

Participation and Power

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INTRODUCTION

As the United States experiences a fast-moving crisis of “democratic decline,”¹ one of the many arenas where this crisis manifests is in the closing off and warping of public participation in federal policymaking. Among the slew of unconventional and unlawful administrative actions pursued by the second Trump administration, one clear throughline is bypassing conventions of public comment and public participation. For example, the administration has rescinded various agency policies that had opened regulatory proposals to public notice-and-comment for decades.² Meanwhile, its reliance on increasingly personalized and politicized enforcement tools and its withholding of funds as the chief levers for inducing new behaviors among firms and civil society organizations means that much of the Administration’s policy impact is happening through authorities not subject to the Administrative Procedure Act and other statutory requirements for notice, comment, transparency, and public participation. Taken together, these actions add up to a unilateral dismantling of a major plank of the conventional administrative law consensus: The public’s opportunity to provide input on executive branch policies as they are being formulated and considered.³

In other ways, participation is very much central to this autocratizing moment, but in more perverse ways. Many states have implemented policies that incentivize participation of a more pernicious sort: rewarding and calling for ordinary citizens to engage in policing their fellow Americans as a way to enforce new policies restricting reproductive freedoms, targeting LGBTQ rights, and attempting to remake school curricula and culture.

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¹ Steven Levitsky, Lucan A. Way & Daniel Ziblatt, *The Price of American Authoritarianism*, FOREIGN AFFAIRS (Dec. 11, 2025), <https://www.foreignaffairs.com/united-states/american-authoritarianism-levitsky-way-ziblatt> [https://perma.cc/X27Q-HY9Q].

² For an overview of the Trump Administration’s actions on this front, see Sam Berger, *Undermining Accountability in Rulemaking: The Trump Administration’s Attack on Public Engagement in the Regulatory Process*, COALITION FOR SENSIBLE SAFEGUARDS (July 17, 2025), <https://sensible safeguards.org/reports-and-studies/undermining-accountability-in-rulemaking-the-trump-administrations-attack-on-public-engagement-in-the-regulatory-process/> [https://perma.cc/ZZK4-PR4U].

³ See, e.g., Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 554 (2015).

Book bans and enforcement regimes on questions of gender and identity are institutionalizing such tactics in what some scholars and commentators have termed “vigilante democracy” or the rise of the “snitch state.”⁴

If the autocratic turn is enabled by a unique combination of bypassing some forms of participation while activating and weaponizing others, it does not necessarily follow that simply reversing these shifts is the right course for a future democratizing moment if and when one arises. Indeed, for defenders of a liberal democratic system, the role of participation in reimagining or rebuilding institutions is increasingly a vexed question. A wave of recent scholarship and commentary has highlighted the ways in which participation can expand the veto power of particular factions—such as in local zoning decisions—or can impose excessive procedural frictions and burdens on agencies that desperately need to execute impactful policies at speed and scale to deliver results for the public.⁵ And in a world characterized by a cacophony of modern digital media, polarization, and fragmentation, it is reasonable to question the very capability of lay persons and the public at large to participate in any coherent, productive or civically-minded fashion.

These tensions highlight the importance of reengaging this foundational question of participation in administrative action. This paper focuses on these foundational questions of power, participation, and institutional design, in the context of the current crisis of American democracy. I argue that participation is normatively and practically critical to rebuilding and relegitimizing democratic institutions out of this crisis moment. In the aftermath of this current crisis, the task of rebuilding democratic governance will have to go hand-in-hand with the task of forging a new kind of trust and legitimacy for governing institutions with on-the-ground constituencies. Furthermore, participation is essential to many of the foundational functions of an effective democratic order: identifying urgent needs; ensuring policies actually deliver on those needs; recognizing the equal dignity and standing of individuals and communities; re forging a common sense of trust and legitimacy; and holding government accountable.

But for participation to serve these broader democratic aspirations, we need to interrogate our underlying theories of participation and rethink our prevailing institutional architectures for realizing (effective and productive) forms of participation. As Nikhil Menezes and David Pozen argue in a recent paper, for all the widespread invocation of public participation, public law discourse and structures have by and large failed to provide a coherent theorization or institutional instantiation of these aspirations, leaving

⁴ See JON MICHAELS & DAVID NOLL, VIGILANTE NATION: HOW STATE-SPONSORED TERROR THREATENS OUR DEMOCRACY 11 (2025); Adam Serwer, *The Rise of the Right-Wing Tattletale*, THE ATLANTIC (Oct. 3, 2024), <https://www.theatlantic.com/magazine/archive/2024/11/texas-red-state-surveillance-book-bans-abortion/679950/> [https://perma.cc/99PH-Y288].

⁵ See EZRA KLEIN & DEREK THOMPSON, ABUNDANCE 32 (2025); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 349 (2019).

our systems of public participation in policymaking deeply inadequate, and vulnerable to critique.⁶ By contrast, a rich body of scholarship and institutional innovation are increasingly showing the way towards a more vibrant, coherent, empowering, and *effective* approach to public participation in democratic decision-making.⁷ Drawing on these literatures and examples, this paper argues that we should affirmatively embrace the central role of participation in animating democratic governing, particularly in response to the current crises of democratic failure. But for participation to serve these broader aspirations to democracy, it must flow through institutions that are well-designed to empower constituencies, to rebalance power, and to drive towards effective decision-making and shared self-governance.⁸

While the focus here is on participation in administrative processes, this is not to suggest that the aspirations for democracy must flow only through administrative and executive structures. Indeed, the broader burden of enabling inclusive, accountable, and effective governance implicates all of our public law institutions—and in particular our “macro” institutions of elections, parties, legislative designs and powers, and the structure of our courts. But even independent of a renewed democratization of these institutions, there will still be a need to reimagine executive and administrative structures with participation in mind. This paper helps advance the argument that participation should be central to a reimagined administrative state and offers some possibilities for how participation might be reconfigured and reimagined in dramatically different ways.

Part I outlines several distinct “pathological” forms of governing from the standpoint of participation: first, outright autocratic governance that overrides or bypasses participation altogether; second, “captured” forms of governance in which participation is skewed as only a particular constituency or set of groups exercise outsized influence; third, “excess” participation by stakeholders that incapacitates or enervates governing; and fourth, “irrational” participation by an otherwise uninformed, untrustworthy, or unreliable public itself. Part II then offers a normative account of how we ought to conceptualize effective participation—and offers an account of participation that shifts power from more vested interests to more

⁶ See Nikhil Menezes & David E. Pozen, *Looking for the Public in Public Law*, 92 U. CHI. L. REV. 971, 974 (2025).

⁷ See BLAKE EMERSON, *THE PUBLIC’S LAW* 149-84 (2019); Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647, 704-15 (2024); SAMUEL ELY BAGG, *THE DISPERSION OF POWER: A CRITICAL REALIST THEORY OF DEMOCRACY* 176-243 (2024); Katharine Jackson, *Administration as Democratic Trustee Representation*, 29 L. THEORY 314, 329-36 (2023); K. SABEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 166-80 (2016); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CAL. L. REV. 679, 732-38 (2020); K. SABEL RAHMAN & HOLLIE RUSSON GILMAN, *CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS* 205-23 (2019).

⁸ Menezes and Pozen similarly note in their critical review of public participation theories that “designed publics” seem to offer a better path forward for both empowering ordinary people in decision-making and doing so in ways that facilitate accountable yet effective government. See Menezes & Pozen, *supra* note 7, at 1013-17.

historically-marginalized and directly-impacted constituencies, and that productively enhances governing capacity. Part III then focuses on some examples of efficacious, power-shifting participation: in sectoral or national level industrial policy; in participatory design of governing programs; and through institutionalized forms of participatory monitoring and enforcement. Each of these examples offers a better approach to participation than conventional town halls, notice-and-comment dockets, or community board meetings. The paper concludes by considering the implications for a more efficacious and participatory administrative state of the future.

I. PARTICIPATION AND DEMOCRATIC DYSFUNCTIONS

Since the rise of the modern administrative state, there has been a recurring debate over the question of participation and technocratic governance. In the 1920s, as the pressures of industrialization sparked a wave of innovation in new administrative agencies, Walter Lippman published a notable book critiquing mass media and its implications for public opinion. People, to Lippmann, were too irrational and too susceptible to manipulation by modern mass media. This in turn suggested the importance of governance by public-minded experts insulated from mass politics. Arguing partly in response to Lippman's thesis, the philosopher John Dewey authored a series of essays and books acknowledging the difficulties of rational public deliberation in the context of high inequality and modern mass media. But for Dewey, the answer lay not in an abandonment of democratic judgment, but in seeking to construct alternative institutional forms to organize collective action and enable the public to learn over time.⁹ A century later, many of the same tensions continue to shape debates over the ways in which effective governance and mass democracy can be reconciled.

In the contemporary context, there are three distinct lines of critique, each of which pulls in a different direction on this question of participation in administration.

First, skeptics of technocratic government offer strong arguments for increased democratic accountability and popular control over administrative policymaking. On this view, the problem with technocratic expert-led governance is that technocratic experts may be too removed from the lived experience of communities on the ground—and that the very discourses of technocratic judgment create a subtle filter that can efface considerations of inequality, power, equity, and other hard-to-quantify values. This in turn can make regulatory policy systematically skewed towards more well-resourced and connected organized interests. These critics focus on the potential challenges of insulated, expert-dominated administrative bodies,

⁹ WALTER LIPPMAN, *PUBLIC OPINION* 365 (1922); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 185-219 (1927).

and the degree to which they may rely heavily on particular quantitative, economistic approaches to policy design and rationality.¹⁰

A second set of concerns raise a different challenge: not of insufficient embeddedness in democratic politics, but of overrepresentation of dominant voices. Here, the premise is that administrative agencies are in fact already highly porous: Policymaking is interwoven with a wide array of external voices from civil society and interest groups advocating for their views.¹¹ But the concern arises because this embeddedness in broader stakeholder voice is *uneven*. Well-resourced, dominant interest groups, for example, are particularly adept at navigating the range of administrative processes, and have the resources to fund neutral-seeming expert research to help back up their policy advocacy.¹² A variation of this concern highlights the inequities of these disparities in particular: It is the most vulnerable and historically marginalized groups that are least likely to have sufficient influence to counterbalance these influence campaigns.

Both of these sets of critiques—of technocratic rule and of disparities in power and influence—suggest some form of greater democratic control over participation in administrative decision-making would be beneficial. By contrast, a different set of critiques push in the other direction. For these critics, the pathologies of administrative governance stem not from a *lack* of participation, but from the harmful consequences of *too much* participation. These critics highlight the ways in which excessive procedures, including for consultation and participation, can slow down the capacity for effective action.¹³ In the local zoning and housing context, the paradigmatic example is the role of community boards in approving (or vetoing) new projects, creating a multiplicity of veto points and opportunities for organized niche interests to have outsized influence. At the federal administrative state level, similar critiques have been levelled against participation mechanisms like advisory bodies. A variation of this critique recapitulates Lippman's concern from a century ago: that lay persons and the mass public are so irrational, inconsistent, and susceptible to manipulation that it does not make

¹⁰ See, e.g., ELIZABETH POPP BERMAN, *THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY* 15-18 (2022); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 35-40 (2004); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 71-98 (2010).

¹¹ See Anya Bernstein & Cristina Rodriguez, *The Accountable Bureaucrat*, 132 *YALE L.J.* 1600, 1655-67 (2023).

¹² See, e.g., Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 *ANN. REV. POL. SCI.* 37, 45-48 (2019). See also KATHLEEN THELEN, JINGTIAN CHEN & MORGAN GILLESPIE, *THE CHAMBER OF INFLUENCE: CORPORATE POWER IN AMERICAN COURTS* (Princeton University Press, forthcoming) (on file with author); K. Sabeel Rahman & Kathleen Thelen, *The Role of the Law in the American Political Economy*, *THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER* 76-102 (Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2021).

¹³ See, e.g., Bagley, *supra* note 6, at 348.

sense to rely on lay participation as a means of democratic accountability or legitimacy.¹⁴

But despite these concerns, the prospect of greater democratic participation seems essential in any reconstructed administrative state. Particularly in the face of pervasive distrust of government, seemingly intractable and irreconcilable divergences of political opinion, and highly urgent and specific local needs in communities, the notion of greater direct involvement in the practice of self-government feels even more vital. Participation offers a way to reground government in the urgent needs and lived reality of specific constituencies. It also provides people direct experience with governing—including the challenges of addressing complex policy problems, and coming to a common way forward despite diverse points of view. These direct experiences increase trust and legitimacy even when the policy outcomes do not track exactly with each participant's views. And most importantly, direct involvement with governing offers a way to disrupt existing power disparities between influential and dominant groups on the one hand, and more diffuse, vulnerable, and impacted communities on the other. By directly engaging communities in governance and decision-making, participatory models can help catalyze and fuel broader efforts to organize communities through civil society organizations, themselves essential to the broader health of democracy.¹⁵

The task then is to construct forms of democratic participation that can realize some of these benefits and mitigate the pathologies of capture, disparate voice and influence, or lack of coherent public opinion. Indeed, among scholars and practitioners of participatory governance, one of the central insights is that participatory decision-making, including over complex policy matters, is very much possible, but depends on constructing equitable and effective participatory institutions.¹⁶

¹⁴ See, e.g., CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS* 79-89 (2016) (describing the systematic limitations and biases of the voting public); see also STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS* 7-76 (2008) (discussing the “cynical” views of participation in regulatory policy; Croley himself is more optimistic about participation’s potential, however). The participation skepticism is most pronounced today among critics of excess process in the administrative state, including Bagley, Klein, and Thompson.

¹⁵ See, e.g., Alexander Hertel-Fernandez, *How Policymakers Can Craft Measures That Endure and Build Political Power*, ROOSEVELT INST. (June 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_How-Policymakers-Can-Craft-Measures-that-Endure-and-Build-Political-Power-Working-Paper-2020.pdf [<https://perma.cc/24HS-GUNE>]https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_How-Policymakers-Can-Craft-Measures-that-Endure-and-Build-Political-Power-Working-Paper-2020.pdf; Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 560 (2021); BAGG, *supra* note 8, at 1-10.

¹⁶ See, e.g., Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. 66, 74 (2006); Rahman & Simonson, *supra* note 8; RAHMAN & RUSSON GILMAN, *supra* note 8, at 37-43.

II. REIMAGINING PARTICIPATORY GOVERNANCE

Many of the critiques of participatory governance imagine particular pathological examples: the proliferation of veto-points in local zoning policy fights that create outsized influence for well-resourced local landowners seeking to block affordable housing developments; open-ended town halls and notice-and-comment procedures that inevitably over-index on more resourced and sophisticated voices; and expressions of irrational or dominating impulses by participants mobilized through fear of others.

Yet at the same time, there are many different models of participatory governance in evidence. Over the last twenty years, a growing number of states and localities, working with civil society groups, have piloted efforts to experiment with different kinds of participatory governance approaches. Take, for example, efforts to promote more inclusive development in Oakland. In a city marked by a boom of new investment and revitalization, a recurring challenge has been to steer the influx of investment in ways that share the gains more equitably. Working with the City Council, a coalition of grassroots organizations piloted a creative approach to “community benefits agreements” to govern the redevelopment of Oakland’s Army Base in 2013. Through this approach, developers came to an agreement with the city government about “high road” labor standards for the redevelopment projects and commitments to investments in the local community’s needs. But beyond this commitment, the novelty of this arrangement laid in its institutionalization: The project was coordinated by a community oversight board appointed by the mayor and comprised of representatives from labor, local civic groups, and the developers themselves. That board in turn was empowered to hear concerns from workers and residents spotting areas where the project was falling short of its community commitments. This monitoring function of the oversight board provided a focal point for community concerns—and a forum for dispute resolution that enabled the project to move forward while being responsive to the needs of constituencies that would otherwise be easily overlooked or bypassed.¹⁷

Consider another, more recent example. In 2024, Unify America, a national civic organization focused on deliberative democracy, began a pilot program in Montrose, Colorado. Organizers working with Unify America built a sophisticated process of door-to-door engagement with residents, building awareness and buy-in for a broader civic consultation forum. The forum consisted of 1,000 panels of 64 delegates each, constructed to balance representation across different demographics, regions, and experiences in the county. These groups then engaged in discussion about community needs and priorities and received briefings about different policy tradeoffs

¹⁷ For a longer discussion of this example, see Rahman & Simonson, *supra* note 8, at 707.

and challenges. This process yielded 24 detailed policy proposals on everything from land use to universal childcare.¹⁸

These examples highlight some of the central design tensions and questions that will have to be addressed in any attempt to build a more participatory approach to federal administrative governance. They point to a richer conceptualization of participation itself—which in turn opens up a wider range of institutional design approaches.¹⁹ Scholars arguing for greater forms of democracy in the administrative state offer a range of normative arguments. Some emphasize the importance of participation as a way to instantiate “relational fairness,”²⁰ or the epistemic virtues of structured forms of representation in decision-making.²¹ Others point to the importance of participation as a form of countervailing power, responding to disparities of influence and voice.²² But these normative values from participation turn crucially on questions of design—how participation is structured, what decisions are up for debate, and who is in the room. If the goal is to make good on underlying values of democracy and accountability, while also avoiding some of the pathologies of ineffectual, captured or weaponized participation, then the answer lies in different design approaches.

Productive participation—participation that facilitates both meaningful empowerment of impacted constituencies and enables effective governance at scale—requires attentiveness to several key design elements.²³

First, there is a basic tension between power and input: Are grassroots constituencies being engaged to provide input to decision-makers (who retain the actual decisional power), or are they being accorded some share of decisional power? Even more broad-based and grassroots input would be beneficial to boosting the responsiveness and legitimacy of administrative governance. At the same time, to overcome more structural challenges of capture, disparate influence, and corruption, models that accord greater power to representative bodies of impacted constituencies may be more desirable.

¹⁸ For a longer discussion of this example, see Hollie Russon Gilman, Sarah Jacobs, Harry Nathan Gottlieb & Matt Byrne, *Making Child Care Accessible through a Citizen's Assembly*, NEW AM. (Apr. 15, 2024), <https://www.newamerica.org/political-reform/briefs/making-child-care-accessible-through-a-citizens-assembly/> [<https://perma.cc/2YFZ-G2F4>].

¹⁹ For a longer discussion of these conceptual points in the following paragraphs, see, for example, RAHMAN & RUSSON GILMAN, *supra* note 8, at 169-200; Rahman & Simonson, *supra* note 8, at 689-99.

²⁰ See Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 775 (2023).

²¹ HÉLÈNE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY* 134-38 (2020).

²² See Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1600, 1655 (2022); BAGG, *supra* note 8, at 56.

²³ The following discussion builds on some of my previous work, including RAHMAN & RUSSON GILMAN, *supra* note 8; K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315 (2018); Rahman & Simonson, *supra* note 8.

A second related tension lies in the nature of the participatory body itself. Is it comprised of dedicated representatives from existing civil society groups (such as labor unions, grassroots membership organizations, or organizations of beneficiaries, parents or other impacted communities)? Or is it a process that is open to all? Is the deliberating and participating group constructed through careful curation by the process organizers to ensure a balanced and representative group? Or should the group be organized by lot or some other random process that cannot be gamed or biased? Relatedly, should participants simply be voicing their opinions, or should they be engaged in a longer process of discussion, debate, and learning from experts about the nuances of the issues under consideration? Each of these models might offer different tradeoffs in addressing the balance between concerns around efficacy and speed on the one hand, and unequal power and voice on the other. But one common thread is that all these options depart from the conventional town hall model of simply having an open forum without other organizing or structuring of the constituencies to be engaged. These kinds of generic open forums are of limited value in large part because participation in them is so easily skewed towards those with time and resources—and because the influence that results is similarly skewed towards the more sophisticated players. Many of the dysfunctions of standard public participation efforts stem from this more generic approach, rather than taking a more structured approach to constituting the roster of participants and the nature of the conversation within the group.

Finally, there is a set of considerations around where participation sits within the larger policy process. Some of the critiques around excess community voice—such as in the local land use and zoning context—see participation as a problematic source of delay. But these dysfunctional forms of participation are flawed not because of participation itself, but because of *how* the participation is structured. Often these participatory engagements occur at the *end* of a policy process, when many of the policy questions have been worked through already. This positioning is problematic for two reasons. First, it can make actual decisional power costly. It is disruptive to have many months, if not years, of policy work blocked at a late stage. This in turn pressures policymakers to make consultation processes less meaningful, merely checking the box of hearing public input or reviewing written comments. Second, positioning the consultation moment at the end of the process makes it less powerful and effective from the standpoint of impacted constituencies themselves. Even if they could alter the policy proposals at this late stage, so much has already been decided in terms of what to prioritize that the impact on outcomes is significantly diminished. By contrast, participation that takes place “upstream” at the design stage of a new policy process is far more productive, less disruptive, and more impactful for the participants themselves. For example, engaging impacted constituencies in helping to design new approaches to safety net programs centers individuals’ lived experiences at an early enough stage to be both influential and

time effective. Likewise, engagement that helps policymakers and agencies set their priorities and agendas early on can have similar benefits.

III. INSTITUTIONALIZING PARTICIPATION IN ADMINISTRATION

These general design considerations point to a range of institutional implications for a future reconstructed administrative state. Consider three different models of participatory governance. In each of these models, participation is structured to provide meaningful voice on the part of impacted constituencies and hold other organized interests accountable. In each of these models, the processes do involve some potential for disagreement and slowdown of policymaking, but they do so in more contained ways that preserve the capacity of the state to govern at scale. And in each of these models, participation is oriented less towards an extra layer of veto power, and more towards affirmative productive forms of engagement that shape strategies and outcomes.

A. *Upstream co-governance*

One alternative approach to productive participation is to structure participatory co-governance “upstream”—moving it earlier in the policy process and encompassing a wider range of interconnected policy questions in a more holistic frame.

Consider the next set of tensions around urban planning, zoning, infrastructure projects, and related issues of (de)segregation or environmental justice. One mode of conventional participation on these issues involves project-by-project reviews, such as environmental reviews, in which stakeholders have an opportunity to participate. Another mode involves hyper-local approval processes, such as community board approvals for new housing. These are the kinds of processes that have garnered criticism for multiplying veto points and enervating the state’s capacity to build with speed and scale.²⁴ For critics of these processes, the problem is in the fact of participation itself. The very opening of these decision-making processes to participation invites special interest lobbying, dysfunction, and delay. But as others have noted, community engagement on issues such as environmental harms, or labor conditions, or community benefits, is essential to bringing in local knowledge of conditions and channeling development benefits more broadly.²⁵ Insofar as these structures are problematic, one could imagine a

²⁴ See, e.g., David Schleicher & Nicholas Bagley, *The State Capacity Crisis*, 66 B.C. L. REV. 2301, 2354-60 (2025).

²⁵ For more recent rejoinders to these critiques, see, for example, Raj Nayak, *A More Progressive Abundance*, DEMOCRACY J. (Jan. 27, 2026), <https://democracyjournal.org/arguments/a-more-progressive-abundance/> [<https://perma.cc/753L-HBCQ>]; <https://democracyjournal.org/magazine/79/rethinking-state-capacity/> Brian Callaci & Sandeep Vaheesan, *Rethinking State Capacity*, DEMOCRACY J. (Winter 2026), <https://democracyjournal.org/magazine/79/>

very different design model that integrated these essential local and stakeholder perspectives in a more efficacious way at the regional and macro level.

In local government law, the fragmentation of local authorities has been a well-noted structural contributor to the persistence of regional patterns of segregation, disparities in mobility, and in exposure to environmental harms. While we often appeal to the local as a mode of civic engagement, democratic participation, and legitimacy, such participation often takes place within this existing fragmentation of local authorities.²⁶ Yet a more genuinely inclusive polity requires regional level governance. As scholars of race and place have long noted, regional interventions are needed to increase economic mobility and undo durable patterns of segregation.²⁷

The fragmentation of local authorities points to the need for regional-level planning and coordination. Many regions have regional planning and coordination bodies—but these organizations are often more technical in nature, or more closely intertwined with existing policymakers and business interests. By contrast, imagine if such regional-level infrastructure and development planning involved structured forms of stakeholder representation, bringing in representatives of different impacted communities—including those whose voices are traditionally overlooked, or where onramps to shaping policy only exist at the hyper-local level of community boards. Second, imagine if this now inclusive regional body had real decisional power to shape region-wide plans for long-term, holistic approaches to planning and development. And third, imagine if these decisions in turn preempted or bypassed the multiplicity of ex-post veto points that gum up the conventional zoning and building process: community boards, or ex post judicial review. Such a model would provide for inclusion, empowerment, and effective governance.

A similar approach to more empowered ‘upstream’ participatory governance can be imagined at the sectoral level. Consider Kate Andrias’ scholarship recovering the history and possibilities of sector-wide wage boards.²⁸ Wage boards were established in many states in the early twentieth century, as representative bodies comprised of labor, business, and government stakeholders, empowered to set sector-wide regulations around wages, safety, and other worker standards. Like the concept of participatory regional planning, this model offers a more structured form of participation—with stakeholder

rethinking-state-capacity/<https://democracyjournal.org/magazine/79/rethinking-state-capacity/> [<https://perma.cc/4C8U-7NKV>].

²⁶ For an excellent overview and theorization of the role regionalism could play in forging a different model of inclusive citizenship, see Manal Totry-Jubran, *Regionalism as a Mode of Inclusive Citizenship in Divided Societies*, 24 THEORETICAL INQUIRIES L. 189 (2023).

²⁷ See, e.g., Olatunde C.A. Johnson, *Inclusion, Exclusion, and the “New” Economic Inequality*, 94 TEX. L. REV. 1647, 1660 (2016).

²⁸ See, e.g., Kate Andrias, *Constitutional and Administrative Innovation through State Labor Law*, 2024 WISC. L. REV. 1467, 1497 (2024).

representatives rather than fully open-ended participation or captured forms of decision-making. Further, these processes have real stakes, rather than offering a mere opportunity for input that may or may not be heeded by the government. Finally, these decisions, once reached, set policy for the rest of the sector, making this investment in participatory co-governance more productive and effective than a more fragmented, veto-ridden process. As Amy Kapczynski and Joel Michaels have suggested, this model of participatory, inclusive macro-level economic policymaking can extend readily to industrial policy as well.²⁹ In an era of revitalized state-led investment in key industries, in an attempt to jump-start new sectors, these efforts could be similarly approached through investment planning bodies that are themselves representative, inclusive, and effective.³⁰

B. Downstream participatory implementation

A second model of productive participatory governing moves participation not *upstream* to shape overarching regulatory frameworks for whole regions or sectors, but rather *downstream*, focusing participation on the task of enforcing public policies. Here, the experiential knowledge of directly-impacted individuals and communities is leveraged to spot violations of existing policies, and to help magnify the capacity of the state to enforce those standards. This kind of participation offers a different kind of countervailing power, through the ability of grassroots individuals to monitor compliance.³¹

A classic example of such participatory monitoring can be found in the Community Reinvestment Act (CRA) of 1977. Under the CRA, banks were obligated to invest more capital in historically under-invested communities where investments were scarce due to practices of racial discrimination and redlining. But what made the CRA unique is that there was a point of leverage for these community beneficiaries: they could register complaints and trigger an oversight investigation of banks that failed to meet these affirmative lending obligations. Meanwhile, banks had a strong incentive to score well on these reviews, which were factored into banking regulators' decisions on potential future merger approvals.³² Mirroring the features of productive participation noted above, the CRA empowered impacted communities to have greater influence on policy outcomes. And this form of participation in effect made government itself more efficacious, expanding the enforcement reach of existing fair lending rules. We can see similarly

²⁹ See Amy Kapczynski & Joel Michaels, *Administering a Democratic Industrial Policy*, 18 HARV. L. & POL'Y REV. 279, 304-10 (2024).

³⁰ *Id.*

³¹ For a broader theorization of this idea of monitoring as a form of democratic power, see PIERRE ROSANVALLON, COUNTER-DEMOCRACY 4, 34 (Arthur Goldhammer trans., 2010).

³² For a longer discussion of this case, see, for example, RAHMAN & RUSSON GILMAN, *supra* note 8, at 186-90.

empowering participatory monitoring in other contexts. The Consumer Financial Protection Bureau (CFPB) operated a robust complaint database, in which impacted individuals could flag instances of unfair consumer financial products. This database directly enhanced the oversight and policymaking functions of the agency by spotlighting new problems and emerging trends in the market.

Participatory monitoring offers useful checks on state power as well. As Jocelyn Simonson has argued, communities of color have organized “copwatching” practices to exert countervailing pressure on police use of force policies and racialized violence.³³ In recent weeks, the surge of violent immigration enforcement undertaken by the current administration has prompted self-organized networks of “ICE watchers” using similar tactics of monitoring and documentation as a form of holding the state accountable.³⁴

These two contexts demonstrate that grassroots community organizing can serve as an effective mode of participation. Connecting these efforts to formal institutions of oversight would create a compelling form of accountability in which participation plays a key role.

C. Participatory design

A third model of productive participation can be found in policy design. Conventionally, we expect policy design to put the agency policymakers in the driver’s seat. Policy might be informed by an initial wave of ad hoc and informal input from stakeholders—which might easily tilt towards more well-connected and resourced voices. And once the policy is mostly formulated, then there might be a form of public input, such as notice-and-comment in an administrative rulemaking. By contrast, participatory design approaches involve structured forms of engagement with a balanced set of voices—through representative assemblies or panels of impacted community members—who are then engaged in an in-depth process of policy design with policy experts.

A classic example of participatory design is participatory budgeting. This process has primarily been used to shape the allocation of usually local-level expenditures. But this kind of structured engagement by directly impacted individuals to design budgets can extend to even more complex policy design questions. Take the structure of the modern safety net. For much of its existence, the modern safety net has encoded systems of punitive oversight of recipients and burdensome enrollment procedures, which together make it difficult for many to access their benefits. Further, these

³³ See Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 413 (2016).

³⁴ See e.g., Jon Collins, Tinted Windows and Out-of-State Plates: How ICE Watchers Look for Agents in Their Neighborhoods, MINNESOTA PUBLIC RADIO, Dec 6, 2025 (describing how residents in Minneapolis self-organized to monitor ICE agents during the occupation of Minneapolis) (available at: <https://www.mprnews.org/story/2025/12/05/twin-cities-ice-watchers-keep-tabs-for-agents-in-their-neighborhoods>) (last accessed April 9, 2026).

barriers are distinctly racialized and gendered, helping reproduce structural inequalities.³⁵ One approach to remedying these structural features of safety net design has been to engage beneficiaries in the work of co-designing the safety net programs themselves. Beneficiaries offer insight into their experience of seeking to access these programs and also contribute to shaping and testing alternative models. This participatory approach to design—also called “human centered design” by some practitioners—helps reveal the most difficult friction points in enrollment and benefit delivery processes, and surface more dignified and streamlined alternative models.³⁶ This participatory approach to safety net design offers tremendous potential for federal agencies that run benefits programs, including IRS tax credits, disaster relief, disability insurance, and food stamps.³⁷

Administrative agencies could adopt a similar co-design approach to set their policy agendas and priorities. Traditionally, the formal public consultation process for regulation involves the opportunity for the public to submit written comments to proposed regulations. But these notice-and-comment procedures suffer from many dysfunctions. They are skewed towards more resourced and sophisticated players, have highly variable impact on the policy design, and do not by themselves create structured engagement to rebalance power and voice towards the most vulnerable

³⁵ For a broader discussion of administrative burden, safety net system design, and their structural implications, see, for example, Victor Ray, Pamela Herd & Donald Moynihan, *Racialized Burdens: Applying Racialized Organization Theory to the Administrative State*, 33 J. PUB. ADMIN. RSCH. & THEORY 139, 145 (2023).

³⁶ For an influential account of this methodology, see, for example, Tara Dawson McGuinness & Anne-Marie Slaughter, *The New Practice of Public Problem Solving*, 17 STAN. SOC. INNOVATION REV. 27, 28 (2019); TARA DAWSON MCGUINNESS, POWER TO THE PUBLIC: THE PROMISE OF PUBLIC INTEREST TECHNOLOGY 74-99 (2021); JENNIFER PAHLKA, RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER 235-58 (2023).

³⁷ There were a host of documents and commentaries spotlighting these experiments in 2021-2024. See, e.g., Pam Coleman, *The Federal government is redesigning how it delivers services*, PERFORMANCE.GOV (Apr. 19, 2022), <https://www.performance.gov/cx/blog/re-designing-how-gov-delivers-services/> [https://perma.cc/J6QE-HMAH]; Federal CX Team, *Six Month Update on CX EO*, PERFORMANCE.GOV (Aug. 1, 2022), <https://www.performance.gov/cx/blog/six-month-update-on-cx-eo/> [https://perma.cc/SJ94-YWQU]; Shalanda D. Young & Dominic J. Mancini, *Improving Access to Public Benefits Programs Through the Paperwork Reduction Act*, OFF. MGMT. & BUDGET (Apr. 13, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf> [https://perma.cc/GYY6-ESQM]; Sabeel Rahman, *OMB Announces New Action to Improve Government Services*, OFF. MGMT. & BUDGET BLOG (Apr. 13, 2022), <https://bidenwhitehouse.archives.gov/omb/briefing-room/2022/04/13/omb-announces-new-action-to-improve-government-services/> [https://perma.cc/89DD-FQXY]; *Tackling the Time Tax: Appendix C: Paperwork Burden Accounting*, OFF. MGMT. & BUDGET (2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2024/10/FINAL_REV_2023-ICB-Appendix-C-FY-2023-Paperwork-Burden-Accounting.pdf [https://perma.cc/AAQ9-SLYB]; *Strategies for Reducing Administrative Burden in Public Benefit and Service Programs*, OFF. MGMT. & BUDGET (Dec. 2022), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/12/BurdenReductionStrategies.pdf> [https://perma.cc/V6V3-S948]; see generally, *Tackling the Time Tax*, OFF. MGMT. & BUDGET (July 2023), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/07/OIRA-2023-Burden-Reduction-Report.pdf> [https://perma.cc/23AM-4B5R].

and impacted constituencies. By contrast, agencies could adopt structured participatory models to shape their priorities *before* policies are fully formulated through intensive technical and intra-Executive debate. Agencies could replace, for example, archaic advisory committee processes with civic assemblies and representative bodies modeled on state and local pilots. The goal would be to proactively engage impacted, but historically overlooked, constituencies in structured environments that facilitate meaningful deliberation offsetting broader disparities of power and influence.³⁸

III. CONCLUSION: TOWARDS A PARTICIPATORY ADMINISTRATIVE STATE

Building participatory governing structures is essential to addressing problems of disparate power, capture, and alienation of communities from government. There are very real concerns to grapple with about the potential ineffectiveness or dysfunction of participatory framework. Participation can contribute to sclerotic bureaucracies, capture by dominant interests, and the transmission of irrational, extreme, or incoherent public opinions. Yet those pathologies, while real, often reflect poorly not on participation per se, but on *poorly-designed* participation. This contribution has suggested a different way to think about participatory administrative governance, highlighting models of *productive* participation. In these models, participatory engagement by impacted constituencies is structured in ways to empower vulnerable and marginalized voices. It does so by facilitating the organization of individuals and communities in decision-making spaces in which they are able to productively contribute to the formulation, design, and implementation of state policy.

These models of productive participation do not exhaust the sweep of democratizing transformations needed to emerge from this moment of autocratic ascendance. There are broader structural questions that must be addressed, including the Senate's minority rule, inequitable and unresponsive electoral systems, and the separation of powers. But even in a world where democratic reforms are enacted, there will still be a need for *administrative* structures—and those structures must be *democratic*.³⁹

³⁸ Here, too, there have been some early experiments with this kind of participatory design of whole regulatory strategies and agendas. *See, e.g.*, Executive Order 14091, 88 Fed. Reg. 10825, § 5 (2023) (calling for more proactive engagement with impacted communities); Executive Order 14094, 88 Fed. Reg. 21879, § 2 (calling for more participatory engagement in the early stages of regulatory agenda-setting; *see also* Richard L. Revesz, *Broadening Public Participation and Community Engagement in the Regulatory Process*, OFF. MGMT. & BUDGET (July 19, 2023), <https://public-archiving.s3.us-east-1.amazonaws.com/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf> [<https://perma.cc/L4JM-JXRC>] (emphasizing the inadequacy of notice and comment procedures and encouraging agencies to develop more proactive and early-stage modes of engagement). These measures have of course been rescinded by the current administration but indicate alternative possibilities for the future.

³⁹ *See* EMERSON, *supra* note 8, at 149-84; RAHMAN, *supra* note 8, at 142.

Elections and legislatures cannot decide all questions of public policy. Further policy design and implementation will always require an administrative process of some form. Furthermore, these administrative structures cannot be merely automatic or mechanical; judgment will still be required. These realities offer not a tragedy for democracy but an opportunity. It is in administration that we have the ability to structure different forms of decision-making. Engaging impacted communities more directly in policymaking offers a promise of deeper legitimacy and shared ownership, and of genuine self-governance in a way that elections and legislatures do not wholly achieve. To be sure, our experience and history of administration has rarely been democratic in this deep sense. But as a domain of institutional innovation, the administrative state offers *greater* plasticity and flexibility for innovating and housing the kinds of participatory alternatives described above.

What then would a more participatory federal administrative state of the future look like? This symposium contribution does not offer a precise blueprint, but the above discussion is indicative of some areas for further exploration.⁴⁰

These approaches to productive participation suggest a very different model than those instantiated in the canonical legislative frameworks of administrative law, from the APA's notice-and-comment and formal hearing processes to the statutory framework for advisory committees in the Federal Advisory Committee Act. The negotiated rulemaking process may seem somewhat closer, but focuses more on time-intensive bargaining around individual rules, rather than the kind of upstream, downstream, or co-design approaches described above. Nor are these approaches to participation well-advanced by greater judicial review of the sort contemplated (but not pursued) in cases like *Vermont Yankee* or *Ohio v. EPA*.⁴¹ Instead, this approach would require a more wholesale redesigning of agency structures themselves, from staffing to decentralization and the chartering of new bodies.

Consider staffing. These concepts of participatory administration imply a very different approach to the staffing and structuring of federal agencies themselves. This kind of structured participatory engagement requires dedicated staffing and expertise, particularly in the form of experienced organizers, facilitators, system designers, and the like. Some agencies have staffing for civic engagement, but these units are often separate from the policy design teams and from agency leadership, or are cabined in regional field offices. Expanding these teams and integrating them more centrally into the

⁴⁰ See Jocelyn Simonson & K. Sabeel Rahman, *The Part IV Problem in Legal Scholarship*, 126 COLUM. L. REV. (forthcoming 2026) (manuscript at 1) (arguing law review articles need not include a specific list of actionable and feasible prescriptions).

⁴¹ *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *Ohio v. E.P.A.*, 532 U.S. 904 (2001).

work and leadership of the agencies would dramatically shift their role and effectiveness. Similarly, the Executive branch itself might be restructured with a dedicated centralized office whose primary role is to push and complement agencies in engaging with communities. This dedicated office could provide support and technical assistance, as well as offer a venue for constituencies to press agencies that might be slow to respond to their demands.⁴²

Another structural shift in administrative agencies could be in shifting the balance from centralized to place-based offices. Future rebuilt administrative agencies might take a more creative approach to the distribution of decision-making between concentrated offices in Washington and more local or regional locations. For example, a 1960s War on Poverty initiative experimented with locally-rooted, federally-funded “community action agencies” that engaged grassroots communities, particularly those from historically vulnerable and marginalized constituencies, to reshape implementation of local benefits and development policies. These attempts at “maximum feasible participation” proved controversial. Indeed, precisely because of how much power they seemed to afford grassroots communities, the community action agencies were quickly defunded and dismantled. Yet the brief experiment highlights the potentially transformative nature of more direct participatory empowerment—and the ways in which federal agencies could embed those processes in more visible and tangible local spaces rather than inside the beltway.⁴³ Indeed, several scholars have begun to argue for a more radical decentralization of the administrative state across the country, moving more power and staff to regional and field offices as ways of boosting the local visibility, legitimacy, and participation in administrative processes.⁴⁴ As suggested in Part III.A, regional and place-based administrative structures offer unique possibilities for more productive participatory approaches.

Finally, this vision of participatory administration is not just a charge for future executive actions; it is more fundamentally a task for *legislative* action to charter new and different administrative bodies—and perhaps even reconfigure existing ones.⁴⁵ Congress might create more tailored forms of structured, productive participation and embed these in any substantive piece of legislation. For example, imagine if the billions of dollars of

⁴² A version of this idea has been proposed in Congress, with legislation proposing the creation of an Office of the Public Advocate.

⁴³ For a broader discussion of this model, its historical limitations, and potential future possibilities, see, for example, Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1 (2010).

⁴⁴ See, e.g., Ganesh Sitaraman, Morgan Ricks, & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1834 (2021); David Fontana, *Administrative Decentralization*, SSRN (Feb. 10, 2026) (manuscript at 41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6177500 [https://perma.cc/X8DD-ZPTK].

⁴⁵ See, e.g., K. Sabeel Rahman, *Anti-Domination and Administration*, 100 N.Y.U. L. REV. 1984, 2031 (2025) (discussing the importance of chartering new administrative bodies).

infrastructure investments authorized in 2022 also established regional, place-based, sectoral, or national forms of participatory decision-making and implementation. What might those programs have looked like, and what might their political and constituency-reshaping implications have been? These concepts can be embedded and adapted to any substantive area of policymaking, from housing to energy policy. Similarly, Congress might create dedicated structures in the federal administrative state to instantiate productive participation. Legislative proposals for regulatory reform envision some of this—like draft legislation calling for an Office of the Public Advocate.⁴⁶

There are of course other possibilities not named here—and a post-authoritarian moment for American democracy will require an extremely wide array of democratizing transformations.⁴⁷ But in any such democratizing agenda, the reimagining of administration to be productive *and* participatory must be a central component.

⁴⁶ This kind of Congressional creativity may be possible under some readings of current separation of powers doctrine, despite the near-elimination of removal protections, particularly if new administrative bodies are designed to be more akin to hybrid public-private entities like the Federal Reserve or Amtrak. But ultimately the restoration of Congress's full prerogative to design and structure administrative bodies as it sees fit is a vital frontline in any democratizing reform agenda.

⁴⁷ See, e.g., Rahman, *supra* note 45, at 2029-2045.