WHAT'S LEFT OF ENVIRONMENTAL DEMOCRACY?

*Wyatt G. Sassman**

The foundations of environmental democracy—the laws and practices that give people a say in decisions that affect their environment—are crumbling. The "permitting reform" debate and pressures to build climate infrastructure have undermined confidence in the public's role in environmental policy, resulting in widespread calls to rethink the basic foundations of environmental law in modern governance and constrain the public's role.

This Article offers an alternative vision for rethinking the public's role in environmental law to better achieve its democratic potential while enabling decarbonization. The public's institutionalized role in environmental law has failed to achieve its democratic potential because it paid insufficient attention to building the material foundations of the public's power. This oversight resulted in many communities simply being left out of environmental law's processes, giving the public's role an elite, exclusionary, and oppositional character that has been exploited to criticize it in recent permitting reform debates. Rather than constrain the public's role because of this failure, this Article offers a vision for rebuilding the public's role to better achieve its democratic potential by building the material foundations of the public's power.

To do so, the Article draws on scholarship in law and political economy, and particularly scholarship on using administrative procedure to build democratic power, to develop a normative vision for rebuilding the public's role in a way that promotes democratic decision-making at the speed and scale necessary to confront climate change. Using this normative vision as a guide, the Article proposes rebuilding the public's role in environmental law on two new regulatory foundations—benefit sharing and regulation as democratic planning—that build the material foundations for public power in decarbonization and restructure participatory processes to enable democratic decision-making at speed and scale. These new foundations reflect well-established regulatory ideas and existing practices in federal administrative law, thus offering a credible alternative for rebuilding the public's role in environmental law to meet the challenge of the climate crisis.

---

* Associate Professor of Law, University of Denver Sturm College of Law. Many thanks to Ann Eisenberg, Nicholas Stump, Lingxi Chenyang, Anthony Moffa, Kaitlin Caruso, Scott Bloomberg, Anna Mance, and other participants at workshops hosted by the Rocky Mountain Junior Environmental Law Scholars group and at the University of Maine School of Law for their feedback on earlier drafts. Special thanks to Logan Malik, Lisa Campbell, Elena Ivanova, and other editors at the *Harvard Environmental Law Review* for their careful work and thoughtful engagement that substantially improved this article.

Table of Contents

Introduction 462
I. The Challenge of Environmental Democracy 469
A. The Rise of Environmental Democracy 470
B. The Realities of Environmental Democracy 478
C. The Limits of Capitalist Development 484
D. The Turn Against Public Participation 489
II. Rebuilding Environmental Democracy 495
A. Democratic and Sustainable Political Economy 496
B. Participatory Administration 503
C. An Environmentalism that Builds Power 507
III. Building the Public's Power 509
A. New Regulatory Foundations 510
1. Benefit Sharing 510
2. Regulation as Democratic Planning 515
B. Environmental Democracy and the Just Transition 519
Conclusion 521

Introduction

Did environmental law go too far? With the momentum of the largest public demonstration in American history before the protests over George Floyd's murder, the environmental movement carved an institutional role for the public in environmental policy that Congress then codified into the major environmental laws of the 1970s. In this role, the public has authority to participate in environmental permitting decisions,[1] help design environmental regulations,[2] and even enforce the environmental laws against the government and individual

1. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7661a(b)(6) (requiring that regulations implementing the Clean Air Act's permitting system include "offering an opportunity for public comment and a hearing," as well as "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law."); Clean Water Act, 33 U.S.C § 1342(b)(3) (requiring that regulations implementing the Clean Water Act's permitting system ensure that "the public . . . receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application"); 40 C.F.R. § 1503.1 (2024) (requiring agencies to request comments from the "public, affirmatively soliciting comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action," as part of the NEPA process).

2. *See, e.g.*, 42 U.S.C. § 7409(a)(1)(B) (requiring EPA to solicit public comment when setting national air quality standards under the Clean Air Act); 33 U.S.C. § 1251(e) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under" the Clean Water Act "shall be provided for, encouraged, and assisted by the Administrator and

polluters.[3] By institutionalizing a role for the public in the day-to-day making and implementing of environmental policy, the environmental laws "reconceptualized the policy process."[4] Rather than the "regulated vs. regulator model" that had defined twentieth century American governance, environmental law operated under a "triangular" governance model where the public had a distinct, legally-protected role alongside the government and regulated industry in crafting and implementing environmental policy.[5]

An increasingly dominant narrative among legal and policy commenters argues that this governance model is one of the primary reasons why the United States cannot meet the major policy challenges of our time.[6] By creating a "decentralized, legalistic model of governance" that promotes years-long environmental reviews and offers multiple points for any aggrieved member of the public to challenge government decisions, environmental law has created a "permitting hell" of delays that prevent the nation from building necessary infrastructure such as new housing to alleviate housing insecurity or new renewable energy projects to combat climate change.[7] As economic insecurity and the climate crisis worsen, the status quo has become untenable. For this reason, even those who have spent their careers in environmental law are sounding the alarm: environmental law *did* go too far.[8] It's time to rethink environmental law to its

---

the States."). *See generally* Administrative Procedure Act, 5 U.S.C. 553(b) (describing the public's role in agency rulemaking).

3. *See, e.g.*, 42 U.S.C § 7604 (the Clean Air Act's citizen suit provision); 33 U.S.C. § 1365 (the Clean Water Act's citizen suit provision).
4. Paul Sabin, Public Citizens: The Attack on Big Government and the Remaking of American Liberalism 162 (2021).
5. *Id.* at 162–63 (quoting James Moorman, the first director of the Sierra Club Legal Defense Fund).
6. *See, e.g.*, Ezra Klein, *What America Needs Is a Liberalism that Builds*, N.Y. Times (May 29, 2022), https://perma.cc/5YZV-3DMP [hereinafter Klein, *Liberalism that Builds*]; J.B. Ruhl & James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 Emory L.J. 1, 6–7 (2023) [hereinafter Ruhl & Salzman, *The Greens' Dilemma*]; *see also* Ezra Klein, *Two Theories of What I'm Getting Wrong*, N.Y. Times (July 16, 2023), https://perma.cc/4PL4-NF7A (citing Ruhl & Salzman).
7. For discussion of a "decentralized, legalistic model of governance," *see* Klein, *Liberalism that Builds*, *supra* note 6. For "permitting hell," *see*, *e.g.*, Ronald Bailey, *Permitting Hell v. Climate Hell at COP27*, Reason: Climate Change (Nov. 15, 2022), https://perma.cc/2EJL-ESHL. *See generally* Brink Lindsey, Niskanen Center, State Capacity: What Is It, How We Lost It, and How to Get It Back (2021), https://perma.cc/6VHJ-LMZ8.
8. *See, e.g.*, Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 12 ("We want to make clear at the outset that this explicitly is not an 'anti-environmentalist' article. We both have devoted our careers to environmental protection. We think it critical, though, to highlight and unpack the growing challenges within the environmental movement needed to recognize the tradeoffs between rapidly planning, siting, and constructing climate infrastructure versus environmental protection, distributive equity, and public participation."); *see also* Ezra Klein, *Government Is Flailing, in Part Because Liberals Hobbled It*, N.Y. Times (March 12, 2022), https://perma.cc/DJY5-W2X6 ("But as so often happens, one generation's solutions have become the next generation's problems.").

foundations, they argue, to clear the way for building infrastructure at the pace and scale needed to meet modern challenges.[9]

This debate is the latest iteration of a longstanding struggle in American governance to square large-scale, coordinated development with commitments to democratic accountability. In 1944, David Lilienthal famously characterized the Tennessee Valley Authority, or TVA, as "democracy on the march."[10] TVA is a federally-owned corporation that was created during the New Deal to economically develop the Tennessee River valley through coordinated agricultural and infrastructure projects across the state and local jurisdictions of the valley—what Lilienthal called "unified development."[11] Lilienthal was one of the TVA's first administrators and, later in his career, wrote a book trying to answer a question: "How can large-scale economic development be effective and at the same time fulfill the desire for significant grass-roots participation?"[12] Writing in the shadow of European fascism, Lilienthal argued that the TVA's development represented a balance that combined centralized economic planning with "decentralized" implementation to combat the risk of concentrated government power.[13] This was "democracy at the grass roots" and, Lilienthal explained, essential to maintaining "the broadest possible coalition of all forces" needed to accomplish coordinated and effective development.[14] "A democratic government must retain the confidence of the people for whose welfare it must act," Lilienthal cautioned: "Democracy cannot thrive in an atmosphere of fear" about "the abuse of governmental authority."[15] The TVA, a federal development agency with a local and regional focus, had found the answer.

Equally famous is that Lilienthal's answer seemed impossible to square with the TVA's reality. In the Tennessee Valley, many people's experiences with

---

9. Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 12 ("[W]e argue that the time is ripe to consider a New Grand Bargain—a new environmental and siting regime designed for the scale and urgency of climate infrastructure.").
10. David E. Lilienthal, TVA—Democracy on the March (1944).
11. *See* 16 U.S.C. § 831 (the TVA Act); Lilienthal, *supra* note 10, at 193 ("'Unified development' as I have described the idea in action is, in substance, the valley's synonym for 'planning.'"). Lilienthal uses the concept of "unity" in several senses, including to describe how resource development must incorporate environmental sustainability as a condition for effective community economic development and democratic governance. *See, e.g.*, *id.* at 55–61 (describing examples of environmental harm and concluding: "There are principles and policies to develop and to observe if people are to benefit and democratic institutions are to flourish. The unity of nature's resources must not be disregarded, or the purpose for which such developments are undertaken will be betrayed as it has been betrayed before: by the way the job is done.").
12. William W. Drumright, *His Search for a Viable Middle Ground: A Reappraisal of David E. Lilienthal's TVA—Democracy on the March*, 63 Princeton Univ. Libr. Chronicle 467, 483 (2002).
13. *Id.* at 474.
14. *Id.* at 481, 485.
15. *Id.* at 483.

the TVA were deeply disempowering. [16] The TVA seized land for its infrastructure projects by federal authority and displaced entire communities by "decree," often without giving people options for working or living elsewhere.[17] Many communities had lived in the same place for generations only to see their home "drowned" by a TVA dam.[18] Regionally, the TVA remains an archetype not of grassroots democracy but of distant, arbitrary government power reshaping the landscape by fiat. For those like me who grew up near TVA lakes, you heard stories about the towns that sit still under the water—a grim reminder of when democracy marched.[19] To critics, Lilienthal's vision of the TVA as an image of grassroots democracy was a "myth"[20]—or worse still, "hypocrisy on the march."[21]

As Paul Sabin has documented, the public interest lawyers who helped build the public's role in environmental law were reacting to this disregard the government showed towards communities and natural places in pursuit of development.[22] Dams flooding towns and farms, highways paving over neighborhoods and scenic places, pesticides sprayed on food and children without safety testing—to public interest advocates, the root of all of these problems

16. *See* Joseph Stephens, *Forced Relocations Presented More of an Ordeal than an Opportunity for Norris Reservoir Families*, Historic Union County (May 1, 2018), https://perma.cc/9EPA-NKG3. One resident's poem is particularly poignant:

> There has been a decree in all of this;
> But when we leave home ties with regret;
> TVA must allow us our memories;
> For 't'will be impossible for us to forget.
>
> That memory will give us our home back,
> It will give us our childhood day;
> It will give us our friends and neighbors;
> as they were before TVA.

Id.

17. *Id.*

18. *See* Jennifer Watts, *Underwater Ghost Towns of Tennessee*, Tenn. State Museum (May 18, 2021), https://perma.cc/6U8S-BK89 (describing that Willow Grove, Tennessee is "as 'the town that drowned'" under the waters of the Dale Hollow Dam—named for the Dale family who had owned land it flooded.).

19. *See id.* ("Tennessee is known for its many beautiful lakes. What people don't know is some lakes have a secret. Under the sparkling waters are sunken towns. Whole communities were flooded by the Tennessee Valley Authority (TVA) in the 20th century."). Notably, Tennessee only has one natural lake formed by a series of earthquakes in 1811 or 1812 that caused the Mississippi River to flow backward and create Reelfoot Lake in the far northwestern corner of the state; most of the state's other lakes are TVA reservoirs. *See* Josh Keefe, *Why Doesn't Tennessee Have Natural Lakes?,* The Tennessean (June 6, 2023), https://perma.cc/5RUM-8AHA.

20. Drumright, *supra* note 12, at 489.

21. *Id.* at 471.

22. *See, e.g.*, Sabin, *supra* note 4, at 101 ("The lawsuits were a repudiation of the government's modernist development plans, as represented, for example, by the Tennessee Valley Authority.").

was that government had grown too close to the industries it was supposed to be regulating. Their solution was to institutionalize a distinct role for public interest advocacy to combat industry capture and hold government accountable.

In environmental law, this strategy resulted in the triangular governance model that institutionalized the public's role in environmental policy. In accomplishing this however, the public interest movement also helped undermine public confidence in the New Deal coalition—the alliance between industry, government, and labor—that had set the model for liberal governance and public development in the United States. Public interest advocacy had inadvertently helped open the way for the rise of conservative attacks on big government and deregulatory Republican administrations. Sabin concludes that the breaking of this coalition has remained the central problem facing liberal governance in the United States: no Democratic administration since, from Carter through Biden, has yet been able to square the demands of a government that can accomplish major public projects with democratic accountability.[23]

The climate crisis has pushed this problem to the forefront again, and this time with a special focus on the public's role in environmental law. The transition away from fossil fuels at the speed and scale necessary to avoid the most catastrophic impacts of climate change will require building huge amounts of infrastructure—from new solar farms and wind turbines to new transmission lines across the country—at speeds and scales never before seen.[24] The United States has invested heavily in climate infrastructure through the Inflation Reduction Act and Bipartisan Infrastructure Law, yet local communities are using environmental laws to challenge projects and "permitting hell" continues to slow and stall necessary projects. Decarbonization will be, among other things, a generation-defining infrastructure project similar to the stakes and scale of the New Deal itself.[25] Federal policy has, at times, committed to squaring the development needed to combat climate change with grassroots participation.[26] Yet policy and

23. *Id.* at xvi-xviii, 192–94 (making the point from the Carter to Obama administrations). The Biden Administration made substantial progress on jump-starting the clean energy economy but it faced familiar indicators of a lack of democratic accountability, such as local resistance to projects and failure to convince the broader electorate. *See, e.g.*, Brent Cebul, *Bidenomics: Farewell to an Idea?*, N.Y. Rev. Books (Jan. 15, 2025), https://perma.cc/6ZWV-NG3B. (explaining that Biden's electoral failure was rooted in economic policy whose "initiatives primarily subsidize corporations; the trickle-down benefits for workers and regular people are supposed to come later.").

24. *See, e.g.,* Wyatt G. Sassman, *Community Empowerment in Decarbonization: NEPA's Role*, 96 Wash. L. Rev. 1511, 1521–24 (2021) (detailing the stakes and scale of decarbonization).

25. *Id.* at 1515 ("The transition to clean energy will be a transformative, generation-defining infrastructure project comparable in ambition and social impact to the New Deal.").

26. *See* Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14008, 86 Fed. Reg. 7619 § 219 (Jan. 27, 2021) ("To secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern. That means investing and building a clean energy economy that creates well-paying union jobs, turning disadvantaged communities—historically marginalized and overburdened—into

legal commenters, faced with the stark urgency of the climate crisis, increasingly look backwards for guidance on how to enable decarbonization. Backwards to a time before the public held its role in environmental law. Backwards to a time when democracy marched, unchallenged, at the edge of rising waters.

This Article looks forward. As Part I describes, the public's role in environmental law holds the potential to democratize environmental policy by codifying people's right to a say in decisions that affect their environment—the potential for environmental democracy. The public's role has, however, failed to live up to this potential because the elite roots and subsequent professionalization of public interest environmental advocacy has worked to exclude many communities from the policymaking process, exacerbate environmental racism, and entrench a view of public participation as a kind of interest-group advocacy rather than an exercise of democratic citizenship. These dynamics reflect, in part, the limitations imposed on environmental law by a broader political commitment to economic development led by private capital. This capitalist development model presents public participation as a form of costly regulation with marginal benefits, empowering arguments for constraining the public's role in environmental law. The challenge for environmental democracy, then, is to try to offer its own answer to the question Lilienthal faced sixty years ago: A vision of the public's role in environmental law that can bridge the need for large-scale development to meet the climate crisis with a commitment to grassroots, democratic participation.

To meet this challenge, Part II draws on two threads of legal scholarship to develop a normative vision for the public's role in environmental law that recognizes its past limits and meets modern demands to act at scale and speed. One thread is scholarship in law and political economy that charts a path for reform to achieve a democratic and sustainable society. Informed by left political thinking, this work focuses on the material foundations of political power. It highlights the need for reforms that empower popular movements to challenge concentrated economic power and achieve transformative change to political and economic systems. In particular, this work elevates democratic planning and collective ownership of production systems such as electricity generation as interventions that can break concentrated power and enable transformative change towards a sustainable political economy. The other thread is legal scholarship on how to use administrative processes to promote democratic decision-making—a thread I refer to as participatory administration. This work provides concrete principles for reforming administrative processes to become spaces of democratic mobilization and collective decision-making that can act decisively to meet modern challenges. In this way, these threads of scholarship offer a normative vision for rethinking the public's role in environmental law

---

healthy, thriving communities, and undertaking robust actions to mitigate climate change while preparing for the impacts of climate change across rural, urban, and Tribal areas.").

to enable transformative change at the speed and scale necessary to meet the climate crisis—a normative vision of environmental democracy on the march.

Part III proposes a path for implementing this normative vision through two concrete policy concepts: benefit-sharing and regulation as democratic planning. Benefit-sharing requirements are regulatory requirements used around the world to give affected communities a stake and level of control over development. In this way, benefit-sharing requirements offer a well-established regulatory tool for building the material foundations of the public's role in environmental law by giving communities a direct stake in decarbonization. The public's direct stake in decarbonization should, in turn, be supported by administrative processes reconceptualized through the principles of participatory administration as spaces for democratically planning and mobilizing for the transition away from fossil fuels. This strategy of using regulation to grant the public a material stake in development, mobilize that development, and establish spaces for democratically planning can serve as a credible, durable model beyond decarbonization for democratizing our economy and facilitating a broader just transition to a sustainable society.

All told, this Article asks what's left of environmental democracy in two senses. First, it surveys and contextualizes the public's role in environmental law to ask what remains of its democratic potential. In the face of a broader turn against the public's role in environmental law, this Article argues for reviving its democratic potential and charts a path towards achieving it. Second, the Article charts this path by turning to legal scholarship informed by the political traditions of the left. It brings a focus on the material foundations of political power to debates around reforming environmental law to facilitate decarbonization. It articulates a regulatory strategy for reviving the public's role that recognizes the need for transformative change to achieve a democratic and sustainable political economy.

In doing so, the Article offers two contributions. First, it draws together several distinct threads of scholarship on environmental law and political economy to articulate a coherent vision for the public's role in environmental regulation during the climate crisis. Second, it directly engages with the broader permitting reform debates by offering this vision as a credible policy alternative to arguments for limiting the public's role in decarbonization. The public's institutionalized role in environmental regulation offers remarkable potential for democratizing policymaking, even if it has never fully lived up to that potential. Rather than further constraining this role, the climate crisis demands that we lean deeper into its democratic potential and reach forward to a vision that can bridge the need for large-scale, coordinated development with democratic accountability. The challenge of decarbonization demands that democracy march again. Deciding which democracy will march—whether a democracy like TVA's or something different—is the challenge we now face.

I. The Challenge of Environmental Democracy

Environmental democracy is a commitment that people should have a say in decisions that affect their environment.[27] This commitment has both normative and institutional dimensions.

Normatively, environmental democracy is a basic commitment to democracy that recognizes the deep interrelationship between people's lives and where they live, work, and play—how decisions affecting a person's environment directly affect that person.[28] If democracy is a commitment that people should have a say in decisions that affect them, environmental democracy is an application of that principle to decisions such as the granting of a permit to build a polluting facility in a person's neighborhood or setting regional air pollution standards in the area where a person lives because those decisions directly affect that person. Viewed slightly differently, the normative commitment to environmental democracy reflects a central lesson of the environmental justice movement: that harming people's environment is a way of politically disempowering them.[29] If the solution to disempowerment is democracy, then the solution to disempowerment through environmental harm is environmental democracy.

Institutionally, environmental democracy often describes a set of three procedural guarantees or "access rights" intended to give people a say in the regulatory process for making decisions that affect their environment: the right to access information about decisions affecting their environment, the right to

27. *See* Frank Fischer, *Environmental Democracy: Participation, Deliberation, and Citizenship,* Env't and Soc'y, at 257–58 (2018) (nothing that the "common thread" that unites definitions of environmental democracy is "the belief that citizens affected by environmental concerns should have equal rights in participating in environmental decision-processes."); *Promoting Environmental Democracy*, Ctr. for Int'l Env't L., https://perma.cc/KCU4-437L ("The principles of environmental democracy—the rights to information, public participation, and justice—ensure that people have a meaningful say in decisions that affect them and effective ways to protect their rights."). *See also* Neil A.F. Popovic, *The Right to Participate in Decisions That Affect the Environment*, 10 Pace Env't L. Rev. 683 (1993).

28. Susan Hazen, *Environmental Democracy*, 8 Our Planet 31 (1997) (noting that environmental democracy "reflects increasing recognition that environmental issues must be addressed by all those affected by their outcome, not just by governments and industrial sectors. . . . For those whose daily lives reflect the quality of their environment, participation in environmental decision-making is as important as in education, health care, finance and government.").

29. *See generally, e.g.*, Luke W. Cole & Shiela R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 65–70 (2001) (summarizing the roots of environmental racism in discriminatory housing and social policies, and how these dynamics politically, economically, and socially disempower communities); Dina Gilio-Whitaker, As Long as Grass Grows: The Indigenous Fight for Environmental Justice, From Colonization to Standing Rock 24–26, 35–39 (2019) (describing American settler-colonial policies as a structure "designed to eliminate the Native via physical and political erasure" with "the purpose of political control and domination [to] gain access to territory" and describing the role that acts of "ecological disruption" and environmental injustice played in American settler-colonialism).

participate in decisions affecting their environment, and the right to access judicial and administrative remedies in disputes regarding decisions affecting their environment.[30]

As Part I.A explains, these ideas are rooted in the rise of environmental law in the United States and specifically the role that the public carved for itself in that process. The basic idea that people should have a legal right to access and influence decisions that affect their environment has spread across the world, elevating environmental democracy as a guiding principle of international environmental law. Yet, as Part I.B describes, environmental democracy has never achieved its aspirations in the United States. The elite roots and subsequent professionalization of environmental advocacy exacerbated the exclusionary effects of the legal processes intended to give the public broad access to the regulatory process. Although motivated to break elite capture over the environmental regulatory process, the environmental movement functionally secured a place for elite environmental advocates rather than democratizing the regulatory process.

Part I.C then offers an alternative perspective on this failure by contextualizing the public's role within the broader commitment to economic development led by private capital. Because this commitment limits the broader potential of environmental regulation, it also subjects the public's role in environmental regulation to specific vulnerabilities: namely, arguments that the public's role is a form of costly regulation and that the public is fundamentally an outsider with no real stake in developments that affect them. Part I.D finally explains how the recent turn against public participation in response to the climate crisis exploits these vulnerabilities. This background and context set up the challenge of environmental democracy: articulating a vision for the public's role in environmental law that bridges the need to decarbonize at scale and speed with democratic, grassroots participation.

A. The Rise of Environmental Democracy

Fueled by the growing environmental movement and widespread opposition to highway development across the country in the 1960s, lawyers started turning to the courts to protect neighborhoods and scenic places from infrastructure

30. *Implementing Principle 10 of the Rio Declaration*, United Nations Env't Programme (Aug. 16, 2016), https://perma.cc/653B-C3YT [hereinafter *Rio Declaration*] (characterizing "three fundamental rights: access to information, access to public participation and access to justice," as "access rights" and "key pillars of sound environmental governance."). *See also Enviro Democracy & Access Rights*, Ctr. for Int'l Env't L, https://perma.cc/9BTW-969N (characterizing access rights as "at the heart of environmental democracy, embodying the procedural dimensions of the right to a healthy environment."); Guila Parola, Environmental Democracy at the Global Level 99 (2015) ("In a sense, these rights 'give practical form, in the specific context of environmental policy, to the general principles of democracy and the rule of law already enshrined in other international prescriptive instruments on the protection of human rights'").

development.[31] To do so, they took advantage of the Administrative Procedure Act's broad language that any person who is "affected or aggrieved" by an agency's decision may challenge it in court.[32] Using this hook, they started challenging administrative decisions that preceded infrastructure development and found a sympathetic judiciary that shared then-common elite concerns about environmental degradation and government capture.[33]

These cases generally involved local, unincorporated, and often single-issue civic and conservation groups suing federal agencies to challenge decisions around major infrastructure projects—primarily highways.[34] These groups initially faced arguments that members of the public with no direct economic interest in the infrastructure development should not be allowed to challenge it; however, in early cases such as *Scenic Hudson* in 1965, these citizen groups won decisions recognizing their "standing" based on their distinct position to protect the "local," "aesthetic," or "conservational" interests implicated by the relevant statutory scheme from government abuse.[35] Through these early administrative

31. Oliver Houck, *Unfinished Stories,* 73 U. Colo. L. Rev. 867, 896–97 (2002) (noting that environmental litigation began when "groups of determined residents organized in Boston, Chicago, Washington, New Orleans, San Francisco, and San Antonio went to court to defend their downtowns, their homes, and their parks" from interstate highways).

32. David Sive, *The Litigation Process in the Development of Environmental Law (1995 Garrison Lecture),* 19 Pace Env't L. Rev. 727, 730–31 (2002) ("the earliest group of important cases were essentially judicial reviews of administrative actions, instituted by environmental advocates, under a statutory review provision of the Administrative Procedure Act (APA).").

33. *See* Sabin, *supra* note 4, at 92–99 (describing how "[t]he idea that litigation by citizen groups might usefully counter agency power was becoming an increasingly widely held view by liberals," and that "[a]gency deficiencies also led courts to welcome new litigants into the courtroom and to entertain new kinds of legal claims" brought by early environmental lawyers). *See also* Sive, *supra* note 32, at 738–39 (discussing the general view that the "roots of judicial activism in environmental litigation lay in social attitudes toward environmental problems prevailing among the American public in the late 1960s," including the influence of "social activism" on elite opinion).

34. *See, e.g.*, Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179, 181 (6th Cir. 1967) (characterizing the plaintiffs as "members of an unincorporated association of some thirty Negro and white businessmen, teachers, ministers, civic and professional leaders, and residents of North Nashville" suing "on behalf of themselves as individuals, in the name of their association, and on behalf of the community they represent.").

35. Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965) ("In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests."). *See also* Rd. Rev. League v. Boyd, 270 F. Supp. 650, 660 (S.D.N.Y. 1967) (describing *Scenic Hudson* as having "changed" the law on whether citizen groups have standing to challenge agency decisions related to infrastructure development); *id.* at 661 ("I have concluded that these provisions are sufficient, under the principle of *Scenic Hudson*, to manifest a congressional intent that

law cases, litigators laid the groundwork for what would become the public's role in environmental law.

Then in 1969, Congress passed the National Environmental Policy Act, or NEPA.[36] While now understood as a vehicle for public participation in environmental decision-making, NEPA was not intended for that purpose.[37] Rather, NEPA's purpose was to coordinate federal agency decisions affecting the environment around a coherent policy—the National Environmental Policy laid out by Congress in Section 101 of the Act.[38] It did so by requiring agencies to study the likely impacts of their actions and solicit feedback from other agencies.[39] It also created the Council on Environmental Quality within the Executive Office of the President to coordinate agency actions around Congress' policy.[40] As drafted, the public had no express role in NEPA's implementation.[41] NEPA's initial text did require that documents generated under NEPA be made available to the public, and Congress' policy did recognize public values of environmental protection.[42] But NEPA's initial text and structure contemplated that those values would be advanced by agency coordination—not by the public.[43]

The agencies, however, had little interest in coordinating to advance NEPA's values. The federal bureaucracy notoriously opposed NEPA, slow-walking the Act's implementation and, in some cases, outright flaunting the law's basic procedural requirements.[44] President Nixon, who signed NEPA into law, almost immediately soured on the Act and environmental issues generally, leaving the new Council on Environmental Quality without political capital to police agency compliance.[45] NEPA's rapid failure was a matter of widespread public concern, with Council officials being hauled before congressional committees to

towns, local civic organizations, and conservation groups are to be considered 'aggrieved' by agency action which allegedly has disregarded their interests.").

36. *See* Sassman, *supra* note 24, at 1516.
37. *Id.* at 1534–36.
38. *Id.* at 1534–35; *see also* 42 U.S.C § 4331 ("Congressional declaration of national environmental policy").
39. 42 U.S.C § 4332.
40. 42 U.S.C. § 4342. *See also* Sassman, *supra* note 24, at 1535–36 (discussing NEPA's executive oversight function).
41. NEPA does not require agencies to seek input from the public. Nor does NEPA's text expressly give the public authority to challenge agency decisions—indeed, the legislative history suggests that Congress cut a provision recognizing people's right to a clean and healthy environment out of an express concern that it would grant the public a right to challenge agency compliance with NEPA. *See* Sassman, *supra* note 24, at 1536.
42. 42 U.S.C § 4332(C)(v) (requiring public disclosure of NEPA documents); *id. §* 4331(a) (stating that Congress's policy should be pursued "in cooperation with State and local governments, and other concerned public and private organizations").
43. *See id.*
44. *See* Sassman, *supra* note 24, at 1536–37.
45. *Id.* at 1536.

sheepishly admit their failure in front of the press.[46] NEPA never fully recovered from this failed launch, and Congress' environmental policy remains largely a dead-letter to this day. Rather, NEPA became something else in the hands of public-interest litigators.

The litigation strategies that civic and conservation groups used to challenge infrastructure projects ran full steam into NEPA's shambolic rollout. Relying again on the Administrative Procedure Act's broad cause of action, litigators targeted agencies' failure to implement NEPA's basic procedural requirements as a vehicle for trying to get courts to enforce Congress' substantive environmental policy goals.[47] They continued to find a sympathetic judiciary, and the litigators racked up win after win against recalcitrant agencies.[48]

This early environmental law practice was "deeply seductive."[49] Advocates from this period describe the "glamour" of fighting "David v. Goliath" cases against the government and winning.[50] They felt the euphoria of power that came with stopping a seemingly unstoppable federal infrastructure project like the Trans-Alaska Pipeline from a "tiny law firm run out of a dingy office" in Washington, D.C.[51] They were building a new field of "environmental law" one decision at a time and proving that citizen litigation was an effective tool for holding a sluggish, captured government accountable.[52] It was a heady time that seemed to both validate the rule of law and presage the end of an era; a time when a few lawyers could stall the Tennessee Valley Authority from building a dam—the *raison d'être* of perhaps the archetypal New Deal development agency—for the sake of a tiny fish.[53]

It is from these "dingy law offices" that the major environmental advocacy groups we know today grew. The Natural Resources Defense Council, Environmental Defense Fund, Earthjustice—each had its start among the small cadres

46. *Id.* at 1536–37. *See also* E.W. Kenworthy, *Hart Prods Nixon on Environment Act*, N.Y. Times (Nov. 19, 1970), https://perma.cc/XJ4M-63C3.

47. *Id.* at 1538–39.

48. *Id.*; *see also* Sive, *supra* note 32, at 736 ("The rate at which NEPA, for example, was made meaningful by litigation was truly explosive. One can safely say that no other statute has ever been effectuated by so many cases in so short a time."). This success before the courts was eventually curbed by the Supreme Court. *See infra* notes 80–82 and accompanying text.

49. Sabin, *supra* note 4, at 103.

50. Sive, *supra* note 32, at 728, 733.

51. Sabin, *supra* note 4, at 103–104.

52. *See generally* Thomas P. Alder, From Law and the Environment to Environmental Law: A Founder's Recollections, Env't L. Inst. 6 (2019) (describing the start of the Environmental Law Reporter on the model of the Selective Service Law Reporter to promote environmental law by collecting and circulating decisions to lawyers). *See also* Sive, *supra* note 32, at 732 (noting the "creation of the Environmental Law Institute and its Environmental Law Reporter").

53. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978). *See also* Sabin, *supra* note 4, at 101 ("The lawsuits were a repudiation of the government's modernist developmental plans, as represented, for example, by the Tennessee Valley Authority.").

of lawyers winning these cases in the 1960s and 70s.[54] As part of a broader public interest law movement, these lawyers convinced major foundations to fund their organizations to challenge government action and counter industry influence in environmental policy.[55] As a condition of securing this support, these lawyers committed to working within the system—they committed to operating within existing power structures such as the courts to shield themselves and their funders from political attacks.[56] This was a natural compromise because, while influenced by the cultural revolutions of the 1960s, these lawyers were almost exclusively white, male, elite-educated people who believed the system worked. Indeed, they were proving that the system worked—that rule-of-law litigation could be used to protect the environment by holding the government accountable to the public.[57] They were proving that Earth did not need another Earth Day with thousands of people in the streets—what the Earth needed was a good lawyer.[58] Specifically, it needed professional lawyers in Washington and New York who could fundraise and "out-professionalize" the opposition.[59] They would beat the system at its own game.

These dynamics around public interest environmental advocacy and NEPA litigation codified the public's role in American environmental policy in three ways. First, these dynamics led to the development of public participation in NEPA's environmental impact assessment process. Broad opposition to implementing NEPA among the executive agencies led the Council on Environmental Quality to focus narrowly on enforcing the clearest procedural requirement in the Act—that agencies prepare a "detailed statement" documenting the expected impacts of their decision.[60] This effort originated the Environmental Impact Statement and NEPA's larger environmental impact assessment process

54. *See* Sabin, *supra* note 4, at 43–46 (discussing the origins of EDF and NRDC).

55. *See id.* at 45–56.

56. *See id.* at 47 (noting how early public interest environmental lawyers "explicitly distinguished themselves from protesters and rioters, and they believed that the system would respond to their legal claims.").

57. *See id.* ("The environmental lawyers' faith in the responsiveness of the legal system reflected the fact that their firms were founded by idealistic, ambitious, and highly educated professionals, almost entirely white men. They believed in the system's capacity for reform because they were privileged products of it.").

58. *Id.* (quoting EDF's co-founder: "We're Hawks . . . but we operate entirely within the socio-legal structure. We don't block traffic. We don't sit in. We don't riot."). *See also* Earthjustice, https://perma.cc/F3PS-PK4L ("Because the Earth Needs a Good Lawyer.").

59. *See* Sabin, *supra* note 4, at 123 (noting how environmental groups "consolidated their operations closer to the main centers of political and financial power," and how "[m]oving to Washington provided access to the administrative state."). For "out-professionalize the opposition," *see* Leon Billings & Thomas Jorling, *Origins of Environmental Law (Class 4; Fall 2014)*, Colum. Univ. (Sept. 24, 2014), https://perma.cc/YWK7-HKQG ("environmental movement had to outprofessionalize the opposition").

60. Sassman, *supra* note 24, at 1538–39.

that has come to almost entirely define the Act. Reacting to the judicial decisions generated by early public interest environmental litigation, the Council built out the process for drafting and publishing these environmental documents initially through guidance and, eventually, binding regulations.[61] Among other things, these guidance documents and regulations included requirements that agencies seek and consider public comments on the scope and content of the environmental documents.[62] Because of NEPA's broad scope, these requirements brought the public into the agencies' decision-making processes on a wide range of important decisions, including many major infrastructure projects. Once codified, the Council's regulations "became NEPA" and, in turn, the NEPA process became focused on providing public access to information and participation in environmental decision-making.[63]

Second, NEPA's public failure contributed to a general skepticism in Congress around the executive's ability to enforce environmental mandates, helping to support legislation that codified the public's role in environmental law. In the early 1960s, Congress had been increasing federal authority around environmental protection out of skepticism that states would take necessary action.[64] By the time of NEPA's fallout, Congress was becoming similarly skeptical that the federal government would take the necessary action.[65] Starting with the Clean Air Act in 1970, these concerns led to a series of highly detailed environmental

61. *See* National Environmental Policy Act—Regulations, 43 Fed. Reg. 55978 (Nov. 29, 1978) (promulgating initial NEPA regulations). CEQ issued these regulations to fulfill an order from President Carter to publish "regulations to Federal agencies for the implementation of the procedural provisions of" NEPA. Exec. Order No. 11,991, 42 Fed. Reg. 26967 (May 24, 1977). Although CEQ's NEPA regulations have consistently been understood as binding on other federal agencies, *see, e.g.,* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355 (1989), a panel of the D.C. Circuit recently held that CEQ does not have authority to issue regulations that bind other agencies, Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902, 908 (D.C. Cir. 2024). The D.C. Circuit sitting en banc denied petitions for rehearing but did so by clarifying that the panel decision's reasoning regarding the NEPA regulations was dicta. Marin Audubon Soc'y v. Fed. Aviation Admin., No. 23-1067, 2025 WL 374897, *1 (D.C. Cir. Jan. 31, 2025). At the time of publication, the Trump Administration had also recently rescinded President Carter's order, Exec. Order No. 14,154, 50 Fed. Reg. 8355 (Jan. 20, 2025), and rescinded CEQ's regulations implementing NEPA, Removal of National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 10610-15 (Feb. 25, 2025).

62. Sassman, *supra* note 24, at 1539.

63. *Id.* at 1539–42.

64. An example of this effect was that Congress consistently adopted legislation increasing federal responsibility around water pollution control over the 1960s, culminating with the 1972 amendments transforming the Federal Water Pollution Control Act into the complex, top-down regulatory scheme of the Clean Water Act. *See, e.g.*, Richard Lazarus, Making of Environmental Law 52–53 (2004) (describing federal water pollution legislation from the 1950s and 1970s as "incrementally upp[ing] the ante of the federal role" in water pollution).

65. *See, e.g.*, Leon Billings & Thomas Jorling, *Origins of Environmental Law (Class 4; Fall 2014)*, Colum. Univ. (Sept. 24, 2014), at 1:35:00-1:38:30, https://perma.cc/YWK7-HKQG (two congressional staffers instrumental in the drafting and passage of the Clean Air Act

statues that, among other things, expressly codified a role for the public in helping implement the laws' standards. Notably, these laws included "citizen suit" provisions that authorized the public to enforce environmental laws by suing the government for failing to implement the laws and suing specific polluters for violating the laws' requirements.[66]

Third, the Supreme Court endorsed a broad approach to standing for environmental plaintiffs. In *Sierra Club v. Morton*, the Supreme Court held that environmental groups had standing to access the courts based on injury to the "aesthetic, conservational, and recreational" interests of their members.[67] In doing so, the Court essentially codified the reasoning of earlier lower court decisions that ensured the groups' members actually used the areas they were coming to court to protect.

Later research into the justices' papers revealed that this holding was a pragmatic compromise among divergent views on how to appropriately acknowledge the public's role in environmental policy.[68] The justices held different views on whether, for example, groups like the Sierra Club should have standing simply by virtue of their status as public interest organizations or, as Justice Douglas famously argued, as a kind of representative for the rights of the environment itself.[69] In this debate, requiring that groups demonstrate their members use and enjoy the place affected by the challenged decision emerged as a pragmatic compromise that granted public interest groups expansive access to courts while tethering public interest advocacy to at least some tangible connection to the real world. No justice, at least publicly, seriously questioned whether groups such as the Sierra Club should be able to access the courts in environmental disputes. Even as judicial expectations around standing for environmental plaintiffs have fluctuated, this basic compromise has thus far withstood the test of time.[70]

Together, these developments secured an institutional role for the public in environmental policy. Through NEPA, the public would participate in assessing the environmental impacts of any major federal action, which include most permits for major development projects. Under the major administrative and environmental laws, the public had express authority to start the regulatory

describing Congress' motivation to give executive agencies "as little discretion as possible" in protecting public health through the Act).

66. *See, e.g.*, 42 U.S.C § 7604 (the Clean Air Act's citizen suit provision); 33 U.S.C. § 1365 (the Clean Water Act's citizen suit provision).

67. Sierra Club v. Morton, 405 U.S. 727 (1972).

68. *See* Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and A Solution to the Problem of Environmental Standing*, 30 Fordham Env't L. Rev. 21, 25 (2018).

69. *See, e.g., id.* at 43 (noting differences in opinion among the justices on environmental standing, including Justice Douglas's view of himself as "something of an iconoclast on the issue").

70. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); FDA v. Alliance for Hippocratic Medicine, No. 23–235, slip op. at 12 (2023) ("When the government regulates parks, national forests, or bodies of water, for example, the regulation may cause harm to individual users.").

process through petitions, to participate in making environmental policy, and even to enforce environmental laws and regulations against both the government and polluters. These institutional roles were backstopped by broad access to the courts, where the public could invoke judicial power to both protect their access to the environmental policymaking process and enforce the outcomes of that process. The result was, as described earlier, a new approach to governance: a "triangular" governance model where the public held a legally-protected role alongside regulated industry and government regulators.[71] The government had regulatory authority, the industry had property rights, and the public had administrative procedure.

These ideas went on to "conqu[er] the world."[72] Through the nearly worldwide adoption of environmental impact assessment laws and other international conventions, the public's role in environmental decision-making was integrated into the fabric of international environmental law.[73] While the specific details vary widely, the core idea that the public should have a legal right to participate in environmental decisions became a general principle of public international law.[74]

Important for our purposes here, this international context expressly linked the public's institutional role in environmental law with the language of democracy. International law articulated that giving people a say in decisions that affect their environment is critical to democratic governance and that the public's exercise of that role is a key part of modern democratic citizenship.[75] In this

71. Sabin, *supra* note 4, at 162–63.

72. *See* Tseming Yang, *NEPA's Conquest of the World*, ABA (May 12, 2023), https://perma.cc/26GG-LKT6. *See also* Tim Hayward, Constitutional Environmental Rights 143 (2005) (noting that rights "of access to environmental information, participation in environmental decision-making, and access to justice in environmental matters—have received widespread support from environmental campaigners, have been recognized as workable rights by legal commentators, and have been increasingly endorsed by governments.").

73. *See* Tseming Yang, *The Emergence of Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law*, 70 Hastings L.J. 525, 527–28 (2019) (explaining that "NEPA is the original model for environmental impact assessment procedures across the world" and providing "empirical support for the proposition that the duty to conduct an [environmental impact assessment] is no longer a hortatory admonition of good practice or authorization for discretionary application, but has in fact become a globally accepted legal norm."); Rio Declaration, Principle 10, *supra* note 30; Aarhus Convention on Access to Information, *Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 2161 U.N.T.S. 447 (June 25, 1998) (codifying the institutional pillars of environmental democracy – access to information, decision-making, and courts – into public international law).

74. *See* Yang, *supra* note 73, at 566–67 ("Norms that might be good candidates for General Principles status could be public participation and transparency norms, as embodied for example in the Aarhus Convention.").

75. For example, U.N. Secretary General Kofi Annan described the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters as "one of the most far-reaching international treaties in the field of environmental democracy" and celebrated how its "core principles" guaranteeing the "right to information, the right to participate and the right to seek access to justice" would

way, American environmental law realized a deeper commitment to democratic citizenship by opening policymaking directly to the public through administrative law and citizen enforcement.

This insight helps draw out alternative visions for the public's role in American environmental law. Congress' view of the public's role was "complex" and reflected different visions in environmental statutory text and structure.[76] One vision, for example, saw the public as supplementing the government's primary regulatory authority.[77] Another vision saw the public as exercising its own, independent regulatory authority alongside the government.[78] Provisions codifying the public's role in environmental law often reflect this tension. For instance, citizen suit provisions prohibit citizens from enforcing environmental laws where the government is "diligently" prosecuting a violation—yet those provisions authorize citizens to enforce environmental laws even if the government has exercised its prosecutorial discretion not to.[79]

The balance between these congressional visions matters for achieving the democratic potential of the public's institutional role. The former, constrained view sees the public as a kind of regulatory input intended to support the government's authority. The latter, more robust view sees the public as exercising independent authority and agency that reflects core democratic action. As the next section explains, the public's role has failed to reach its democratic potential because several dynamics emphasized the former, more constrained view of the public's role over the latter.

B. The Realities of Environmental Democracy

The public's role in American environmental law has generally failed to achieve its democratic potential for several related reasons. The elite roots and professionalization of environmental advocacy emphasized advocacy in the public interest rather than bringing the public into the process. This reduced

"empower citizens to hold governments accountable and to play a greater role in promoting more sustainable forms of development." Press Release from Kofi Annan, UN Secretary General, to Aarhus Convention on Access to Information (May 27, 2005) (https://perma.cc/8269-GXMG).

76. Jeffrey G. Miller, *Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion*, 10 Widener L. Rev. 63, 73 (2003) (discussing how "the legislative history" around citizen enforcement is "complex.": "It suggests Congress did not have a single intent in enacting the citizen suit provisions, but rather it intended the provisions to serve several purposes."); Anna A. Mance, How Private Enforcement Exacerbates Climate Change, 44 Cardozo L. Rev. 1493, 1519–20 (2023) (discussing congressional rationales for introducing citizen enforcement).

77. *Id.* (noting one "purpose was to assure compliance with environmental statutes by encouraging government enforcement.").

78. *Id.* ("One clear purpose was to be a vehicle for citizen participation in government, with its broader goals of providing transparency and openness in government in turn promoting public ownership of and trust in government.").

79. 33 U.S.C. § 1365.

the public's role to a kind of interest-group-based advocacy that exacerbated the exclusionary features of environmental law's participatory tools, entrenched environmental racism, and paved the way for doctrinal changes that doubled-down on a vision of the public's role as supporting government advocacy rather than exercising its own authority. The overall result is a governance model that is structurally resistant to its democratic potential and, as explained in the next section, vulnerable to critiques that the public's role is a form of costly regulation.

To start, the elite roots and subsequent professionalization of public interest environmental advocacy distanced those advocates from popular movements. As described above, early public interest advocates and their funders sought to establish a practice of sophisticated, public interest advocacy distinct from popular movements that rocked the 1960s.[80] This divide deepened as the major public interest environmental groups grew and professionalized into large organizations of expert, salaried advocates that engaged in technical regulatory advocacy.[81] Many organizations, such as NRDC and EDF, transitioned into a paid-membership structure for the pragmatic reasons that they needed an alternative source of funding and that Supreme Court doctrine required them to have members in order to access the courts.[82] The point was always to engage in elite advocacy in the public interest—not to bring the public itself into the environmental regulatory process.

This focus on professionalized advocacy exacerbated the problem that participatory policies tend to be under-representative and exclusionary if not deliberately designed and carefully implemented.[83] Opportunities for public participation that are nominally open to the entire public, whether it is an opportunity to comment on a technical permitting decision or a local public hearing, tend to be utilized more and more effectively by those with wealth, privilege, and access to expertise. For this reason, participatory tools tend to overrepresent the preferences and values of whiter, wealthier, and more privileged communities while underrepresenting communities of color and communities with less wealth. Likewise, participatory tools tend to overrepresent voices that oppose a project or proposal while underrepresenting alternative views, including those in favor of the project or proposal. This dynamic, particularly in land use and environmental contexts, leads many to characterize the public as driven by reactionary "not in my backyard" or "NIMBY" sentiment—criticism that, in addition to being misleading and unhelpful, is often leveraged to discredit the public's

80. Sabin, *supra* note 4, at 47.
81. *Id.* at 128.
82. *Id.* at 127–28.
83. *See* Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Processes*, 90 Fordham L. Rev. 1083, 1084–87 (2021).

role in environmental policy more broadly rather than to highlight design and implementation problems that cause this effect.[84]

The primary tools of public participation in environmental regulation, such as public comment in the NEPA process or citizen enforcement suits, were not deliberately designed to address this problem. And the environmental groups' focus on elite advocacy helped ensure that these tools were not carefully implemented to broaden public access. Members of the public who did make it into the process tended to be either people identified by environmental groups as strategically valuable to establish standing or wealthy, privileged communities with the time, resources, and access to expertise necessary to leverage the participatory tools of environmental law to oppose projects.[85]

This dynamic of professionalized advocacy feeding into the exclusionary features of environmental law's participatory tools fueled the disproportionate burden faced by communities of color and low-income communities. In the 1980s, the environmental justice movement brought attention to how long-standing racially-discriminatory practices and policies resulted in communities of color and low-income communities facing more pollution exposure generally and more polluting facilities specifically than whiter, wealthier communities.[86] The movement expressly criticized the environmental advocacy community for benefiting whiter, wealthier communities at the expense of communities of color and low-income communities.[87] Movement advocates argued that, by helping privileged communities resist polluting facilities, environmentalists were pushing facilities into less politically powerful communities of color and low-income

84. For NIMBYism's lack of value, *see, e.g.*, Joseph Rand and Ben Hoen, *Thirty Years of North American Wind Energy Acceptance Research: What Have We Learned?*, 29 Energy Rsch. & Soc. Sci. 135, 138, 143 (2017) (surveying social science literature and finding agreement among researchers that "the NIMBY framework is overly simplistic," is "unable to explain the complex motivations, concerns, and perceptions that can lead to opposition and negative attitudes," is "generally used pejoratively," is "politically inappropriate and can often lead to misunderstanding, adding little value to the decision-making process," and "should be abandoned altogether" as an explanation for community opposition to renewable energy). For continued use of NIMBYism to discredit community opposition, *see, e.g.*, Jim Motavalli, *The NIMBY Threat to Renewable Energy*, Sierra Club (Sept. 20, 2021), https://perma.cc/YZE3-NYB9 ("Some opposition to renewable energy projects is based on legitimate concerns about protecting natural spaces. But a good portion of the resistance is due to NIMBYism—the 'not in my backyard' syndrome.").

85. *See* Sabin, *supra* note 4, at 105–06 (explaining how environmental law organizations became large membership organizations but that that most members "were check writers" and membership programs "served primarily as vehicles for lawsuits" by generating standing witnesses "and fundraising."); Lemar, *supra* note 83, at 1112–33 (explaining how privileged communities tend to make greater use of participatory mechanisms).

86. Cole & Foster, *supra* note 29, at 19–33.

87. *Id.* at 30 (explaining how some environmental justice "activists regard the traditional environmental groups as obstacles to progress, if not outright enemies" because of their express decisions not to focus on supporting communities of color and low-income communities).

communities that were already overburdened by pollution.[88] In this way, the environmental movement was actively contributing to environmental racism and political disempowerment of communities of color and low-income communities through the "slow violence" of pollution and socio-political isolation.[89] Environmental justice leader Dr. Robert Bullard captured this point by suggesting that people stop calling environmentalists NIMBYs for their "not in my backyard" motivation and instead call them PIBBYs for their actual motivation to put polluting facilities "in Blacks' backyards."[90]

A final thread that limited the democratic potential of the public's role in environmental policy was a series of judicial decisions that interpreted the public's role as primarily supporting government regulation rather than exercising independent authority or agency. While early advocates found a sympathetic judiciary, judicial attitudes towards public interest advocacy shifted in the late 1970s when courts became more concerned with setting boundaries around the public's role in environmental law than enabling it. For example, courts made clear that agencies were required to consider public input in decisions but were generally entitled to deference from courts on the substance of the decision, even if the agency's decision rejected public input.[91] Other decisions interpreting the public's authority to enforce environmental laws emphasized the view that the public's role in enforcement was limited to supplementing the government's authority.[92] As one contemporary put it, these decisions read like a "litany against citizen enforcement" rather than a careful parsing of Congress' legislative text or

88. *See, e.g.*, Paul Mohai et al., *Environmental Justice*, 34 Ann. Rev. Env't. & Res. 405, 413 (2009) (summarizing empirical research attributing disproportionate siting of waste facilities in communities of color "to rising public concerns about environmental hazards during this period, especially about hazardous wastes after the enormous publicity given the Love Canal crisis in the late 1970s, and the greater success of white communities at keeping noxious land uses from being sited in their neighborhoods. As a result of this success, locally unwanted land uses (LULUs) became increasingly diverted to politically more vulnerable low-income and people of color communities, corroborating Bullard & Wright's (54) earlier argument that 'not in my backyard' (NIMBY) increasingly became 'place in blacks' backyards' (PIBBY).").

89. *See, e.g.*, Rob Nixon, Slow Violence and the Environmentalism of the Poor 2–3, 6–9 (2013) (describing how "slow violence," defined as "a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all" that includes poor and vulnerable people's disproportionately high exposure to toxins, challenges legal and political intervention).

90. *See, e.g.*, Cheraine Stanford, *Robert Bullard on the Critical Role of Environmental Justice*, WPSU, at 08:00 (April 17, 2020), https://perma.cc/JJ4P-AH2W ("The idea that, you know, not in my backyard, or NIMBY, was a practice that, that white elected officials, that was the dominant paradigm and what . . . But the flip side of that, what I call instead of NIMBY was PIBBY, place in Blacks backyard.").

91. *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 547–548 (1978).

92. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987).

intent when it institutionalized the public's role in environmental policy.[93] While these decisions did not disturb the core foundations of the public's role, they did signal that the public interest environmental movement had lost its principal source of power and innovation—sympathetic judges. The result was that while environmental groups still had broad access to courts, often that access was only able to secure procedural wins that further emphasized the agency's authority as primary rather than expand the public's independent authority.

The confluence of these dynamics—the exclusionary professionalization of environmental advocacy, the grassroots critiques of the environmental justice movement, and doctrinal shifts that limited the public's authority—has left contemporary environmental advocacy with a complicated relationship to democracy. First, these dynamics have tended to position democratic organizing in contrast to mainstream environmental legal advocacy. Those who participated in the early public interest environmental movement came to regret distancing environmental advocacy from popular movements.[94] Attempts to reconnect environmental advocacy with social movements, reaching as far back as the Reagan administration and as recently as the broader revival of social justice movements in the wake of George Floyd's murder, have been difficult to square with the top-down structure of environmental advocacy and poor policy design of environmental law's participatory tools that exacerbate their exclusionary effects.[95] This difficulty, combined with the limitations set by court decisions, settled environmental advocacy into a relatively mundane form of interest-group-led advocacy. Lawyers in the environmental justice movement did articulate a powerful vision for environmental lawyering that leverages environmental law's

93. Jeffrey G. Miller, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.: Invitation to the Dance of Litigation*, 18 Env't L. Rep. News & Analysis 10098, 10102 (1988) ("The Court's argument has nothing to do with citizen enforcement against wholly past violations. It is more a litany against citizen enforcement generally.").

94. Sabin, *supra* note 4, at 108 (describing how "some of the founders of the environmental law firms themselves later worried that they had taken a wrong turn by embracing legal strategies to the exclusion of political movement building," and quoted Gus Speth as saying: after a "more than 'forty-year experiment on whether mainstream environmentalism can succeed . . . we opted to work within the system of political economy we found, and we neglected to seek transformation of the system itself."). *See also id.* at 105 (noting how "recent critics of the environmental movement have lamented lost opportunities" for coalition building.).

95. *See, e.g.*, Jason Dinh, *Did Big Green Groups Fumble Their George Floyd Moment?*, Atmos (May 22, 2024), https://perma.cc/HPA6-977E (describing environmental group's historic and continued failures to grapple with racial justice). *See also* Sabin, *supra* note 4, at 105–06 (noting that "some coalition-building" between the environmental movement, labor organizations, communities of color, and grassroots advocacy organizations "did occur in the late 1960s and early 1970s," but its "potential" went "mostly unfulfilled and did not product robust, lasting alliances" and "public interest lawyers' efforts to embed themselves within the system as reformers did not sit well with less establishment oriented activists.").

participatory tools towards grassroots movement organizing outside of the regulatory process.[96] But they generally presented this vision in opposition to mainstream environmental advocacy that operated within existing power structures, creating a lasting divide within the environmental community between large, mainstream environmental organizations and a more critical, outsider vision of environmental advocacy focused on movement building beyond the traditional limits of environmental law.[97] This insider/outsider dynamic has complicated the broader environmental movement's ability to normatively center democracy and popular movements within its legal advocacy and institutional position.

Second, these dynamics revealed environmental law's insufficient focus on the material foundations of participatory governance. Environmental law developed innovative tools for bringing people into the regulatory process, but effectively using those tools required time, money, and expertise that most communities lacked. These realities limited the democratic potential of the institutional role for the public and the "triangular" governance structure that advocates had secured in environmental policy.[98] The public's role developed despite this problem because it was primarily developed by public interest advocacy groups expressly funded to bring time, money, and expertise to bear in the policymaking process. But in doing so, the public's role functionally retracted into a role for professional public interest advocates, obscuring the deeper democratic potential of the governance model. As they stand, environmental law's participatory tools can offer communities opportunities to organize around the regulatory and legal process. But these opportunities alone are generally insufficient to build the resources and expertise needed to either influence a particular policy outcome or to counter the decades of economic disinvestment and pollution burden that limits many communities of color and low-income communities from exercising political power.[99] This inattention to the material foundations of political power limited the democratic potential of environmental law's participatory tools by excluding many communities from effectively using them. In this sense, environmental law, as currently socially and legally structured, tends to offer communities a half-version of democracy—a limited opportunity to react to and potentially oppose development happening to them rather than, for example,

96. *See, e.g.*, Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 Va. Env't L.J. 687, 702–09 (1995).

97. *See id.* at 704 ("The professional model may be very effective at building the 'movement' of the particular legal organization. Slick direct mail appeals decrying the conditions in East L.A. or East St. Louis may fill the coffers of some big name environmental group. Unfortunately, the professional model is entirely ineffective at building the environmental justice movement at the local level.").

98. Sabin, *supra* note 4, at 162–63.

99. *See, e.g.*, Cole & Foster, *supra* note 29, at 39–41 (showing how, even when low-income communities and communities of color organize to participate in public process, regulators take advantage of communities' lack of expertise and experience to stonewall, embarrass, and exclude communities from meaningfully participating in the process).

a meaningful say in building a sustainable, thriving, and healthy community. This half-version matters deeply because, as discussed further below, it shows why the tendency of local communities to oppose projects has roots in the structure and policy design of environmental law—not in some inherent oppositional character of people.

Faced with these challenges, the public's role has struggled to escape its characterization as a form of regulation rather than an exercise of democratic citizenship. As the next section explains, this perspective opens it to vulnerabilities.

C. The Limits of Capitalist Development

One way to understand environmental law's failure to achieve its democratic potential is through the limits imposed on environmental law by a commitment to economic development led by private capital. As other scholars have documented, this cross-cutting commitment to capitalist development in American law has structurally limited environmental law's ability to achieve its substantive goals of protecting public health and welfare.[100] This commitment to capitalist development also structurally limits the public's role within environmental law in ways that provide important context to recent debates.

Specifically, environmental law's commitment to capitalist development presents the public's role in environmental law as a form of regulation itself rather than as an exercise of democratic authority. Presenting the public's role as a form regulation compromises the public's role in two related ways. First, it presents the public as a cost imposed on development similar to any other regulatory requirement—and, importantly, a cost with questionable benefits given the exclusionary and limited nature of environmental law's participatory tools to result in better or more representative outcomes. Second, locating the public within the regulatory process positions the public as an outsider to development with a stake only in the process and not in the development itself. Together, these features compromise the public's role by presenting it as an instrumental policy choice rather than a normatively valuable end.

Capitalist development is economic development led by private capital in the sense that private holders of wealth decide what, where, and when to build things.[101] An alternative model would be, for example, public

100. *See generally* Michael M'Gonigle & Louise Takeda, *The Liberal Limits of Environmental Law: A Green Legal Critique*, 30 Pace Env't L. Rev. 1005, 1015 (2013) (discussing "the interaction of the liberal economic/political context with its environmental regulatory constraints"). *See also* Nicholas F. Stump, Remaking Appalachia: Ecosocialism, Ecofeminism, and Law 101 (2021) ("The environmental law regime, as enacted in the 1970s, was also merely supporting of the liberal capitalist paradigm. Thus, for this core, structural reason—even aside from environmental law's additional flaws discussed above, environmental law wholly incapable of stemming the global ecological crisis.").

101. Dietrich Rueschemeyer, Evelyne Huber Stephens & John D. Stephens, Capitalist Development and Democracy 1 (1992) (describing capitalist development as "economic development driven by capital interests in competition with each other.").

development—where the government decides what, where, and when to build things. While development in the United States is subject to various forms of state oversight and support, it is fundamentally dependent on private capital proposing and building projects. To the extent public policy guides development, it does so by seeking to incentivize capitalist development and evaluate or mitigate projects as proposed by capital.

For example, federal climate policy is firmly rooted in this capitalist development model. The Inflation Reduction Act promoted massive development of renewable energy and other climate infrastructure by incentivizing private capital to propose and build projects through tax credits and other financial incentives intended to reduce the cost and risk of development. As a primary example of modern American "industrial policy," the federal government plays a crucial but ultimately secondary role in development by seeking to "derisk" and "crowd-in" private capital as a way to build socially-necessary projects.[102] Rather than build a renewable energy project itself, for example, the federal government will identify certain public lands for renewable energy development and seek to induce a privately-funded entity to propose and develop projects.[103] Sometimes it works and private capital proposes projects necessary to meet policy goals; sometimes it doesn't and nothing gets built. In this way, American climate policy is dependent on private investors' decisions to propose and carry through projects.[104]

As scholars have recognized, this political commitment to capitalist development has imposed substantive limitations on environmental law.[105] Capitalist development depends on acceptable returns.[106] For this reason, policies structured around promoting capitalist development are necessarily limited by the boundaries of preserving acceptable returns.[107] Put differently, environmental regulation can only go so far—it cannot, for example, impose regulatory costs that threaten acceptable returns such that it would, for example, stop capital

102. *See* Amy Kapczynski & Joel Michaels, *Administrating a Democratic Industrial Policy*, 18 Harv. L. & Pol'y Rev. 280 (2024), https://perma.cc/H8YW-YMH7 (discussing industrial policy).

103. *See, e.g.,* Bureau of Land Mgmt., *Competitive Leasing*, https://perma.cc/9TFP-SLGX.

104. My focus on American climate policy here is not intended to suggest that capitalist development of renewable energy is limited to the United States, as many renewable energy and decarbonization projects around the world reflect a similar reliance on private capital.

105. M'Gonigle & Takeda, *supra* note 100, at 1059–68.

106. *Id.* at 1062 ("In a free and competitive market economy, capital demands a return, whether in interest payments or returns on investment. Thus, under capitalism, growth has a life of its own; it is inherent to it. That is what capital does automatically, and must do, if it is to perform its essential function.").

107. *See id.* at 1067–68 ("In other words, environmental law works as a kind of *law of mitigated production*, the primary goal of which is to improve existing processes and structures of production but without fundamentally challenging the context in which they operate.").

from proposing socially necessary projects like renewable energy facilities or lead capital to abandon socially necessary operations such as petroleum refining.[108]

This substantive commitment to maintaining capitalist development has two effects on environmental regulation. First, it necessarily positions regulation in opposition to growth and subordinates regulatory goals to the overarching goal of preserving acceptable returns.[109] Second, it promotes a kind of undertheorized, negative-rights approach to environmental quality—private development is *per se* acceptable and should be mitigated only to a minimal extent necessary to protect public health or the environment while preserving returns.[110] Scholars have articulated these limitations as environmental law's economically and politically "liberal" paradigm; economically liberal in the sense that it centers capitalist development, and politically liberal in the sense that it conceptualizes environmental health and quality as a negative constraint imposed on economic development.[111]

These substantive limitations imposed on environmental law by a commitment to capitalist development also impose particular limitations on the public's role in environmental law. By locating the public's role within this constrained regulatory process, the public's participation appears as a form of regulation similar to other process requirements that an agency must comply with. As a form of regulation, the public's role is thus subject to the same cost-based and conceptual constraints imposed on environmental regulation broadly.[112] Rather than being an exercise of democratic citizenship, the public's role in a particular permitting or policy decision is open to evaluation based on its instrumental value as part of the agency's exercise of its regulatory authority. This view of the public's role as a form of regulation exposes it to two vulnerabilities.

The first is that the public's role presents as an especially costly form of regulation that, from the instrumental perspective of improving agency decisions, offers marginal benefits. Public participation in environmental policy can be costly, particularly in time—adding months or even years to a

108. *See id*. at 1067 (concluding that the goal of environmental law "is not to challenge the liberal economic order, but to make it work in harmony with the environment.").

109. *Id*. at 1059–68.

110. Stump, *supra* note 100, at 51–53.

111. *See generally* M'Gonigle & Takeda, *supra* note 100. You can imagine other ways of thinking about environmental law – environmental law could enable alternative forms of public development, or reconceptualize environmental health and quality as a foundation for economic development – and find support for those ways of thinking. Often the problem is that environmental law's liberal paradigms are implicit and external limitations, making it harder both to recognize them and target them for reform within environmental law.

112. *See, e.g.*, J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 Vt. L. Rev. 693, 719 (2020) [hereinafter Ruhl & Salzman, *What Happens*] (presenting a policy "trade off" between public participation and speed of the permitting process); Michael Gerrard, *A Time for Triage*, 39 Env't F. 38 (2022) (similarly presenting failure to reform public participation to enable quicker permitting as a result of "tradeoff denial").

regulatory process if one includes the potential for judicial challenges from the public.[113] On the other hand, the public's participation can offer limited value and even negative influences in a particular decision or policy given its limited doctrinal effect and exclusionary tendencies. If current doctrine says that an agency need not follow the public's input, and current participatory structures tend to generate public input that is unrepresentative or even obstructionist, then the participatory process seems to add little value for high cost. Because private development can be particularly vulnerable to unpredictable costs and delay, these costs can be prohibitive.[114] Indeed, part of what has given environmental law its NIMBY character is that groups can use the participatory process to delay and undermine projects. This dynamic becomes especially problematic for renewable energy development, which has faced substantial public opposition and is particularly vulnerable to delay.[115]

The second vulnerability is that the view presents the public as outsiders with no independent stake in the development itself. As noted, the commitment to capitalist development characterizes development as *per se* acceptable and environmental regulation as a negative constraint on that development. By incorporating the public's role through this negative constraint, the public is limited to a role as an outsider with no stake in development distinct from the government's regulatory authority. This effect is exacerbated when the public's role departs from or challenges the government's regulatory authority. Under this conceptual approach, the government plays its appropriate role by minimally mitigating developments' impacts. As a form of regulation, the public's limited role is to inform the government's exercise of that minimal authority. When the public challenges the government's authority or steps beyond it to exercise its own authority, it steps beyond its appropriate role without authority or a direct stake in the development itself. From this perspective, the public is a perpetual outsider.

113. Simply preparing for, taking in, and responding to public comments in the legally minimal sense can take six to twelve months and substantial agency effort. Facilitating meaningful public participation, such as when an agency affirmatively solicits representative participation from affected communities, demands even more time and effort. And judicial challenges from the public, whether rooted in participatory process or in the public's authority to enforce other legal violations, can take years itself.

114. *See, e.g.*, Brian Potter, Arnab Datta & Alec Stapp, *How to Stop Environmental Review from Harming the Environment: Permitting reform is an opportunity to accelerate decarbonization*, Institute for Progress (Sept. 13, 2022), https://perma.cc/HS2K-DX54 (articulating the "monetary," "time," and "uncertainty" costs for projects requiring NEPA review). While this analysis is helpful for illustrating views on cost vulnerabilities associated with permitting, I do not endorse the analysis' larger conclusions about and recommendations for reforming the permitting system.

115. *See* David Adelman, *Permitting Reform's False Choice*, 51 Ecology L.Q. 129, 157–66 (2024) (noting widespread public opposition to renewables projects, and while concluding opposition nationally is "not at crisis levels," adding that state-specific data is "more complex and threatening" and that "public opposition can be a major obstacle to project development").

Imagine, for example, an environmental group arguing that an agency's proposed permit for a new factory does not include strict enough air pollution controls that would cost the factory more money. The group threatens to sue the agency to slow the process and potentially derail the project. Why should the group be able to do this? Under the conceptual constraints of a commitment to capitalist development, the group should have no authority to do so: The group has exceeded its appropriate role in the regulatory process as providing input on the agency's decision and has no independent stake in the project itself. While acting consistent with their legal authority, the environmentalists are outsiders, inappropriately butting their way into the development process through process rights rather than a stake in the project. Such a role, under this constrained view, should be carefully constrained so as to not unsettle the underlying commitment to promoting capitalist development.

Understanding these vulnerabilities helps orient the narrative around the realities of environmental democracy. Judicial and legislative innovations institutionalized the public's role in making and enforcing environmental policy. The substantive limitations imposed on environmental law by a commitment to capitalist development then fed back into the public's role. Because environmental law maintained a divide between regulation and development, the public's role was necessarily a form of regulation. This positioned the public not as a stakeholder or partner in development that affected it but instead as a form of regulation, and thus primarily a cost. To the extent the public had a role, it was positioned fundamentally as an outsider with no stake in development.

Contextualizing the public's role within the broader commitment to capitalist development is helpful here for two reasons. First, it demonstrates that giving the public a stake in development would ground the public's institutional role in environmental governance in material foundations, helping to break through both the social limitations on the democratic potential of environmental law and the conceptual limitations of a commitment to capitalist development. When development and environmental goals align, as is the case with decarbonization, the triangular governance model offers a framework for a similar triangular development model that builds the public's role into decarbonization.[116]

Second, articulating these vulnerabilities reveals the roots of the recent and broader turn against public participation in American policy discourse. As climate policy has aligned the interests of capitalist development with environmental policy, the public's role has come under intense criticism as delaying the massive infrastructure buildout necessary to combat climate change.

116. On alignment between development and environmental goals, *see* Sassman, *supra* note 24, at 1521–24 (explaining how decarbonizing to avoid catastrophic climate change will require "one of the most ambitious infrastructure programs ever contemplated in the United States—reworking one of the most legally, technologically, and socially complex systems in American life on a short deadline.").

This turn against public participation risks eroding the public's role and closing off its potential for democratizing the transition to clean energy. As the next section explains, this development poses a defining challenge and opportunity to environmental democracy that demands recentering the public's role in environmental law around principles and policy design targeted at democratizing environmental decision-making and specifically bringing the public into the transition away from fossil fuels.

D. The Turn Against Public Participation

The climate crisis is, among other things, an infrastructure crisis. Because burning fossil fuels is the primary cause of climate change, our primary strategy for combating climate change is shifting sectors of our economy away from burning fossil fuels, or "decarbonizing" those sectors of the economy.[117] Within this strategy, the priority is to transition electricity-generation away from fossil fuel combustion, such as burning coal, oil, and natural gas, and instead towards renewable, zero-carbon sources, such as wind and solar power.[118] This initial transition enables decarbonization of other sectors through electrification, such as decarbonizing transportation by transitioning from combustion engines to electric vehicles.[119] Broadly consistent with this approach, the United States had committed to achieving net-zero electricity generation by 2035.[120]

However, decarbonizing electricity generation presents a massive infrastructure challenge that is, as one study put it, only "barely" feasible under current policy conditions.[121] Growing renewable energy generation will require substantially more land than existing energy infrastructure, often in places distant from where the electricity will be used and where existing electricity transmission infrastructure does not yet exist.[122] In addition, transitioning to renewable energy will require updating existing electricity infrastructure and likely building more infrastructure, such as batteries, to balance out intermittent generation.[123] Moreover, the urgency of the climate crisis and decades of inaction means the United States has an extremely short timeline—roughly a decade—to accomplish this.[124] All told, this means building more renewable

117. Sassman, *supra* note 24, at 1522.
118. *Id.* at 1522–23.
119. *Id.*
120. *Id.* This commitment was based on executive orders that have since been rescinded by the Trump Administration in 2025. *See, e.g.*, Initial Recissions of Harmful Executive Orders and Actions, 90 Fed. Reg. 8237 (Jan. 20, 2025), https://perma.cc/E6ET-ECHA (rescinding, among other orders, the Biden Administration's Exec. Order No. 14008 (committing "carbon pollution-free electricity sector no later than 2035")).
121. Sassman, *supra* note 24, at 1523.
122. *Id.* at 1523–24.
123. *Id.*
124. *Id.* at 1522.

and other energy infrastructure than ever before at scales and speeds that have literally never been done before in the United States—a project at the scale of building the Interstate Highway System in roughly a third of the time.[125] The scale of this challenge is what elevated proposals such as the Green New Deal in U.S. policy discourse to leverage the full authority of the federal government towards meeting this challenge while using it as an opportunity to invest in and engage communities.[126]

Building the highway system, of course, prompted the "freeway revolts"—widespread public opposition that helped fuel the environmental movement and lay the foundations of environmental law.[127] Building renewable energy development has prompted similarly widespread community opposition.[128] While this opposition can take many forms, communities can leverage environmental laws to slow or challenge renewable energy projects based on these projects' localized environmental impacts.[129] In this way, the localized impacts of climate infrastructure can counterintuitively position environmental law against the broader goal of combatting climate change. This "green versus green" conflict can create difficult dynamics that undermine the democratic potential of the public's role in environmental law.[130] For example, fossil-fuel interests opposed to climate action exploit this conflict by inflaming community opposition to renewable energy development through shadowy funding and misinformation.[131] Similarly, local opposition to renewable energy can exacerbate the cultural divide in environmental advocacy between grassroots organizing and professional policy advocacy by seemingly forcing a conflict between commitments to climate action and supporting local communities.[132]

The scale of the climate infrastructure challenge has created widespread agreement on the need for legal reform to speed infrastructure development, but the specific problem of local opposition has created sharp divides on how to reform environmental law and its practice. Professors J.B. Ruhl and James

125. *Id.* at 1524.

126. *Id.* at 1525. *See also* Paul Waldman, *Trump Is Onto Something About the Green New Deal*, Heatmap (July 26, 2024), https://perma.cc/6AF7-JC2T (noting that the Green New Deal is "the law in everything but name.").

127. *See generally* Jeffrey Brinkman & Jeffrey Lin, *Freeway Revolts! The Quality of Life Effects of Highways,* 106 Rev. Econ. and Stat. 1 (2024) (describing and evaluating the freeway revolts).

128. *See, e.g.,* Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 35–45 (cataloguing examples).

129. *Id.*

130. *Id.* at 35, 45 (characterizing local opposition as a "green versus green" dilemma).

131. *See* Isaac Slevin, William Kattrup & Timmons Roberts, *Against the Wind: A Map of the Anti-Offshore Wind Network in the Eastern United States*, Climate and Dev. Lab (Dec. 12, 2023), https://perma.cc/UT7F-UEMR.

132. *See, e.g.*, Sassman, *supra* note 24, at 1513, n.8 (discussing how a Sierra Club local chapter's support of an African-American community opposing a solar project led six of nine board members to resign in protest, stating that the opposition was "indefensible" in the face of climate change).

Salzman set the stage for this debate by arguing that the ambitions of the Green New Deal are outright incompatible with the "old green laws."[133] As they see it, the rise of environmental law in the 1970s represented a "grand bargain" that "slowed and increased the costs of infrastructure in exchange for greater environmental protection."[134] This bargain operates by legally empowering "citizen voice"—a term drawn from economists Leah Brooks and Zachary Liscow to describe "a combination of social movements, legislation, and judicial doctrine that significantly expanded the opportunity for citizens to influence government behavior directly to reflect their concerns"—to increase infrastructure costs through delay and demands for project mitigation.[135] While it "has proven a very good bargain" on Ruhl and Salzman's assessment, it has never been politically popular and has become untenable in the face of the climate crisis.[136] They are careful to explain that it is "inaccurate to lay all of the blame for increases in infrastructure cost and delay at the feet of strong environmental laws," but they argue the public's role in environmental law is an important part of the problem and a special problem for building climate infrastructure.[137] And even if the public overlooks localized environmental impacts in the spirit of climate action—which they say has not happened—then conservative interests will leverage environmental law's tools to oppose climate action.[138] For this reason, they argue that environmentalists face a "dilemma" of trade-offs, and particularly a trade-off "between speed of process and public participation."[139]

133. Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 60. *See also* Ruhl & Salzman, *What Happens, supra* note 112. Importantly, Ruhl & Salzman acknowledge that conflict between environmental law and renewable energy development "is not new news." See *id.* at 697, nn.15–16 and accompanying text.

134. Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 11. *See also id.* at 24 ("In exchange for greater environmental protection, major infrastructure projects—particularly linear projects such as pipelines, transmission lines, and highways—now had to undergo an extensive and complex array of environmental assessment and permitting programs to ensure environmental protection goals were integrated into project planning, siting, and design. Infrastructure development could go forward, but under a new regime devoted to environmental protection.").

135. *Id.* at 34 (citing Leah Brooks & Zachary Liscow, *Infrastructure Costs*, 15 Am. Econ. J. 1 (2023)).

136. For "very good bargain," *see id.* at 6. *But see id.* at 25 ("Despite these achievements, both sides of the political spectrum have criticized the Grand Bargain.").

137. For an argument that it is an important part of the problem, *see id.* at 34 ("Just because environmental law is one of several contributing factors, however, does not mean it is unimportant."); for an argument that it is a special problem for climate infrastructure, *see id.* at 3545 ("There is no 'green pass' for renewables.").

138. Ruhl & Salzman, *What Happens*, *supra* note 112, at 695.

139. Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 45 (identifying the "Green's Dilemma" as facing that "green trade-offs are real."). *See also* Ruhl & Salzman, *What Happens*, *supra* note 112, at 719 ("That leads to the third trade-off: the balance between speed of process and public participation.").

Ruhl and Salzman, for their part, come down firmly on the side of speed.[140] They propose a centralized federal process for approving climate infrastructure that would maintain only a limited role for the public to "provide input" and "identify concerns at critical junctions," further disempowering the public in favor of centralized agency authority.[141]

Leading climate law scholar Professor Michael Gerrard took a similar stand in a remarkably personal article arguing that "the environmental community has tradeoff denial."[142] "It's too late to protect everything," Gerrard begins soberly.[143] We are "desperately behind in the energy transformation," environmental law is "ironically" part of the problem, and to solve it "we must accept difficult tradeoffs, sacrificing some of what we consider precious in order to avoid far worse impacts."[144] One such tradeoff is "that we will need to reform public participation (important as it is) to keep it from paralyzing clean energy development until some elusive form of consensus is reached."[145] Gerrard reflected that he spent many years in law practice "litigating against things like highways, landfills, and incinerators" and "used to say that I never met an EIS that I couldn't sue."[146] "But the worm has turned," Gerrard continued, and "we need to set aside our tools of obstruction" to achieve the "task before us now"—building "a massive amount of clean energy and climate adaptation infrastructure."[147]

This turn against the public among environmental law scholars found quick and powerful allies across the political spectrum. As Ruhl and Salzman noted, conservatives long criticized the public's role in environmental law for its ability to stop infrastructure projects.[148] Conservative groups began beating the drum louder that the public is the problem.[149] Progressive policy commenters picked up the turn as well, folding environmental law into a broader narrative

140. Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 68 (proposing a "strategy [that] places speed and climate impact on par with (and potentially ahead of) conservation, distributional equity, and social justice."). *See also id.* at 79 ("The most challenging part of the New Grand Bargain will be meaningful consideration of local conservation, equity, and participation concerns. We start from the premise of triage, that prioritizing speed and impactful climate projects will require trade-offs against other goals.").

141. *Id.* at 80.

142. Gerrard, *supra* note 112, at 40.

143. *Id.* at 38.

144. *Id.*

145. *Id.* at 40, 42.

146. *Id.* at 42.

147. *Id.*

148. Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 25–26.

149. *See, e.g.*, Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It*, Regul. Transparency Project (Oct. 16, 2018), https://perma.cc/NPZ9-VK27 (offering several reforms for limiting the public's role in NEPA); Diana Furchtgott-Roth, *How the Next Conservative Administration Can Restore American Energy Dominance*, Heritage Found. (Feb. 16, 2024), https://perma.cc/22ZX-JYEF ("Faster infrastructure permitting and approval of export terminals would enable oil

that the United States can no longer achieve major policy goals because we've created an overly burdensome permitting process that enables local communities to stall and derail projects such as building affordable housing, high-speed rail, and climate infrastructure.[150] Ezra Klein wrote in *The New York Times* that environmental laws are "powerful allies of an intolerable status quo, rendering government plodding and ineffectual and making it almost impossible to build green infrastructure at the speed we need."[151] The Atlantic published an article titled "Community Input is Bad, Actually," arguing that "community groups block explicitly green developments" and "have weaponized environmental regulations in their quest to do so."[152]

The overall result of this narrative was to open the political conditions for some of the first legislation amending the environmental laws in decades. Specifically, Senator Manchin leveraged his vote needed to pass the Inflation Reduction Act to secure an agreement from Democratic leaders to pursue permitting reform legislation that would remove barriers environmental law posed to energy development—both fossil fuel and renewable energy.[153] Initial legislation in 2023 amended NEPA in minor ways intended to speed up and simplify the environmental assessment process, such as requiring page limits and specific timelines on environmental studies.[154] Senator Manchin and other legislators have continued to offer further proposals for reforming the permitting process to speed energy development, although they have generally failed to move forward in Congress.[155]

The push for permitting reform has nevertheless faced resistance. Environmental justice advocates have argued against reform proposals that limit the public's role, particularly under NEPA. NEPA's process "doesn't go far enough" to protect communities, one advocate explained, "but it's still seen as a first line of defense for cultural communities and indigenous communities as well."[156]

---

and natural gas to travel to where they're needed and help to lower global emissions as gas replaces coal.").

150. Klein, *supra* note 8.

151. *Id.*

152. Jerusalem Demas, *Community Input Is Bad, Actually*, The Atlantic (Apr. 22, 2022), https://perma.cc/9NMF-C7WE.

153. Kelsey Tamborrino, *Manchin's pitch to energy leaders: IRA without permitting reform a missed opportunity*, Politico (Sept. 23, 2022), https://perma.cc/J4AJ-4RUC.

154. *See generally* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5 (2023) (codified at 42 U.S.C. 4331 et seq.). For page limits, see 42 U.S.C. § 4336a(e); for specific timelines, see *id.* § 4336a(g).

155. Diana DiGangi, *Drive for Energy Permitting Reform Fuels Tensions Between Climate, Environmental Justice Advocates*, ESGDive (June 11, 2024), https://perma.cc/R9SA-W4JG ("Congress is also tackling permitting reform, with 10 bills introduced in this session alone, but the bills have struggled to advance despite bipartisan calls for action.").

156. *Id.* This view that the status quo is not acceptable is widely shared by prominent progressive commenters in the permitting reform debate. *See* Rhiana Gunn-Wright & Kristina Karlsson, *What the NEPA Data Actually Shows, and the Case for Progressive Permitting Reform*,

For this reason, tampering with the public's authority under NEPA is a third-rail for many—"it's like … tampering with Social Security."[157] Rather, advocates argue that public participation should become more robust as part of any NEPA reform process.[158] Groups therefore support alternative legislative proposals that, along with other reforms intended to accelerate decarbonization, would amend NEPA to require community impact reports, mandate engagement with environmental justice communities, and require consideration of cumulative impacts.[159]

Others criticize the basic foundations of the permitting reform debate, and particularly its focus on the federal environmental laws. Professor David Adelman argues that, when considering data cited by many permitting-reform advocates, it turns out that most renewable energy projects do not require major federal permits and most are not challenged under the federal environmental laws.[160] While most opposition is at the state and local level, "data suggest that throughout most of the country public opposition" to renewables "is not at crisis levels."[161] Rather, "low percentages of projects are subject to public opposition and less than ten percent of wind or solar projects were cancelled."[162] For this reason, Adelman criticizes the legislative debate about permitting reform, and specifically its focus on federal environmental law, as motivated by anecdotal rather than empirical evidence and reflecting a "double-standard" that

Roosevelt Inst. (July 21, 2023), https://perma.cc/UH4S-WKKV (noting that "neither [author] has argued that NEPA is working ideally in its current state" and arguing for solutions "that will improve NEPA's efficiency. . . . NEPA has played a crucial—though still inadequate—role for frontline communities often silenced by deep legacies of environmental and systemic racism, giving them more say in what infrastructure is built in their communities and pushing those in power to better account for the potential harms of projects. . . . But it is important to recognize that litigation, especially for frontline communities, has been used as a last resort precisely because other methods of democratic participation and oversight—including NEPA's community participation processes—have either been ineffective or inaccessible. Making it harder to file suit will not dissipate the discontent that led to litigation. It will simply mean people look for other channels to express this frustration—including joining forces with astroturfed groups that oppose renewable energy projects and seed disinformation to do so.").

157. DiGangi, *supra* note 155.

158. *Id. See generally* Sassman, *supra* note 24.

159. *See, e.g.*, Press Release, Raul Garcia, Vice President of Policy and Litigation, Earthjustice, Earthjustice Responds to Senator Manchin and Barrasso's Permitting Bills (July 23, 2024) (https://perma.cc/FA96-EQ9D) ("We urge Congress to reject this proposal, and instead pass proposals like the Clean Electricity and Transmission Act and the Environmental Justice for All Act to help us reach our clean energy goals while protecting communities.").

160. David E. Adelman, *Permitting Reform's False Choice,* 51 Ecology L.Q. 129 (2024), https://perma.cc/9T5C-63KG; David E. Adelman et al., *Dispelling the Myths of Permitting Reform and Identifying Effective Pathways Forward*, 55 Envtl. L. Rep. 10038 (2025) (identifying several "myths" of the permitting reform debate and arguing that each is "premised on misperceptions of the law, the facts, or both.").

161. *Id.* at 160.

162. *Id.*

privileges "policies that erode environmental protections" over "those that have the potential to impact the public directly."[163]

Adelman's analysis helps reveal that the turn against public participation in legal and policy commentary is less about the specific details of renewable energy policy and instead about the longer-running conceptual debate over how to create a governance structure that works at the speed and scale of modern problems. Ruhl and Salzman make this explicit when they urge us to move "beyond tweaking" and towards a new understanding of environmental law—a "new grand bargain focused on decarbonization."[164] The problem isn't that the existing governance structure is bad or even that it won't work—it's that it is not certain our governance structure will work when the stakes are at their very highest.

This uncertainty calls for deeper rethinking of our environmental governance structures, and because the public's role sits at the center of environmental law's governance model, rethinking the public's role is necessarily part of this debate. Part of what has made Ruhl and Salzman's work so compelling is that it resonates with this broader narrative that the rise of environmental law helped break our nation's ability to respond to major policy challenges by empowering the public to challenge development. Faced with this narrative, one vision—perhaps the most popular one—is to further marginalize the public's role. The challenge of environmental democracy then is to offer a different vision for the new grand bargain: one that extends the roots of the public's role to cultivate a new vision of environmental law that bridges the demands for democracy and decarbonization.

II. Rebuilding Environmental Democracy

The public's role in environmental law has failed to reach its democratic potential because of social and legal dynamics that emphasize environmental law's lack of attention to the material foundations of participation. Specifically, environmental law has neglected to address the resources and access needed to effectively engage policymaking and recognition of people's stake in the development of their communities. These dynamics have left communities on the outside of both the policy and development process, leading to conflict and opening the public's role to criticism in the face of the climate crisis. The climate crisis demands a new vision of the public's role in environmental law that better reaches its democratic potential while promoting action and the scale and speed necessary to meet the challenge.

163. *Id.* at 168.

164. Ruhl & Salzman, *The Greens' Dilemma*, *supra* note 6, at 68–69 (emphasis and capitalization removed).

To start building that normative vision, this part draws on two threads of scholarship in law and political economy. Part II.A outlines scholarship charting the scale and stakes of reform needed to achieve a democratic and sustainable political economy. This work emphasizes the transformative governance changes necessary to enable a transition to a democratic and sustainable society and emphasizes the importance of reforms that shift power to people and build durable political power. This work identifies two reforms in particular—collective ownership and multiscale democratic planning—as effective strategies for building power towards a democratic and sustainable future. Part II.B discusses scholarship that specifically targets the mechanisms of administrative procedure to shift power to people and build durable power—a scholarly thread I refer to as participatory administration. This work identifies how administrative processes can shift democratic power by rethinking participatory procedures into authoritative, contested, mobilizing, and decisive spaces of democratic decision-making. Part II.C then summarizes these ideas to offer a framework for rebuilding the public's role in environmental law to meet the challenge of decarbonization.

A. Democratic and Sustainable Political Economy

This part looks to two threads of scholarship that focus on how law structures the conditions of political and economic inequality. Scholars in this area recognize that spiraling inequality has led to a crisis with both material and political dimensions.[165] Materially, "people's basic needs are not being met" by either the state or market and, in the face of climate and ecological crisis, "conditions are increasingly unsurvivable."[166] Politically, "[o]rdinary people have no way to determine the conditions of their lives," and thus, are unable to exercise political agency.[167] For this reason, we need to critically assess the law's role in creating these crises and pursue reforms—both within law and beyond—that can enable a transition to a democratic and sustainable society.

Scholarship calling for a democratic political economy explores reforms that can build a more meaningful sense of democratic control and accountability under conditions of legally-structured inequality. It critiques existing political and economic structures for imposing limits on people's ability to have a "real say over all aspects of their lives."[168] The nation has a deeply flawed political

165. Jedediah S. Purdy, David S. Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1822 (2020).

166. Amna Akbar, *Demands for a Democratic Political Economy*, 134 Harv. L. Rev. F. 90, 92 (2020) [hereinafter Akbar, *Democratic Political Economy*].

167. *Id.*

168. *Id.* at 113 ("This is what is meant by a democratic political economy where people have a bigger choice than between two candidates for the highest office, where they have real say over all aspects of their lives, where they are not subject to unchecked private or state power."); *see also* Amna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*,

system unable to achieve its democratic aspirations because of how it separates and allocates political and economic power. Scholars writing on democratic political economy thus seek to achieve a society where people are "not subject to unchecked private or state power" by putting "power and resources in the hands of everyday people, through new forms of democratic public and community ownership at national, regional, and local levels."[169] While broad and dynamic, this growing literature has two conceptual emphases that are helpful for our purposes here.

First, this work emphasizes the need for *transformative change* to achieve meaningful democratic agency.[170] This commitment is rooted in the broader left-political tradition that focuses on the material foundations of political power. This tradition rejects any division between the economic and political and asserts that meaningful democracy requires democratic control over the systems of production that are necessary to sustain a dignified, politically-engaged life.[171] For example, a society where people cannot reliably count on access to safe water because they or their community lack money to pay for that necessity is not a democratic society in a meaningful sense because people do not exercise control over a basic foundation for life.[172] Imagining a United States where

132 Yale L.J. 2497, 2527–29 [hereinafter Akbar, *Non-Reformist Reforms*] ("Embedded in the concept is a theory of change: a criticism of the prevailing political, economic, and social system or set of relations, who benefits from it, and at whose expense, and how; a horizon for a radical new state, society, or world; and an evolving praxis of how to bridge the two.").

169. Akbar, *Democratic Political Economy*, *supra* note 166, at 113.

170. *Id.* at 100 (noting "a larger project of transformation"); *see also* Nicholas F. Stump, *Ecosocialism, Degrowth, and Global South Thought: Critical Legal Transformations*, 49 Wm. & Mary Env't L. & Pol'y Rev. 1, 20–23 (forthcoming 2025) [hereinafter Stump, *Ecosocialism, Degrowth, and Global South Thought*] (using the language "transformative change" and answering "why, specifically, is capitalism ecologically unsustainable, thus requiring complete system change?").

171. *See* Akbar, *Democratic Political Economy*, *supra* note 166, at 97 (stating the goal to "create the conditions where popular majorities can engage in self-rule requires a vision of democracy that does not separate politics from the economy and that is committed to grassroots power and a more ambitious program of reform"); Jedediah Britton-Purdy et al., *Building A Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1831 (2020) (defining a democratic political economy to include conditions where "the substance of economic life must support democratic self-rule by ensuring substantial equality, freedom from abjection and dependence, a workplace experience of dignity and self-assertion rather than vulnerability and humiliation, and the capacity to build power through institutions such as unions. A democratic political economy must be answerable to its citizens' rule, and it must produce citizens capable of ruling it.").

172. The Flint Water Crisis is a deeply tragic and ongoing example of this effect. *See, e.g.*, Carrie Cochran et al., *Michigan residents plagued by Flint water crisis face mounting bills for water they're afraid to use*, Scripps News: Scripps News Investigates (May 23, 2024), https://perma.cc/5KXZ-77NG ("Anita Johnson is one of at least 9,000 customers the city says are more than six months behind on their bills. She and others who live here still don't trust the water a decade after city and state officials made a drastic decision meant to save the Flint water system money. Instead, toxic water that flowed into people's homes left a wake

people's access to safe water is guaranteed, rather than a nation where you can lose access to safe water if you cannot pay, demonstrates the scale of change demanded to achieve a meaningful democracy. Achieving such an outcome would require transforming entire systems of how we produce, transport, and provide water—transformative and systemic changes that would shift control over the provision of a basic need from those who own infrastructure to those who rely on it.[173]

Second, this work emphasizes *social movements* as both the source and target of reforms that can achieve transformative change.[174] This is an insight about both the "substance and process" of reform projects, and specifically an insight that reflects skepticism about the role of elites in achieving transformative change.[175] People who directly experience disempowerment and precarity under existing systems are in the best position to both identify transformative reforms and to generate the political power needed to achieve those reforms.[176] By contrast, economic and political elites tend to lack the experience, vision, or political power to either identify or achieve transformative reforms. In this sense, social movements should serve as a central source of reform and campaign proposals, particularly for elites such as lawyers who hope to support transformative change.[177] And for this reason, social movements should be the target of effective reforms as well—reforms that empower social movement organizing in turn generate both the substance and power for transformative change.[178]

Consistent with these points, democratic political economy scholarship broadly resists claims that voting is the only or even the primary method of democratically legitimate reform.[179] Rather, scholarship on democratic political economy seeks to open the grounds for engagement in democratic reform to

---

of lawsuits, an exodus of its tax base, and cost the ultimate price — at least a dozen residents dead and countless others poisoned.").

173. The Flint Water Crisis remains unresolved more than a decade later and continues to limit people's access to safe water based on ability to pay. *See id.* ("For many in Flint, including Johnson, that's meant 10 years of buying bottled water. Ten years of living in fear when using tap water to shower, cook, and wash hands. And years of being charged for it.").

174. Akbar, *Democratic Political Economy*, *supra* note 166, at 97 ("Social movements are essential to contesting the strangled domain of democratic politics under neoliberal capitalism and its unrelenting expansion of the market economy"); *see also* Stump, *Ecosocialism, Degrowth, and Global South Thought*, *supra* note 170, at 57 (noting "social movements actually driving the radical social change process").

175. Akbar, *Democratic Political Economy*, *supra* note 166, at 105.

176. *Id.* at 105 ("People living under perilous conditions must generate analysis of those conditions, and advance solutions, in collective formations.").

177. *Id.* at 104–06.

178. *Id.* at 104–05 (describing reforms that "aim to shift power away from elites and toward the masses of people").

179. *Id.* at 113 ("This is a direct challenge to a view of politics that is constrained by the ballot box and does not touch 'an economy in which elites extract and monopolise wealth and power through their ownership of resources that should serve the common good, be they land, energy, or the money supply itself.'"). *See also* Akbar, *Non-reformist Reforms*, *supra* note 168,

social movements, including social movements that press transformative proposals such as prison abolition and the Green New Deal.[180] Work on democratic political economy thus brings in two ideas from left political theory that offer helpful frameworks for evaluating reforms based on their ability to support popular movements and foster policy responsiveness to those movements.

The first is the idea of *nonreformist reforms*. Drawn from the work of André Gorz, the idea grapples with the problem of how to engage in reform while recognizing that many reforms end up legitimating and perpetuating existing systems of exploitation and disempowerment—a problem labeled "reformism."[181] As recently summarized by Professor Amna Akbar, nonreformist reforms are not susceptible to legitimating the existing system because they seek transformative change driven by social movements.[182] They do not seek to achieve what is "possible within the framework of a given system" but instead seek to achieve "what should be made possible in terms of human needs and demands."[183] Any reform should not be assessed on whether it is "an answer to a policy problem," but instead on its ability "to shift power away from elites and toward the masses of people" and sustain "a long-term struggle of transformation" towards a system of democratic engagement.[184] The larger goal is to "create 'a vast extension of democratic participation in all areas of civic life'" by enabling "an exercise of power by people over the conditions of their own lives."[185]

These descriptions help emphasize why social movements are so central to transformative change.[186] As Akbar explains, transformative changes are often easily recognizable by how quickly they are rejected by established and even sympathetic interests.[187] For example, the Green New Deal was notoriously criticized by the Democratic establishment as overly idealistic only to become the core (without the name) of the Biden Administration's climate policy.[188] Incompatibility is the point of nonreformist reforms; they should be incapable of conforming to the status quo but demand that the status quo conform to them. They are not narrowly tailored; they are reforms with consequences, including

at 2528–29 (discussing "something broader and deeper than a version of democracy limited to the vote or electoral politics.").

180. Akbar, *Democratic Political Economy*, *supra* note 166, at 111–17.

181. *Id.* at 103; Akbar, *Non-Reformist Reforms*, *supra* note 168, at 2527–31. *See also* Stump, *supra* note 100, at 175 (discussing "systemic stepping stone measures").

182. Akbar, *Democratic Political Economy*, *supra* note 166, at 103.

183. *Id.*

184. *Id.* at 104–06.

185. *Id.* at 106.

186. *Id*. at 105.

187. *Id.* at 103–04 (discussing "quick rejections by so many of defund the police or the Green New Deal").

188. Chris Cillizza, *Nancy Pelosi just threw some serious shade at Alexandria Ocasio-Cortez's 'Green New Deal*,' CNN (Feb. 8, 2019), https://perma.cc/K7AF-45KD (quoting Pelosi dismissing the Green New Deal as "The green dream, or whatever they call it, nobody knows what it is, but they're for it, right?").

unforeseeable ones. For this reason, such reforms often must be demanded and won by outsiders with less commitment to the status quo and greater appetite for disruptive reform.[189]

The second idea is *countervailing power*.[190] Similar to the idea of nonreformist reforms, the concept of countervailing power grapples with how to engage in transformative change despite the system's constraints. Related to a wide range of left political ideas, the basic point is that one way to build towards transformative change is to create and secure spaces of democratic power and authority that can counter the existing power and authority of entrenched interests. These countervailing spaces can exist outside of state structures, such as people's assemblies.[191] Or they can be institutionalized, such as labor unions or citizen boards implementing legal mandates.[192] For purposes of evaluating reforms, the idea of countervailing power helps sharpen some of the ideas introduced through the idea of nonreformist reforms. When assessing a reform's ability to shift power away from entrenched interests to people, it is important to consider whether the reform shifts power in a way that is both stable and effectively counterbalances existing power. The purpose is not to, for example, always devolve power or diffuse power to individuals. Rather, the purpose is to shift power in a way that secures spaces for people to counterbalance entrenched interests.

The idea of securing countervailing power is immediately recognizable in the public's role in environmental law. As discussed above, public interest environmental advocates secured a stable, lasting place for the public to exert power in environmental policymaking and enforcement. Advocates have effectively used this space to counter industry influence over environmental policy. The problem, though, is that this space is not democratized. Through professionalization and other dynamics, the public's space in environmental policy has been

189. Akbar, *Democratic Political Economy*, *supra* note 166, at 105–06.

190. *See* Akbar, *Non-Reformist Reforms*, *supra* note 168, at 2557–58 ("These campaigns attempt to build pathways for a countervailing force against oligarchic power, and to shift power away from the concentrated top toward the many."). *See also* Akbar, *Democratic Political Economy*, *supra* note 166, at 104–05; Stump, *Ecosocialism, Degrowth, and Global South Thought*, *supra* note 170, at 50–52 (discussing related idea of "dual power"); Kate Andrias, Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 Yale L.J. 546, 625 (2021) (describing "a system designed to build countervailing political power among organizations of the poor and working class" as "creat[ing] structures that enable those groups to exercise effective economic and political power."). *See also* Britton-Purdy et al., *supra* note 171, at 1831 ("We might explore, for example, means to bring representatives of affected communities to participate in administrative decision-making, aiming at modalities of democratic voice that could meet our needs for both (a broadened conception) of expertise and for institutionalized forms of countervailing power.").

191. Stump, *Ecosocialism, Degrowth, and Global South Thought*, *supra* note 170, at 50–51 (noting examples of noninstitutional power).

192. *See, e.g.*, Andrias & Sachs, *Constructing Countervailing Power*, *supra* note 190 (focusing on labor organizing and institutional countervailing power).

occupied by elite advocates. The challenge then is to democratize this space through reforms that can enable people to effect meaningful systems change.

Within the broader literature on democratic political economy, scholars apply these ideas to the climate and ecological crises and chart a path towards a sustainable political economy.[193] These writers acknowledge that the climate and ecological crises are rooted in our broader commitment to capitalist production that links the provision of social goods with privatized systems that demand consistent profits, and thus, increasing levels of social and ecological exploitation to maintain those profits.[194] Because these privatized systems of production are state-sanctioned and insulated from democratic control, the cycle has pushed through the basic limits of ecological and climate capacity. In this way, the ecological and democratic crises are interlinked—both are concerned with the concentration of political and economic power and how to democratize it. For this reason, work on sustainable political economy acknowledges that transformative change is necessary to move away from the extractive and accumulative systems that are at the root of our climate and ecological crisis and that social movements must lead this transformation.[195]

For our purposes here, this work offers two related strategies for transitioning to a sustainable political economy that offer helpful frameworks for understanding the challenge facing environmental democracy.

The first strategy is *collective ownership* of the systems that provide the basic necessities of social life.[196] Collective ownership can take various forms depending on the context and scale of the need, from public ownership by the state to smaller-scale community ownership or even a shared commons.[197] Different models of collective ownership come with different policy design histories and challenges.[198] But in whatever form, the basic goal of this strategy is to break the link between the provision of social necessities such as food, water, or electricity and privatized production models that prioritize profit and insulate production from democratic control.[199] In doing so, collective ownership enables both production solely for the purpose of meeting people's needs as well as collective decision-making as to how to meet those needs.[200] This collective control over the basic necessities of social life thus enables a shift away from unsustainable

193. *See* Stump, *Ecosocialism, Degrowth, and Global South Thought*, *supra* note 170, at 20–21 (discussing how to "drive systemic transformations of our ecological political economy").
194. *Id.* at 20–25.
195. *Id.* at 19–20.
196. *See id.* at 26–28.
197. *Id.* at 27.
198. *See, e.g.*, Gabriel Pacyniak, *Greening the Old New Deal: Strengthening Rural Electric Cooperative Supports and Oversight to Combat Climate Change*, 85 Mo. L. Rev. 409, 412–419 (2020) (describing the history, incredible successes, and ongoing challenges of rural electric cooperatives).
199. Stump, *Ecosocialism, Degrowth, and Global South Thought, supra* note 170, at 23–24.
200. *Id.* at 24.

production modes, enables agency over meeting those needs, and lays the foundation for democratic participation by ensuring people's basic needs are met.[201]

The second strategy is *scaled democratic planning* to facilitate collective ownership.[202] Recognizing the risks of concentrated state power around planning, scholarship on sustainable political economy emphasizes that affected people must make decisions about what they need and how to provide for it.[203] Yet at the same time it will be necessary to plan the transition to democratic, sustainable political economy at different scales.[204] For example, solar panels on someone's home will need to be integrated into the local electricity distribution network, which in turn is connected to a regional transmission network, all of which implicate additional stakeholders and needs.[205] Facilitating collective ownership that effectively directs production towards meeting needs thus requires planning at several scales, and a commitment to democracy requires that this planning itself be democratic and resistant to concentrated state power.[206] Similarly, democratic planning can protect against the risk of concentrated economic power by prioritizing democratic and collective decision-making at different scales.

One important point to emphasize is that, from this perspective, the purpose is not to condition the transition away from fossil fuels on a particular political philosophy—to say, for example, that we should only transition if we do so democratically. Rather, these literatures emphasize the full stakes of what is necessary to accomplish the transition away from fossil fuels—that the only way to accomplish the transition is *through* democracy. Strategies that leave in

201. *See id.* at 24.

202. *Id.* at 24–25.

203. *See id.* at 29–30; Michael Lowy, Ecosocialism: A Radical Alternative to Capitalist Catastrophe (2015) 25–26 (contrasting centralized "bureaucratic" planning, which "is inevitably inefficient and arbitrary" from democratic planning, which is a "radical democratization of the economy"). *See also, e.g.*, Cecilia Martinez, *From Commodification to the Commons: Charting the Pathway for Energy Democracy, in* Energy Democracy: Advancing Equity in Clean Energy Solutions 33 (Denise Fairchild & Al Weinrub eds., 2017) (advocating for "community-based energy planning" where "community members themselves are active planning agents about the type of energy infrastructure they envision for themselves that can best meet community needs"); Hannah J. Wiseman, *Localizing the Green Energy Revolution*, 70 Emory L.J. Online 59, 89, 94, 95 (2021) (arguing for a "localized green revolution, in concert with numerous other pathways toward a lower carbon future" that, among other things, prioritizes "small-scale, low-carbon energy measures in low-income communities" that "carefully address the needs and desires of these communities before plowing forward" through "community-engaged" planning and policy implementation).

204. *See* Lowy, *supra* note 203, at 26–27 (discussing "democratic control of the plan at all levels: local, regional, national, continental, and, hopefully, international since ecological issues such as global warming are planetary and can be dealt with on a global scale").

205. *See id.* at 25.

206. *Id.* at 24–25. *See also* Lowy, *supra* note 203, at 27–28 (arguing that "planning must be grounded on a democratic and pluralist debate at all levels where decisions are to be made," and "representative democracy must be completed, and corrected, by direct democracy, where people directly choose" basic decisions about production and the economy).

place concentrated economic and political power will fail to challenge the core dynamics that are at the root of our linked democratic and ecological crises. These literatures thus engage with the pragmatic questions of how to transition, arguing that democratic, transformative changes are not simply a good idea but are necessary to break concentrations of economic and political power and create conditions for a democratic, sustainable economy. Decarbonization provides an opportunity to enact that necessary change by transforming a system that produces and provides a basic need: energy. If the challenge of environmental democracy is to offer a normative vision that bridges democracy and decarbonization, these threads of law and political economy scholarship offer a full picture of the transformative changes needed to meet that challenge.

B. Participatory Administration

Closely related to scholarship on law and political economy, several scholars have targeted administrative procedure as a central mechanism for addressing inequality.[207] I broadly label this scholarship, exemplified by Professor K. Sabeel Rahman's work, as participatory administration.[208] It offers specific insights on structuring the public's role in policymaking to empower democratic decision-making.

A central intervention of this work has been to recast the administrative agency as a catalyst for democratic decision-making rather than itself serving as an expert or impartial decision-maker. Starting from an understanding of democracy as "expanding agency" to "make possible collective political action," Rahman argues that a central barrier to this collective agency is the concentrated power that elites hold in the current political economic system.[209] Because agencies serve as policy makers and implementers in central aspects of American life, agencies can promote democracy by actively redistributing power in contexts of collective decision-making around discharging their duties. To summarize the basic ideas, Rahman uses the helpful phrase of "civic authorship" to capture the idea that administrative processes can give people a chance to chart their own lives through shared governance.[210]

This scholarship is strongly influenced by the experience of public utilities in both understanding the scope of what decisions should be made subject

207. *See generally, e.g.*, K. Sabeel Rahman, Democracy Against Domination (2017) [hereinafter, Rahman, Against Domination]; K. Sabeel Rahman, *Structural Change and Administrative Practice* (Jan. 29, 2024) (working draft) (on file with the Yale Institution for Social and Policy Studies) [hereinafter Rahman, *Structural Change*]; Daniel E. Walters, *The Administrative Agon: A Democratic Theory for A Conflictual Regulatory State*, 132 Yale L.J. 1 (2022).

208. *See* Rahman, *Structural Change*, *supra* note 207, at 8 (using the phrase "participatory administrative governance"). This phrase is helpful to distinguish this approach from other "classical theories of democratic administration." Walters, *supra* note 207, at 39.

209. Rahman, Against Domination, *supra* note 207, at 3.

210. *Id*. at 90 (civic authorship and replicating domination in method of participation).

to civic authorship and what the problems are with the existing structure.[211] It largely aligns with the core idea of public utilities regulation that businesses serving basic social needs, like providing electricity or transportation, must be subjected to public control. Where utilities law went wrong, these scholars argue, is relying on a kind of expert, insulated regulatory approach to protect the public interest.[212] This expertise-based approach was vulnerable to industry capture that, in turn, fueled movements that discredited administrative regulatory authority—including the public interest environmental law movement. The solution, to these scholars, is to leave behind the concept of agencies as expert regulators and instead reframe agencies as facilitators of meaningful democratic control over the provision of basic social needs.[213] Rather than expert decision-makers, agencies should leverage their authority to rebalance power in collective decision-making. Expertise should still play a role, but in advising collective decision-making rather than serving as the primary justification for agency action.[214] Thus, the basic mandate of public participation in agency decision-making is to facilitate civic authorship.

From a doctrinal perspective, this approach recognizes the limits of both existing participatory structures, such as notice-and-comment, and of consensus-based participatory structures.[215] The former is not rigorous enough, both because existing notice-and-comment approaches fail to rebalance power among participants and because they fail to give participants meaningful authority over the decision. Consensus-based approaches, however, are too demanding. Truly representative, democratic decision-making is necessarily full of conflict. As such, this conflict should be embraced as a method of increasing participation and representation in decision-making rather than seen as a flaw or failure. The agency's role should be to affirmatively build public power by creating a space for collective decision-making over policy and work to rebalance power within that space to ensure representative decision-making.[216]

With this in mind, scholarship on participatory administration offers four guiding principles for reforming public participation: participatory processes should be authoritative, contested, mobilizing, and decisive.

First, participatory processes should be *authoritative*; they should have authority as decision-making processes themselves.[217] Put differently, any process should ensure that the public exercises decision-making authority. Most public participation processes understand the public as informing an agency that holds decision-making authority. Enabling participatory administration requires

211. *See, e.g.*, *id.* at 72–75.
212. *Id.* at 75–77.
213. *See, e.g.*, *id.* at 98–102.
214. *Id.* at 111.
215. Rahman, Against Domination, *supra* note 207, at 113–15.
216. *See id.* at 114–15.
217. *Id*. at 113 (discussing "actual decisional power").

flipping this understanding of public participation—participatory procedures need to be designed so that the public can exercise collective decision-making authority rather than, for example, informing an agency decision-maker that can practically ignore them.

Second, participatory processes should be *contested;* they should be spaces that encourage and facilitate disagreement rather than, for example, avoid conflict or expect consensus.[218] Notice-and-comment processes, for example, largely avoid conflict by limiting the ability of parties to interact with each other. Approaches that focus on consensus or collaboration, on the other hand, can obscure productive disagreement and open processes to capture.[219] Rather, participatory processes should facilitate disagreement that challenges perspectives and diversifies the participants' experience. In this sense, contestation is central to the decision-making theory that underlies this broader approach; namely, that collective decision-making is best facilitated through contested spaces that, as discussed below, are broadly inclusive and designed to reach a final decision.[220]

Third, participatory processes should be *mobilizing*; they should bring in affected viewpoints as a means of mobilizing broader political engagement in policymaking.[221] Despite being a longstanding demand for reform, this goal is difficult to achieve without rethinking the agency's mandate to actively manage the participatory process for specific substantive goals. Namely, agencies should manage participation to both ensure the full range of affected views are heard and activate broader public engagement in the issue. For example, an agency may not only seek out an affected constituency to bring into the process, but may need to activate or support a constituency. In this way, the principle serves dual goals of facilitating contestation by ensuring the specific process represents a broad range of viewpoints while also leveraging the process to build countervailing power by actively bringing the public into the process.[222]

Important for our purposes here, part of the agency's obligation under this principle may be mitigating the influence of established interests—including public interest environmental groups. Theorists of participatory administration do recognize the important role that civic groups, such as environmental organizations, can play in organizing participation and facilitating public engagement in administrative decision-making. However, they are also clear that the central goal is for the public to participate, both to exercise civic authorship and build strong networks of democratic engagement. Advocacy from sophisticated groups, even public interest groups, can undermine those goals.[223] For this

218. *Id*. at 109–10.
219. *Id.* at 107.
220. *Id*. at 110 (on ensuring "that decisions promote the public good"); *id.* at 103–05 (on pragmatic decision-making and collective wisdom).
221. Rahman, Against Domination, *supra* note 207, at 110–11.
222. *Id*. at 105–08.
223. *See id.* at 98–99 (emphasizing the importance of rebalancing power in deliberative spaces).

reason, the agency's obligation to rebalance power in the administrative process may require mitigating the influence of public interest groups to facilitate democratic engagement.[224]

Finally, participatory processes should be *decisive*; they need to be designed to reach a decision under conditions of disagreement. Specifically, participatory processes should be designed with a kind of "final decision-rule" that ends the structured disagreement discussed above.[225] As suggested above, the goal of this rule should not be consensus but rather decision in light of disagreement. In addition to simply ending the process, setting a final-decision rule serves important goals of facilitating learning and deliberation among participants and setting up a process of iterative decision-making.[226] By embracing disagreement, participatory-administration theorists seek to capture the value of iterative learning to improve both substantive decisions and democratic capacity of participants over time.[227]

This approach to public participation fundamentally reframes both the agency and the public's role in the process. It reframes the agency from an expert or impartial decision-maker to a facilitator of contested spaces of democratic decision-making. It views the agency as a catalyst for democratic decision-making by using participatory procedures to actively bring the public into policymaking. And it reframes the public from regulatory inputs—a form of regulation themselves—into authors of their civic life. In this sense, participatory administration offers a roadmap for rebuilding the public's role in environmental policymaking to better achieve the goals of environmental democracy. And, as discussed in Part III, the regulatory and legal foundations for making these changes already exist in environmental law.

Before moving forward, it is helpful to address two potential concerns. The first concern is whether people can be trusted to make decisions around complex policy issues at all. Participatory administration approaches explicitly push back on what Rahman characterizes as "a subtle form or modern antidemocracy"—"declining faith in the viability of political engagement" and "anxiety about citizen biases and raw populism" that motivates policy "favoring competency and impartiality as a smokescreen for blunting the edge of a truly more inclusive and participatory collective action."[228] Participatory administration rejects these concerns as a "normative mistake" that overemphasizes concerns around individual decision-making capacity and overlooks both the nature and potential

224. *Id.* at 107.
225. *Id.* at 110.
226. *Id.* at 103–05.
227. Rahman, Against Domination, *supra* note 207, at 114–15. *See also* Walters, *supra* note 207, at 58–72.
228. Rahman, Against Domination, *supra* note 207, at 98, 112–13.

of collective democratic decision-making.[229] By carefully structuring decision-making spaces around principles of power-sharing and contestation, participatory administration approaches incorporate insights from political theory and institutional design to facilitate shared learning and open deliberation that can enable effective democratic decision-making on complex issues.[230]

The second potential concern is that participatory administrative approaches are susceptible to holdouts. At the root of this scholarship is a robust view of administrative power as a central tool to counterbalance concentrated economic power through decisive, democratic action. It is not about creating another veto point. It is about expressly grappling with disagreement and creating a contested space for democratic decision-making that can act authoritatively. It is about embracing conflict while admitting that this embrace requires additional considerations, such as recognizing decisions as contingent and provisional.[231] In this way, participatory administration seeks to create a vision for effective democratic decision-making that works at speed and scale—a vision that can help remake environmental law to work at speed and scale of the climate crisis.

C. An Environmentalism that Builds Power

In broader debates around permitting reform, one refrain is that we need a "liberalism that builds."[232] This refrain targets a vision of American liberal governance: "We need to build more homes, trains, clean energy, research centers, disease surveillance" and "we need to do it faster and cheaper."[233] Yet: "Do we have a government capable of building? The answer, too often, is no."[234] The problem, this argument asserts, "isn't government. It's our government"—and specifically, our government's focus on administrative procedure to bring democratic legitimacy to its actions when procedure doesn't bring legitimacy and instead "render[s] government ineffective."[235]

One response to this refrain has been that the problem isn't procedure; it's "money and power," and specifically concentrated money and power in specific interests.[236] What generally stops America from building is not regulation but a lack of political coalitions necessary to maintain the momentum through the

229. *Id.* at 112; *see also id.* at 98 ("we must understand that the capacity for and dynamics of democratic politics are not only a product of individual qualities but rather dynamically generated under particular social and institutional contexts.").

230. *See id.* at 109–115.

231. Walters, *supra* note 207, at 58–72 (on building "provisionality and contingency" into the administrative state through conflict).

232. Klein, *Liberalism that Builds*, *supra* note 6, at 3.

233. *Id.*

234. *Id.* at 6.

235. *Id.* at 8.

236. David Dayen, *A Liberalism That Builds Power*, Am. Prospect (May 25, 2023), https://perma.cc/398P-JDHG.

procedures and carry major projects to the end.[237] What builds these coalitions is directing power and money to those who have been excluded from the process.[238] What we need then is "a liberalism that builds power" by directing resources to build durable coalitions behind the social projects we need to accomplish.[239]

This idea is a helpful way of understanding the connection between the normative frameworks laid out above and the challenge of permitting reform. Calls for a democratic and sustainable political economy are fundamentally concerned with power. They seek reforms that will build power in social movements by democratizing control over the provision of basic needs through collective ownership and democratic planning, empowering people to exercise political agency and secure a sustainable, just society. Related work on participatory administration targets administrative procedure as a mechanism for building that power. Through participatory regulation, administrative agencies can serve as catalysts for organizing democratic power over the provision of basic needs and building durable coalitions necessary to govern. Importantly, these normative frameworks share an express commitment to governance that acts with speed and scale necessary to combat major policy problems.[240] They do so both by grappling with the transformative changes necessary to act with that speed and scale, and by explicitly grappling with how to incorporate contestation into democratic decision-making.

In this way, these normative frameworks can help build a vision of the public's role in environmental law that reaches its democratic potential while acting at the speed and scale necessary to meet the climate crisis. Environmental law secured an institutional role for the public in the administrative mechanisms of environmental governance. This role has failed to reach its democratic potential, and the climate crisis demands that we rethink the public's role. The frameworks of political economy and participatory administration chart a path for reforging the public's role in environmental law to leverage its position to build democratic power and act at the speed and scale necessary to combat climate change. As the next section explains, I argue that we can accomplish these goals by re-grounding the public's role in two new regulatory foundations: benefit-sharing requirements that grant the public a direct stake in the development necessary to achieve decarbonization, and an understanding of regulation as a form of scaled democratic planning. These new foundations would establish a material basis for the public's role that can help realize its democratic potential and lay the groundwork for a democratic and sustainable political economy.

But before moving there, it is worth noting the Biden Administration had made progress towards the goals of deeper public participation and distributing the material benefits of the transition through the Justice40 program.

237. *Id.*
238. *Id.*
239. *Id.*
240. *See* Rahman, Against Domination, *supra* note 207, at 116–17.

Recognizing the transformative potential of the transition away from fossil fuels, the Biden Administration committed to directing at least 40 percent of the benefits of the transition to overburdened communities of color and low income communities.[241] Motivated by similar concerns of equity, the Biden Administration had also worked to expand public participation in administrative procedures by expressly directing agencies to actively engage the public and mobilize underrepresented viewpoints in the administrative process.[242] It is important to recognize that these steps do make progress on some of the values identified above, including creating more inclusive administrative processes and recognizing how the legacy of environmental racism has eroded the material foundations of political power.

These steps were, however, "a far cry" from participatory democratic governance outlined above.[243] As with other tweaks, these steps maintain a vision of the public as an element of the regulatory process and outside the broader development process—even if a beneficiary of it. Without addressing that material barrier, steps to deepen public participation and distribution of benefits can only go so far—the public cannot exercise the control necessary to engage in meaningful civic authorship. The proposals below seek to overcome this barrier by bringing the public into development.

III. Building the Public's Power

How can the public's role in environmental law be refocused on building power? As the prior part discussed, scholarship on law and political economy and participatory administration offer relatively clear prescriptions. The basic idea is to build political and economic power in social movements that can push back against entrenched interests through reforms that, for example, promote collective control over the provision of basic necessities and rethink administrative procedures as spaces for democratic mobilization. This part offers proposals for accomplishing this through new regulatory foundations for the public's role in environmental law: benefit-sharing and regulation as democratic planning. Part III.A introduces these new regulatory foundations, arguing that they both take advantage of well-established regulatory models to accomplish the power-shifting goals of the normative frameworks laid out above. Re-grounding the public's role in these concepts helps build a vision for democratizing environmental regulation in a way that can act at the speed and scale necessary to

241. *Tackling the Climate Crisis at Home and Abroad*, Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7631 (Jan. 27, 2021) (detailing the Justice40 program). As noted, the Trump Administration has rescinded this executive order.

242. *See generally* Rahman, *Structural Change*, *supra* note 207 (discussing administrative policy changes in the Biden administration from a political economy perspective).

243. *Id.* at 51 ("This participatory vision of administration remains a far cry from the day-to-day of regulatory governance.").

combat climate change. Part III.B then makes several arguments in favor of this approach: that this approach is credible under legal and political constraints, that it is nonetheless transformative, and that it offers a model for democratizing other elements of civic life to advance the just transition.

A. New Regulatory Foundations

This part presents two alternative foundations for the public's role in environmental law.

1. Benefit-Sharing

The first foundation that should reground the public's role in environmental law is benefit-sharing. Benefit-sharing is the idea that communities impacted by development should share in the development's benefits.[244] Legal benefit-sharing requirements have a long-standing history and are common around the world, particularly in regulatory regimes around mining development.[245] Benefit-sharing requirements can vary widely, including sharing project revenue, promoting investment in the community, and requiring that communities hold an equity share in the development. Benefit-sharing provisions are often considered alongside the other access rights as a mechanism for giving communities a say about the design and operation of development that impacts their environment.[246]

Because benefit-sharing requirements can promote community ownership and control over privately funded development, they can serve as a well-established bridge to the normative goal of democratizing the process and outcomes of decarbonization through collective ownership of climate infrastructure. American climate policy's commitment to capitalist development creates a barrier to effective democratic participation in decarbonization by situating affected community members outside of the development process. Benefit-sharing requirements can intervene in this dynamic by bringing the public directly into the development process and building an energy system that structurally incorporates public control and purposes.

---

244. Tracy Stein et al., *Addressing the "Green Resource Curse" in Sub-Saharan Africa*, 53 Env't L. Rep. 10212, 10221 (noting that benefit-sharing provisions focus "on the equitable allocation of financial and other benefits" from a project).

245. *See, e.g.*, *id.* (noting that "the vast majority of Sub-Saharan African countries (34 of 48) have enacted legislation providing at least minimal benefit-sharing provisions in the context of mining."); *see also* Perrine Toledano et al., Colum. Ctr. on Sustainable Inv., Community Benefit Sharing and Renewable Energy and Green Hydrogen Projects: Policy Guidance for Governments 11 (2023), https://perma.cc/A3EV-RA7P [hereinafter CCSI, Benefit Sharing] (offering a wide range of examples from around the world of benefit-sharing arrangements).

246. Stein, *supra* note 244, at 10225–27 (discussing access to information and legal recourse).

There are several well-established regulatory approaches for accomplishing this, both domestically and internationally. One approach is to require that developers share ownership in the development with affected community members.[247] Under this approach, individuals or a group of affected community members would become partial owners of the development alongside the developers. This approach is intended, at least in theory, to ensure that community members share the financial benefits and control that developers do by directly incorporating community members into the organizational structure of the development. As one report from the Columbia Center for Sustainable Investment explained, this approach "can hold great promise" both as a "path to fair distribution" and as "a path to social acceptance because it gives communities a stake in the success and longevity of the project."[248] For this reason, several European nations—Denmark, Germany, Scotland, and the Netherlands—have adopted policies to support this approach.[249] Several states—California, Colorado, Minnesota—have limited policies intended to support shared renewable development, but the approach has not yet been widely adopted in the United States.[250]

Another approach is to require that developers enter into contractual agreements with affected communities to provide benefits and establish conditions on the development, often called community benefit agreements.[251] Rather than sharing benefits and control through ownership rights, this approach grants community members contract rights. This approach builds on a longer tradition, both good and bad, in the United States of using community benefit agreements to mitigate development impacts.[252] For this reason, the community benefit agreement approach has seen more broad support in the United States.

247. *See* Toledano et al., CCSI, Benefit Sharing, *supra* note 245, at 15–17 (describing "shared community ownership").

248. *Id.* at 15.

249. *Id.* at 17 (describing how, among other policies, these countries have implemented "revolving funds" as a "place to provide communities with access to finance for project development costs.").

250. *Id.* at 17. Colorado law, for example, incentivizes utilities to develop community-scale solar projects that promote participation by low-income community members in the project by reducing utility bills. *See* Lilli Ambert & Maria McCoy, *Colorado's Community Solar Program*, Inst. For Loc. Self-Reliance (June 27, 2024), https://perma.cc/2M6W-E8VM.

251. Toledano et al., CCSI, Benefit Sharing, *supra* note 245, at 14–15 (describing benefits delivered through a "community development agreement"). *See also* Matthew Eisenson & Romany M. Webb, Sabin Ctr. for Climate Change L., Expert Insights on Best Practices for Community Benefits Agreements 3 (2023), https://perma.cc/N86L-HZ7K (noting the frequent use of community benefits agreements in renewable energy development and describing these agreements as "highly customizable in form and content and can be tailored to meet the specific needs of the host community," often including "monetary benefits" and "non-monetary benefits"); Seema Kakade, *A Contractual Relationship to Environmental Justice*, 73. Am. U. L. Rev. 343, 371–79 (describing considerations around community benefit agreements).

252. *See* Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 Cardozo L. Rev. 1773 (2016).

The U.S. Department of Energy, for example, required certain projects that received funding under the Bipartisan Infrastructure Law and Inflation Reduction Act to develop a "community benefit plan," which may result in a community benefit agreement.[253] California and New York require that developers provide community benefits as part of developing renewable energy projects in those states, and these requirements expressly contemplate that developers may meet this requirement by entering into community benefit agreements.[254]

Benefit-sharing requirements around developing the infrastructure needed for decarbonization can be deliberately designed to shift power and promote environmental democracy in three senses.

First, benefit-sharing requirements can politically and economically empower communities by shifting control over the production of social necessities such as electricity to people.[255] As discussed above, political inequality and ecological unsustainability are rooted in centralized control over social necessities in a capitalist production model that prioritizes increasing levels of wealth and resource extraction to produce returns. These conditions politically and economically disempower communities and promote disinvestment. Through ownership or contract, benefit-sharing requirements offer a tool for community control over the methods, practices, and purposes of development. Through this control, benefit-sharing can offer communities an active role in shaping and leading a vision for development that environmental law has structurally lacked. In this way, benefit-sharing requirements can fill the missing structural piece of environmental law's democratic potential.

Second, benefit-sharing requirements can help build the material foundations of participatory governance. As noted above, the environmental justice movement's critiques highlight environmental law's insufficient focus on building the time, wealth, and capacity that communities need to meaningfully

253. Abraham Gomez et al., Clean Air Task Force, Understanding Community Benefits Plans at the Department of Energy and Their Potential for Impact 12 (2023), https://perma.cc/MX9M-L24G; *DOE Launches Map Highlighting Benefits to Communities Selected for Biden-Harris Clean Energy Projects*, Dep't of Energy (Aug. 15, 2024), https://perma.cc/R3XW-JADT.

254. *See, e.g.*, Cal. Pub. Res. Code §§ 25545.1, 25545.10(a) (2022) (offering a unified state permitting process for renewable energy projects that have entered into a community benefits agreement); 16 N.Y. Comp. Cods R. & Regs. tit. 16, §§ 1100-1.1, 1100-6.1(f) (2024) (creating an expedited permitting process for renewable energy facilities that requires any "permitting shall provide host community benefits, such as Payments in Lieu of taxes (PILOTs), other payments pursuant to a host community agreement or other project(s) agreed to by the host community.").

255. *See* Shalanda Baker, Revolutionary Power: An Activist's Guide to the Energy Transition 136 (2021) ("Actual participation requires the economic participation in projects in the form of co-ownership of projects. Incorporating co-ownership into the design of community solar policy will require that third-party developers partner with community organization and community members in the development of projects early in the development process.").

leverage their participatory tools in a narrow sense or build political power to meaningfully develop their communities in a broader sense. Benefit-sharing requirements are a straightforward and direct mechanism for addressing this failure. While limited in its scope, this idea has already motivated federal policy, as exemplified by the Department of Energy's implementation of the Justice40 program through its requirement for community benefit plans.[256]

Building community power through benefit-sharing requirements also helps insulate it from partisan pushback. As Blake Emerson has documented, one way to understand the Supreme Court's recent attacks on administrative power is through what Emerson calls the court's "private prerogative": an overarching commitment to protect private rights, such as property and contract rights, from administrative interference.[257] Because benefit-sharing requirements can empower communities through private rights—ownership and contract rights—they run counter to this broader anti-administrative strategy and may be better insulated from partisan attack once communities have secured them. In this sense, robust and effective benefit-sharing targeted at empowering communities can build durable countervailing power in the transition that fundamentally reorients the dynamics of capitalist development.

Third, benefit-sharing requirements reduce conflict and can promote community support for the transition.[258] Although frequently mischaracterized as NIMBYs in legal and policy commentary, the social science demonstrates that community opposition to renewable energy infrastructure is most often motivated by a sense that communities are bearing the burdens of an industrial project for little or no benefit.[259] For this reason, the literature has long emphasized the early and meaningful community engagement that collaboratively identifies and commits to clear community benefits as one of the most effective ways to reduce opposition to renewable energy projects.[260]

---

256. *See* Gomez et al., *supra* note 253, at 12.

257. Blake Emerson, *Vindicating Public Rights*, 26 Univ. Pa. J. Const. L. 1424, 1427 (2024).

258. *See, e.g.*, Stein et al., *supra* note 244, at 10221.

259. Sassman, *supra* note 24, 1528–30 (discussing how "the NIMBY narrative has been 'widely discredited' in social science literature 'as simplistic, pejorative, politically inappropriate, and unhelpful as a framework to explain public attitudes' towards renewable energy development.").

260. *See, e.g.*, Leah C. Stokes et al., *Prevalence and Predictors of Wind Energy Opposition in North America*, PNAS (Sept. 25, 2023), https://perma.cc/XH6R-LGXW (noting that previous research on community opposition to renewable energy development "has convincingly shown that the siting process is important to acceptance," and that "[t]he closest proxy that we have for process is a measure of community ownership for American wind projects. In line with previous research, we found that community ownership was associated with less opposition. This suggests that sharing profits from wind projects with the community will decrease opposition."). *See also* Toledano et al., CCSI Benefit Sharing, *supra* note 245, at 6–11 (noting the role of benefit sharing in reducing community opposition to projects and offering recommendations focused on meaningful community engagement in designing benefit sharing outcomes).

However, longstanding experience with benefit-sharing around the world also offers four important lessons.

The first and most basic lesson is that benefit-sharing requires that communities and developers engage with each other early in the project design process, in good faith, and with carefully-balanced negotiating power.[261] As I have argued elsewhere, regulation can play an important role both in timing engagement between communities and developers as well as setting boundaries and expectations around the benefit-sharing process.[262] A state or federal environmental impact assessment process, for example, can play a helpful role in prompting early engagement between developers and community members and contextualizing any benefit-sharing outcome. Governments, including local governments, can play an important role in balancing power dynamics that run both ways in benefit-sharing contexts—communities should not be able to "indefinitely hold up projects" yet developers cannot exercise so much power that benefit-sharing "risks being pro forma rather than meaningful."[263] The central insight is that regulation and government oversight must play an important role in structuring the context of benefit-sharing negotiations. Many of the lessons of participatory administration—such as structuring decision-making processes that are contested but decisive—are essential guides here.

Another lesson is that benefit-sharing requirements must offer communities sufficient control over a project to be effective. This requires flexibility and sensitivity to the details of the project, corporate structure, and community context. For example, a study of Indigenous co-ownership of mining projects around the world found that Indigenous communities often were only able to secure minority ownership that did not enable meaningful influence or control over the project.[264] The study found that, in addition to failing to directly empower communities, participation without control led to negative consequences for communities. For example, participation without control could lead to internal community conflict where participating community members are seen as "ineffective" or "having sold out," or capture where participating community members did not act with the broader community's consent or interest.[265] The study concluded that "[c]ontrol and influence are not automatic and unproblematic outcomes" of a community ownership stake, and benefit-sharing structures need to be sensitive to corporate structure and community dynamics to ensure

261. *See* Toledano et al., CCSI, Benefit Sharing, *supra* note 245, at 7, 9–10.

262. *See generally,* Sassman, *supra* note 24.

263. Toledano et al., CCSI, Benefit Sharing, *supra* note 245, at 9.

264. Anthony Kung, Sarah Holcombe, Joel Hamago & Deanna Kemp, *Indigenous co-ownership of mining projects: a preliminary framework for the critical examination of equity participation*, 40 J. Energy & Nat. Res. L. 413, 419–26 (2022).

265. *Id.* at 431.

meaningful control.[266] Promoting a large enough community ownership share may therefore require substantial government support.

A third lesson is that benefit-sharing can expose communities to financial and other risks that should be mitigated through government support. Co-ownership can, for example, expose communities to responsibility for escalating costs, unanticipated project delays, and delayed benefits to communities.[267] Likewise, communities with benefit-sharing agreements can face uncertainties related to contract ambiguity that expose communities to possible risks.[268] Project failures can impact communities, creating a new avenue for disinvestment and community harm. Low-income communities face greater risk from these issues.[269] Similar to above, government support will need to be directed at mitigating this risk, particularly to communities of color and low-income communities.[270]

The final lesson is that benefit-sharing around climate infrastructure needs to be matched with effective planning at multiple scales.[271] Integrating community-scale climate infrastructure into, for example, the regional electrical grid requires both technical coordination and regulatory coordination to overcome structural barriers to distributed infrastructure. Moreover, decarbonizing communities in a lasting and equitable way requires planning beyond the specific infrastructure project itself. A community-owned solar project is more likely to succeed if, for example, a new manufacturing facility is also sited nearby to guarantee consistent demand for the solar project's energy while further supporting the community's economic development.[272] In this sense, planning and coordination across scales can be important to achieving the durable and power-sharing of benefit-sharing.

2. Regulation as Democratic Planning

The second principle that should reground the public's role in environmental law is that regulation should be reconceived as a tool for scaled democratic planning. As discussed earlier, work on participatory administration provides a roadmap for restructuring administrative processes such as rulemaking and

266. *Id.*

267. Toledano et al., CCSI, Benefit Sharing, *supra* note 245, at 16.

268. *Id.* at 16.

269. *Id.* at 17.

270. As Shalanda Baker has argued, policy could condition tax incentives on community equity participation. Baker, *supra* note 255, at 159.

271. *See* Stump, *Ecosocialism, Degrowth, and Global South Thought*, *supra* note 170, at 24–25.

272. *Cf.* David Roberts & Tombo Banda, *Making mini-grids work in sub-Saharan Africa*, Volts at 21:56 (June 5, 2024), https://perma.cc/KU25-3VXJ (discussing "electrification and energy access . . . more holistically in the context of economic development," and giving the example of matching distributed electrification projects with development projects such as agricultural processing facilities that would provide demand for that electrification).

permitting decisions to facilitate democratic decision-making and power building. Specifically, this work focuses on reforming participatory procedures to ensure that they are authoritative, contested, mobilizing, and decisive. This perspective reframes the role of agencies in an administrative process directed toward democratic empowerment: agencies shift from expert decisionmakers to catalysts and facilitators of democratic decision-making.

As with benefit-sharing requirements, there are well-established regulatory frameworks for implementing these principles of participatory administration. These frameworks provide a scaffold around which the normative principles of participatory administration can be incorporated into administrative and environmental law to democratize decision-making and facilitate collectively planning the transition away from fossil fuels.

One such framework is negotiated rulemaking. Negotiated rulemaking is an alternative procedure for agency rulemaking where the agency brings together stakeholders to draft a rule before it goes through traditional rulemaking procedures of the Administrative Procedure Act.[273] Authorized by the Negotiated Rulemaking Act, the process is intended to be "a realistic alternative" to "adversarial rulemaking" that enables "face-to-face negotiations and cooperation" as well as sharing "information, knowledge, expertise, and technical abilities possessed by the affected parties."[274] In this way, negotiated rulemaking is intended to promote "a process resembling deliberative democratic policymaking" where stakeholder "debates over policy content occur in public view," stakeholders benefit from each others' perspectives, and their shared experience has "the power to influence the substance of regulations."[275] Negotiated rulemaking is an option available to all federal agencies, and is sometimes statutorily required.[276]

Another framework is programmatic environmental reviews under NEPA. NEPA generally requires agencies to study the environmental impacts of major federal actions through a public process.[277] Because this process can have important impacts on project design and permitting outcomes, agencies have tended to engage the public earlier in the process, such as through "scoping" meetings where the public helps develop the scope of the study.[278] While this assessment process is most often linked to a specific project or permit, agencies can engage in a "programmatic" assessment the covers multiple projects across a region.[279]

273. Rebecca S. Natow, *Negotiated Rulemaking in the U.S. Department of Education: Where Administrative Law Meets Higher Education Policymaking*, 1 (Ctr. for the Study of the Admin. State, Working Paper 23-02, 2023), https://perma.cc/KC6Y-VSW8.

274. *Id.* at 1; Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, § 2(3), 104 Stat. 4969, 4970 (1990) (listing the congressional findings supporting the Negotiated Rulemaking Act).

275. Natow, *supra* note 273, at 1.

276. *Id*. at 1 (noting the Department of Education).

277. *See* 42 U.S.C § 4332(C).

278. *See* 40 C.F.R §§ 1501.2 (urging agencies to apply NEPA "early in the process"), 1502.4 (discussing scoping).

279. *See* 40 C.F.R. § 1501.11.

Programmatic assessments can be particularly helpful for facilitating multiple development projects across a region by simplifying the environmental review process for each project within the programmatic study. Programmatic assessments can also be effective tools for incorporating the public into planning large-scale development. An example of these benefits is the Western Solar Plan, where the federal government has used a single programmatic NEPA process to comprehensively plan and facilitate solar developments on public lands across eleven western states to meet the goal of decarbonizing the electricity grid by 2035.[280]

Climate law experts such as Michael Gerrard have long advocated for using more programmatic environmental reviews to speed the environmental review and permitting process for climate infrastructure projects.[281] And recent changes to NEPA regulations are intended to facilitate greater use of programmatic assessments to speed project development.[282]

These frameworks offer a meaningful vehicle for incorporating democratic decision-making into the administrative process for planning the transition. Both offer opportunities for agencies to engage in high-level planning around the transition, whether through making the rules that will govern the transition or planning climate infrastructure projects at scale. Both also offer structured opportunities for agencies to affirmatively bring the public into that high-level planning process. In this way, these frameworks often preexisting models for shifting the character of regulatory planning around the transition from expert, technical process to a catalyst for participatory governance.

Both frameworks would nevertheless need reform to meet the aspirations of participatory administration. Both negotiated rulemaking and programmatic assessments have, for example, faced criticism for failing to be sufficiently inclusive.[283] Both frameworks are also criticized for being open to agency manipulation.[284] Negotiated rulemaking in particular has been criticized for its expectation that stakeholders reach consensus for the process to meaningfully influence agency action.[285] Each process would need important shifts in how

280. *See* Press Release, Bureau of Land Management, BLM Analysis Aims to Optimize Solar Energy Development Throughout the West (Jan. 17, 2024), https://perma.cc/8SDU-GUNP.

281. *See, e.g.*, Tiffany Challe, *Testimony of Michael Gerrard to Congress About Siting Renewable Energy on Public Lands*, Sabin Ctr. for Climate Change L. (May 6, 2019), https://perma.cc/NS2K-YCFP ("The Western Solar Plan is a good example of what can be done without new legislation.").

282. *See*, *e.g.,* 89 Fed. Reg. 35442, 35472, 35489–92 (May 1, 2024).

283. *See, e.g.*, Natow, *supra* note 273, at 21–22 (discussing criticism that "there is insufficient representation of all interested parties on negotiated rulemaking committees.").

284. *See, e.g.*, NEPA Task Force, Report to the Council on Environmental Quality: Modernizing NEPA Implementation 39 (2003), https://perma.cc/8ZWSLVE5 (describing concerns that agencies manipulate programmatic assessments to create a "shell game" and avoid problems).

285. *See* Walters, *supra* note 207, at 40.

they are implemented to meet the demands that they promote contested processes of democratic decision-making.

But the point here is not that negotiated rulemaking and programmatic environmental review are perfect—rather, the point is that the distance between the administrative processes we have now and the processes that would enable democratic planning of the transition at speed and scale is not that far. The central insight of the scholarship on participatory administration is that, when carefully structured, participatory administrative processes are not only empowering but effective—that, when authorized to do so, contested spaces can make difficult governance decisions at the necessary speed and scale through shared learning and collective wisdom.[286]

That such an outcome is possible is one of the primary lessons of the SunZia Wind and Transmission project, the largest renewable energy development in the western hemisphere that broke ground in June 2024.[287] Named after the rising sun on Arizona's flag and the red-sun symbol of the Zia people on New Mexico's, the SunZia project will build 900 wind turbines in New Mexico and a 550-mile transmission line across New Mexico and into Arizona to power the cities of Arizona and California.[288] An investigation of SunZia's nearly eighteen-year planning and permitting process revealed one of the central lessons of the project is that it is possible to build effective coalitions around large-scale renewable projects through good-faith, structured collaboration.[289] SunZia's incredible scale had mired the project for years, pitting developers against environmental groups and Native American communities in the familiar dynamic.[290] That process was reset when a new developer took over the project and took a collaborative approach to "learn how it could build the power line in the least intrusive way" through "original research" and partnerships with environmental groups.[291]

Within five years of the new developer taking over with this new approach, the project had been redesigned, received all necessary permits and approvals, and had broken ground.[292] Environmental groups that once opposed the project now "praise" it, highlighting that the developer's "good faith" approach was central to finding compromise.[293] But, the investigation cautioned, this "collaborative relationship was possible in part because it was facilitated" by

286. *See generally* Rahman, Against Domination, *supra* note 207.

287. Robinson Meyer, *The Long, Strange Success Story of America's Biggest Clean Energy Project*, Heatmap (June 18, 2024), https://perma.cc/PL3T-H286 [hereinafter Meyer, *Success Story*].

288. *Id.*

289. Robinson Meyer, *3 Takeaways From Our SunZia Investigation*, Heatmap (July 8, 2024), https://perma.cc/8SE7-GFME [hereinafter Meyer, *3 Takeaways*].

290. *Id.*

291. *Id.*

292. Meyer, *Success Story*, *supra* note 287.

293. Meyer, *3 Takeaways*, *supra* note 289.

a federal champion—a senator from New Mexico.[294] The senator helped the parties manage disagreements to reach a decisive conclusion. That facilitated, good-faith collaboration is "why" the project "was a success."[295]

Importantly, SunZia is a complicated story about shared learning and compromise, not a story of deliberative consensus. Native American communities still challenge the project.[296] And, SunZia is "praised in New Mexico but criticized in Arizona," where there was no such champion to facilitate compromise.[297] Rather, SunZia gives us an example of how creating facilitated spaces of good-faith, collective decision-making makes it possible to build coalitions that act at the speed and scale necessary for decarbonization. Incorporating these lessons into a regulatory framework committed to democratic decision-making—a framework that, for example, focused on inclusive political mobilization and contestation—helps resolve tensions around the democratic legitimacy of acting with speed and scale in the era of climate crisis.

B. Environmental Democracy and the Just Transition

Regrounding the public's role in environmental law in the regulatory frameworks of benefit sharing and democratic planning offers a pathway towards reviving its democratic potential by giving people a direct and material stake in the process of decarbonization. This material stake in the successful planning and implementation of decarbonization helps cut through conceptual limitations of the public's role, bringing the public inside the development process. This move both shifts power to people while building the foundations for durable coalitions behind decarbonization. This part offers three additional points in favor of this approach.

First, this approach is credible under political and legal constraints. As Professor Rahman has noted, regulatory reforms intended "to tackle structural inequities and build a new more inclusive political economy" face external constraints from, for example, the Supreme Court's broader attack on the administrative state, congressional gridlock, and shifting executive priorities.[298] "Given these pressures, administrative reformers necessarily have to think about creative and adaptive approaches to building new forms of governance in ways that are likely to survive and be effective."[299] This Article's approach follows credible reforms within these constraints in two senses. It seeks to leverage well-established regulatory concepts, even if underutilized ones, to create the

294. Meyer, *3 Takeaways*, *supra* note 289 ("Why it was a success is that Pattern acted and negotiated it in good faith with us," Hayes said.).

295. Meyer, *Success Story*, *supra* note 287.

296. Wyatt Myskow, *Legal Challenges Continue for SunZia Transmission Line*, Inside Climate News (May 8, 2024), https://perma.cc/Y444-9QSW.

297. Meyer, *3 Takeaways*, *supra* note 289.

298. Rahman, *Structural Change*, *supra* note 207, at 57–59.

299. *Id*. at 58.

conditions for transformative reform. Both concepts have tools that are already available to federal agencies and already in use in state agencies in ways that can help promote rapid adoption at the federal level. In addition, giving people a direct stake in decarbonization through private rights such as co-ownership in projects or contract rights through community benefit agreements can help insulate these reforms from the Supreme Court's broader attack on regulatory power and capricious executive priorities. Both features serve to make this approach credible under political and legal constraints facing administrative reform.

Second, this approach is nevertheless designed to foster transformative change. As discussed earlier, scholarship in law and political economy offers the concepts of nonreformist reforms and countervailing power as frameworks for evaluating incremental reforms intended to promote transformative change. Nonreformist reforms promote change by shifting power to people to sustain "a long-term struggle of transformation" and enable the "exercise of power by people over the conditions of their own lives."[300] Similarly, reforms that generate countervailing power build durable spaces of democratic control that can counter entrenched interests. The approach articulated in this Article meets both tests. By granting the public a stake in decarbonization, this approach shifts power away from entrenched interests such as energy developers and utilities towards people and enables people to exercise power over both the production of a foundational social need – electricity – and their role in decarbonization. Moreover, by seeking to reground the public's role in environmental law around these principles, this approach institutionalizes this power shift to create durable, countervailing power over the transition away from fossil fuels.

Finally, this approach can offer a framework for reforms that promote a just transition beyond decarbonizing electricity generation. While transitioning away from fossil fuels is an immediate and urgent step to mitigate climate change, transition to a more just, sustainable society will require transitioning many systems for providing basic social needs away from similarly exploitative practice and entrenched interests, such as the food production system. These transformations will require confronting similar challenges associated with remaking complex systems of production and logistics. This Article's approach offers a regulatory framework for bringing the public into large-scale development that can lay the groundwork for similar transitions in these other areas. In this way, the vision of environmental democracy laid out in this Article is intended to meet the primary challenge of remaking environmental law to meet the challenge of climate change, but it offers a broader vision for transitioning systems of production towards democratic control that can help advance a broader just transition.

300. Akbar, *Democratic Political Economy*, *supra* note 166, at 104–06.

Conclusion

In the summer of 2024, the Supreme Court issued a series of decisions designed to "destabilize administrative law."[301] These cases—*Loper Bright*, *Ohio v. EPA*, *Corner Post*, and *Jarkesy*—had marginal, albeit important, effects on their own. But, collectively, they "create a variegated and powerful toolkit" for "judges to throw out regulatory actions with which they disagree."[302] As Rahman explains, this toolkit destabilizes the administrative state's ability to accomplish anything by increasing the likelihood that an "opportunistic judge" will stall or throw out the agency's work.[303] "This instability is precisely the point," as it "shifts power" away from institutions more open to social movements and democratic reforms towards insulated courts and the "well-resourced repeat players" adept at manipulating the legal process: "interest groups" as well as "corporations, monopolists, and the wealthy."[304] All this means "ordinary citizens are likely to lose out."[305]

In the face of such ongoing retrenchment, it is tempting to return to the "defensive-crouch"—to defend the status quo and try to avoid further destabilization until political conditions change.[306] But as Rahman explains, it is "critical" that we not make this mistake around administrative law for two reasons.[307] First, "our existing administrative apparatus" is not all that defensible.[308] It "not particularly well-suited to advance equity or inclusion" or "tackle deeper structural inequities and challenges with speed and scale."[309] Defending the status quo risks further entrenching inequality and failing to meet defining challenges of our time, such as climate change. Second, combating destabilization requires an alternative vision. Political conditions will not change on their own but in response to a positive vision of "effective, equitable, and democratic governance."[310] We must not "limit our ambition to playing defense" in the face of retrenchment: "Rather, now is precisely the time to deepen and sharpen our vision for what kind administrative state we need to make our aspirations for a more equitable, inclusive, and sustainable economy and society real."[311]

---

301. K. Sabeel Rahman, *After Chevon: Political Economy and the Future of the Administrative State*, L. and Pol. Econ. Project: Blog (July 23, 2024), https://perma.cc/63AW-DEQA [hereinafter Rahman, *After Chevron*] (citing Steve Vladeck, *Destabilizing the Administrative State*, One First (July 8, 2023), https://perma.cc/8E98-5TLU).
302. Rahman, *After Chevron*, *supra* note 301.
303. *Id.*
304. *Id.*
305. *Id.*
306. *See* Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, Balkinization (May 16, 2016), https://perma.cc/28HT-LJTB.
307. Rahman, *After Chevron*, *supra* note 301.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*

Environmental law, and the public's role in it, is facing a similar moment of destabilization. The turn against the public to facilitate decarbonization risks undermining the foundations of the public's role in environmental policy. In response, many advocates have sought to defend the status quo—seeking to, for example, oppose proposals for reforming NEPA's process in an effort to protect communities. But, as many of those same advocates recognize, the status quo is not all that defensible. Environmental law's participatory tools have generally failed to reach their democratic potential. They have instead tended to exclude communities, entrench environmental racism, and limit a democratic vision for the public's role. Much like the rest of our administrative structure, environmental law's participatory tools are "not particularly well-suited to advance equity or inclusion" or "tackle deeper structural inequities and challenges with speed and scale."[312]

In response, we need to articulate a vision of "effective, equitable, and democratic" environmental governance.[313] This Article has sought to do so by seeking to revive a democratic vision for the public's institutionalized role in environmental law, identify the limits and failures of that vision, and chart a path forward in the era of climate crisis. Calls to achieve a democratic and sustainable political economy offer a normative vision for the public's role in environmental law centered on achieving transformative change through reforms that break existing power structures and shift durable power to communities. Two broader strategies for achieving democratic power while promoting ecological sustainability are promoting collective ownership of systems that produce basic social needs through multi-scaled, democratic planning. Work on participatory administration, in turn, offers a roadmap for democratizing our existing mechanisms of administrative governance. By reforming administrative law's participatory tools to be authoritative, contested, mobilizing, and decisive, administrative governance can help square the goals of empowering people to make decisions about policies that affect them, combatting inequality by durably shifting power to people, all while enabling government to act at the speed and scale needed to combat the major challenges of our time.

The challenge of decarbonization in our polarized era offers an opportunity to implement these ideas and reassert the democratic potential of the public's role in environmental law. The public's institutionalized role offers an administrative framework around which we can build a positive vision of environmental democracy that meets the challenge of decarbonization in our polarized era by building decisive democratic power. We can accomplish this by rebuilding the public's role on the new foundations of benefit-sharing requirements that facilitate meaningful community ownership over climate infrastructure and regulatory reforms that reframe administrative processes as authoritative, contested, mobilizing, and decisive spaces for democratic planning for the transition.

312. *Id.*

313. Rahman, *After Chevron*, *supra* note 301.

With these tools, we can offer a vision of environmental democracy that can meet the scale and speed of decarbonization in our polarized era.