigate themselves, the government should have its strongest obligation to seek compensation on their behalf. Furthermore, victims are in the best position to assist enforcers in determining appropriate remedies, at least with regard to achieving a sense of individualized justice.

Criminal law, and the victim participation movement within it, provides guidance for the path forward. In the 1970s, victims' rights advocates sought to provide victims a central role in the criminal legal process and leaned on the tradition of criminal restitution to show that victims' interests were not being fairly or adequately incorporated into

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206 *See* Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1648 (2017) ("[A]n intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a plaintiff.").

207 *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 411–12 (2013) (denying to grant summary judgment for respondents, who set forth no specific facts demonstrating their claim, based on "mere allegations").

208 *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring) (opining that if the district court cannot ensure that damages will go only to injured class members, then the award cannot stand).

the decisionmaking process.[209] Congress listened and, starting in the 1990s, passed a series of federal statutes expanding the participatory rights of victims in the criminal legal process.[210] These laws centered on concerns about restitution, and they provided victims participatory rights in three main categories: equitable compensation, fair representation, and direct participation rights.[211]

Federal law guarantees victims in criminal cases the right to full compensation.[212] Whenever identifiable victims experience a physical injury or pecuniary loss as a result of criminal conduct, prosecutors must seek restitution for certain categories of crime.[213] There is also a collateral source rule, which requires criminal defendants to pay restitution in the criminal proceeding even if victims are otherwise able to seek relief in civil litigation.[214] These laws reflect a better balancing of the interests in cases involving harm to victims and are equally applicable in the administrative context. By contrast, no agency is bound by law to seek restitution in administrative enforcement actions, and there are no guidelines governing situations where agencies do request restitution. For example, the FTC typically seeks "restitution" on a discretionary basis, meaning that it does not commit to returning *any* of its settlement funds to victims.[215]

There are also laws guaranteeing participation rights to victims throughout the criminal process, including the right to notice and the right to be heard.[216] Prosecutors are obligated to identify and notify potential victims of various proceedings throughout the duration of the criminal case.[217] Federal law also provides victims a "right to confer" with prosecutors at various stages throughout the litigation, including indictment and sentencing.[218] They are allowed to appear and petition the court directly so long as it does not interfere with a

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209 *See* Zimmerman & Jaros, *supra* note 194, at 1401 (citing Bruce Jacobs, *The Concept of Restitution: An Historical Overview*, *in* RESTITUTION IN CRIMINAL JUSTICE 45, 45–51 (Joe Hudson & Burt Galaway eds., 1977)).

210 *See, e.g.*, Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, tit. V, 104 Stat. 4820–23 (codified as amended at 42 U.S.C. §§ 10606–10607) (detailing the rights of crime victims and the services to be provided to them); Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, tit. II, 110 Stat. 1214, 1227–41 (codified as amended in scattered sections of 18 U.S.C.) (enhancing victim participation and creating a mandate for restitution to victims of certain crimes).

211 *See* Zimmerman & Jaros, *supra* note 194, at 1402.

212 18 U.S.C. § 3771(a)(6). *See generally* Zimmerman & Jaros, *supra* note 194, at 1403–04 (reviewing the federal scheme for victim restitution in criminal cases).

213 18 U.S.C. § 3663A(c)(1)(B).

214 *Id.* § 2259(b)(4)(B)(ii); *id.* § 3664(j)(1).

215 *See supra* note 166.

216 18 U.S.C. § 3771(a)(2), (4).

217 *Id.* § 3771(c)(1).

218 *Id.* § 3771(a)(5).

criminal defendant's right to a fair trial,[219] which is not a concern in most administrative actions.

Agencies fail to confer any of these participatory rights to victims. Though victims are not—and indeed, often cannot—be legal parties to most agency actions and accordingly do not possess due process rights, Congress should still provide them with statutory rights of participation and restitution. Without notice, victims (and even the general public) are unlikely to be aware of enforcement actions or settlement proposals that directly affect their interests. Few people, without a known connection to a case, read the Federal Register or comment on settlement proposals.[220]

Neither model of administrative law—accountability or arbitrariness—suggests that victims should have absolute participatory rights in every circumstance. Requiring agencies to seek and consult victims is costly and may be impracticable in many cases,[221] threatening administrative paralysis that leads to arbitrary decisions accountable to nobody.[222] Regardless, concerns about financial and efficiency costs do not justify a system that leaves no constructive participatory rights for victims at all. Instead, agencies should be required to take reasonable efforts to provide notice, consult with victims, and provide meaningful opportunities to participate. Agencies will not be penalized if victims express no interest in involvement after being notified of the enforcement action, and notice alone is unlikely to be prohibitively costly because these provisions apply only where victims are readily identifiable and have experienced harm.[223]

At the same time, government attorneys must take care to prevent victims' interests from impeding the lawful and professional performance of their official duties. Agencies may be "corrupted" by victim input if it so persuades the agency that it is no longer able to remain neutral and instead unlawfully or unethically assumes the victim's interests as its own.[224] That said, none of the participatory rights suggested here establish obligations that bind agency enforcement to victim interests. They merely require the agency to confront

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219 *Id.* § 3771(b).

220 *See* Zimmerman, *supra* note 55, at 549 (analyzing the prevalence of public comments on Fair Fund distribution plans published by the Securities and Exchange Commission).

221 *See supra* note 118 and accompanying text (noting the costs of broad participation rights).

222 *See supra* text accompanying notes 120–21 (describing the CSPC's regulatory failure caused by massive public participation).

223 *See supra* note 202 (discussing victim participation in SEC enforcement proceedings).

224 *See* Gershman, *supra* note 179, at 564 (describing ways in which a prosecutor may be compromised by their interaction with a victim).

these interests and consider them, which signals an attempt to legitimize agency action and improve its responsiveness to the public interest (among other interests).

Victims should have more expansive rights of participation than the public at large—even if it comes at the expense of broader public participation rights in agency decisionmaking. In criminal law, the public participates largely through political representation of the public prosecutor, and a small number of individuals sit on any given jury. By contrast, victims have broad participatory rights. A bifurcated model of participatory rights similarly based on affected interests may be appropriate in agency decisionmaking as well. Rather than focusing on increasing access points to the agency for the general public, accountability and rationality may be better served by prioritizing direct participation for victims.

Congress could address many of these concerns by passing a statute that governs enforcement actions and settlements for all agencies with authority to seek compensation on behalf of victims. Any reform should focus on granting rights at the deliberative stage before the action reaches the courts because, as the diminishment of the Tunney Act demonstrated,[225] judges are unlikely to give serious consideration to the public interest. It is possible that courts would take up this mantle and review similar procedural violations on the enforcement side—after all, courts started taking their judicial responsibility more seriously when the APA was enacted and procedural participation rights were granted to the public[226]—but they should not be relied upon as a backstop to guarantee meaningful participation. In a similar vein, this statutory proposal is just one of many possible solutions. Rather than providing a final resting place for the issues raised in this Note, it serves instead as an entry point for further discussion about the ideal way to structure participatory rights in administrative enforcement.

For the general public, any statute should require stronger versions of the rights already provided by agencies like the FTC: a notice-and-comment procedure for proposed settlements with mandatory agency responses and more complete and open accounts of the decisionmaking process. For victims, greater involvement in the investigatory and remedial stages is an important first step and would provide agencies with beneficial information while giving victims the assurance that their voices, and their harms, and being heard and consid-

[225] *See supra* notes 74–80 and accompanying text.

[226] *See supra* notes 114–17 and accompanying text (detailing post-APA judicial review of procedural participation rights).

ered. In especially large cases, like the Facebook settlement, where direct victim participation may replicate the general concerns with broad public participation, Congress should provide for forms of representative representation like the class-action device and its attendant procedural safeguards to ensure that victim interests are adequately represented.[227] Beyond any statutory requirements, agencies should ultimately adopt procedures tailored to the particular victim needs of the crimes they enforce, but it is clear that—as a matter of administrative legitimacy and effectiveness—they should do more than they do now.

The proposed statutory procedures would have had a significant impact on the FTC-Facebook settlement. At a basic level, it would have required the Commission to provide a more reasoned explanation for its proposed settlement: the causes of action, the remedies, and the liability release. Even if the public disagreed with the settlement, they would have been assured that their comments were heard and received a response from the agency. These measures may have mitigated the angry public response, but more importantly they would have enabled the public to criticize the FTC with fuller information. This, in turn, would strengthen agency accountability and limit the risk of arbitrary enforcement decisions by increasing transparency. Victims would have even greater participatory rights, likely through the use of a representative agent. Their participation would have been especially useful during the investigative stage, since they had the best access to information about some types of harm that resulted from Facebook's violative data policies. This input also would have affected remedial considerations because the victim's representative could have advocated for restitution to harmed consumers and other types of relief that were not sought by the FTC. Ultimately, participation by the public and victims would have resulted in a more thorough and reasoned settlement that reflects due consideration for their interests, and it would have promoted enforcement decisionmaking that comports with the prevailing theories of administrative law.

CONCLUSION

The Facebook settlement is but one example of agencies purporting to act in the public interest but without sufficient safeguards to ensure that it is actually doing so. This is not wholly the fault of the administrative state: Courts have largely abdicated their role as an arbiter of agency decisionmaking, and Congress has tried only in lim-

[227] *See* FED. R. CIV. P. 23(a)(4) (listing requirements for adequate representation in class actions).

ited instances to secure stronger review of administrative enforcement.

However, something must be done in order to preserve the legitimacy of the administrative state. Some degree of public—and victim—participation is supported by the dominant models of the administrative state. Direct participation provides democratic accountability to agencies, like the FTC, that are significantly untethered from the political process. And participation also promotes informational exchange between the public and agencies that informs rational and robust decisionmaking. Beyond mere legitimacy, participation also promotes a number of other benefits, like more accurate settlements, feelings of procedural fairness, and wider cultural acceptance of the administrative state.

Some agencies already allow for public participation. The FTC, for example, treats enforcement actions similarly to rulemaking, seeking public comment on each of its proposed settlement agreements, and it often publishes responses—though it has never rescinded a proposed settlement in response to this process. The SEC already incorporates some kind of victim participation when it seeks restitution, perhaps in an attempt to ensure it may adequately compensate defrauded investors. However, as a whole, the administrative state lacks procedures for meaningful participation, particularly with respect to victims who cannot seek relief for their harms by any other means.

The idea of victim participation in government enforcement is not revolutionary: It has been already integrated into the criminal process for many years. Victims have an array of rights in criminal proceedings, including the right to be noticed, the right to be heard, and the right to full compensation. While it may not be possible, or even desirable, to mirror these rights in every administrative setting, they provide a starting point for Congress to consider in any legislative reform aimed at ensuring adequate consideration of the interests affected by administrative enforcement. Rather than an end, this Note and its statutory proposal are merely the beginning of what will hopefully be a longer discussion of the role of the public—and victims—in the administrative state.