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Policymaking as Power-Building

K. Sabeel Rahman
Brooklyn Law School, sabeel.rahman@brooklaw.edu

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K. SABEEL RAHMAN *

The problem of balancing power through institutional design—always a central concern of constitutional theory—has taken on even greater salience in current scholarship in light of contemporary concerns over economic inequality and failures of American democracy today. This paper extends these concerns into the realm of administrative law and the design of regulatory policy. I argue that in an era of increasing (and increasingly interrelated) economic and political inequality, we must design public policies not only with an eye towards their substantive merits, but also in ways that redress disparities of power. In particular, we can design policies to institutionalize the countervailing power of constituencies that are often the beneficiaries of egalitarian economic policies, yet lack the durable, long-term political influence to sustain and help implement these policies over time.

This concept of "policymaking as power-building" rests on a descriptive and normative claim. Descriptively, the paper shows how historical and contemporary analyses of administrative governance indicates that regulatory institutions and policies are already involved in shaping and responding to the balance of power among civil society groups. Normatively, the paper argues that this reality should be harnessed to pro-actively design policies that mitigate power disparities, and in so doing promote greater democratic responsiveness through regulatory policy design. The paper develops this argument through case studies of power-balancing policy design in local regulatory bodies around economic development initiatives, and in federal regulation around the case of financial reform. The paper then theorizes a more general framework for designing similar power-shifting policies that are portable across substantive areas of law and policy and across federal, state, or local level administration. This framework should be of interest to policymakers, advocacy groups, and other practitioners

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designing regulatory policies and concerned about dangers of capture and disparate influence.

This account of policymaking as power-building synthesizes literatures in law, social science, and political theory to offer a more institutionally-rich account of power and the interactions between constituencies on the one hand and policymaking institutions on the other. It also extends the current debates on power and public law, law and inequality, and administrative and local government law.

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I. INTRODUCTION

The problem of power—and in particular, balancing the differential power of different factions to preserve effective, accountable, and responsive republican government—has always been a central concern of constitutional and public law. In today's era of growing economic inequality, these age-old concerns about how institutional structures allocate power and protect against potentially excess influence of any one faction have become a renewed area of concern for scholars of constitutional law, public law, and law and inequality.[1] Indeed, a wide body of social science research has documented that economic wealth in particular generates troubling disparities in political power and influence, thereby skewing our ordinary processes of democratic governance: legislation is empirically more

1. *See e.g.*, Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014); Joseph Fishkin & William Forbath, *Wealth, Commonwealth, & the Constitution of Opportunity*, (Univ. of Texas Law, Public Law Research No. UTPUB632) (Forthcoming, 2018) https://ssrn.com/abstract=2620920; GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 J. CONST. L. 419 (2016); Daryl Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 33 (2015); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016).

responsive to the preferences of wealthier citizens;[2] legislators themselves are dependent on campaign funders and donors rather than constituents for winning office;[3] organized business interests have proven more resourced and sophisticated in building an influence ecosystem of lobbying, advocacy, and model legislation bodies that have major impact on state, local and federal legislatures, as well as regulatory bodies;[4] the shared social and cultural background among legislators, regulators, and economic elites induces more elite-friendly policies.[5]

But the challenge of mitigating these disparities of political power is not just a question of macro-level constitutional or structural institutional design. Rather, public policy itself plays a role in shaping the balance of power between different constituencies in civil society—and their relative ability to exercise power and influence on public policy in the future. This power-shifting dimension of policy design is often overlooked in more substantively-oriented policy discussions. But a self-conscious use of policy design to balance disparities of political power can play an important role in these larger conversations about power, public law, and inequality today. This is what I call in this paper *policymaking as power-building*. I argue below that in an era of increasing (and increasingly interrelated) economic and political inequality, we must design public policies not only with an eye toward their substantive merits, but also in ways that rebalance disparities of power. In particular, public policy should be aimed at institutionalizing the countervailing power of constituencies that are often the beneficiaries of egalitarian economic policies, yet lack the durable, long-term political influence.

Specifically, this paper makes three main arguments and contributions. First, the paper develops a theoretical framework for understanding power and power-building, drawing on and contributing to an overlapping set of literatures in public law, administrative law, social movements, and social science. In so doing, the paper develops implications for public law debates, policymakers, and social movement actors alike. Specifically, I suggest that

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2. *See generally* LARRY BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2010); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012). Martin Gilens & Benjamin Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014); Benjamin Page, et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013).

3. *See generally*, LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (Harv. U. Press Eds., 2014).

4. *See generally*, Alex Hertel-Fernandez, *How the Right Trounced Liberals in the States*, 39 DEMOCRACY J. (Winter 2016), http://democracyjournal.org/magazine/39/how-the-right-trounced-liberals-in-the-states/; JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

5. *See generally*, Nicholas Carnes, WHITE COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING (2014).

power distributions are not an intrinsic property of pure institutional design or of raw interest group resources. Rather, power is *relational*, emerging out from the dynamics of how civil society groups *interface* or interact with policymaking institutions. It is by altering and reshaping this state-society linkage that institutions create new forms and distributions of power.

Second, I argue that this power-building orientation to policy and institutional design is of particular relevance in context of regulatory institutions and the administrative process. While we are accustomed to a long-standing debate about regulatory constraint and discretion, the relationship of administrative agencies to the separation of powers, and the balance between expertise and public input in regulatory policymaking, viewing the administrative process as a mode of constructing—and potentially remedying—power disparities suggests some valuable new approaches to policy and regulatory design. The administrative process is already one of more flexible and fluid public law arenas in which to experiment with approaches to balancing political power.[6] Nor is this administrative focus limited to the federal arena; arguably some of the most compelling experiments in administrative power-balancing has been taking place at the state and local level.[7] This orientation towards power provides a distinct lens that recasts and repurposes existing literatures in administrative law, to better address problems of inclusion, accountability, responsiveness, and above all, political power.

Third, the paper outlines a more generalizable toolkit through which policies can be designed to empower key constituencies, and to mitigate disparities of political power. This toolkit is also portable—easily applied to policy contexts from federal, state, or local arenas—and trans-substantive—adaptable in different policy areas.

Highlighting and developing this strategy of power-building through policy design offers several valuable implications. For policymakers, these ideas could inform regulatory policies and designs that help mitigate disparities of influence, particularly between more well-connected and resourced interest groups and more diffuse or disempowered constituencies. For advocacy groups, these ideas suggest a way to strategically design public policy and regulatory initiatives in ways that forge tighter links to constituencies that may benefit from key policies, but might otherwise be

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6. *See, e.g.*, Levinson, *supra* note 1, at 142. Levinson suggests this in his piece, but does not fully explore the larger implications of what power-balancing might mean as a serious guiding principle in administrative policy and institutional design.

7. Administrative law scholars are only just beginning to mine the diverse experiences of state and local administrative processes for larger implications for public law concerns. *See generally*, Nestor Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017); Miriam Siefter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017).

politically ill-equipped to defend them from rollback. If legal and social science scholarship have documented how economic inequality and political inequality reinforce one another as politically-powerful actors push for policies that exacerbate inequality, this paper suggests a way towards the inverse dynamic: in which policies aimed at promoting *economic equality* are made more durable and effective through policy designs that help create more *political equality*.

These arguments are of particular concern in light of both the growing importance of regulatory agencies in driving the larger policy debates, and how this increased centrality of regulation places previous waves of regulatory process reform under strain. As this paper will suggest, as an empirical matter, federal regulatory agencies are already central to major policy initiatives, even above and beyond formal actions of Congress. This is in part because of the accumulation of delegations of agency authority, and in part because of the political incentives to make policy through the Executive Branch in the face of either divided government where different parties control the White House and the Congress, or sclerosis and gridlock within Congress itself—or both. The administrative state has long been subject to waves of institutional process reform from the passage of the Administrative Procedure Act to more recent attempts at leveraging new technological and online tools to improve agency processes. But the practical and political stakes of regulatory judgment today suggests the need for more far-reaching institutional design approaches.

The paper develops this argument in part through two empirical case studies. First, the paper looks at power-building policy designs that have been innovated in context of local-level battles between politically-powerful developers on the one hand, and less-influential community organizations representing residents and workers on the other. These community groups are often on the losing side of policy fights in the city—particularly in high-growth, gentrifying areas. Yet, as documented below, policymakers and advocacy groups in some places like Oakland have begun experimenting with a novel approach: in addition to securing substantive policy commitments on issues like labor standards and community benefits, these policymakers have created new *administrative bodies* to oversee development projects. Crucially these commissions are designed to magnify and institutionalize the political influence of those local communities and labor groups that are often outgunned and overlooked in battles with more resourced and influential developer interest groups.[8]

Second, the paper draws out further lessons about power-shifting policy designs from the realm of administrative law and post-financial crisis

8. *See infra* Part III.B.

regulatory reform debates. The Dodd-Frank Wall Street Reform and Consumer Protection Act, in particular, created the Consumer Financial Protection Bureau, which has operated since its inception not only as a major policy innovator on consumer finance issues; it has also served as a conduit for engaging and empowering traditionally diffused, under-resourced, and marginalized stakeholders in an area of law and policy—financial regulation—more readily dominated by established business interests.[9]

Both of these case studies are prime examples of policymaking as power-building: the designing of institutions, policies, and processes aimed not to just to achieve policies that mitigate economic inequality, but also to address a background disparity of power and influence. In both examples we see a key stakeholder community that is historically undermanned and less influential than the more resourced and sophisticated industry players—residents and labor groups against developers, or consumers against the financial sector—benefiting from institutions and policies designed in part to place these constituencies on more equal footing. These case studies illustrate how power disparities might be mitigated through regulatory and administrative institutions or processes; and how these efforts might be more or less successful depending on context and design choices. In developing this argument, this paper adds to parallel literature developed in areas like labor law and criminal justice reform, where scholars are similarly concerned by the need to mitigate deep inequalities in power.[10]

To these accounts, this paper adds a further dimension of exploring how power disparities can potentially be mitigated specifically through *regulatory* processes, particularly in the case of economic policy making. Indeed, this approach extends the recent concerns of public law scholars like Daryl Levinson, Kate Andrias, Ganesh Sitaraman and others about how constitutional structures fail to balance disparities of power particularly in the face of economic inequality with respect to the sub-constitutional realm of policy design—specifically, the structuring of administrative and regulatory institutions and processes. While we have a robust tradition of examining questions of political power in constitutional law—from classic accounts of Madisonian republicanism to doctrinal traditions of political process theory—these same concerns are in many ways better addressed through the more granular and day-to-day work of regulation and policy design. As this paper will argue, the front-lines for attempts to rebalance power, particularly over economic policymaking, often manifests in the

9. *See infra* Part III.A.

10. *See generally, e.g.*, Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. L. REV. 1609 (2017); Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623 (2016).

realm of administrative and local government law—the public law structures that shape more prosaic and day-to-day interactions between stakeholders, interest groups, and policymaking institutions.

In extending the questions of power and structure from constitutional to the administrative arena, this paper also reframes some of the conventional accounts in administrative and local government law. Administrative law literature has perennially been concerned about questions of agency authority, discretion, and constraint, while local government law has often addressed questions of city power and structure. This paper draws out a related, but different set of concerns. How do administrative institutional designs and processes (whether at the federal, state, or local level) shape the terrain of power and influence among *civil society groups* themselves? How might these administrative structures be reformulated to better balance the power dynamics between competing interests and constituencies? The goal here is not so much a content-neutral, trans-substantive view of institutional authority and accountability per se, but rather a focus on how these institutional arrangements can be leveraged to mitigate pre-existing disparities in power and influence among different stakeholder and civil society groups. The paper proceeds as follows.

Part II develops the case for approaching power-building through regulatory agencies and policies. This Part offers a descriptive claim that both historical and contemporary analyses of the regulatory state indicate that regulatory agencies and processes already play a major role in responding to civil society constituencies and pressures in ways that can alter the background balance of power between these groups. Part III advances a complementary normative claim. This Part suggests that the administrative state can offer affirmative democracy-enhancing and power-balancing benefits—in contrast to its usual characterization as an apolitical, neutral, or technocratic domain. This reality outstrips some of the existing frameworks of regulatory process reform and redesign, suggesting the need for a more thorough approach to assuring balanced accountability of and participation in regulatory processes. Part IV turns to case studies of local economic development and federal financial regulatory reform, examples of deliberate attempts at power-building policy and institutional design in the administrative state. These examples offer insight into institutional design strategies that can be employed to reform administrative processes to pro-actively address disparities of power and influence.

Part V then draws on these empirical accounts to extract some general tools, strategies, and approaches through which administrative processes can be adapted to mitigate power disparities across issue areas and levels of government. Part VI explores some broader theoretical and scholarly implications for debates over democratic theory and institutional design.

This Part also explores broader implications of these arguments for scholarly debate, in particularly highlighting lessons for current scholarship in administrative law, law and social movements, and the emerging scholarship on both power and inequality. Finally, Part VII concludes with some broader reflections on our understandings of democracy and the regulatory state.

II. ADMINISTRATIVE POWER AND PROCESS

Administrative law and the administrative process represents a domain where these power-shifting concepts can have real effect in balancing disparities of political power.[11] The literature on participation, institutional design, and the regulatory state is vast, and it has often revolved around perennial questions of agency restraint and discretion—and the implications for constitutional, legal, or political legitimacy.[12] But it is also true that the administrative process already represents a more fluid and dynamic institutional context in which these questions of balancing power can be answered. Levinson himself notes waves of administrative law innovation—from judicial process review aimed at limiting regulatory capture to designs for institutional reforms within agencies themselves[13]—as one of the areas of public law most attuned to questions of power. This is partly true, and partly misleading. As this Part will suggest, it is very much the case that the regulatory state is in fact an arena in which politics takes place, just on different terms from what we might see in a more familiar electoral, legislative, or advocacy context. The power implications of regulatory institutions and processes has periodically provoked waves of institutional reform attempts at assuring procedural fairness, agency responsiveness, and accountability—previewing today's concerns about agency authority, capture, and the need to balance power and influence.

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11. For an account of power, social movements, and the administrative state, *see* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 143–46 (2017). It should be noted that this theorization of power-building outlined above need not be limited to the context of state institutions. Arguably, similar concerns can shape strategies for building and exercising power against other decision-making institutions, such as private actors and corporations. Indeed, many corporate responsibility and social justice campaigns face difficulties along these exact lines. These movements face challenges in identifying the locus of real decision-making power in an era where corporations and employers are themselves controlled by layers of financial investors and umbrella companies—and where outside stakeholders tend to lack levers through which to exert influence and pressure.

12. *See* Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 228 (2016) ("The study of American public administration often zeroes in on questions of control. Who should direct, guide, or check our vast and powerful administrative agencies—and in what ways? These questions have long been, and continue to be, pressing ones for practical, normative, and constitutional reasons.").

13. Levinson, *supra* note 1, at 112–18.

A. AGENCY AUTHORITY AND REGULATORY REFORM

In recent years, federal administrative agencies have come to play an outsized role in public policy disputes.[14] In part this is a byproduct of the accumulation of decades of broad statutory delegations from Congress. But it is also a result of the political dynamics of an increasingly polarized political climate. Thus, in periods of divided government, Presidents have incentives to drive policy agendas through regulation rather than through a hostile Congress. This is precisely the case in the later years of the Obama administration, which produced major battles over administrative authority arising, for example, out of the Deferred Action immigration reforms, the EPA's Clean Power Plan, and the Department of Labor's overtime pay rule—each of which were subjected to major litigation and court injunctions. But such expanded regulatory policymaking is also very much present in context of unified party control of Washington as well. Thus, the early months of the Trump Administration, despite a favorable Republican control of both Houses of Congress, has generated similarly explosive opposition to major agency-driven initiatives on immigration policy and elsewhere.

For some legal scholars and practitioners, this centrality of administrative authority is an indication of the need to revisit the basic constitutional position of administrative agencies.[15] Justice Clarence Thomas has expressed a willingness to reconsider basic administrative law doctrines of judicial deference to agency interpretations of law,[16] as has the newest Justice Neil Gorsuch. Republicans in Congress have also proposed legislation attempting to undo this practice of judicial deference.[17] Such a wholesale restraint of the administrative state seems both difficult to implement and unwise; the realities of modern governance and policymaking depends critically on agency policymaking and the division of labor between legislative and regulatory bodies.

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14. *See generally, e.g.*, Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1701 (2017) (noting the broad accumulation of regulatory authority, further expanded by features like regulatory waivers and accreted de facto delegation from overlapping statutory authorizations). On the role of agencies as primary policymakers in conditions of divided government and Congressional gridlock, *see generally, e.g.*, Cynthia Farina & Gillian Metzger, *Introduction: The Place of Agencies in Polarized Government*, 115 COLUM. L. REV. 1683 (2015); Jody Freeman & David Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014); Abbe Gluck, Comment, *The Supreme Court 2014 Term: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015); Thomas McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L. J. 1671 (2012); Gillian Metzger, *Agencies, Polarization and the States*, 115 COLUM. L. REV. 1739 (2015).

15. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

16. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *see also* U.S. Aid Funds v. Bryana Bible, 807 F.3d 839, *cert. denied*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting) (suggesting the importance of revisiting principles of Seminole Rock and Auer Deference).

17. *See* Separation of Powers Restoration and Second Amendment Protection Act, S. 2434, 114th Cong. (2nd Sess. 2015–2016).

But it is also the case that the recurring concerns with agency authority have fueled waves of legal and institutional reform aimed at improving the balance of expertise and accountability within the regulatory state itself.[18] The early battles over the constitutionality of the New Deal administrative state eventually produced foundational case law confirming the agency's constitutional status, as well as the landmark Administrative Procedure Act.[19] In the 1970s, a new wave of public interest legislation in areas like environmental law and consumer protection created another wave of expanded agency authorities and responsibilities. This expansion of agency authority came with parallel efforts to deepen agency accountability, through transparency measures like the Freedom of Information Act ("FOIA"), and the rise of "interest representation" in the regulatory process.[20] These accountability regimes, notably, evinced a greater skepticism on the part of reformers about the public interestedness of agencies, seeking to prevent special interest influence and regulatory capture, even as they sought to expand agency authority at the same time.

While concerns about agency authority grew in the late 1970s and into the 1980s, driving a shift towards deregulation,[21] regulatory reform in the 1990s and early 2000s took a different valence, seeking not to expand external forms of accountability through participation or transparency, but rather to invest in *internal* forms of rationalization and oversight of agency action through the institutionalization of mechanisms for cost-benefit analysis, and a deeper commitment to presidential control of administration.[22] These new measures absorbed the "Chicago School" critiques of regulatory capture and market efficiency into an attempt to make regulation smarter, more rational, and more effective.[23] This rationalizing and expertise-enhancing ethos has continued in more recent years as regulatory reform has increasingly drawn on advances in "civic technology,"

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18. *See* Reuel Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism*, 1945–1970, 53 VAND. L. REV. 1389, 1410–16 (2000); Reuel Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 399–341 (2007); *see generally* Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

19. *See e.g.* Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1567 (2011).

20. *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Thomas Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1040 (1997) (arguing that judicial review in the 1960s and 1970s worked to push agencies to expand representation and participation of stakeholder interests in shaping regulatory policies).

21. *See generally* Jodi Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2011).

22. *See* Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 108–10 (1994); *see generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

23. *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 661–91 (1998).

experimenting with online measures for increasing transparency, participation, and agency analysis.[24]

But these prior waves of reform have generally, with some exceptions, tended to focus more on the goal of rationalizing and improving governance, and less on addressing the background problems of disparate political power and influence. To the extent that these measures of enhancing expertise, insulation, transparency, and the like can address disparities of power, they do so by prioritizing a more streamlined, and conflict-free vision of "good governance."[25] Yet even today there remains a broader concern across the political spectrum about the risks of regulatory capture—the fear that agencies might be particularly susceptible to the greater influence of industry actors, whether in context of financial regulation, or in the failures of enforcement leading up to the Gulf Oil Spill.[26] Recognizing the realities of regulatory power can have large implications for a range of legal doctrines in administrative law, from delegation to arbitrary and capricious review.[27] But it also suggests the potential need for a more far-reaching exploration of legal and institutional reform to the process and structure of administrative agencies themselves.

The ideas of checks and balances, contestation, and participation are by no means new to the modern administrative process. As Jon Michaels has argued, we already have a "self-regulating administrative ecosystem" that is "capable of harmonizing presidential priorities, public concerns, legislative interests, expert opinions, and legal obligations."[28] On Michaels' account, the administrative process recreates the familiar ethos of checks and balances and contestation from the classic Madisonian separation of powers, but in a different form.[29] This "administrative separation of powers" involves instead the tensions and checks between three sets of administrative actors:

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24. *See, e.g.*, BETH NOVECK, SMART CITIZENS, SMARTER STATE: THE TECHNOLOGIES OF EXPERTISE AND THE FUTURE OF GOVERNING 210–26 (2015).

25. For a longer critique of the good governance framework and regulatory reform, *see* generally RAHMAN, *supra* note 11, at chapters 5 & 7.

26. *See, e.g.*, Senator Sheldon Whitehouse, Speech on the Senate Floor (June 17, 2010) (available at https://www.whitehouse.senate.gov/news/release/whitehouse-slams-corporate-influence-at-mms-proposes-legislation-to-defend-integrity-of-government). More recent scholarship on regulatory capture attempts to be more rigorous in defining and diagnosing capture as deviations from a prior, legitimate policymaking process. *See, e.g.*, Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 177–80 (2011) (defining capture as being present when a sector of an industry has "acquired persistent influence [in a regulatory regime] disproportionate to the balance of interests envisaged when the regulatory system was established."). *See also* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, 1–22, (David Carpenter & David A. Moss, eds., 2013). This of course begs the question of what a 'legitimate' process looks like Part III of this paper below offers one possible normative theory of democracy and regulation.

27. *See generally* Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L. J. 1003 (2015).

28. Michaels, *Of Constitutional Custodians and Regulatory Rivals*, *supra* note 12, at 231.

29. *Id.*

politically-appointed leaders, the professional expert civil service, and civil society actors and interest groups.[30] Given this reality, the real problems of administrative authority are not generic or endemic to all administrative action; rather, where the administrative state is most problematic is where these internal checks and balances might be undermined or "disabled,"[31] for example in independent agencies, in context of privatization, or in settings of overly-interfering political pressure on civil society and independent civil servants.[32]

While I am largely in agreement with Michaels' account, this concern about the barriers to a well-functioning system of administrative checks and balances is very real—and I would argue, a more endemic weakness lies precisely in the degree to which civil society is in fact able to engage with the administrative process on inclusive and equitable terms. Michaels rightly notes that participation and civil society role might be "uneven, halfhearted, prohibitively expensive, or shortsighted,"[33] and the types of participation that take place may not in fact accord with deliberative or majoritarian ideals.[34] Indeed, many of the standard frameworks for civil society participation in the administrative process are either not sufficiently powerful to fully balance rival forms of power and influence, or they are themselves easily co-opted by existing loci of political power—exacerbating rather than balancing power disparities.[35]

Consider for example, the two most common and foundational mechanisms of administrative participation: transparency and notice-and-comment. While transparency measures—notably the Freedom of Information Act (FOIA) regime—have become touchstones for norms of transparency and accountability, their day-to-day operation of FOIA falls far short of these aspirations. FOIA itself is "shot through with exemptions," and use of the FOIA system tends to favor sophisticated industry and business interests. Rather than facilitating inclusive decision-making, FOIA can often be a harmful distraction and imposition on regulators themselves. And perhaps most perniciously, FOIA facilitates an ethos of distrust and skepticism towards government, rather than deepening norms that encourage more productive forms of engagement.[36] Similarly, several studies have

30. *Id.* at 236–41.
31. *Id.* at 231.
32. *Id.* at 279–90.
33. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 551 (2015).
34. *Id.* at 558.
35. Andrias offers a similar take on this argument. *See* Andrias, *Separations of Wealth*, *supra* note 1, at 475–76.
36. For a recent critique of FOIA and its harmful implications, *see* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1101 (2017) ("Given

highlighted how notice-and-comment is often dominated by more established and sophisticated business interests.[37] More recently, the advent of "e-rulemaking" via online commenting platforms like Regulations.gov has made possible the mass flooding of comment dockets from a much wider range and quantity of commenters.[38] While this is a potentially positive development, there is still much work to be done both technologically and normatively to enable regulators to manage these mass comment dockets.[39] There is also some skepticism about the degree to which such mass comments are in fact useful or influential on rulemaking.[40]

Indeed, while the administrative state already possesses a variety of mechanisms for participation, from notice-and-comment to negotiated rulemaking to advisory committees and more,[41] the efficacy of these mechanisms and the degree to which they serve to counterbalance power disparities depends a great deal on presumptions about *who* makes use of these vehicles, and *how* influential those uses actually are.

B. BATTLING UPHILL: SOCIAL MOVEMENTS AND THE ADMINISTRATIVE STATE

These key points—the reality of regulatory politics, and the useful but limited ability of existing regulatory institutions to balance disparities of power and influence—are highlighted by the rich historical literature documenting how social movements and civil society actors have engaged regulatory agencies. Political science scholarship on "bureaucratic politics" highlights how regulators themselves are political actors, leveraging relationships and coalitions among civil society actors to build their legitimacy and autonomy—which in turn enables regulators to carve out the

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FOIA's many limitations and drawbacks, a forward-looking legislative approach must do more than refine the Act's request-driven strategy: it must look beyond the FOIA strategy altogether."); *see also* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 894–914 (2006) (describing the positive and negative consequences of transparency under disclosure laws, including FOIA); Jameel Jaffer & Brett M. Kaufman, *A Resurgence of Secret Law*, 126 YALE L.J. F. 242, 243–49 (2016) (examining the decline of the FOIA "working law" doctrine developed by the Supreme Court); *see generally* Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972) (discussing the early role of the judiciary in FOIA determinations).

37. *See generally e.g.*, Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

38. For a discussion of e-rulemaking, *see* NOVECK, *supra* note 24.

39. For a discussion of new computational tools to assist in synthesizing mass comment dockets, *see* Michael Livermore, Vladimir Eidelman, & Brian Grom, *Computationally Assisted Regulatory Participation*, 93 NOTRE DAME L. REV. (forthcoming 2018).

40. *See* Cynthia R. Farina et. al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 477 (2011) ("The true potential of Rulemaking 2.0 is unknowable at this point because e-rulemaking has not tried systematically to address the barriers of stakeholder unawareness, process ignorance, and rulemaking information overload.").

41. *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. Rev. 1300, 1308–10 (2016) (summarizing existing vectors for participation).

policy space needed to act as policy entrepreneurs and innovators. Regulatory power, as a result, is less a consequence of commands from above or legal procedural hurdles and protections, but rather the interface between state actors on the one hand, and civil society actors on the other.[42] Meanwhile a growing literature in legal history and "administrative constitutionalism" highlights the ways in which social movements from civil rights to economic justice to labor advocates have deliberately and strategically engaged regulatory agencies as an often overlooked but critical arena in which to contest existing power disparities and generate new norms and policies in response.[43] Historical excavations of social movement interactions with local-level bureaucracies yield similar lessons in the local administrative context. These accounts underscore that while regulatory processes are already arenas of political contestation and disagreement, they nevertheless still suffer from severe disparities in power and influence.

1. *Movements and Power in the Federal Administrative State*

Consider for example, Meg Jacobs' account of World War II-era price administration. Even at the height of top-down wartime administrative planning, movements engaged the regulatory state to shape policies and contest visions of economic and political inclusion. As Jacobs details in her study of the Office of Price Administration ("OPA") in the early 1940s, the growing consumer rights movement used the fact of wartime administrative price-setting over consumer goods as a catalyst for organizing. The OPA stitched together a "cross-class coalition of consumers" around the goals of price stability.[44] For Jacobs, that window of dynamic interplay between a broad-based consumer movement and the OPA not only shaped the OPA's policies and internal norms; it also helped deepen the identity and aspirations of the consumer movement itself.[45] This is an example of what Jacobs calls "state-building from the bottom-up."[46] But over time, this coalition was disrupted and marginalized by more organized interest groups who gained the upper hand in influencing wartime price-setting, ultimately leading to its demise.

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42. *See* DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928 (Ira Katznelson et al. eds., 2001); *see generally* DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (Ira Katznelson et al. eds., 2010).

43. *See* Gillian Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1905–06 (2013) (describing and reviewing this trend in the literature).

44. Meg Jacobs, *"How About Some Meat?": The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–1946*, 84 J. AM. HIST. 910, 931 (1997).

45. *See id.* at 939–40.

46. *Id.* at 912; *see id.* at 939–40.

Similarly, Karen Tani's study explains how Native American activists battled to secure access to welfare benefits under the Social Security Act and the Constitution by navigating state and federal bureaucracies in the 1930s and 1940s.[47] Here too, there is both an indication of the potential value of the administrative process—by creating another policymaking arena, it afforded a more hidden but potentially powerful space in which a marginalized constituency could make novel claims, and seek redress that might otherwise be denied—as well as a warning of the difficulties that such strategies might pose; for once favorable allies within the agency leave or are disciplined, the efficacy of these movement advocacy strategies plummets.

More recently, battles over "Net Neutrality" and the principles governing the backbone infrastructure of the internet have been the product of a pitched political battle between interest groups, activists, and regulators at the FCC. Movement activists successfully pressured FCC commissioners through social media campaigns and sit-ins, harnessing tactics more commonly employed in electoral campaigns and legislative lobbying, while other groups leveraged outside experts to monitor technical FCC proposals and suggest alternatives.[48] In so doing, these vast yet often difficult-to-organize constituencies successfully checked the more powerful and well-connected vested interests of internet service providers, and telecom giants like Comcast and Verizon. Yet here too the story is a mixed one: as the Obama administration gave way to the Trump administration, net neutrality was placed on the chopping block under the new FCC leadership, repealed by the FCC under President Trump's appointed Chairman, Ajit Pai.[49] The relative ease with which these policies were undone despite extensive stakeholder and popular opposition indicates the need for greater channels for voice and representation within the administrative process.

2. *Movements and Power in the Local Administrative State*

The opportunities and challenges posed by the administrative process are not limited to the federal arena. Local administration indicates the same dynamics as both an arena where power can be exercised and contested—and a domain where existing power disparities tend to reassert themselves with troubling ease. Consider for example, the experience of the War on Poverty and the welfare rights movement of the 1960s and 1970s. Though often dismissed as a failure, these efforts involved a number of attempts to

47. *See generally,* Karen M. Tani, *States' Rights, Welfare Rights, and the Indian Problem: Negotiating Citizenship and Sovereignty, 1933–1954*, 33 LAW & HIST. REV. 1 (2015).

48. *See generally* Edward Walker et al., *What Worked in the Fight for Net Neutrality,* THE GETTYSBURG PROJECT ON CIVIC ENGAGEMENT (August 2015), http://gettysburgproject.org/net-neutrality.

49. *Restoring Internet Freedom*, FCC Docket 17-108 (December 14, 2017) https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0105/FCC-17-166A1.pdf (declaratory ruling).

create some very real avenues for empowering African-Americans, the urban poor, and minority groups.[50]

The 1964 Economic Opportunity Act ("EOA") developed new programs to tackle poverty through job training, work-study, and access to legal services. But the most radical innovation of the War on Poverty lay in its experiments with policies and institutions that mobilized community groups themselves as a political force to hold the bureaucracy itself accountable to its poverty-reduction mandate. The EOA provided funding for community organizing; created local boards consisting of local government officials and representatives from business, local community groups, and minority and low-income stakeholders; and involved community organizations in the implementing poverty-reduction programs such as training centers and legal services clinics.[51]

For advocates of this "maximum feasible participation" approach, power was a central animating concept.[52] These policymakers saw poverty as a problem of political disempowerment, not just of insufficient income.[53] Therefore, the only way to combat poverty was to empower poor people with direct voice in the shaping, governing, and implementing of poverty programs.[54] Only through such direct empowerment could the poor hold the bureaucracy accountable—and redress the traditional disparities of political influence in local government.[55] This political strategy for reducing poverty proved remarkably effective.[56] By creating institutionalized sources of political power and leverage, the community action approach inspired many local community organizations to channel funds toward expanding membership, providing services, and mobilizing constituencies as a political force in defense of poverty-reducing policies.[57] Even where local groups were denied representation on community action boards by local elites, the institutional commitment to representation created a potent foundation for exerting political pressure on policymakers.[58]

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50. For several recent analyses of the positive political effects of the War on Poverty and their implications for today, *see generally, e.g.*, NOEL A. CAZENAVE, IMPOSSIBLE DEMOCRACY: THE UNLIKELY SUCCESS OF THE WAR ON POVERTY COMMUNITY ACTION PROGRAMS (2007); *see also* Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1 (2010).

51. *See generally* CAZENAVE, *supra* note 50; *see also* Melish *supra* note 50.

52. *See generally* Melish, *supra* note 50.

53. *See generally* CAZENAVE, *supra* note 50; Melish *supra*, note 50.

54. *Id.*

55. *Id.*

56. *See generally* CAZENAVE, *supra* note 50.

57. *Id.*

58. *See generally* WAR ON POVERTY: A NEW GRASSROOTS HISTORY, 1940–1980 (Annelise Orleck & Lisa Hazirjian eds., 2011).

As some recent historical accounts suggest, the collapse of the War on Poverty owes much to a backlash against this community empowerment—in a sense, proving just how potent these new institutional structures could be in shifting the balance of power at the local level. As community action programs catalyzed the mobilization of grassroots constituencies to advocate for more accountable and equitable economic policies, the backlash from local power elites—from the political establishment to business interests—led to systematic efforts to defund and dismantle community action.[59] Ultimately, the problem was a lack of alignment over the importance of community action itself. Federal officials saw participation as a more surface-level strategy to generate cooperation and consensus among stakeholders, whereas the civil rights and welfare rights movements saw it as a mechanism for reclaiming greater political power over economic policymaking. State and local governments, meanwhile, saw the directive for formal representation of the poor as a categorical threat to their own authority and control of patronage networks.[60] Even the founders of the program in the Johnson administration often operated under vastly different motivations and visions for how significantly the program should invest in poor people's *political power*, as opposed to merely providing welfare services.[61] As a result of these tensions, while more than 1,600 community action boards were established by 1968, covering two-thirds of the nation's counties; by 1974 most of the funding for the most active programs had been withdrawn due to new restraints from Congress and the dismantling of the Office of Economic Opportunity, the federal office charged with creating and coordinating community action across the country.[62]

The experience of the War on Poverty underscores similar lessons found in administrative constitutionalism literature. First, local level administrative processes and institutions, such as the allocation of economic development funds and the administering of poverty programs, represented a valuable political arena that grassroots constituencies could target, mobilize around, and seek to leverage for substantive claims. In so doing, the processes of local administration became a key battleground not just over substantive policies, but over the background distribution of local political power. Indeed, it was this threat to the existing power hierarchy that generated the harsh counterreaction among local mayors and other powerful elites against welfare rights activists. Second, the critical challenge for these models to work, however, is to secure the buy-in and cooperation both from

59. *Id.*

60. Melish, *supra* note 50, at 28.

61. *See generally* MICHAEL GILLETTE, LAUNCHING THE WAR ON POVERTY: AN ORAL HISTORY (Oxford Univ. Press 2nd ed. 2010).

62. Melish, *supra* note 50, at 26–27.

government officials and from community groups. As the War on Poverty's failure indicates, where officials themselves reject the core premise of participation, it is difficult to sustain these procedures. Where communities are not organized and mobilized through advocacy and membership-based organizations, there is no countervailing voice that can exert this kind of pressure and credibly claim to speak on behalf of these communities when policies are made.

These are just a few examples of the rich and growing historical literature documenting these dynamic interactions between social movements, administrative agencies, and the battles over public policy and broader norms.[63] For our purposes, the point is that empirically, agencies and the administrative process are arenas in which important political battles about policy and foundational norms take place. Social movements and grassroots constituencies can engage in this arena, which affords new opportunities for advocacy and claims-making. But while the administrative process affords multiple points of entry for constituencies to engage, it does not do enough to balance these terms of engagement. Thus, it is also the case that conventional avenues into these spaces are by themselves not enough to assure a level playing field. More sophisticated, well-resourced, and established interest groups can too easily reassert their dominance, while the ability of grassroots movements to exert influence is also too dependent on the presence of favorably disposed officials within the bureaucracy itself. This leaves the administrative arena in a difficult position: on the one hand, its institutional flexibility and dynamism affords a surprising *potential* for remedying broader disparities of political power; on the other hand, this potential is only sporadically and occasionally realized.

III. THE DEMOCRATIC POTENTIAL OF ADMINISTRATION: A NORMATIVE CASE

From their inception, regulatory agencies have been seen as a remedy for legislative failures. Late nineteenth century reformers developing new regulatory agencies were in part concerned with the dangers of legislative capture, corruption, or ineffectiveness. Furthermore, these early agencies were understood as part of a broader effort to restore popular sovereignty

63. *See generally, e.g.*, JOANNA GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (Cambridge Univ. Press 2012) (examining post-war administrative reforms and the role of the judiciary in legitimizing administrative law in national governance); *see generally* SOPHIA LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (Cambridge Univ. Press 2014) (exploring the evolution of equal employment rights through battles over the hiring and promotion practices in regulatory agencies like the Federal Communications Commission and the Federal Power Commission); *see generally* Sophia Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010).

over the more systemic and structural threats to the public good: the upheavals of industrialization, new forms of economic power and inequality, and experiences of economic dislocation that seemed to outstrip the capacities of conventional policy tools and institutions.[64] But what is especially interesting about historical and contemporary accounts of bureaucratic politics and administrative constitutionalism is their *democratic* valence. Each of these accounts shine light on the efforts by constituencies that are in different ways politically marginalized to enter the regulatory arena and leverage the regulatory process in an attempt to offset this disparity of political power. Regulatory agencies, as policymaking spaces with discretion, become arenas where these constituencies attempt to achieve a more equitable political voice. Indeed, the combination of administrative discretion and the administrative process suggests that in addition to its contributions of expertise and policy innovation, we might think of the regulatory state as mitigating democratic defects as well.

As more of our day-to-day governance takes place through administrative agencies and processes, the battles over administrative authority have become more fraught.[65] This anxiety is what lies behind calls to reassert classic separation-of-powers restraints on administrative agencies.[66] But these appeals to administrative restraint are themselves problematic; much of the authority and discretion afforded to agencies is ineradicable—and arguably desirable.[67] In contrast to its image as a clinical and mechanistic enterprise, the regulatory process is an essentially political one, an arena in which different constituencies attempt to build and exercise political power, shape public policy, and contest the meaning of moral and policy norms. Adrian Vermeule has argued extensively that we must embrace the reality that regulation is necessarily comprised of "gray zones" of agency discretion beyond direct oversight or accountability.[68] Complete control over agencies is too costly to achieve given the vast expanse of the regulatory state; nor is such tight control desirable.

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64. *See, e.g.*, RAHMAN, *supra* note 11; *see generally* William J. Novak, Stephen W. Sawyer, & James T. Sparrow, *Democratic States of Unexception: Toward a New Genealogy of the American Political*, *in* THE MANY HANDS OF THE STATE: THEORIZING POLITICAL AUTHORITY AND SOCIAL CONTROL 229 (2017); William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377 (2010).

65. *See, e.g.*, Levinson, *supra note* 1, at 47 ("The more power the state possesses, the more it matters who controls that power."); *id.* at 50–54 (describing the rise of battles over executive power, presidential authority, and the administrative state as rooted in similar concerns).

66. *See generally* HAMBURGER, *supra* note 15.

67. *See generally* Cass Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (2015); ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE (2016).

68. *See generally* VERMEULE, *supra* note 67; Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

This reality of administrative power raises two major implications. First, administrative processes are *already* political domains, affected and influenced by the same kinds of normative judgments and power disparities that characterize ordinary electoral or legislative politics. This reality of power and influence is one of the key lessons of the ongoing concerns over regulatory capture, and the obvious and more subtle ways in which more powerful organized interests, particularly business interests, are able to shape regulations.[69] Second, the plasticity and front-line nature of administrative institutions and processes provide a surprising potential for reshaping these processes in ways that can take better account of such power disparities. Indeed, the persistence of administrative discretion is not a tragic defect of modernity to be minimized or eliminated; rather it is an attractive feature of modern governance to be optimized and embraced. It is this administrative flexibility and discretion that enables agencies to address the complexities of public policy in a rapidly changing society.[70]

If this is the case, then it seems that administrative bodies and processes can help address two of the central normative challenges in democratic politics: first, creating spaces in which constituencies can engage in the collective enterprise of making political and policy judgments, and second, in addressing persistent problems of disagreement and power. Indeed, democratic theorists addressing these questions evoke principles and arguments that can be extended to the administrative arena—not just the legislative or electoral arenas that are the more conventional focal points for democratic political theory.[71]

A. DEMOCRATIC JUDGMENT IN ADMINISTRATION: WALDRON REVISITED

The idea that administrative processes may be desirable as a *democratic* space may seem counter-intuitive at first, but consider the ways in which today's administrative institutions share several features of quintessentially democratic policymaking. To see this democratic potential of regulation, consider a brief comparison to normative defenses of the central institution of democratic popular sovereignty: the legislature. In Jeremy Waldron's classic defense, legislation is fundamentally democratic for three reasons: first, legislation provides an institutional forum in which collective reasoning can occur—and where disagreement can be engaged openly.[72] Second,

69. For a good overview of the latest scholarship diagnosing and analyzing regulatory capture, *see* PREVENTING REGULATORY CAPTURE, *supra* note 26, at 6–7, 9–11, 15–16.

70. For a defense of agency discretion and flexibility, *see* Vermeule, *Our Schmittian Administrative Law*, *supra* note 68.

71. *See, e.g.*, JEREMY WALDRON, THE DIGNITY OF LEGISLATION 70 (1999).

72. *See* WALDRON, *supra* note 71; *see also* Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 654–60 (1995).

because legislation arises from elected representatives, the outcomes of legislation are understood to be fundamentally *ours*—the product of a collective process in which we all have joint authorship—not the result of an alien or arbitrary force.[73] Third, decision-makers are bound by the rules they enact, forcing them to grapple with the costs, burdens, and opportunities arising from policy judgments they might make, while internalizing the tradeoffs and moral risks of their decisions.[74] For Waldron, the messiness and complexity of ordinary legislation is both what seems to drive many theorists to seek more neutral, apolitical forms of judgment—as in the valorization of courts—yet it is that same messiness that makes legislation fundamentally democratic and valuable.[75]

Waldron's concern with preserving the space for democratic politics and agency has at times manifested in a critical stance towards the regulatory state.[76] Yet the same defense of legislation, against the idealized image of judicial or apolitical judgment, can also be applied to the administrative state. This intuition may be surprising, because on the surface, regulation seems more analogous to the judicial model than the legislative one, both in its mainstream image and daily operations. The conventional image of regulation draws much of its legitimacy from the idyll of rational technocrats, who like judges, are insulated from the vagaries of conventional politics, making judgments on the basis of their expertise and reason, bound by norms of neutrality and objectivity.[77] But regulatory bodies share many of Waldron's democratic features.

First, regulation can serve as a policymaking forum for collective decision-making. Most statutes and legislative arrangements are broad, leaving weighty moral and political judgment in the hands of agencies.

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73. *See* WALDRON, *supra* note 71 at 87.

74. *See id.* at 80.

75. *See id.* at 24 (describing the common attraction to the judicialized model of decision-making—seen as neutral, apolitical, rational, and deliberative—as rooted in a distrust of ordinary politics as messy, fickle, prone to capture, and the product of tumultuous multitudes of representatives and interest groups, and subject to all the contingencies, arbitrariness, and instabilities of fallible human judgment: "the danger of focusing on legislation is that, as a source of law, it is *all too human*, all too associated with explicit, datable decisions by identifiable men and women that we are to be subject to *these* rules rather than *those*."); *id.* at 35 ("We should look [instead] . . . at what conflict and tumult and numbers can accomplish for liberty, and not be too easily disconcerted by the noisy or smelly or unsavory atmosphere of the popular assembly.").

76. See for example Waldron's defense of the separation-of-powers as a normative democratic value. *See generally* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433 (2013). Defenders of regulatory authority like Adrian Vermeule have seen this as a problematic attempt to undo much of modern administrative law out of a concern of the blending of judicial, legislative, and executive function in regulation. *See generally* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. L. REV. 673 (2015); *see also* Sunstein & Vermeule, *The New Coke*, *supra* note 67.

77. For an example of such expertise-oriented regulatory reform, the Dodd-Frank financial regulation overhaul is a prime example, particularly in its approach to addressing the problem of too-big-to-fail (TBTF) financial firms. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.S. § 5301 (2010); *see also* RAHMAN, *supra* note 11, at Ch. 2.

Administrative agencies are one of the primary ways in which our political system addresses some of the most fundamental, yet difficult policy questions. From environmental to workplace safety, to financial regulation, to consumer protection, the modern regulatory state is our primary tool for addressing systemic social and economic concerns. Furthermore, agencies—more so than legislatures—are positioned at the front-line of governance, where these policy problems are ultimately resolved, implemented, and enforced.[78] It is at the regulatory level that policymakers are forced to confront directly the nuts-and-bolts and fundamental societal tradeoffs that policies might trigger. Agencies thus provide a "central linchpin" in linking democratic consent with concrete problem-solving.[79] And in an era of legislative gridlock, we have seen agencies increasingly repurposing old statutory authorities to develop new policies.[80] Agencies thus possess broad authority, and play a central role in policymaking.

Second, agencies and the administrative process offer, perhaps counter-intuitively, some major advantages over the electoral and legislative processes in representation, inclusion, and voice. In particular, agencies have the ability to house a more dynamic forum of representation that is not bounded by the geographic boundaries of legislative districts.[81] Electoral politics remains structured around geographically-bound jurisdictions, yet many of the most important interests and concerns in modern governance cut across these districts, whether in the form of race, ethnicity, class, gender, environmental concern, or other interests.[82] For these groups, nonelectoral forms of representation are crucial to securing an adequate voice in the political arena. The regulatory process offers a more hospitable arena for issue and constituency-based advocacy and voice.[83] The administrative process, then, is more than just a remedial attempt at defusing anxieties about administrative power that exists outside the classic separation-of-powers framework. Rather, it offers the potential of creating genuinely new and

78. CHRISTOPHER K. ANSELL, PRAGMATIST DEMOCRACY: EVOLUTIONARY LEARNING AS PUBLIC PHILOSOPHY 3 (2011) (describing how public agencies are the "nexus of democracy and governance," where popular consent and legitimation in broad terms clashes with the need to respond to immediate complex policy problems).

79. *See id.* at 5.

80. *See id.* at 3.

81. Mark E. Warren, *Governance-Driven Democratization*, 3 CRITICAL POL'Y STUD. 3, 6 (2009) (Agencies possess a unique "capacity to bring into existence dynamic, serial, and overlapping peoples and constituencies," engaging all affected citizens "in contrast to pre-defined and relatively static territorial constituencies.").

82. *See generally* Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387 (2008).

83. *Id.* at 388–90; *see id.* at 396–97 ("Nongeographical constituencies—those emerging from race, ethnicity, class, gender, environment, global trade, and so on—are represented only insofar as they intersect with the circumstances of location, producing only an accidental relationship" between the institutional structure of electoral representation and the ideal of democratic self-governance).

more balanced forms of democratic participation and engagement in the day-to-day task of governing.

Third, the good judgment that Waldron celebrates in legislatures is a product of the fact that decision-makers must themselves face the repercussions of their decisions, thus forcing a degree of internalizing costs and tradeoffs, which in turn promotes good judgment. But this is what agencies, more so than legislatures, are particularly adept at doing through their processes of consultation and impact analysis.

Where the analogy holds weakest is in Waldron's normative commitment that decision-making processes be inclusive of affected interests and be understood as expressions of the collective will. The administrative process has developed mechanisms to engage and include diverse stakeholders in the policymaking process. But as we will see, administrative institutions can be reworked to better facilitate such engagement and inclusion, particularly in light of disparities of power, resources, organization, and sophistication among different stakeholders. Nevertheless, agencies are structurally well-positioned as sites of political judgment and day-to-day governance. If we can expand their ability to manage an inclusive political process, the underlying democratic potential of the administrative process can be more fully articulated.

B. POWER AND DISAGREEMENT IN DEMOCRATIC THEORY: MADISON REVISITED

Putting power at the center of our analysis changes significantly how we think about the realities of democratic politics—and what the implications might be for democratic institutional design. In particular, it calls into question one common approach to viewing democratic institutions: what we might call a "good governance" framework. These policies—such as efforts to prevent lobbying, undo the "revolving door," increase the barriers between interest groups and policymakers to make the latter more autonomous and independent, or bind policymakers more directly to rational and apolitical standards of decision-making through data and expertise requirements and transparency measures—ultimately seek to *rationalize, sterilize,* or *insulate* the policymaking processes from the undue influence of special interests.[84]

But this view of democratic defect and remedy is problematic. Citizens and political associations are not disinterested, rationalistic, deliberative actors; they are, rather, necessarily subjective, partial, political. It is this partiality that motivates political action, and which is irreducibly at the heart

84. For an extended critique of the "good governance" view of democracy, *see e.g.*, HOLLIE RUSSON GILMAN AND K. SABEEL RAHMAN, OF, FOR, AND BY THE PEOPLE: CIVIC POWER IN AN ERA OF INEQUALITY (Cambridge Univ. Press, forthcoming), and RAHMAN, *supra* note 11 at 109–11.

of most normative disagreements in politics.[85] Furthermore, attempts at sterilizing the policymaking process, however well-intended, have to be viewed with some degree of skepticism, for it seems unlikely that insulation can redress the fundamental problem of disparate political power. More well-resourced and sophisticated individuals and groups are likely to overcome higher barriers to political entry; the groups most politically disempowered are more likely to be "screened out."[86]

The reality is that disagreement and power politics are here to stay, nor are they equally distributed across groups and geographies. That being the case, the challenge for democratic institutional design is not to attempt to sterilize policymaking of these pressures, but rather to engage, manage, and balance them in ultimately productive ways. As James Madison famously observed, a central goal of democratic institutional design was to counteract the dangers of "faction" and of "cabals of the few" by harnessing the countervailing power of rival factions and groups to prevent concentrations of political power.[87] That is, "ambition must be made to counteract ambition."[88] This is the core Madisonian insight: given realities of power and disagreement, institutional design must seek to that *channel* such disagreement productively, creating institutions that facilitate the mutual checking of power and influence.[89]

Whether Madison himself was a true populist, or instead someone bent on preserving aristocratic rule[90] is somewhat tangential for this broader point. The key for our purposes is this shift to a specifically *power-balancing* view of institutional design and democratic politics.[91] The goal, then, is not

85. *See generally, e.g.*, NANCY ROSENBLUM, ON THE SIDE OF ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2010); MIKA LAVAQUE-MANTY, ARGUMENTS WITH FISTS: POLITICAL AGENCY AND JUSTIFICATION IN LIBERAL THEORY (2002); Hannah Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 346 (1981) ("What we need here [to generate political action] is not separation but linkage. It is the connection that matters, the transformation of social conditions into political issues, of need and interest into principle and justice.").

86. *See, e.g.*, SITARAMAN, *supra* note 1, at 44–47, citing to Kevin M. Stack, *The Paradox of Process in Administrative Rulemaking* (forthcoming 2018).

87. *See* THE FEDERALIST NO. 10 (James Madison).

88. THE FEDERALIST NO. 51 (James Madison); *accord* Levinson, *supra* note 1, at 33, 36.

89. Levinson uses this Madisonian approach to frame the purposes of constitutional design as balancing power. *See* Levinson, *supra* note 1. *See also* Jane Mansbridge et al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. POL. PHIL. 64, 93 (2010) ("If, as we believe, the exercise of power is inevitable in human politics, then we must, like Madison, design democratic institutions that incorporate that power rather than ignore it.").

90. *See* J. S. MALOY, THE COLONIAL ORIGINS OF MODERN DEMOCRATIC THOUGHT 1–23 (2008) (discussing the participatory strains of founding-era republicanism).

91. The emphasis on countervailing power and contestation and its contrast to good governance understandings of democracy represents a running fault line in democratic theory, between accounts that prioritize consensus, deliberation, and collaboration on the one hand, and accounts that emphasize conflict, disagreement, and contest on the other. *See generally e.g.*, JOHN P. MCCORMICK, MACHIAVELLIAN DEMOCRACY, 141–69 (2011) (contrasting his contestatory approach to the more aristocratic, deliberative view of other modern republican theorists like Philip Pettit); IAN SHAPIRO, THE

necessarily to prioritize institutional designs for their epistemic, deliberative, or technocratic values (though we may of course still hope to promote such values). Rather, this Madisonian view suggests that institutions must also focus on facilitating countervailing power and checks and balances. While we often associate Madisonian institutional design with the constitutional separation of powers, this focus on power-building could take a variety of other forms.[92] Some scholars have highlighted the role of class-based institutions in empowering the powerless public against powerful economic elites as a major tradition in republican thought, from the Roman tribunes of the plebs to more modern consociationalist models.[93] Election law scholars have similarly appealed to Madisonian values of contestation and conflict to call for more competitive electoral systems that undo "lockups" of the electoral process from overbearing parties, political entrenchment, or even campaign finance overreach.[94]

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Descriptively, administrative agencies and processes already serve as key forums for democratic politics, advocacy, and social movement engagement with policymakers. Normatively, these institutions and processes could be adapted to more self-consciously promote these democratic features of administration—in particular, facilitating collective democratic judgment and balancing power disparities across different constituencies. But for regulatory agencies to be more effective at this democratic aspiration, we need a somewhat different approach to the design and implementation of regulatory policy. In the next Part, we will see some examples of how local and federal administration can be harnessed to deliberately mitigate power disparities and facilitate the engagement of movements and grassroots constituencies. This in turn will help us develop some more generalizable lessons and tools to be discussed in Part V.

IV. ADMINISTRATIVE POWER-BUILDING: TWO BRIEF EXAMPLES

Administrative agencies and processes can be useful spaces in which to reshape the power dynamics between different interest groups,

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STATE OF DEMOCRATIC THEORY (2003). For an application of a similar Madisonian view of contestation to issues of legislative reform, *see* Lee Drutman, *Political Dynamism: A New Approach to Making Government Work Again* NEW AMERICA (February 2016) https://static.newamerica.org/attachments/12404-political-dynamism-2/political_dynamism.c416ce23ca23482b8da8f0feaf14dbb3.pdf. *See also* Levinson, *supra* note 1, at 33 ("Constitutionalism is the project of creating, allocating, and constraining state power.").

92. *See* Andrias, *Separations of Wealth*, *supra* note 1, at 423.

93. *See* MCCORMICK, *supra* note 91; Sitaraman, *supra* note 1 (exploring what a similar strategy for balancing class-based political power might look like in more formal 'mixed-constitutional' methods).

94. *See* Elizabeth Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1505–06 (2000).

constituencies, and institutional levers. This Part highlights two concrete, paired examples: first comparing two new federal agencies developed in response to the financial crisis; and second, comparing two local government boards that seek to empower stakeholders through different mechanisms. These paired contrasts suggest how administrative institutions and policies can be deliberately designed to mitigate power disparities. In turn, these cases will inform the beginnings of a more general framework discussed in Part V below.

A. POWER, POLICY, AND REGULATION: POST-FINANCIAL CRISIS REFORMS

Despite the vast implications financial regulation has on the economy and society as a whole, financial regulatory agencies have traditionally been relatively insulated from broad-based participation by constituencies outside of financial industry interests. The relative insularity of financial regulatory agencies has made it challenging to elevate the views and concerns of marginalized, vulnerable, or diffused constituencies above the demands of firms with business interests at stake.[95] While much of the financial regulation debate has tended to focus on policy questions of systemic risk, financial stability, and consumer protection, the Dodd-Frank Wall Street Reform and Consumer Protection Act also offers an instructive example of how institutional design questions can also have implications for the broader balance of power between different constituencies. Consider in particular the contrast between the two new agencies created by Dodd-Frank: the Financial Stability Oversight Council ("FSOC") and the Consumer Financial Protection Bureau ("CFPB").[96]

From a policy perspective, the central problem the FSOC was designed to solve was the fragmentation of the financial regulatory landscape. Prior to the 2008 financial crisis, part of the challenge was that no single regulator was charged with the responsibility for systemic financial stability concerns. As a result, the risks of mortgage-backed securities and toxic assets fell through the cracks in the gaps between the jurisdictions of securities,

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95. Gillian Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129, 130–31 (2015) ("Although financial regulation agencies engage in notice-and-comment rulemaking, their regulatory mode is often more informal, ad hoc, and hidden from public view. Protecting vulnerable groups and preventing externalities are important concerns, but an overriding regulatory goal is ensuring the stability of the financial system, which often means protecting profitable lines of business."); *see also* Saule Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 623 (2012) (noting the chronic lack of public representation and participation in financial regulation—especially macro questions of systemic risk).

96. For a preliminary take on this comparison see my earlier work, RAHMAN, *supra* note 11, at 156–60.

commodities, and bank regulators.[97] But this fragmentation represents more than just a policy problem; it was also an accountability problem. In a highly fragmented regulatory ecosystem, established players like financial firms who can navigate accordingly, exploit gaps for regulatory arbitrage, and exercise outsized influence on individual regulatory agencies.[98]

In the debate over regulatory fragmentation, the idea of consolidating all our financial regulatory institutions into a "single-peak" regulator similar to the UK's Financial Services Authority was quickly dismissed.[99] Nevertheless, the FSOC as created represents a major attempt at consolidating systemic risk regulation authority in a single body, and coordinating between the different financial regulatory agencies like the SEC, the CFTC, and more.[100] Creating a centralized systemic risk regulator transformed the dynamics of power and influence in financial regulation, enabling not only policy coordination, but also protecting against undue industry influence. The FSOC is insulated from interest group pressure, with increased political accountability upwards to the President through the Treasury Secretary's role as chair of the FSOC.[101] But what is telling about the FSOC is that even as it attempted to rationalize and coordinate regulation, closing off gaps for financial firms to arbitrage, it did little to expand the direct representation and voice of affected but often less influential constituencies. As Saule Omarova has noted, to make macro financial policy more accountable and responsive would require institutionalizing greater representation of more diverse constituencies from workers to consumers to student debtors and others.[102] Omarova's counter-proposal is the creation of a "Public Interest Council" with representatives of these diverse constituencies, charged with overseeing and holding accountable financial regulators themselves.[103]

Like the FSOC, the CFPB was partly created to respond to the problem of capture and fragmentation of banking and financial regulators.[104] But in

97. *See e.g.,* Michael Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, at 94–95 (2012).

98. On the facility of interest groups in exercising influence on regulators in fragmented and complex regulatory environments, *see generally* e.g., Dan Awrey, *Complexity, Innovation, and the Regulation of Modern Financial Markets*, 2 HARV. BUS. L. REV. 235 (2012) and John Coffee, *Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012).

99. *See* Michael S. Barr, *Comment: Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations*, 78 L. & CONTEMP. PROBS. 119, 122–25 (2015).

100. *Id.*

101. Metzger, *Through the Looking Glass*, *supra* note 95, at 146–47.

102. Omarova, *supra* note 95.

103. *See id.* at 659–69 (describing the details of Omarova's proposed Public Interest Council).

104. *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321 (2013).

contrast to the FSOC, the CFPB was designed not just to be insulated from political pressure, but rather to be more accountable; first, through a substantive mission of consumer protection, and second, through a greater commitment to engagement with grassroots constituencies and affected communities.[105] As a result, the success of the CFPB is arguably a product of the agency's de facto role as a "proxy representative" of consumer interests in the financial regulatory ecosystem.[106]

First, the CFPB possesses a newly consolidated and empowered decision-making authority. This makes it more visible to lay citizens as a target for airing grievances and seeking redress. It also makes it more responsive and accountable by centralizing consumer protection and watchdog functions. A consolidated CFPB offers one way of re-slicing the same policy space that had previously been fragmented, confusing to lay constituencies and easily navigated by financial sector firms. Instead, the CFPB centralizes authority in one agency, thus clarifying lines of accountability and responsibility, and providing a clear target against whom stakeholder groups can make claims.

At the same time, the CFPB has a culture that enables it to act not only as a neutral policymaker, but as a *representative* of consumer interests. The CFPB contains designated offices for outreach to and engagement with constituencies that may have particular needs, but are often overlooked in financial regulation policy, such as veterans, students, and pensioners.[107] The agency's orientation is also a product of its personnel: many individuals working in the CFPB are themselves veterans of the consumer rights movement.[108]

Through public hearings and town halls set up around the country, [109] CFPB staff leverage public engagement to identify priorities for new rules and enforcement actions. The agency has also experimented with online platforms to engage broader participation, from its launching of a new centralized consumer complaint database, to its innovative use of online platforms like Regulation Room to engage more diverse groups in commenting on ongoing rulemakings.[110] The CFPB also runs a complaint

105. Metzger, *Through the Looking Glass*, *supra* note 95, at 148, 152; Barr, *Comment: Accountability and Independence in Financial Regulation*, *supra* note 99, at 127.

106. *See* Danial Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 365 (Daniel Carpenter & David Moss eds., 2013).

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

108. Telephone interview with Consumer Financial Protection Bureau, Community Affairs office, (May 28, 2015).

109. *See, e.g.*, *Field Hearing on Debt Collection in Sacramento*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-debt-collection-sacramento-calif/ (last updated July 28, 2016).

110. *See, e.g.*, Farina et al., *supra* note 40.

database,[111] compiling millions of grievances and concerns from the general public, in a publicly-searchable and accessible system.[112] The database enables the CFPB to set priorities based on its analysis of the real problems facing ordinary Americans.[113] The public nature of the database also helps shame and hold accountable industry actors, while holding the CFPB itself to account.

The agency also operates an office of community affairs office charged with organizing outreach to consumer advocacy groups and seeking input from constituencies like minorities, students with debt, and homeowners.[114] Community Affairs invests significant staff time and resources into identifying grassroots stakeholders, lay citizens, and community organizations who can speak for different segments of the population, actively working to build the trust and relationships needed to engage and empower these grassroots voices in shaping the agency's direction by identifying problems, and weighing in on open policy questions.[115] By running town halls, focus groups, online engagements, and other strategies, Community Affairs has as its core mission the building of trust and relationships with affected constituencies, in hopes of channeling these grassroots concerns into the core work of the agency itself.[116]

Viewing the FSOC and CFPB in comparison is instructive. Both FSOC and CFPB radically reshaped the relationships between industry and regulators by creating a new consolidated, centralized regulatory authority.[117] This consolidation of authority changes existing power dynamics, disrupting existing relationships between industry and agencies, and closing off gaps firms can exploit. But it is the CFPB that has generated the most vitriolic pushback from financial interests, in large part because of the realization that it can serve as a powerful advocate on behalf of constituencies ordinarily overrun in financial reform decisions. The fact that the CFPB combined both a consolidation of authority and power on the one

111. *Consumer Complaint Database*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/data-research/consumer-complaints/ (last visited Oct. 10, 2017).

112. *Id.*

113. *See* Barbara Kiviat, *The CFPB Is Making Government More Accountable. The GOP Wants to Stop It*, WASH. MONTHLY (June 8, 2017), http://washingtonmonthly.com/2017/06/08/the-cfpb-is-making-government-more-accountable-the-gop-wants-to-stop-it/.

114. THE CONSUMER FINANCIAL PROTECTION BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/ (last visited Jan 31, 2018).

115. Telephone interview with Consumer Financial Protection Bureau, *supra* note 108.

116. *Id.*

117. Metzger, *Through the Looking Glass*, *supra* note 95, at 148; *see also* Leonard J. Kennedy, Patricia A. McCoy & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1158–59, 1164–65 (2012) (arguing that the CFPB is fulfilling its statutory obligations through four principles: "(1) a market-based approach, (2) a focus on evidence-based analysis, (3) a commitment to encouraging and enabling robust public participation through transparency and innovative uses of technology, and (4) a recognition that history and other agencies' experience can provide invaluable guidance.").

hand with a greater connection to grassroots constituencies on the other made it a more radical threat to existing distributions of power and influence in the financial regulation space. The FSOC by contrast, while powerful in its own right, has been approached by financial sector interests like any other regulator—indeed, from the Volcker Rule to other major FSOC initiatives, financial sector interests have proven adept at lobbying and influencing even the FSOC's new systemic risk regulations.[118]

B. ECONOMIC DEVELOPMENT AND THE BATTLE FOR URBAN EQUITY

We can see similar challenges in balancing power in the context of local-level regulation. As several scholars working in the revived interest in local government law and urban inequality suggest, questions about participation and power have long shaped local battles over economic development, zoning, and housing policy.[119] The porousness and relative informality of local level administrative governance offer wider opportunities for civil society participation, organizing, and influence.[120] In one sense, decisions over local land use and housing policy enjoy multiple, institutionalized forms of representation and participation meant to balance power disparities and assure an inclusive policymaking process, from community boards to zoning procedures and more. But these institutional efforts to balance power are only effective when they occur in institutions that exercise significant authority and influence themselves. Battles over urban inequality and economic development thus highlight the importance of *both* institutional consolidation and authority on the one hand, and expanded civil society leverage on the other.

Consider for example, the ongoing interest in balancing constituency power and interests against more well-resourced and powerful groups like developers and financiers in context of urban development projects. Beginning in the 1990s, civil society groups began experimenting with

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118. *See generally, Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F.Supp.3d 219 (D.C. Cir. 2016) (reversing FSOC's determination that Metlife constituted a significant financial institution); Hilary J. Allen, *Putting the "Financial Stability" in Financial Stability Oversight Council*, 76 OHIO ST. L.J. 1087, (2015) (arguing that the influence of the Federal Reserve and Treasury Department handicaps FSOC's ability to perform its duties); Cary Martin Shelby, *Closing the Hedge Fund Loophole: The SEC as the Primary Regulator of Systemic Risk*, 58 B.C. L. REV. 639, (2017) (describing FSOC's failure to classify hedge funds as Systematically Important Financial Institutions and arguing that the SEC should be the primary agency tasked with financial stability); Christina P. Skinner, *Regulating Nonbanks: A Plan for SIFI Lite*, 105 GEO. L.J. 1379 (2017).

119. *See generally*, e.g. RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE (2016); Davidson, *supra* note 7; Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014). For classic accounts of democracy, power, and inequality in the city, *see* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (2001); GERALD E. FRUG & DAVID BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2013).

120. *See* Davidson, *supra* note 7.

"community benefits agreements" ("CBAs") as a way to hold developers more accountable for investing in local communities rather than simply exploiting these neighborhoods for elite-serving and gentrifying projects.[121] Generally, CBAs refer to contractual agreements between private developers and grassroots community groups (though increasingly local governments have also become direct parties to more modern agreements), committing developers to invest some degree of resources into local needs—such as parks and infrastructure—while also committing to certain labor requirements, including hiring from local communities and complying with higher wage and worker safety and security standards.[122] CBAs have been praised as a way to hold developers accountable for more inclusive and equitable development.[123] But they also have their critics. In some cases, CBAs have been vehicles for more narrow constituencies to extract concessions that may or may not serve the larger neighborhood.[124] Even if CBAs are successful, there remain challenges for their impact, as they are limited to the particular development or project, and often lack a larger connection to regional or city-wide zoning, housing, and land use decisions.[125]

A key challenge for CBAs has been not only in assuring representativeness of the community groups negotiating with developers; there has also been an ongoing challenge of assuring that developers actually follow through on these commitments.[126] Community benefits are often agreed to but ignored, as developers capture or simply run roughshod over local government bodies. As one study suggests, successful CBAs are often marked by the presence of well-organized, effective community organizing groups capable of holding developers accountable to the terms of the agreement.[127] But in recent years, newer experiments with CBAs suggest a further set of requirements: not only well-organized community groups, but specifically well-organized community groups that are connected to institutional levers of influence and power.[128]

The recent debate over the Oakland Army Base redevelopment is illustrative of this power-oriented approach. The Army Base is home to a massive $152 million venture transforming the old army base into a global

121. *See generally e.g.* Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic of the New Accountable Development Movement*, 17 J. COMMUNITY PRAC. 88 (2009); Edward W. De Barbieri, *Do Community Benefits Actually Benefit Communities?*, 37 CARDOZO L. REV. 1773 (2016).

122. *Id.*

123. *Id.*

124. *See* De Barbieri *supra* note 121, at 1788–91.

125. For a recent overview and analysis of CBAs, *see generally* De Barbieri, *supra* note 121.

126. *Id.*; See Parks & Warren, *supra* note 121.

127. *See generally*, Parks & Warren, *supra* note 121.

128. *Id.*

logistics and shipping center.[129] In 2013, the developers entered into a community benefit agreement and a project labor agreement with the City of Oakland and a coalition of community organizations, spearheaded by Revive Oakland, itself an umbrella group bringing together faith groups, labor organizations, racial and economic justice organizations, and community members. [130] The Oakland CBA involves two notable elements.

First, in order to implement the local hire requirements, the city formally created the West Oakland Job Resource Center.[131] The CBA requires the developers to work with the Job Center when hiring for the project.[132] Furthermore, the city engaged the East Bay Alliance for Sustainable Economies ("EBASE"), one of the leading grassroots organizations in the area and a key player in the Revive Oakland coalition, to get the Job Center up and running.[133] The Job Center meanwhile pro-actively recruits qualified candidates, while providing support and referrals for job seekers helping them leverage their engagement with the Army Base project into longer-term jobs and careers.[134] As a workforce development and jobs plan, this has proven successful, particularly in transitioning local hires into longer-term trades and careers.[135] For our purposes, it is the creation of the Job Center itself, and the role of EBASE in taking on responsibility but also a share of power over the hiring of the project, that is notable.

This role of community groups is even more apparent in the enforcement regime set up by Oakland for the project. The development and CBA are both monitored by a newly-created, city-chartered oversight body comprised of representatives from the developers and community organizations.[136] The Commission is comprised of eleven members appointed by the Mayor,[137] removable for cause.[138] Five of the members are required to be appointed

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129. *See* Annie Sciacca, *Port gives initial OK to revamp former army base in West Oakland,* MERCURY NEWS, November 10, 2017 https://www.mercurynews.com/2017/11/10/port-gives-initial-ok-to-revamp-former-army-base-in-west-oakland/.

130. *See EBASE and Revive Oakland Win Big,* PARTNERSHIP FOR WORKING FAMILIES (June 29, 2012), http://www.forworkingfamilies.org/article/ebase-and-revive-oakland-win-big. *See also* K. Sabeel Rahman, *The Key to Making Economic Development More Equitable Is Making It More Democratic,* NATION (Apr. 26, 2016), https://www.thenation.com/article/the-key-to-making-economic-development-more-equitable-is-making-it-more-democratic/.

131. Telephone interview with East Bay Alliance for a Sustainable Economy (Apr. 22, 2015) [hereinafter EBASE]. *See also EBASE and Revive Oakland Win Big, supra* note 130; Rahman, *The Key to Making Economic Development More Equitable, supra* note 130.

132. EBASE, *supra* note 131.

133. Id.

134. Id.

135. *See* Fran Smith, Opinion, *Oakland Army Base Is a Model for Equitable Development,* NEXT CITY (Feb. 19, 2016), https://nextcity.org/daily/entry/oakland-army-base-jobs-community-benefits-development.

136. See Oakland, Cal., Ordinance 13140 (Nov. 13, 2012).

137. *Id.* at § 3.

138. *Id.* at § 6.

from various community organizations and coalition groups specified in the ordinance, with an additional two members from organized labor.[139] The remainder of seats are split between two members from the city and two from the developer.[140] This distribution of seats is telling: not only are local stakeholders included, but they hold the balance of power on the Commission. The city and developers combined constitute only four of 11 seats; the Revive Oakland coalition and its partners and labor together hold seven seats.[141] The powers of the Commission are also significant. The Commission is charged with reviewing the implementation of the CBA, monitoring compliance with the agreement, and negotiating directly with the developers for remedies of possible violations.[142] The city itself is committed to enforce the agreement as a backstop if such negotiations fall short.[143] The Commission is also charged with issuing reports and findings, and empowered to develop additional procedures for its monitoring functions.[144]

The Commission provides a foothold of oversight power for all affected stakeholders. It also provides a forum for airing grievances empowering community organizations and civil society groups to bring claims where the developers might be falling short of commitments on local hire or community benefits investments. [145] As a result, the Commission both serves as a unique focal point for civic engagement, and a vital point of leverage for community members to influence the project on an ongoing basis. According to Revive Oakland members, the project is not only meeting its local hire benchmarks, but exceeding them.[146] More importantly, this substantive outcome has been achieved through a structure that has created greater power and influence for the communities themselves. The national Partnership for Working Families is already developing newer iterations of this model for CBAs around the country.[147]

The idea of incorporating constituent representation on local commissions is by no means new, but these commissions can often fail to create the kind of power-shifting that has marked the Oakland CBA and Commission. To illustrate this divergence, consider by contrast the attempt to institutionalize representation in rent-stabilization policy in New York City.

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139. *Id.*
140. *Id.* at § 3.
141. *Id.*
142. *Id.* §§ 1, 2a–2c.
143. *Id.* § 2d.
144. *Id.* § 5.
145. RAHMAN, *supra* note 11.
146. See EBASE, supra note 131.
147. *See Policy & Tools: Community Benefits Toolkit*, PARTNERSHIP FOR WORKING FAMILIES, http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies (last visited Oct. 10, 2017).

Housing and land use policy in New York have long been dominated by wealthier, well-connected, and politically-influential real estate interests, with deep connections in both New York and in the state government in Albany. There are, however, multiple institutionalized requirements that seek to balance this power disparity by codifying some degree of consultation and influence for resident and tenant interests. For example, approximately two million units of housing are rent-stabilized, where annual rental increases are set by the Rent Guidelines Board ("RGB"), an administrative board comprised of representatives from landlord groups, tenant advocacy groups, and "public" members—all appointed by the Mayor.[148] This not only gives tenants a voting bloc on the board; it also provides a catalyst for tenant groups to organize around: the board's annual public hearings are largely dominated by extensive tenant participation, as tenants provide testimony and appeal for low rent increases.[149]

Yet these modes of institutionalized participation amount to less than they seem. The RGB, for example, does succeed in catalyzing organizing among tenant groups, but it is unclear how much autonomous power and influence tenant groups can leverage through this particular foothold. Historically, the fact of mayoral appointment has meant that, while formally independent and bound to make its decisions on the basis of housing market data generated by RGB staff and state economic analysis, the RGB has voted largely in the spirit of the mayoral administration.[150] Thus the RGB voted for massive rent increases under Mayor Bloomberg—despite the severe economic pressures of the post-financial crises recession on tenant incomes, wages, and affordability.[151] Under Mayor de Blasio, the RGB has generally been more tenant-friendly. It is also notable that the balance of power on the Board is held not by the tenants and their two seats, but by the five "public" members, who on their own constitute a voting majority even if both tenants

148. *See* N.Y. UNCONSOL. §26-510; N.Y. UNCONSOL. § 8624. *See also,* N.Y.C. RENT GUIDELINES BOARD, http://www.nycrgb.org/html/about/intro/toc.html (last visited Oct. 10, 2017).

149. *See* Mireya Navarro, *New York City Board Votes to Free Regulated Rents on One-Year Leases*, N.Y. TIMES (June 29, 2015), https://www.nytimes.com/2015/06/30/nyregion/new-york-city-board-votes-to-freeze-rents-on-one-year-leases.html; Mireya Navarro, *For the Second Year, Rents in Some Stabilized Apartments in New York City Will Not Increase*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/nyregion/for-the-second-year-rents-in-some-stabilized-apartments-in-new-york-city-will-not-increase.html; Khorri Atkinson, *New York City Approves Rent Increases for Regulated Apartments*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/nyregion/new-york-city-approves-rent-increases-for-stabilized-apartments.html. Note that the Author has served as a Public Member of the RGB from 2015–2016. This account is based on publicly-available information and the Author's experience of the institution.

150. Note that the Author has served as a Public Member of the RGB from 2015–2016. This account is based on publicly available information and the Author's experience of the institution.

151. *See* NEW YORK CITY RENT GUIDELINES BOARD, *Apartment Orders 1 through 49* (1969-2018), https://www1.nyc.gov/assets/rentguidelinesboard/pdf/guidelines/aptorders2018.pdf (last visited Feb. 4, 2018).

and landlords vote in opposition. This is by design, in theory to enable neutral expertise to shape the RGB decisions.[152] Indeed, the requirements for the public members emphasize experience and expertise in housing and economic development matters.[153]

Furthermore, even where the physical presence of tenant organizing groups through hearings and formal seats on the Board are successful in influencing the 'swing' votes of the public members, there is a further problem: the RGB itself lacks significant authority to address the more structural problems of housing inequality.[154] It is telling that many of the concerns raised by tenants in public hearings involve challenges far outside the RGB's relatively narrow rate-setting role. Concerns raised range from pleas for individual redress from difficulties like landlord harassment, forced eviction, poor living conditions, attempts to force tenants to sign new and often skewed contracts, to structural concerns about gentrification, rezoning, and widening inequality.[155] These tenants engage the RGB as a forum to exercise influence and make themselves heard; yet the RGB lacks the authority to address either individualized grievances or systemic policy challenges.

In contrast to the Oakland commission, the RGB is not empowered to provide reports or conduct investigations.[156] The RGB staff produces thorough analyses of housing data including on landlord operating costs and overall tenant and city economic conditions.[157] These reports are important to inform the deliberations of the RGB, and are developed drawing on data shared from city and state agencies. But the RGB itself does not conduct inspections, does not have the power to bring enforcement actions against violations, and is not formally charged with issuing reports or recommendations to either the Mayor or the City Council.[158] While RGB members will often make statements in the public vote, this is a far cry from the kind of reporting, enforcement, and public agenda-shaping power the Oakland commission can exercise.

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152. Note that the Author has served as a Public Member of the RGB from 2015–2016. This account is based on publicly available information and the Author's experience of the institution.

153. N.Y. UNCONSOL. § 26-510(a).

154. *See* e.g. Timothy Collins, *An Introduction to the NYC Rent Guidelines Board and the Rent Stabilization System*, NYC RENT GUIDELINES BOARD, https://www1.nyc.gov/site/rentguidelinesboard/about/history-rent-regulation-and-the-rgb.page (last visited Feb 4, 2018).

155. This assertion is based on the author's personal experience as a board member on the RGB.

156. *See EBASE and Revive Oakland Win Big*, *supra* note 130; Rahman, *The Key to Making Economic Development More Equitable*, *supra* note 130; EBASE, *supra* note 131.

157. *See, e.g.*, N.Y.C RENT GUIDELINES BOARD, 2017 HOUSING SUPPLY REPORT (May 25, 2017), http://www.nycrgb.org/downloads/research/pdf_reports/17HSR.pdf; N.Y.C. RENT GUIDELINES BOARD, 2017 INCOME AND AFFORDABILITY STUDY (last visited Oct. 10, 2017), http://www.nycrgb.org/downloads/research/pdf_reports/ia17.pdf.

158. *See EBASE and Revive Oakland Win Big*, *supra* note 130; Rahman, *The Key to Making Economic Development More Equitable*, supra note 130; EBASE, *supra* note 131.

V. POWER AND INSTITUTIONAL DESIGN

The examples described in Part IV above are illustrative of the larger argument of this paper. In addressing the problem of disparate power, institutional design of administrative agencies and processes can play a major role. Such power-shifting institutional design can forge the kinds of linkages between constituencies and institutions that can reshape the distribution of power and influence.

In political science and sociology, scholars have suggested that policies and institutions which forge more robust links with beneficiary communities are more likely to be durable.[159] But as the examples in Part IV above suggest, this interface between policymakers and constituencies need not be a passive one; rather that relationship can operate in vastly different ways depending on the design of the institutions and policies in question. As we will see below, this suggests that a key focal point for designing power-shifting policies lies in reforming this institution-constituency interface. The Part will then draw out from the case studies above two specific types of strategies through which constituency power can be expanded by policy design.

Building on these case studies, I argue for two general power-shifting design principles. First, power can be shifted by creating institutions and processes that are visible and that have actual power and jurisdictional scope. This helps make community organizing more likely and effective, orienting claims-making by constituencies around a clear target for mobilization—and a target empowered to actually respond to those claims. Second, power can be shifted by increasing the leverage that such stakeholder groups might have on the policymaking institution, through various mechanisms of representation or participation.

A. POWER AS A PROPERTY OF THE INSTITUTIONAL-CONSTITUENCY INTERFACE

For our purposes, we can understand power as the ability to change the outcome or probability of outcomes in favor of one's own preferences or values. Crucially, power need not manifest in direct, intentional influence on policy outcomes; oftentimes, rather, power is manifest in how other actors modify behavior in anticipation of another party's views, and in how the powerful actor can become influential without explicitly seeking a specific policy shift.[160] Power, so defined, is extraordinarily unequally distributed in

159. *See infra* Part V.A.

160. *See* Jane Mansbridge et al., *supra* note 89 at 80 n.44; *accord.*, Levinson, *supra* note 1, at 39 (defining power as the "ability of political actors to control outcomes of contested decision-making

contemporary American political economy. Crucially, these inequities of power often operate through a variety of channels of influence, from direct lobbying to "softer" forms of influence based on shared culture, norms, or class background.

As the CFPB/FSOC and the Oakland/RGB cases suggest, constituency power is greater where citizens are able to contest state action, forcing state actors to give an account of their policies through the imposition of sanctions, procedural requirements, and constraints.[161] But this ability to mobilize and pressure state actors—and the degree of influence that might arise from such mobilization—are products of the institutional structures through which policy is made, and around which such civil society mobilization is oriented.

Public choice theory has long since struggled with the classic power imbalance between diffuse interests and concentrated interests: even if the former might be more numerous or have more critical demands, the latter are more likely to be able to engage in coordinated, concerted, and ultimately impactful policy advocacy.[162] This systematic tendency is exacerbated by the realities of power disparities which can operate through a variety of other channels as well: shared ideological, social, and cultural backgrounds with policymakers; financial influence; influence through providing information and research support for low-capacity policymaking bodies, and more. How might we mitigate these disparities in power and influence? The case studies above raise an important implication: the ability of constituencies to exercise power—whether they are residents in Oakland or consumers in the financial reform debate—stems not just from the organizational strength of these groups in civil society, but also from their interfaces with administrative policymakers. These linkages are what enable these constituencies to exercise political power and influence over, say, the Army Base Project or the implementation of consumer protection regulations.

To broaden this intuition, we can turn to law and social science accounts of how institutions and civil society groups interact. Three different literatures offer some indicators of how institutional design can alter the dynamics of civil society and constituent organizing and mobilizing, to offset

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processes and secure their preferred polices") (citing Robert Dahl's classic WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961)).

161. *See* Mark Philp, *Delimiting Democratic Accountability*, 57 POL. STUD. 28, 32–35 (2009). *See generally* Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214 (2009) (outlining different dimensions of responsiveness and accountability for various types of state officials exercising delegated power, including elected and administrative officials).

162. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (Harv. U. Press ed., 1971).

these systematic advantages for more concentrated, well-resourced, and well-connected groups.

1. *Public Law Mediating Between Interests and Institutions*

In his recent *Harvard Law Review* Foreword on power and public law, Daryl Levinson rightly notes a central challenge for the problem of balancing political power: a basic tension between a focus on balancing power through *institutions* on the one hand—following Madison's view of the separation of powers in Federalist 51—and balancing powers through *interest group pluralism* on the other, in keeping with Madison's argument in Federalist 10.[163] In place of this duality, Levinson suggests that we need to view both interests and institutions in relationship to one another, by "passing through" the power of governmental institutions to unpack the configuration of interest group powers that might lie behind particular institutions.[164] Thus the formal separation of powers in public law operates dynamically in relationship to the background alignment of parties and interest groups, shaping if and when the different branches in fact operate to check or empower one another.[165] Similarly, federalism as an institution can provide checks on the central government, but these dynamics are shaped by the partisan and interest group alignments *within* states: so Texas and California are more likely to operate as checks on the federal government when they are vehicles for partisan interests in opposition to the party in power in Washington.[166]

This approach of "passing power through" institutions to the background configuration of interests is important for mapping and diagnosing existing power dynamics. But it also carries some implications for power-shifting institutional design. For starters, the idea of "passing power through" suggests that it is not enough to create institutions or processes on paper and expect these institutions to gain traction as checks and balances on existing power centers; rather, for institutional levers to have real force, there needs to be political actors—interests—that lie *behind* those institutions, and are motivated to make full use of those institutions themselves.[167]

As Kate Andrias rightly notes, if we are to actually redress disparities of power, we need to go a step further, to develop "a range of structural, power-

163. Levinson, *supra* note 1, at 36.

164. *See generally id.* at 40, 84.

165. *See generally* Daryl Levinson & Richard Piles, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

166. *See generally*, Jessica Bullman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); *see also* Seifter, *supra* note 41.

167. For a similar point with respect to the separation of powers, *see generally* David Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014).

shifting reforms to our law, our economy, and our democracy"—in particular, by examining how current and historical social movement like labor and the Black Lives Matter movement have worked to build their core *capacity* to contest and exercise power.[168] Altering the existing balance of power thus requires finding ways to bolster the underlying *capacity* of affected but relatively under-powered interests to exercise power and influence on decision-makers. Part of this has to do with creating new institutional powers and levers, but part of it also requires *linking* those levers to underlying interests or constituencies.

2. *Constituency Effects and Policy Sustainability*

There is a growing literature in political science documenting the ways in which particular institutional and policy designs can foster these linkages with constituencies, making it more likely that these groups will identify with—and thus mobilize to protect—these institutions and policies. The classic example here is Social Security: as a universal benefit, Social Security has played a formative role in shaping the identities of many Americans, ultimately becoming an example of a deeply-embedded social policy that is very difficult to overturn because of this depth of identification and public support.[169]

By contrast, policies that are more "submerged"—hidden from view such that many beneficiaries do not even know they benefit from an institution or government program—are much more easily overturned, and do little to generate public support for or identification with the institutions responsible for providing the benefits in the first place. Suzanne Mettler[170] thus contrasts the design and politics of the Home Mortgage Interest Deduction ("HMID") or food stamp benefits with Social Security to highlight this point: the HMID is a benefit that is politically difficult to overturn because so many constituencies benefit from it, yet it is submerged within the tax code, and unlike Social Security, because few beneficiaries are even aware that they benefit from a government policy or regulatory arrangement.[171] These policies do not generate a systematic awareness, identification, or political affinity on the part of their many beneficiaries. The

168. Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 6–8 (2016). *See also*, Andrias, *Separations of Wealth*, *supra* note 1.

169. *See generally, e.g.*, JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES (Cambridge U. Press ed., 2002); PAUL PIERSON, DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER AND THE POLITICS OF RETRENCHMENT (Cambridge U. Press ed., 1994); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS (The Belknap Press of Harv. U. Press ed., 1992); Andrea Campbell, *Self-Interest, Social Security, and the Distinctive Participation Patterns of Senior Citizens*, 96 AM. POL. SCI. REV. 565 (2002).

170. *See generally* SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY (2011).

171. *Id.*

result is that submerged policies do not have the same kinds of constituency-forming effects on beneficiaries as open entitlements. As Mettler argues, "democracy depends, first of all, on citizens having the means and capacity to form meaningful opinions" about public policy, but "how can citizens establish their own views about its politics—opinions that reflect their values and interests—if they have only limited or faulty information about those policies, or have never heard of them?"[172] Opaque or hidden regulatory schemes and policy designs exacerbate pre-existing disparities of political power and organizational capacity: such submerged policy designs "easily capture and hold the attention of organized interests," but "fail to make themselves apparent as social programs to most citizens who use them," exacerbating the difficulties of organized, countervailing collective action.[173]

Viewed from the standpoint of power and linking constituencies' interests with institutions, this literature suggests that "policy sustainability"[174] is largely a product of the degree to which a policy can generate such positive, public support from beneficiaries, while creating incentives that prevent potential critics from mobilizing in opposition to the policy.[175] While framed as a way to entrench policies and institutions, the mechanisms outlined by this literature operate through changes to the distribution of power as a result of these constituency effects. By making policies and institutions more visible, and more closely bound to the identities and interests of constituencies, we can expand the incentives and likelihood that those constituencies will engage in collective political action to defend the policy or institution with which they identify. In essence, this solves the collective action problem, and helps spur more regular mobilization in defense of the institution or policy. Yet this linkage between interest and institution still relies on public awareness, and is largely felt through public opinion and electoral channels. These instruments are relatively blunt for exercising power, particularly given the myriad of policy questions decided on by legislative and regulatory bodies outside of the public eye and between elections.

3. *Social Movement Theory and Political Opportunity Structure*

We can see a more granular account of how institutional structures can incentivize and catalyze more specific forms of constituency voice and participation in the literature on social movement theory. This literature suggests that the ability of civil society groups to form durable, long-term

172. *Id.* at 26.

173. *Id.* at 46.

174. *See* Eric Patashnik, *After the Public Interest Prevails: The Political Sustainability of Policy Reform*, 16 GOVERNANCE 203, 207 (2003).

175. *Id.*

organizations capable of exercising power depends a great deal on their internal organizational capacity, as well as the larger institutional context in which these groups operate.

Social movements can be understood as a larger network of individuals connected by shared experiences and commitments. These movements can be linked to a variety of formal organizations, and through organized political activity make claims on institutions and policymakers.[176] As sociologists Sidney Tarrow, Charles Tilly, and others have argued, the ability of movements to be successful in exercising political power and winning campaigns depends on a variety of conditions, including the presence of mobilizing narratives that can frame their values and demands, organizational resources and capacity, and "political opportunity structure"—the ways in which existing policymaking institutions create opportunities for movements to make effective claims on policymakers.[177] Political opportunity structure in turn, can inform the strategies and organizational capacities of movements, as movements tend to build a "repertoire" of expertise and skills specialized around the most effective methods of exercising real power and influence.[178]

This social movement literature suggests that beyond the constituency effects identified by political scientists like Campbell, Skocpol, Mettler, and others, there are more fine-grained ways in which institutional structures can catalyze movements and civil society organizations to build and exercise power *based on the types of institutional opportunities for influence.*

B. CATALYZING CONSTITUENT POWER

This literature taken collectively suggests that institutional design can play a large role in shaping the terrain upon which social movements and civil society actors operate. Institutions and processes for policymaking are not just neutral responders to the external pressures of interest groups. Rather, they themselves shape the political terrain on which individuals and constituencies attempt to exercise political power. Thus, institutions and processes can be designed in ways that pro-actively catalyze and facilitate the ability of groups—particularly diffuse, under-resourced, marginalized, or traditionally overlooked groups—to be better able to exercise power and influence.

Expanding this capacity for influence, however, requires looking at both the nature of interest group organization and the institutional context in

176. *See generally*, CHARLES TILLY, CONTENTIOUS PERFORMANCES (2008).

177. *See generally*, SIDNEY TARROW & CHARLES TILLY, CONTENTIOUS POLITICS AND SOCIAL MOVEMENTS (2009); SIDNEY TARROW, POWER IN MOVEMENT (1994).

178. *See, e.g.*, HAHRIE HAN, HOW ORGANIZATIONS MAKE ACTIVISTS: CIVIC ASSOCIATIONS & LEADERSHIP IN THE 21ST CENTURY 68–69 (2014); TILLY, *supra* note 176, at 148–49.

which these organizations act. When interest groups and organizations exercise power, we often tend to focus on the ability to shape a specific policy decision or outcome. And indeed, much of the literature on social movements and organizations often examines case studies at this level of analysis, particularly how civil society groups mobilize and secure specific legal or policy victories.[179] But the likelihood and frequency of such policy victories is shaped by the distribution of power at deeper levels. Specific policy decisions are themselves constrained by the power to set agendas to begin with; if an issue or option is not even considered "viable" or "on the table," no degree of influence on the policy decision itself will be effective. Furthermore, the ability to set agendas is similarly a function of even deeper background structures about who can organize and exercise influence, and who has a seat at the table to begin with.[180] The project of redressing or balancing power disparities thus must approach the distribution of power at this deeper, third-level of *institutional structure and organizational capacity*, rather than focusing on more surface-level issues of specific policy disputes or outcomes.

To understand this focus on structural allocations of power, consider for example, the battle for labor power in today's economy. Among the central challenges for workers organizing today are specific policy questions such as the minimum wage, or fair work-week scheduling. But the ability of workers to drive such specific policy changes, however, is a product of background structural conditions. Can labor groups mobilize a wide enough constituency of workers across different employers, sectors, and geographies? Can they organize such *ad hoc* mobilization into long-term, durable, movement groups that can maintain sustained advocacy pressure? Are there policymaking institutions to which these claims can be directed? Are such appeals *ad hoc* and one-off instances, or can they be more deeply institutionalized so that workers have a more sustained seat at the table, shaping policy on a forward-looking and ongoing basis, rather than battling for after-the-fact redress? Labor law has long been criticized for imposing structural and historical constraints on the ability of labor to forge durable cross-sector coalitions that can exercise ongoing power and influence on the policies of the workplace, for example by excluding many low-wage, precarious types of work, like domestic workers and farm workers—areas

179. *See generally*, Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 WISC. L. REV. 171, (2013) (describing how the law and social movements literature generally examines case studies of specific campaign mobilizations resulting in legal and policy change); *see also* Cummings *supra* note 179, at 184 (noting the tendency of this literature to focus on specific litigation strategies or mobilization efforts).

180. *See generally*, JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE & REBELLION IN AN APPALACHIAN VALLEY (1982); Archon Fung, *Understanding Power*, GETTYSBURG PROJECT ON CIVIC ENGAGEMENT, Jun. 2017 (on file with author).

which now comprise a huge chunk of the modern labor force, and also disproportionately represent communities of color.[181] While some battles over labor organizing and policy are about specific surface issues like wages, others concern deeper structural allocations of power. Indeed, these are the stakes of so-called "right to work" laws (and the contrast to the push for "card check" laws) that would undermine (or expand) the long-term capacity of labor to forge effective, mass civil society organizations.[182]

In terms of our case studies above, this difference between one-off impact and institutionalized power and influence is also evidenced by the difference between the degree of influence that Oakland communities have through the Army Base Commission, contrasted to the occasional and *ad hoc* influence of residents in other CBA battles. Consider the ways in which the presence of the CFPB radically changed the capacity of consumers to drive policy change in financial regulation, in comparison to the pre-Dodd-Frank era.

From the standpoint of power, then, it is crucial to approach institutional design questions with a focus on the interactions between institutions and social movement or civil society organizing.[183] This is not to say that there exists a pure power-balancing process or institutional structure. Procedural protections are certainly susceptible to capture and influence by more well-resourced and sophisticated players.[184] Nevertheless, under conditions of already-existing disparities of capacity and influence, we can identify two dimensions where institutional change can shift the terrain of power and influence in a more equitable and balanced direction: increasing the visibility and authority of policymaking institutions themselves, and creating more points of leverage through which stakeholders can influence policymaking in those institutions themselves.

This linkage between constituencies on the one hand, and policymakers on the other, can in turn be institutionalized at a variety of levels. At the most micro-level, the link can operate through an affected constituency's connection to a specific office holder or specific agency personnel: the appointees on the RGB, or staffers in the CFPB's Consumer Affairs Unit. Alternatively, this link might be institutionalized at the level of an agency

181. *See generally,* DAVID ROLF, FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA (2016).

182. *See e.g.* Rogers, *supra* note 10; Andrias, *The New Labor Law*, *supra* note 10; Nelson Lichtenstein, STATE OF THE UNION 177 (Princeton Univ. Press, 2010); Michelle Miller and Eric H. Bernstein, *New Frontiers of Worker Power: Challenges and Opportunities in the Modern Economy*, ROOSEVELT INSTITUTE (Feb. 15, 2017), http://rooseveltinstitute.org/new-frontiers-worker-power/.

183. *See* e.g. Andrias, *Separations of Wealth, supra* note 1, at 497–99.

184. Administrative law scholars Ganesh Sitaraman and Kevin Stack both refer to this as the "paradox of process." Sitaraman, *supra* note 1 at 1500; Kevin Stack, *supra* note 86.

office—what Margo Schlanger has dubbed "office of goodness."[185] Such offices codify and institutionalize a substantive ethos and commitment to a particular mission—for example, civil rights protections or internal dissenting checks and balances within an agency. By providing advice, assistance, or even independent investigation of complaints and checking of agency analyses, these offices can provide an institutionalized form of countervailing power within the agency.[186]

But crucially, as Schlanger and others have framed it, such offices are for the most part dependent on the rest of the agency, particularly its leadership, for their autonomy and independence.[187] To serve as a foothold for countervailing power, these offices would need to be somewhat autonomous. Long-standing proposals for "proxy advocacy"[188] and "regulatory public defenders"[189] would institutionalize such greater autonomy to make this kind of countervailing power possible. These footholds could also be more forceful in checking agency assumptions and balancing the power and influence of other groups within the agency ecosystem, if they in part possessed a more direct connection to "client" constituencies. Indeed, this is arguably what makes the CFPB so powerful—and so threatening. In a lot of ways the entire agency is a kind of massive "Office of Goodness" but with greater autonomy, independence, resources, and strong formal and informal ties to its core constituency. The combination of participatory and representative mechanisms with the independent funding of the CFPB and its status as an agency operating alongside other financial regulation agencies makes it an extremely effective channel for countervailing power. Thus the "representativeness" or constituency-linkage within an agency is something of a fractal phenomenon, potentially existing

185. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 55 (2014).

186. *Id.* (In this Schlanger's account relates to other studies of internal checks and balances between offices within the same agency.). *See e.g.* Daniel Farber & Anne O'Connell, *Agencies as Adversaries*, 105 CAL. L. REV. (forthcoming). Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L. J. 2314 (2006) (describing internal checks within agencies); Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, (2017) [hereinafter *Subdelegating Powers*] (modeling the incentives for agency heads to subdelegate certain functions to other offices within the agency); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015); Daphna Renan, *Pooling Powers*, 115 COLUM L. REV. 211 (2015).

187. Schlanger, *supra* note 185, at 61 ("Offices of Goodness are internal and dependent on their agency."); *see also* Daniel Carpenter, *Internal Governance of Agencies: The Sieve, the Shove, the Show*, 129 HAR. L. REV. F. 189 (2016) (warning that agency subdelegation of this sort can just as often be used to silence internal dissent as to enable it); Nou, *Subdelegating Powers*, *supra* note 186 (noting that subdelegation of power to an internal office is more likely to occur when the incentives and goals of the agency head and the suboffice align).

188. *See* Schwarcz, *supra* note 106, at 4 (examining case studies of how proxy advocacy and tripartism has helped mitigate the risk of capture in state-level insurance regulation).

189. *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 491 (2005).

at levels ranging from the individual policymaker, to the office, to the agency as a whole. Here too, the lesson is one of institutional flexibility: there are many routes towards facilitating these linkages and thereby rebalancing power relationships within a particular sector or policy area.

In some cases, legislation could create administrative structures and processes designed to facilitate the linkages between constituencies and policymakers, along the lines sketched above. Thus, statutes like the creation of the CFPB or the local ordinances forming the Oakland Commission could be models for future legislative institutional design. But in other cases, these power-shifting processes can be pursued, at least in part, through ordinary administrative discretion. The CFPB does have a unique statutory structure, but many of its practices that expanded the influence and leverage of community groups could be adapted through ordinary regulatory discretion over ad hoc or rule-based procedures.

These power-shifting strategies need not to be limited to public actors. A growing literature has highlighted the ways in which the day-to-day governance of various services and processes involve a wide array of public and private actors, linked together by outsourcing contracts, grants, or other legal arrangements.[190] These legal tools could presumably incorporate to some degree the kinds of procedural arrangements sketched above as part of their contractual terms—along the lines of CBAs themselves.

The rest of this Part develops some more portable strategies for institutional and policy design that can help balance disparities of political power, in particular by focusing on ways in which institutional design and policymaking process can create different *interfaces* between stakeholder and constituency groups on the one hand, and policymakers on the other. These institutions and interfaces can be designed to either exacerbate or mitigate power disparities. Furthermore, by focusing on a set of generalizable approaches to institutional design, this approach to power-balancing can be used and applied in a variety of administrative bodies and institutional contexts.

C. STRATEGIES FOR POWER-SHIFTING POLICY DESIGN

The examples above help highlight how these power-shifting principles might operate in practice. Consider the CFPB and FSOC contrast. Both of these agencies exemplify the first set of considerations, consolidating

190. *See, e.g.*, JODY FREEMAN & MARTHA MINOW, GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1–9 (2009); Alfred C. Aman, Jr. & Joseph C. Dugan, *The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management*, 102 IOWA L. REV. 883, 893 (2017); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 725–30 (2010); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1040–42 (2013); Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 258 (2014).

policymaking authority that was previously fragmented and disjointed, and creating a visible target for policy advocacy and mobilization. But the two institutions diverge significantly on the second set of considerations around points of leverage. The FSOC, despite its committee-like structure with representatives from various financial regulatory agencies, does little to provide entry points or points of influence for affected constituencies. The CFPB by contrast, has made constituency engagement a central feature of its practice.[191] As a result, the CFPB has magnified the influence and impact of a variety of constituencies on federal regulation writ large, from consumers to student debtors to victims of financial fraud. Even the CFPB falls short in the relative degree of informality and discretion in its civic engagement efforts. The complaint database and the pro-active convenings of stakeholders are both initiatives that the CFPB itself has put forward. This is indicative of just how much more agencies can do by deploying their own discretion to create more power-balancing processes—but it also underscores that these initiatives can be just as easily eliminated should agency personnel and priorities change.

The Oakland Commission and New York RGB contrast is similarly instructive. Both of these local administrative bodies offer statutory measures to enhance formal representation for affected constituencies—local residents and community groups in Oakland and tenants in the RGB. Yet the power that these constituencies exercise as a result is vastly different. In the RGB, tenants do not at all hold the balance of power, in contrast to the allocation of seats in the Oakland Commission.[192] Furthermore, the Oakland Commission itself has far more power and authority to begin with than the RGB: while the rent increase rate is in a sense more impactful because it affects the entire city, the RGB itself only sets the rate.[193] The RGB cannot address grievances, issue reports, or monitor compliance.[194] These functions are to some degree met by other regulatory bodies at the state and city level, but these bodies are themselves scattered and fragmented, with relatively limited capacities of their own. The Oakland Commission, by contrast, though more focused on the Army Base Project in particular (rather than all Oakland developments), has a much greater degree of power and influence over the project itself.[195]

191. *See infra* Part IV.A.
192. *See supra* Part IV.B.
193. *See supra* Part IV.
194. *See Id.*
195. *See Id.*

1. *Two Design Principles for Power-Shifting*

Taken together, these examples illustrate the importance of two general features of policy and institutional design that can shape power dynamics. One set of design questions concerns the scope of agency authority. A second concerns the existence of institutionalized points of leverage that enable constituencies to force policy change. Both of these conditions together can combine to generate a greater shift in power and influence.

A first set of institutional design choices for balancing power involves the *consolidation of institutional authority and visibility*.

A central feature of the American policymaking terrain is that it is in fact extremely difficult to navigate. We have an extraordinarily fragmented institutional ecosystem. There is a huge array of policymaking bodies divided horizontally, not only the Federal separation of powers, but also the array of regulatory agencies that exercise overlapping and clashing jurisdictions in some cases, while leaving in place huge regulatory gaps in authority in other cases. This horizontal fragmentation is multiplied by vertical fragmentation between federal, state, and local level institutions.

Such opacity and fragmentation represent a structural feature that is, on balance, problematic from the standpoint of balancing power and enabling countervailing power. While it is true that some degree of fragmentation can be helpful in providing more arenas for countervailing views,[196] there is a tradeoff between such fragmentation and actual policymaking impact. Furthermore, it is more likely that in an extremely fragmented and complex terrain, more well-resourced, sophisticated, and well-connected groups are likely to be able to navigate their way and make themselves heard, while less-resourced groups fall short, appealing to the wrong office or not even knowing where to appeal in the first place. For countervailing power and movement organizing to thrive, there must be a visible *governmental target* to which claims can be brought, and which has the authority and capacity to address those claims. Without a clear and efficacious target, it is difficult to mobilize—and even more difficult to convert mobilization into a policy change. Thus, we can think of this as a *jurisdictional consolidation* condition, and view it as having an inverse-U relationship with balanced power: too much consolidation, and it seems likely that already-powerful groups will capture and dominate the policymaking apparatus; too little, and those same powerful groups will out-maneuver other constituencies to exert maximal leverage.

Closely related to the scope of jurisdiction question is the scope of institutional authority. Where institutions lack the actual authority and

196. *See* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1759–60 (2005) (arguing that decentralization is valuable precisely because it allows minority views to be tested out in practice through local or state level bodies).

capacity to shape social or economic conditions, they are less useful levers through which interests and constituencies can exercise power. Stated another way, the promise of actual "influence over a slice of state power" creates a "powerful incentive" for participation,[197] and thus facilitates the capacity of constituencies to mobilize, organize, and exercise power. These jurisdiction and authority dynamics are exacerbated by problems of *policy complexity, opacity, and visibility.*

Such consolidated institutional authority and visibility can be understood as accelerating and deepening the kinds of constituency effects described above, raising the incentives for groups to mobilize and organize—and thus forging a greater link between interests and the institutions themselves.

Even once institutions are consolidated and visible enough to help generate countervailing mobilization, organization, and advocacy, the capacity of these constituencies to exercise power depends on a further additional set of conditions: whether there are sufficient *hooks and levers* through which constituencies can shape or monitor the policies themselves, and in so doing build and exercise meaningful political power. There must be an *interface* through which these constituencies can engage with policymakers, and have meaningful voice over actual policy decisions. Without such an interface, mobilized groups face an uphill battle in being heard and having real influence. Institutions and processes need to provide these stakeholders and constituencies with real hooks and levers through which they can exercise effective countervailing power, thereby forcing decision-makers to respond to a wider range of voices, concerns, and ideas. So long as participation remains ad hoc or at the whim of the policymaker, it will necessarily be thin, disempowered, less likely to serve as a mode of empowerment or inclusion.

There are a variety of mechanisms through which constituencies can interface with different institutions of policymaking. One set of approaches would seek to codify different types of *interest representation* within policymaking bodies. Representation here is not just about the personnel within the decision-making body; rather, representation can operate more

197. Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. (SPECIAL ISSUE) 66, 69 (2006); Archon Fung, *Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 J. POL. PHIL. 338, 346 (2003). *See generally*, MICHAEL MCGUIRE AND ROBERT AGRANOFF, COLLABORATIVE PUB. MGMT. (2003). *See also* ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 71 (Princeton Univ. Press ed., 2006) (Participants "must believe that there is some benefit to participation: that meetings are not just talk shops or venting sessions."); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 46 (Cambridge U. Press ed., 1976) (The very motivation to engage in political participation requires that individuals feel a "sense of political efficacy."); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1070 (1980) ("Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.").

dynamically as a way to link social movements and civil society actors outside government, to the workings within government.[198] Another set of mechanisms would seek to expand the opportunities for meaningful *participation* of constituencies in shaping, implementing, or monitoring policies themselves. While we have a standard set of tools for transparency and public comment, these tools would have to be modified and employed differently for participation to shift the balance of power.

These two considerations complement and reinforce one another. From the standpoint of social movements or relatively marginalized constituencies, a clearly visible and consolidated institutional target with meaningful authority can help focus and catalyze organizing efforts and orient organizations around an interlocutor more likely to be able to respond. At the same time, exercising power will be difficult absent hooks and levers for exercising influence within these target institutions. Inversely, there may be institutions that offer useful hooks and levers that make it easier for constituencies to plug in to decision-making. But if those decisions and policies are hidden from view, or if the institutions themselves have limited scope and jurisdiction, the value of such participation is diminished.

2. *Participation and Power in Monitoring: Citizen Audits*

Such participation and bottom-up pressure can be implemented at a variety of points in the policymaking process. We tend to think of the engagement of constituencies in context of ex ante consultations before a policy is set. This is the stance of notice-and-comment procedures, negotiated rulemaking, and of ad hoc consultations with stakeholder groups. But often more productive and effective forms of countervailing power take place downstream, through monitoring and oversight of policy outcomes, which then feed back into future new policy decisions. This is the way the CBA process in Oakland operates: grassroots communities are engaged primarily in ex post monitoring of outcomes along a prior set of goals and standards.[199]

More generally, this role of countervailing power in ex post monitoring represents an under-utilized power-shifting design—a strategy that we might think of as "citizen audits."[200] Through greater participation, citizens can act as diffuse networks to track the degree to which regulatory bodies implement

198. *See* e.g. Urbinati & Warren, *supra* note 82, at 388–90; *See* generally, Lisa Disch, *Toward a Mobilization Conception of Democratic Representation*, 105 AM. POL. SCI. REV. 100 (2011).

199. *See* discussion *supra*, part IV.

200. For a generalized account of how such participatory monitoring might work, *see generally* Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, PERSP. POL. (forthcoming 2018).

their policies effectively.[201] Such participation can check the manipulations of private actors by facilitating regulatory enforcement, while also protecting against potentially lax enforcement by regulators themselves. Communities engaged and mobilized in this way can devise their own performance goals, indicators, or targets, which can then be used to evaluate the performance of policymakers and implementation through issuing audits, report cards, and diagnosing blockages, slowdowns, or implementation failures.[202] Policies can be made amenable to such participatory monitoring through further design features: first, providing the means for citizens to monitor outcomes—such as the articulation of standards that outline the goals of the policy and the collecting of data or other metrics on outcomes; second, providing citizens with real leverage by empowering them to trigger actual policy and enforcement proceedings; and third, making these findings and activities public.[203]

As Tara Melish has argued, this strategy of oppositional, adversarial, yet constructive engagement that leverages grassroots monitoring and data collection represents a new pattern of human rights advocacy which emphasizes a shift from "nonnegotiable material demands and mass confrontation" and from claims of right, to "process-oriented" approaches that attempt to create institutional frameworks that encourage accountability.[204] Through participatory monitoring of public standards and goals—for example, via "report cards," citizen auditing, development of alternative proposed budgets, and monitoring of performance indicators—these grassroots groups can track public policy outcomes, diagnose failures and slowdowns, and advocate for policy changes.[205] These citizen audits are a potential alternative strategy for generating accountability and building

201. *See* PIERRE ROSANVALLON, COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST (Arthur Goldhammer, trans., 2008); Melish, *supra* note 50.

202. *See* Melish, *supra* note 50, at 89–98.

203. This type of countervailing power through monitoring, implementation, and enforcement is somewhat akin to conventional legal accounts of the "private attorney general" in that it deputizes civil society and private actors to pro-actively facilitate enforcement by incentivizing them, in part by their own self-interest. This can expand the enforcement capacity of the agency itself. But where private attorney general models have raised concerns about potentially sapping the capacity of the state, the models described above such as the CRA or the Oakland Army Base CBA indicate that institutional structures actually *expand* state capacity and provide an independent lever through which civil society actors can hold both private third parties (like banks or developers) as well as lax regulators to account. On the private attorney general and its potential limits, *see e.g.*, Stephen Burbank, Sean Farhang, & Herbert Kritzer, Private Enforcement, 17 LEWIS & CLARK L. REV. 637, 662 (2013) (describing benefits of private enforcement regimes); Burbank et al., *supra* note 203, at 667 (describing the disadvantages of private enforcement); Pamela Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2002); William Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004) (mapping the different forms of private attorney general lawyers and distinguishing them from public law enforcement officers).

204. Melish, *supra* note 50, at 55, 73–74.

205. *Id.* at 76–99.

political power among marginalized groups. Such models have proliferated in an international human rights context. For example, they have been documented in instances like India's right to information movement and the impact it had on worker and farmer organization around anti-corruption efforts,[206] and the use of digital participatory mapping tools in holding service delivery accountable in Kenya.[207] In the U.S., similar forms of participatory monitoring and countervailing power have been set up through the proliferation of state and local human rights enforcement bodies. These commissions serve as an institutional target and focal point for community mobilization, while monitoring outcomes offers a way for those communities to exercise influence and leverage.[208] Arguably, participatory monitoring has also informed regulatory structures in different ways as well, such as the role of grassroots groups in monitoring and reporting compliance problems with banks under the minority lending requirements of the Community Reinvestment Act,[209] or recent state-level experiments with engaging organized labor in monitoring wage theft and compliance with workplace standards.[210]

VI. IMPLICATIONS OF ADMINISTRATIVE POWER-BUILDING

A. IMPLICATIONS FOR DEMOCRATIC THEORY

This approach to power-building through administrative policy design raises a number of important theoretical implications for how we might better conceptualize participation, representation, and the role of institutions in reshaping power. It also raises implications for legal scholarship, particularly in the areas of public law, power, administrative law, and law and social movements.

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206. *See generally*, Rob Jenkins & Anne Marie Goetz, *Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India*, 20 THIRD WORLD Q. 603 (1999).

207. See generally, e.g., Molly K. Land, *Democratizing Human Rights Fact-Finding*, *in* THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING (Philip Alston & Sarah Knuckey eds., 2015).

208. *See* Melish, *supra* note 50, at 68–110 (showing examples in a state and local context).

209. For a further discussion of the Community Reinvestment Act as an example of participatory regulation, *see* RAHMAN, *supra* note 11, at 161–63; Michael S. Barr, *Credit Where it Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513 (2005); Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617 (2009). Under the CRA, federal agencies conditioned merger approvals on banks meeting local credit needs. Banks' success on this score was determined by a federal regulatory scorecard. But crucially, the benchmarks for local credit needs were both flexible standards, and were subject to debate by local community groups themselves. Where these groups were well-organized, they leveraged their ability to trigger federal inspections and potentially reduce local banks' CRA score (which would undermine lucrative merger approvals) to force banks to negotiate more directly, and in some cases, create entirely new programs to pro-actively address the credit needs of minority neighborhoods. These levers were, however, gradually dismantled, and the power and influence of local groups were reduced.

210. *See* generally, e.g., Janice Fine and Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnership with Workers' Organizations*, 38 POLICY & SOCIETY 552 (2010).

1. *Representation, Participation, and Mobilization*

The idea of expanding interest representation in the administrative state is an old one. Norton Long described such bureaucratic representation as early as 1952, suggesting that the power and authority of agencies would likely not be undone, and instead could be legitimated and directed through dedicated offices that represented the interests of affected constituencies—or through the civil service itself which, by virtue of its democratic and meritocratic nature, drew personnel from the ranks of the ordinary public.[211] Long's central point was that agencies could be "representative" even in the absence of conventional electoral mechanisms.[212] A few decades later, Richard Stewart, backed by the power of judicial review, famously—if ambivalently—explored the prospects of interest representation in administrative agencies.[213] Even as other scholars have explored more participatory and collaborative models of interest representation,[214] a running tension in imagining more democratic and balanced participation in administrative decision-making is the clash between plebiscitarian or direct democratic participation on the one hand, and delegated, representative models on the other.[215] In some ways, measures to engage interest groups in policymaking presume (often mistakenly) that these interest groups will be more internally representative and participatory.[216]

But representation, participation, and the mobilization of countervailing power are closely interrelated, and hard to disentangle in practice. Conceptually, we can understand representation not only as a delegation of authority from a principal to an agent, but also as a dynamic relationship between representative and constituency that catalyzes and generates mobilization around the relationship itself. Indeed, representative institutions and representatives themselves are often the focal points around which communities and constituencies orient their mobilization, debates, and political participation. Institutions like the Oakland Commission, the RGB, and the CFPB create a form of representation to help fuel a more sustained degree of civil society mobilizing and organizing; this in turn links these constituencies to levers of political power, even the absence of more direct

211. *See* Norton E. Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808 (1952). I am grateful to Adrian Vermeule for pointing me towards Long's work in this regard.

212. *Id.*

213. Stewart, *supra* note 20.

214. For classic accounts of collaborative governance, *see e.g.* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997); Michael Dorf and Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998).

215. *See generally, e.g.*, Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) (noting critiques of participation and suggesting the greater value of representative models).

216. *See* Seifter, *supra* note 41.

democratic forms of participation.[217] Furthermore, it is the fact that such engagement is autonomous enough to generate adversarial and oppositional pressure, but embedded enough to have actual influence on policy, that helps make these administrative procedures an expression of countervailing power. The central question from a power-building perspective, then, is not necessarily the choice between 'representative' or 'participatory' mechanisms, but rather a focus on thickening the *relational*—and potentially *adversarial*—interaction between policymakers on the one hand, and constituencies on the other. The fact that these dynamic relationships between constituencies and policymakers can be created through a variety of institutional forms suggests a wider range of flexibility and possible innovation in administrative institutions and processes aimed at facilitating more such linkages.

2. *Contestation Over Consensus*

Another crucial implication of these power-shifting institutional designs lies in the relative autonomy and adversarial capacity of the stakeholder groups involved. In several of the cases described in Part IV, the degree to which otherwise disempowered constituencies—whether community residents in Oakland, tenants in New York, or consumers in national financial regulation—are able to exercise influence through the regulatory process depends on their ability to toggle back and forth between stances of collaboration and engagement on the one hand, and adversarial contestation on the other. This autonomy to engage in more adversarial disagreement when needed to generate pressure is vital for creating meaningful political influence and power.

Furthermore, the importance of this contestatory nature of mobilization provides an important amendment to existing discussions of participatory and collaborative governance in the administrative state. For almost twenty years, scholars have offered a variety of suggestions for how stakeholders can be better empowered and engaged in regulatory policymaking under the rubrics of "collaborative governance" or "new governance."[218] Many of the policy proposals in these accounts, such as greater stakeholder representation and participatory monitoring of outcomes, align with the discussion above. However, these accounts tend to gloss over the necessary role that power and conflict play in creating truly equitable and inclusive processes. In contrast to these accounts, the goal for a power-shifting institutional design should not be to optimize a policy process for efficiency, efficacy, or consensus;

217. For a fuller theorization of this "mobilizational conception of representation," *see, e.g.*, Disch *supra* note 198; Urbinati & Warren, *supra* note 82; *see also* Rehfeld, *supra* note 161.

218. *See* FREEMAN & MINOW *supra* note 190.

rather it should be, in classic Madisonian fashion, to facilitate a productive form of contestation and disagreement.[219]

B. IMPLICATIONS FOR POWER IN LEGAL SCHOLARSHIP

This paper began with noting the resurgence of interest in questions of political power and institutional design. The arguments developed in this paper build on this revived interest, offering a way to conceptualize power particularly in reference to the linkages between institutions on the one hand and constituencies on the other. By designing institutions to deepen these linkages, we can help marginalized communities expand their ability to mobilize, organize, and exercise influence. By bringing together a focus on social movements and organizing on the one hand with an attention to administrative institutions and processes on the other, the arguments above suggest some implications for thinking about power not just in public law scholarship, but in related fields—particularly law and social movements, and the study of administrative law at various levels.

1. *What Law and Social Movements Can Learn from Administrative Theory*

There is of course a robust literature on law and social movements. Much of this literature highlights the ways in which grassroots movements have influenced major court cases, shaping the path of law-making and meaning-making.[220] But as the above accounts of power-building and administrative process suggest, social movement scholars and practitioners alike would do well to broaden their focus to also encompass the interactions between social movements and administrative institutions. Like courts, administrative institutions are another arena in which law and norms are constructed—and like courts, they present a particular configuration of openness to pressure

219. On the distinction between collaborative and contestatory forms of participation, *see* RAHMAN, *supra* note 11, at 105–09. For a critique of collaborative governance and its relative silence with regards to disparities of power, *see e.g.*, Amy Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 Wis. L. Rev. 357 (2010); Amy Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 L. & SOC. INQUIRY 503 (2008); Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation* 2010 Wis. L. Rev. 441 (2010) (using case studies of new governance approaches in financial regulation to argue that conventional views of collaborative governance pay insufficient attention to the need to better institutionalize countervailing power); David Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law* 157 PA. L. Rev. 541 (2008) (making a similar argument in context of poverty law).

220. *See generally*, Suzanna B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CAL. L. REV. CIRCUIT 157 (2015); Thalia Gonzalez, *A Quiet Revolution: Mindfulness, Rebellious Lawyering, and Community Practice*, 53 CAL. W. L. REV. 49 (2016); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014).

and contestation, and insulation from politics. For social movements to exercise greater political influence and power, they will necessarily have to develop a degree of sophistication around engaging administrative processes—much like the grassroots movements for equitable development in Oakland, or the push for federal consumer financial protection after the financial crisis.

Furthermore, the discussion above about power-building and the role of institutional structures in generating greater leverage for grassroots constituencies represents an important addition to existing discussions of law and organizing. As Scott Cummings suggests, "law and organizing" represents a new focus for the law and social movements literature, focusing less on lawyers, litigation, and mobilization, and more on the building of long-term civil society organization, capacity, and leadership.[221] Engaged in the tradition of community organizing running from Saul Alinksy to Cesar Chavez to the civil rights and welfare rights movements, this view of organizing emphasizes the building of durable, long-term relationships, leaders, and capacity, as a foundation for political power. This turn to organizing tracks with important developments in social science, which similarly suggests the importance of relational organizing, mass constituency-building civil society organization, and autonomous grassroots capacity as preconditions for long-term political power.[222] To these discussions of organizing *strategy*, the above discussion highlights the importance of *institutional context* and *institutional reform*. The preceding sections imply that movements will be more able to organize durable coalitions and constituencies when they have footholds in institutions that enable them to exercise actual power. Furthermore, it suggests that organizing groups should actively prioritize pushing for reforms that multiply these footholds—even if that means deferring or delaying a more immediate substantive policy goal. For example, it is one thing to win a one-off wage increase, and quite another to win an institutional change that structurally shifts power towards workers, making many substantive claims more possible in the future.[223]

This in turn suggests that community organizers themselves will have to build organizations, leaders, and skillsets suited to engaging in these institutional arenas—creating a repertoire of action that goes beyond the

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221. *See* Scott Cummings & Ingrid Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001).

222. *See, e.g.*, HAN, *supra* note 178; *see also* THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN CIVIC LIFE (2004) (arguing that historically, the shift away from mass member constituency-building organizing to favor professionalized lobbying and advocacy groups in the late 20th century represented a key driver of the concentration of political power away from ordinary Americans in favor of less accountable and responsive interest group elites).

223. See FUNG, EMPOWERED PARTICIPATION, *supra* note 197.

articulation of grievance and advocacy, to the ability to share in the actual business of governing. This is not an automatic or costless transition, but it is essential to enabling civil society groups to make full use of the kinds of inclusionary strategies discussed above. Furthermore, it is a transition that is increasingly front-of-mind for organizers and advocates themselves.[224] Indeed, in the Oakland case for example, this shift to engaging in governance represented a deliberate and not altogether simple transition in mindset and strategy on the part of the organizing coalition, EBASE.[225] This growing interest among advocacy leaders in actual governance may reflect in part the policy successes these groups have had in recent years at the local level. These successes arise, in part, from favorable relationships with progressive mayors, and until recently, at the federal level through greater access to policymakers under the Obama administration. But, this growing interest also represents an important conceptual leap. While scholars and practitioners alike have noted the systematic ways in which policy can *dismantle* the power of civil society groups—most glaringly in context of the conservative assault on labor organizing[226]—this shift suggests a move to the opposite project, of *building* grassroots power through a more direct engagement with the design and operation of governance institutions. Indeed, by creating greater power and institutionalizing a connection to governance bodies, these strategies might make it more possible for these constituencies to protect, defend, and extend the substantive policy gains.

2. *What Administrative Theory Can Learn from Movements*

If the preceding sections offer implications for organizer-practitioners and law and social movement scholars, there are parallel implications worth noting for administrative law, regulatory theory, and public law.

First, the discussion above suggests it is worth revisiting some areas of administrative law and institutional design debate that had been left behind for a time. Richard Stewart's seminal article on interest representation presented it as an attempt by courts to systematically expand the representation of affected interests through doctrines of due process, standing, and statutory participation rights.[227] This project was itself a response to growing concerns about agency capture and skepticism of the

224. On this shift from "grievance to governance," *see, e.g.*, Jodeen Olguin-Taylor, *From Grievance to Governance: 8 Features of Transformative Campaigns*, MOVEMENT STRATEGY CTR. (Jan. 26, 2016), http://letstalkmovementbuilding.org/grievance-governance-8-features-transformative-campaigns/.

225. See EBASE, *supra* note 131; *see also* Rahman, *The Key to Making Economic Development More Equitable*, supra note 130.

226. *See, e.g.*, HACKER & PIERSON, WINNER-TAKE-ALL POLITICS *supra* note 4.

227. *See generally* Schiller, *Enlarging the Administrative Polity*, *supra* note 18 at 1428–43; Stewart, *supra* note 20, at 1717–56.

capacities of publicly-spirited regulators.[228] But while even advocates of such interest representation like Stewart saw it as a failed policy, more likely to create gridlock and magnify the influence of sophisticated interests rather than creating genuine accountability and participation,[229] this rejection was premature. Interest representation fell short due to limited institutional tools for constructing the contestation, inclusion, and participation necessary to be productive and effective. Armed with a wider array of institutional innovations and strategies—and understanding that effective power-shifting cannot be achieved by the illusion of "perfect" institutions but rather though a combination of institutions interacting with civil society organizing—can offer renewed hope for the democratic potential of institutional design and process reform.

Second, this focus on power-building offers an additional set of tools and concepts that can inform persisting anxieties about regulatory capture and failure.[230] The risks of capture, or more simply, lax and unresponsive regulation, is even greater at the state and local level. For some scholars, judicial review of the administrative process has, at times in the past, served as a mode of facilitating internal administrative checks and balances, and could potentially do so again by prioritizing fair and inclusive processes in its review of agency action.[231] Others have emphasized presidential oversight, and in particular, expertise and rationality-enhancing checks like cost-benefit analysis, as a way to make policymaking more deliberative and neutral.[232] Still others have highlighted the importance of designing agencies to be more insulated and independent from political pressure.[233] The arguments in this paper suggest the potential value of centering power, social movements, and the ways in which institutional structures can alter the dynamics of power and participation. In addition to conventional responses of increasing insulation or "expertise-forcing" requirements on agencies

228. Schiller, *Enlarging the Administrative Polity*, *supra* note 18, at 1398–1428; Merrill, *supra* note 20 at 1040 (arguing that judicial review in the 1960s and 1970s worked to push agencies to expand representation and participation of stakeholder interests in shaping regulatory policies). *See generally* Schiller, *Enlarging the Administrative Polity*, *supra* note 18, at 1415–43; Stewart, *supra* note 20, at 1713–56.

229. Stewart, *supra* note 20, at 1670.

230. For a recent discussion of modern forms of regulatory capture and possible solutions, *see* Schwarcz, *supra* note 106, at 365.

231. Michaels, *Of Constitutional Custodians and Regulatory* Rivals, *supra* note 12, at 274–78; *see also* Sitaraman, *supra* note 1. For a classic (if ambivalent) account of judicial review facilitating interest representation, *see* Stewart, *supra* note 20.

232. *See* Lessig, *The New Chicago School*, *supra* note 23 at 668; Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 2 (2017); Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J. FORUM 263, 263 (2015).

233. *See generally* Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

through rationality review or its equivalents,[234] agency capture can be checked by the countervailing power institutions and processes described above.

Third, these principles of power-building and institutional design can also contribute to some of our persisting anxieties about agency authority, action, and inaction. The unease with regulatory authority often takes on the language of constitutionalism, whether in appeals to due process or in the appeals to principles of the separation of powers as the safeguard for individual liberty.[235] By contrast, this focus on power and institutional structure takes this concern with the constitutional and legal process *values* of inclusion, participation, contestation, and liberty and directs it into very different institutional *mechanisms*.

Indeed, many of today's anxieties about federal administrative power stem from the peculiar *lack* of *intra*-executive countervailing power in an era where external checks in the form of Congressional or judicial review are somewhat thin. Thus, in the later years of the Obama administration, many administrative law scholars suggested the need for, but expressed very real legal and normative problems with, agencies stretching statutory authorities to address pressing policy problems in an era of Congressional recalcitrance and gridlock.[236] Yet with the election of Donald Trump and the return of single-party control in Washington, the problem of agency overreach took a different valence, still raising anxieties about overly-powerful administrative bodies making policy decisions without adequate safeguards. What this whiplash indicates (beyond the see-saw of partisan fortunes in Washington) is a stark reality. In eras of divided government, where one party controls the White House and the other the Congress, it is likely that agencies will stretch their statutory authorities to the breaking point, to drive policy forward, on the expectation that the opposing party in Congress will do everything they can to limit policy "victories" for the President's party. By contrast, in an era of unified government, it is likely that agencies will again power forward, this time with the tacit backing of Congress. This is likely true regardless of

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234. *See* Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2008).

235. *See* Myers v. United States, 272 U.S. 52, 85 (1926) (Brandeis, L., dissenting) (noting friction between the constitutional branches is designed to prevent autocracy); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding Congressional interference with Presidential removal powers); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act as an impermissible delegation of legislative powers); INS v. Chadha, 462 U.S. 919, 944 (1983) (rejecting claim to administrative efficiency in defense of constitutional liberty). *See generally*, Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

236. *See* Farina & Metzger, *supra* note 14; Freeman & David Spence, *supra* note 14; Gluck, *supra* note 14; McGarity, *supra* note 14; Metzger, *Agencies, Polarization and the States*, *supra* note 14.

which party occupies which branch of government, and is a function of both the reality that the separation of powers is mediated by party politics[237]and the current era of extreme party polarization. In either scenario, it seems possible that Federal policymaking would benefit from greater checks and balances *within* the Executive in light of the limitations of Congressional checks, and given the likelihood of judicial deference in many instances of ordinary policymaking.[238]

Fourth, just as engaging with the administrative process requires movements and organizers to adopt new capacities and strategies, it also demands a very different set of skills and personnel than what we usually associate with administrative bodies. We need to invest in government capacity, not just to make and administer policies, but also to design, deploy, and manage these inclusionary, representative, and participatory strategies. Managing interfaces like the CFPB Community Affairs unit or the Oakland Commission requires significant investment and expertise on the part of the conveners,[239] designing representative and participatory mechanisms, providing briefings for the participants on the relevant data and issues, and facilitating discussion to lead to concrete, usable recommendations. Policymakers, whether at the federal, state, or local level, tend not to invest in these skills or tasks. To fully harness the potential of institutional design and policymaking for building countervailing power, this will have to change.[240]

Finally, the arguments of this paper suggest that taking a broader view of the subjects of administrative law scholarship can help yield new insights. Some of the most compelling experiments with new administrative processes and institutional designs have occurred at the state and local level, as Part IV.B above suggests. In keeping with the revival of interest in state and local administrative law,[241] this paper suggests that state and local institutions offer valuable sources of insight and experimentation. Local government law scholars in particular have offered important accounts revisiting questions of

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237. *See* Levinson & Pildes, *supra* note 165.

238. *See* VERMEULE, *supra* note 67.

239. *See* CAROLYN LUKENSMEYER, BRINGING CITIZEN VOICES TO THE TABLE: A GUIDE FOR PUBLIC MANAGERS 305–08 (2012).

240. For a discussion of the role of personnel and capacity in facilitating more inclusive policymaking processes, *see e.g.*, HOLLIE RUSSON GILMAN, DEMOCRACY REINVENTED: PARTICIPATORY BUDGETING AND CIVIC INNOVATION IN AMERICA (2016); RUSSON GILMAN & RAHMAN, forthcoming, *supra* note 84. *See also* Charles F. Sabel and William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011); *see also* Cuéllar, *supra* note 189, at 491–97; *see also* Lisa B. Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WISC. L. REV. 297 350–56 (proposing language for a new Federal executive order that would prioritize management of collaborative and participatory processes).

241. *See* Davidson, *supra* note 7; Seifter, *supra* note 41.

power, institutional structure, and participation.[242] These links between local government and administrative law scholarship are thus worth drawing out more in future work.

3. *Power, Inequality, and Public Law*

As noted above, our current concerns about economic inequality and disparities of political power are intertwined. The ideas in this paper suggest that as we consider the substantive legal and policy changes needed to tackle the current crisis of *economic* inequality,[243] we must also consider institutional and process reforms aimed at mitigating *political* inequalities. In a sense, these strategies are content and context-neutral—they can be deployed in a variety of policy areas. As we have seen above, power-shifting institutional designs can be baked into economic development policies, and financial regulations alike. Similar designs might be incorporated into other areas of law too, from criminal justice reform to labor law.[244]

But in another sense, these principles are not neutral at all. Indeed, they are very much directed towards prioritizing and lifting up *particular* constituencies and stakeholders. Our choice of *which* policy areas to apply these tools, and *which* groups to empower in these ways are necessarily morally and normatively-tinged, to some degree informed by our view of which interests are worth privileging. But they also respond to a very real and objective reality that not all civil society groups are equally influential—and that our presumptions about the fairness and legitimacy (not to mention, durability) of public policies often presume without sufficient basis a level political playing field.

This ambiguity may be troubling to some, but it is also largely unavoidable. To the extent that we see a genuine disparity of political power, and see that disparity in turn fueling economic policies that widen inequality in normatively troubling ways, these tools above can offer some guidance for how to develop not just substantive policies in response, but also countervailing power capable of *defending* those policies and facilitating more equality-enhancing policies in the future.

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242. *See generally*, SCHRAGGER, *supra* note 119; Shoked, *supra* note 119; Sheila Foster, *The City as Commons*, 34 YALE L. & POL'Y REV. 281 (2016); Michelle Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014).

243. For a good overview of the law and inequality debate and its broader implications, *see e.g.* David Grewal and Jedediah Purdy, *Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1 (2014).

244. *See supra,* note 10.

VII. CONCLUSION: POWER AND POPULAR ADMINISTRATION

"The administrative process," proclaimed James Landis in 1938, "is, in essence our generation's answer to the inadequacy of the judicial and legislative process."[245] One of the architects of the New Deal and the newly-minted Security and Exchange Commission (which he would later chair), Landis depicted the turn to expert regulation as a necessary revolution in American governance, given the complexities of modern policymaking and the limits of interest group politics and archaic legal doctrines.[246] While few today would share Landis' unabashed faith in the superiority and infallibility of technocratic expertise, we find ourselves drawn into a similar position. Across different policy domains, the reach and importance of the regulatory agency has never been greater. Agencies continue to play a critical role in providing expertise in devising and implementing complex policy schemes. But agencies are also increasingly serving as critical "gap-fillers", stepping into the policy and political voids created by sudden crises, congressional gridlock, and changing social and economic conditions. The regulatory state, for better or worse, continues to assert itself as a corrective to the inadequacies of the constitutional branches.

Today Landis seems both prescient and naïve—we are indeed increasingly dependent on regulatory agencies to do the heaviest lifting when it comes to policymaking and addressing changing social and economic conditions; but we also have very little faith in their ability to do so and serve the public good. This paper suggests one possible pathway forward: like Landis, I have suggested above that regulatory agencies can in fact help overcome failures of existing political processes. But instead of Landis' faith in expertise, I have argued above that it is the *democratic* potential of the regulatory process that gives rise to this potential. Regulatory agencies have the (under-utilized) potential to house and foster a more inclusive, empowered form of participation and engagement—mitigating disparities of political power. In so doing, regulation can also serve as an arena where constituencies can engage with the realities of policymaking, and share in the task of self-governance.[247] As with popular constitutionalism, this concept of popular administration is both a descriptive and a normative one. It is descriptive in that it highlights a strand of administrative law theory and practice that often goes overlooked—the ways in which regulatory agencies have at times worked to foster more direct forms of interest representation,

245. JAMES LANDIS, THE ADMINISTRATIVE PROCESS 46 (1938).

246. *See generally, id.*

247. An analogy might be drawn here to Judith Resnick's argument that the participation in adjudication through courts provides many citizens with a vital experience of sovereignty. *See generally,* JUDITH RESNICK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

participation, and civic empowerment. It is normative in that it suggests that this inclusionary vision of regulation ought to be the ideal towards which regulatory reform should strive.

This normative aspiration is made all the more vital by the realities of our current democratic deficits and the very real disparities of political power and influence. In recent years a growing body of research has highlighted the ways in which our electoral and legislative systems are deeply unresponsive and uninclusive. Popular administration is not a substitute for addressing these defects. But it is an important complement to legislative and electoral democracy—and an often overlooked arena in which reformers and citizens alike can attempt to gain a greater foothold in the political process.

The potential here is vast. From community development initiatives designed by agencies like HUD, to the promotion of financial inclusion through the CFPB, to the design of new labor laws for the 21st century by Department of Labor, there are a variety of major public policy challenges, each of which implicate important and diverse constituencies who are not usually best represented through conventional geographic electoral districts or legislative lobbying. State and local administrative bodies also govern vast swaths of our social and economic lives, from housing, to the safety net, to workplace safety, to basic health and police powers, and have perhaps even greater plasticity to be adapted into more power-balancing processes and institutional forms. While power continues to shape the dynamics of governance and regulation, through regulation we might help rebalance these disparities, and in so doing create new types of democratic experience, participation, and self-governance.

NOTES