The Challenges of Participatory Administration

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American administration is beset by critics on all sides. A conservative Supreme Court majority is skeptical of administration's democratic legitimacy. Meanwhile, a rising chorus on the left criticizes agencies for inadequate consideration of public perspectives. These critics claim that agency proceedings should be more "democratic," offering greater opportunity for robust public engagement. One area in which these calls are particularly pointed is energy regulation. Energy administration is formal, adversarial, and complex. At the same time, its subject matter is of high salience for individuals and communities concerned about the climate crisis and energy equity.

This Article argues that enthusiasm for "democratic administration" should be tempered by a little realism, especially in areas like energy regulation. History teaches that while modest efforts to expand administrative participation can succeed, more ambitious reforms generally falter. The reasons for this, the Article suggests, are the inevitable trade-offs between expanded public engagement and other core administrative law values such as effectiveness, expertise, and non-arbitrariness.

Using energy administration as a case study, the Article surveys federal and state agency responses to the call for more robust participation. It concludes that these efforts are unlikely to achieve advocates' most ambitious goals.

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Instead, this Article proposes less romantic but more promising paths forward. First, attention could be re-focused on legislative change. Second, institutional structures for representation of particular interests could be enhanced. Finally, deliberative bodies of stakeholders outside of specific regulatory proceedings could be established to amplify the public's voice in administration without creating significant tension with other administrative law values.

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INTRODUCTION

If you believe the critics, American administration has a democracy problem. Voices on both the right and the left assert that agencies are insufficiently responsive to the public, although the conclusions they draw from that diagnosis are quite different. On the one hand, conservative skeptics of administration (including sitting members of the Supreme Court) challenge large swaths of administration as undemocratic and therefore illegitimate.[1] At the same time, voices on the left assert that public engagement with agencies should be more robust, in part as a counterweight to what they see as inadequate attention to the impacts of regulation on historically marginalized communities.[2] As

[1] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 737 (2022) ("[T]he framers believed that a republic — a thing of the people — would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'") (Gorsuch, J., concurring); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 251 (2020) (expressing concern about "the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure") (Thomas, J., concurring in part and dissenting in part). *See also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2247 (2024) (overruling 1984 decision in *Chevron v. NRDC* that stated that courts would defer to agency interpretations of ambiguous regulations).

[2] *See infra* Part I.A.

a result, federal and state regulators have faced growing calls to make their processes more inclusive and participatory.[3]

A robust literature in administrative law addresses the challenge from the right.[4] This Article responds to the second critique. Many of the advocates for more participatory administration focus on agency rulemaking, which is more easily amenable to public engagement.[5] This Article, by contrast, confronts squarely the difficulties inherent in broadening public engagement in other forms of agency decision-making. It takes energy regulation as its subject, arguing that the frequently complex, formal, and adversarial proceedings that are its bread and butter are relatively infertile ground for the participatory vision.

Energy regulatory agencies are confronting their own calls for expanded public participation.[6] Growing concern about the climate crisis has spurred increased interest in the work of energy regulators.[7] Deeply held views about the role that fossil fuels should play in the energy economy of the future have prompted advocates to center once-obscure decisions by the Federal Energy Regulatory Commission ("FERC") and state energy agencies.[8] There have also been growing calls for justice for communities disproportionately impacted by energy infrastructure and the climate emergency.[9]

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[3] *See infra* Part I.B.

[4] *See, e.g.*, Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 51-52 (2017) (describing the emerging resistance to administrative government). *See generally* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2019) (challenging the historical underpinnings of the Court's administrative skepticism); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 130 (2021) (arguing that early Congresses enacted broad delegations of administrative rulemaking authority).

[5] *See infra* Part I.A.

[6] *See id.*

[7] *See, e.g.*, Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 583 (2018) ("In the face of [climate change], few Americans express continued desire to punt energy policy to bureaucratic experts.").

[8] *See infra* Part I.B.

[9] Shalanda Baker, for example, writing about the oil and gas communities along the gulf coast in Louisiana and Texas, argues that "[t]he energy system has, in many ways, swapped out one system of extraction — legalized slavery — and replaced it with a more

Some energy agencies are answering the call for more substantial public engagement in their decision-making. At the federal level, FERC recently revived a moribund provision of the Public Utility Regulatory Policies Act of 1978 ("PURPA") calling for an Office of Public Participation at the agency.[10] The Office supports individuals and groups that lack the knowledge or resources to participate effectively in Commission proceedings. It will also offer funding for intervenors in some proceedings.[11] Some states are keeping pace with FERC's efforts, and others are ahead. California, Oregon, Idaho, Minnesota, Wisconsin, and Michigan run active intervenor compensation programs.[12] Colorado's legislature recently tasked its public utilities commission with adopting rules to improve equity for, minimize impacts on, and prioritize benefits to disproportionately impacted communities.[13] As part of this effort, the commission is considering how it can "better engage participants, such as members of the public and representatives from disproportionately impacted communities."[14]

The idea of renewed civic engagement in the work of government inspires, especially at a time when frustration with elected representatives and the judiciary is running high, affecting members of both political parties and those with radically different conceptions of the role of government and of the good life.[15] Nevertheless, this Article

modern one" where oppression takes the form of pollution. SHALANDA BAKER, REVOLUTIONARY POWER 46 (2021). The energy transition, she predicts, "provides an opening to change destiny." *Id.*

[10] *See infra* Part I.B.

[11] *See infra* Part I.B.

[12] NAT'L ASS'N OF REGUL. UTIL. COMM'RS, STATE APPROACHES TO INTERVENOR COMPENSATION 5 (Dec. 2021), https://pubs.naruc.org/pub/B0D6B1D8-1866-DAAC-99FB-0923FA35ED1E [https://perma.cc/8MBU-88L7] [hereinafter NARUC, INTERVENOR COMPENSATION].

[13] 2021 Colo. Legis. Serv. Ch. 220 (S.B. 21-272) (codified at COLO. REV. STAT. ANN. § 40-2-108 Sec. 3).

[14] Colorado PUC, In the Matter of the Commission's Implementation of Senate Bill 21-272 Requiring it to Promulgate Rules in Which it Considers How Best to Provide Equity in All of Its Work, Decision No. C22-0239, Decision Opening Proceeding, Setting Objectives and Staff Direction, and Soliciting Comments and Information (Apr. 6, 2022).

[15] *See Congress and the Public*, GALLUP, https://news.gallup.com/poll/1600/congress-public.aspx [https://perma.cc/9B7H-TT4H] (displaying polling data showing that

questions the viability of true participatory democracy in government administration.

Notwithstanding transformations during the New Deal and other progressive movements, parts of administration remain formal, adversarial, complex, and costly.[16] Energy administration is one such domain. Especially within utility regulatory commissions, quasi-legislative rulemaking proceedings make up a relatively small part of the administrative action. Instead, a great deal of energy policy is made in specialized proceedings that set rates or grant licenses. Barriers to participation in such proceedings are not easily removed because they protect other fundamental values of administration including effectiveness, expert decision-making, and non-arbitrariness.[17]

Ultimately, this Article concludes that corners of the rich and heterogenous world of administration,[18] like much of energy regulation, are poor loci of democratic engagement. Nevertheless, elements of the contemporary critique of energy policy as insufficiently attentive to particular interests, including those of historically burdened and marginalized communities, ring true. The Article therefore identifies a suite of interventions that might answer the call for greater consideration of stakeholder perspectives in energy regulation while minimizing conflicts between participation and other administrative law values.

The first Part below describes calls for the democratization of government agencies in general and for greater public participation in the work of energy agencies in particular. Part II provides a brief overview of energy regulation and details efforts by the Federal Energy

Congress's approval rating stands at 16%); Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (Jul. 21, 2023) https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/ [https://perma.cc/SZF7-DV6J] (revealing that fifty-one percent of those polled had an unfavorable view of the Supreme Court, the highest unfavorable rating since polling began in 1987).

[16] *See* Nick Bagley, *The Procedure Fetish*, 118 U. MICH. L. REV. 345, 371 (2019) (observing that the administrative state "is more complex, improvisational, and downright strange than we sometimes like to acknowledge").

[17] *See infra* Part II.B.

[18] *See* Kisor v. Wilke, 588 U.S. 558, 576 (2019) ("[T]he administrative realm is vast and varied . . . .").

Regulatory Commission ("FERC") and various state energy agencies to increase public engagement in their proceedings. Part III attempts to explain why these efforts (and those like them) are unlikely to revolutionize administration. First, it situates the efforts in historical context, conceding the success of notice-and-comment rulemaking and expanded intervention standards in providing greater public access to regulatory proceedings, but emphasizing the failures of more robust participatory interventions such as negotiated rulemaking. It then turns to the frictions at the heart of any participatory effort. It identifies other values served by structural and procedural features that make energy agencies in particular challenging sites for democratic engagement. The primary value considered here is effectiveness, but expert decision-making and non-arbitrariness can also be in tension with expanded participation.

Part IV turns to alternatives, proposing several possible ways to promote greater representation of stakeholder interests in energy regulation without sacrificing other administrative values. It suggests, first, that calls for more administrative democracy should not distract from the project of legislative change. It is understandable that frustration with legislative dysfunction at the federal level, and with various legislative pathologies in the states, may redirect engagement efforts to administration. At the same time, substantive amendments to energy legislation can achieve many of the goals of energy stakeholders in a way that is more comprehensive, durable, and democratic than proceeding-by-proceeding engagement at regulatory commissions. Second, Part IV suggests that strengthening representation of stakeholder interests is preferable to direct public engagement. Interest representation by government or independent advocates has proven successful in the past at navigating participatory tradeoffs and can succeed again in this political moment. Finally, to the extent that stronger participatory medicine is desired, this Part also proposes a paradigm of *deliberation alongside administration*, which would create or expand opportunities for deeper dialogue between regulators and citizens outside of specific proceedings.

I. DEMOCRATIC AGENCIES?

The past several years have seen growing demands for a more expansive public role in administration of the law. The first Section below describes these appeals. The second Section describes calls for greater participation in energy administration specifically.

A. The Broader Calls for Agency Democracy

In the past several years, scholars and policymakers have begun to call for greater popular engagement with administration more broadly.[19] What unites these projects is a faith that broader and more extensive public engagement with agency decision-making is at least a partial remedy for what ails government today. While in agreement that broader public participation is warranted, however, commentators differ in both their diagnoses of administration's ailments and in their prescriptions. Some critiques go to the heart of the administrative project, describing it as illegitimate without a more direct tether to

[19] The Biden administration has been receptive to these calls. In July 2023, the administration released a memorandum for the heads of executive departments and agencies on the topic of "Broadening Public Participation and Community Engagement in the Regulatory Process." Memorandum from Richard L. Revesz, Administrator, Office of Information and Regulatory Affairs, Broadening Public Participation and Community Engagement in the Regulatory Process (Jul. 19, 2023). This memorandum built on an earlier Executive Order. *Modernizing Regulatory Review*, Exec. Order No. 14,094, 88 Fed. Reg. 21,879 (Apr. 6, 2023) (encouraging federal agencies to provide opportunities for "equitable and meaningful participation by a range of interested or affected parties, including underserved communities"). The memorandum found that "[i]t is crucial for Federal agencies to craft regulatory proposals with input from affected members of the public," and that such input "can lead to more effective and equitable regulations; greater trust in government and democratic accountability; and increased public understanding of the regulatory process." Revesz, *supra*, at 1. Similarly, in an earlier Executive Order, the administration encouraged agencies to proactively engage interested or affected parties in the development of regulatory agendas and plans. Exec. Order No. 14,094, *supra*, at Sec. 2 (c). The Order further proposed that, in conducting this outreach, agencies should use, "as practical and appropriate," "community-based outreach; outreach to organizations that work with interested or affected parties; [] agency field offices; [and] alternative platforms and media." *Id.* While the administration did not specify the details of this engagement, its interest means that agencies will be grappling with the very challenges discussed here over the coming months and years.

popular will.[20] Others echo a concern raised earlier by public interest reformers after the collapse of the New Deal consensus: namely that government itself cannot be relied upon to represent "the people."[21] A related concern is that existing participatory mechanisms are skewed: they allow regulated industry ample opportunity for input but fail to engage "ordinary citizens"[22] or marginalized communities.[23] Some of these authors also see the potential for administrative participation to promote civic engagement more broadly.[24]

The authors have lofty aims. Sabeel Rahman writes, for example, that the administrative process "might need to undergo" a "radical transformation."[25] Chris Havasy calls for a "new democratic relationship between agencies and citizens,"[26] and strengthening of "the direct relationships between agencies and citizens through democratizing administrative policymaking."[27] Blake Emerson proposes

[20] *See, e.g.*, K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 9 (2016) (characterizing agencies as unable to muster legitimacy because of their insulation from the public); David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 611 (2012) (asserting that the democracy ideal best supports the idea of administrative legitimacy); Chris Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 751-52 (2023) (proposing that agencies be legitimated through direct engagement with citizenry) [hereinafter *Relational Fairness*].

[21] RAHMAN, *supra* note 20, at 2-4 (expressing concern about captured regulators); Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 L. & HIST. REV. 965, 971 (2015).

[22] RAHMAN, *supra* note 20, at 2-4.

[23] *Id.* at 113 (embracing participatory budgeting processes in part because of its ability to bring marginalized groups into the process); K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, 50 POL. SYMP.: POL. SCI. & POL. 751, 751 (July 2017) (proposing the use of citizen audits for the same reasons).

[24] *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1332 (2016) (summarizing positions of authors who value participation for its ability to increase civic engagement).

[25] K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1705 (2018) [hereinafter *Reconstructing the Administrative State*]. One of Rahman's more concrete proposals is that responsibility for monitoring and enforcement be devolved to constituencies affected by the relevant program. *Id.* at 1707.

[26] *Relational Fairness*, *supra* note 20, at 750.

[27] Chris Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647, 707 (2024) [hereinafter *Radical Administrative Law*]. Havasy proposes a shift away from traditional

that the true heir to the Progressive administrative state is participatory rather than merely expert and apolitical.[28] Emerson suggests that agencies should experiment with allowing beneficiaries to "participate in designing, implementing, and monitoring welfare programs."[29] David Arkush proposes the use of "administrative juries" to make policy decisions.[30]

Many proposals focus squarely on the rulemaking process. Shoba Wadhia and Christopher Walker argue that because informal (or "notice-and-comment") rulemaking is more democratically accountable than other forms of policymaking, presidents should choose this form of regulation when it comes to major policy decisions.[31] Bijal Shah, whose work argues that administrative systems subordinate minority interests to other administrative goals,[32] also centers

notice-and-comment rulemaking and toward something that looks more like negotiated rulemaking (or that at least draws on negotiated rulemaking as a "helpful guide[]"). Havasy, *Relational Fairness*, *supra* note 20, at 758-59. His proposals are sweeping: "[A]ll persons potentially affected by an agency must have the opportunity to deliberate with the agency during administrative decision-making." *Id.* at 757. Havasy would also impose on agencies an affirmative duty "to reach out to affected parties traditionally excluded from administrative policymaking." *Id.* at 791.

[28] BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 149-50 (2019).

[29] *Id.* at 173.

[30] David Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1458 (2013). Admittedly, some proposals in the administrative democracy canon are more incremental. Dan Walters, for example, recommends a shift in orientation rather than a revolutionary remaking of administration. Drawing on theories of agonistic democracy, he proposes that administration should continue to value contestation over consensus in its incorporation of public input. Daniel Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 14 (2022). And although many of Sabeel Rahman's proposals are revolutionary rather than incremental, he also endorses more limited reforms, including some of those advocated in Part IV. *See* Rahman, *Reconstructing the Administrative State*, *supra* note 25, at 1706 (supporting the use of advisory groups, stakeholder representatives, proxy advocacy, "regulatory public defenders," and offices of goodness).

[31] Shoba Sivaprasad Wadhia & Christopher J. Walker, *Assessing Visions of Democracy in Regulatory Policymaking*, 21 GEO. J. LAW & PUB. POL. 389, 411 (2023). Note that this is the opposite of Walters's proposal that a shift of emphasis from rulemaking to more adversarial forms of agency action can better-invigorate productive conflict in administration. Walters, *supra* note 30, at 46.

[32] Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 10 (2024).

rulemaking, suggesting greater incorporation of situated knowledge from vulnerable communities into notice-and-comment rulemaking.[33] In a similar vein, Emerson (along with Jon Michaels) has suggested that no major regulations be "proposed without meaningful consultation with those for whom the laws and regulations are designed to protect."[34]

While it is not a major feature of their work, some of these authors briefly acknowledge the implementation challenges facing their more ambitious proposals. Blake Emerson concedes that administrative structures, while open to public participation, must remain "capable of efficient action."[35] He also acknowledges that increasing public access will consume time and resources and can delay policymaking.[36] Emerson further qualifies his democratic vision by emphasizing the value of administrative reason and deliberation, which suggests a filtering role for administrators in "reviewing citizens' contributions to the regulatory process and attempting to give a best account of what citizens wanted and valued."[37] Havasy, too, concedes that "the practical demands of governance necessitate that majority rule should be used to make timely political decisions."[38] He also acknowledges the existence of "other normative values in administration" as a reason that participation should not be given absolute priority.[39]

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[33] *Id.* at 22, 41.

[34] Blake Emerson & Jon. D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 133 (2021).

[35] EMERSON, *supra* note 28, at 7.

[36] *Id.* at 175-76 ("To be sure, such a process would be quite costly . . . . Democracy in the modern world is expensive and you get what you pay for."). To mitigate the delay inherent in increased participation, Emerson suggests the expanded use of interim final rulemaking, in which agencies issue regulations quickly but subsequently accept comment that can be used to replace the interim rule with a final one. *Id.* at 175.

[37] *Id.* at 18.

[38] Havasy, *Relational Fairness*, *supra* note 20, at 794. This is one reason why he proposes a filtering process to limit participation. *Id.* at 783.

[39] *Id.* at 782. For example, Havasy concedes that, "[g]iven the institutional demands of agencies and the limited scope of affected private actors, it does not make sense to install electoral forms of democratic participation in agencies." *Id.* at 796-97.

These caveats would seem to acknowledge that, as with any kind of substantial structural or procedural reform, the devil is in the details.[40] The absence of specificity is understandable: these authors are producing compelling works of political theory and administrative history rather than manuals of administrative practice. But there are good reasons to supplement these accounts with discussions of how participatory ideals might actually be implemented in particular domains of administration, and what headwinds they might face. The next Parts turn to that project.

B. Energy Democracy

This Section turns to the way that these broader efforts have manifested in the field of energy regulation. As Shelley Welton has remarked, "there is a widening call among activists, scholars, and regulators for the 'democratization' of energy law and policy."[41] The phrase energy democracy is capable of multiple meanings, but here it is used to describe a governance regime in which members of the public have a broader participatory role in energy decision-making.[42]

Although it echoes efforts to expand participation by ratepayers and environmental advocates at public utility commissions in the 1960s and 1970s,[43] the movement for energy democracy is relatively new.[44] Welton

[40] Some authors emphasize that ideal participatory structures and processes will only be determined through institutional experimentation. *Id.* at 832.

[41] Welton, *supra* note 7, at 584.

[42] Welton identifies three ways in which the idea of energy "democracy" has been used, including consumer choice, local community control, and, most relevant here, making governing institutions "more responsive to citizen concerns and preferences." *Id.* at 586-87.

[43] *See* Robert B. Leflar & Martin H. Rogol, *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 HARV. J. ON LEGIS. 235, 235 (1976) (proposing legislation to permit greater participation by residential consumers at public utility commissions); Sabin, *supra* note 21, at 969 (documenting the nascent environmental movement's challenges to energy infrastructure siting and its skepticism about administrative representation of the public interest).

[44] Kacper Szulecki and Indra Overland point out that most of "the growing literature on energy democracy . . . has only been published from 2017 onwards." Kacper Szulecki & Indra Overland, *Energy Democracy as a Process, an Outcome and a Goal: A Conceptual Review*, 69 ENERGY RSCH. & SOC. SCI. 1, 2 (2020).

links the increased interest in public participation to the growing recognition "that the world of energy involves fundamental ethical questions."[45] Some of the arguments for engagement are about equity or justice,[46] while others assert that participation "results in better, not just fairer, governance."[47]

As Part IV will discuss, it is somewhat surprising that calls for more democracy have been addressed to regulatory agencies rather than to legislatures. Part of the reason may be that broadly worded energy statutes leave significant discretion to administrators.[48] Another reason, at least when it comes to federal policy, may be the legislative dysfunction gripping Congress.[49] Two very recent pieces of federal

[45] Welton, *supra* note 7, at 583 (citing BENJAMIN K. SOVACOOL & MICHAEL H. DWORKIN, GLOBAL ENERGY JUSTICE: PROBLEMS, PRINCIPLES, AND PRACTICES 1 (2014)). Welton disaggregates the call for energy democracy into three separate movements: a movement seeking greater consumer choice, a movement seeking more local control over energy decision-making, and a movement seeking greater access to government decision-making processes about energy policy more generally. It is the last set of calls for energy democracy — those that focus on greater engagement with energy decision-making — that are the focus of this Article. *Id.* at 581.

[46] *See, e.g.*, Shalanda Baker & Andrew Kinde, *The Pathway to a Green New Deal: Synthesizing Transdisciplinary Literatures and Activist Frameworks to Achieve a Just Energy Transition*, 44 FALL ENVIRONS ENV'T L. & POL. J. 1, 1 (2020) (locating the movement for energy democracy within the broader topic of energy justice); Felix Mormann, *Clean Energy Equity*, 2019 UTAH L. REV. 335, 378-79 (2019) (promoting wider public participation in energy policymaking as a way to address equity concerns).

[47] Szulecki & Overland, *supra* note 44, at 1.

[48] *See infra* notes 292–301 and accompanying text.

[49] *See* Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 85 (2015) (concluding based on a review of theoretical and empirical literatures that congressional problem-solving capacity has reached a new low); Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?* 45 ENV'T L. 1139, 1147 (2015) (bemoaning the "total demise of Congress as an effective environmental lawmaking body"). *See also* Annie Karni, *House Dysfunction by the Numbers: 724 Votes, Only 27 Laws Enacted*, N.Y. TIMES (Dec. 20, 2023) https://www.nytimes.com/2023/12/19/us/politics/house-republicans-laws-year.html (observing that the number of bills passed by the House in 2023 was lower than any other time in the last decade). States are not immune from legislative dysfunction. *See* Jason Hancock, *Missouri Senate Dysfunction Leads to Gridlock on Final Day of 2023 Legislative Session*, MO. INDEP. (May 12, 2023) https://missouriindependent.com/2023/05/12/missouri-senate-grinds-to-a-halt-on-final-day-of-2023-session/ [https://perma.cc/5TQE-PBPK]; Reid Wilson, *Inside America's Most Dysfunctional Legislative Body*, THE HILL (Feb.

legislation providing financial support for the clean energy sector may have made the legislature a more appealing advocacy target by renewing hope that progress on energy policy may still be made in that forum.[50] Yet the more significant of these bills — the Inflation Reduction Act — was pushed through the fast-track budget reconciliation process,[51] providing less opportunity for public input. Moreover, neither piece of legislation focused on federal agencies' core regulatory authorities.[52] This means that energy agencies remain an attractive target for stakeholder influence.

The proposals for enhancing "energy democracy" vary in ambition. Welton herself makes a relatively modest claim: "[G]iven the relative dearth of participatory mechanisms to date in energy law — and the pressing new questions confronting the field regarding the future shape of our energy systems — some opening up of the field is worthwhile."[53] The National Association of Regulatory Utility Commissioners ("NARUC") concludes in a recent report that "[e]merging stakeholder engagement processes" at public utility commissions "are a key tool for informed decision-making" and "can help achieve win-win outcomes in the public interest."[54] Felix Mormann suggests that "policymakers

5, 2021) https://thehill.com/ homenews/state-watch/537376-inside-americas-most-dysfunctional-legislative-body/ (describing Alaskan state House's inability to govern during the pandemic); Natasha Korecki, *How Illinois Became America's Failed State*, POLITICO (Jun. 10, 2017) https://www.politico.com/story/2017/06/10/illinois-debt-deficit-budget-election-239384 (describing state's repeated failure to pass budget legislation).

[50] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021); Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

[51] *See* CONG. RSCH. SERV., BUDGET RECONCILIATION MEASURES ENACTED INTO LAW SINCE 1980 12 (Nov. 2, 2022) (identifying the Inflation Reduction Act as having resulted from reconciliation directives in the FY2022 budget resolution).

[52] The Infrastructure Investment and Jobs Act did make a few adjustments to regulatory authority, most notably by enhancing FERC's authority to override state objections to siting interstate transmission lines in some areas of the country. 16 U.S.C. §824p(b)(1)(C)(iii) (expressly permitting FERC to override state authority when a state commission has denied an application).

[53] Welton, *supra* note 7, at 589-90.

[54] JASMINE MCADAMS, NAT'L ASS'N OF REGUL. UTIL. COMM'RS, PUBLIC UTILITY COMMISSION STAKEHOLDER ENGAGEMENT: A DECISION-MAKING FRAMEWORK 3 (2021), https://pubs.naruc.org/pub/7A519871-155D-0A36-3117-96A8D0ECB5DA [https://perma.cc/V3U2-W39R] [hereinafter NARUC, STAKEHOLDER ENGAGEMENT].

should solicit more widespread feedback and participation at the design and implementation stages of the next generation of clean energy policies."[55]

Other proposals are more ambitious. In its People's Utility Justice Playbook, the Energy Democracy Project suggests that grassroots coalitions "organize testimony at public hearings so that people can provide their direct experience and overwhelm the regulatory body with stories from the ground or from your aligned experts."[56] A report by the Center for Progressive Reform encourages participants to "look beyond the 'notice and comment' process"[57] and focus on administrative agenda-setting, permitting, enforcement, and grant-making processes as effective targets for public engagement.[58] They highlight the option of creating intervenor funding programs to support participation in these proceedings as well as the adoption of enforceable participation rights.[59] Shalanda Baker, who held the position of Director of the Office of Economic Impact and Diversity at the U.S. Department of Energy, has urged that "traditionally excluded voices become a central part of the energy policy conversation."[60] She proposes that agency meetings be made more accessible to frontline communities by offering financial support to defray participation costs and by providing childcare support during meetings.[61]

There are also increasing calls for broader participation within the complex yet influential entities known as Regional Transmission

[55] Mormann, *Clean Energy Equity*, *supra* note 46, at 37. Mormann acknowledges the "significant time and resources" that participatory policymaking will require and concedes that "not every institution tasked with energy-related policymaking and regulation has the resources required" to review large numbers of comments or hold weeks of hearings. *Id.*

[56] THE ENERGY DEMOCRACY PROJECT, PEOPLE'S UTILITY JUSTICE PLAYBOOK 42 (2021).

[57] JAMES GOODWIN, DEFINING ENERGY DEMOCRACY: CLAIMING OUR EQUITABLE ENERGY FUTURE THROUGH COLLECTIVE POWER 18 (2023).

[58] *See id.* at 7-8, 18.

[59] *Id.* at 15.

[60] Baker & Kinde, *supra* note 46, at 29.

[61] *Id.* at 30.

Organizations ("RTOs") or Integrated System Operators ("ISOs").[62] These are membership organizations made up of transmission owners within a given geographic footprint. While originally created primarily to facilitate transmission planning and operation, today they perform essential functions within wholesale energy markets, establishing the rules by which those markets are governed as well as administering them.[63] Yet the governance structures of RTOs and ISOs are opaque.[64] In a recent piece, for example, Dan Walters and Andrew Kleit criticize RTOs as insufficiently inclusive of stakeholder perspectives.[65] Others have identified the high costs of monitoring and participating in RTO decision-making, the technical complexity of the decisions, and the time required to engage effectively as barriers to stakeholder engagement.[66]

Other calls for energy democracy are equally ambitious but less specific, underscoring the importance of participation without

[62] *See, e.g.*, Daniel E. Walters & Andrew N. Kleit, *Grid Governance in the Energy-Trilemma Era: Remedying the Democracy Deficit* 74 ALA. L. REV. 1033, 1036 (2023) (describing RTOs as "obscure, esoteric, and clubbish entities").

[63] *See id.* ("It is somewhat shocking . . . that many crucial decisions about electric power service in the United States are made not by consumers or their utilities — that is, by markets — nor by state public utilities commissions or federal regulators — that is, by democratically responsive government institutions.").

[64] Views beyond those of the transmission owners themselves are solicited through stakeholder engagement processes. *See* Stephanie Lenhart & Dalten Fox, *Participatory Democracy in Dynamic Contexts: A Review of Regional Transmission Organization Governance in the United States*, 83 ENERGY RSCH. & SOC. SCI. 1, 6-10 (2022) (conducting literature review and identifying common features of RTO governance structures).

[65] Walters and Kleit do not advocate full public process within these institutions. Instead, they suggest incremental adjustments such as notice and the opportunity for public comment on policy proposals as well as more creative deliberative approaches, especially at the early policy development stage. They also favor clearer information about agendas and committee processes, and propose the creation of a record for judicial review. Walters & Kleit, *supra* note 62, at 1076-82.

[66] Michael H. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 584 (2007). The authors also note that, in contrast with more organized interests, individual users of energy will have little to gain by participation in comparison to the costs of doing so. *Id. See also* Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, 118 COLUM. L. REV. 1067, 1109-12 (2018) (describing RTO governance process and identifying barriers to meaningful stakeholder input).

specifying the locus or nature of that engagement.[67] Denise Fairchild, President Emeritus of the Emerald Cities Collaborative, advocates "the decentralization and democratization of the power sector" to achieve "energy democracy."[68] Fairchild's vision of energy democracy requires that "those directly impacted [by energy-related decisions] have to be the ones making them."[69] Greater engagement of citizens from "low-income, racial, ethnic, and immigrant communities," Fairchild anticipates, will produce decisions that "are more effective because they are informed by lived experience" and because these citizens "come up with solutions that traditional environmentalists might not think of."[70]

Finally, for some scholars, expanding participatory opportunities in governmental decision-making is only a first step. Shalanda Baker and Andrew Kinde assert that allowing "for greater participation in energy production and ownership without attention to underlying inequities" is an "ahistorical, equity-agnostic approach" that "threatens to replicate the injustices in the existing energy system."[71] They stress the role of community residents as actual decision-makers on energy questions that affect them.[72] Although participation in energy decision-making may not be a sufficient condition for these authors, it is a necessary one.

II. PARTICIPATORY EFFORTS IN ENERGY ADMINISTRATION

This Part offers a high-level overview of energy regulatory mechanisms and the agencies responsible for their implementation. It does so to underscore why participation is so challenging in this domain of administration due to its emphasis on relatively formal, adversarial

[67] *See, e.g.*, CLIMATE JUST. ALL., TEN PRINCIPLES FOR ENERGY DEMOCRACY 1 (2023) ("[P]articipation in decision-making . . . is essential to good environmental decision-making.").

[68] Denise G. Fairchild, *Powering Democracy Through Clean Energy*, *in* David Orr, Andrew Gumbel, Bakari Kitwana & William S. Becker, DEMOCRACY UNCHAINED: HOW TO REBUILD GOVERNMENT FOR THE PEOPLE 263, 267 (2020).

[69] *Id.* at 269.

[70] *Id.*

[71] Baker & Kinde, *supra* note 46, at 13.

[72] *Id.* at 23 ("[J]ustice in energy generation, distribution, and transition activities will be achieved only if the decision-making power and control over the systems lies in the hands of the community affected by that system.").

proceedings and its technical subject-matter. It then turns to the ways that energy agencies are responding to the calls for greater public participation described in the previous Part. They are doing so by exploring a variety of stakeholder engagement mechanisms, from intervenor compensation programs to affirmative agency outreach to the establishment of offices dedicated to facilitating public participation.

A. Energy Regulation

Energy regulatory responsibilities are divided between the federal and state governments. Multimember commissions are the prime sites of energy regulation, although single-head agencies like the Department of Energy and various state energy agencies take important actions as well.[73] The Federal Energy Regulatory Commission ("FERC") and state public utility commissions ("PUCs")[74] are technocratic by design, a legacy of their Progressive-era creation to counter the expertise of monopoly corporations.[75] FERC oversees transmission of electricity and gas in interstate commerce as well as wholesale sales of those commodities.[76] State PUCs, meanwhile, retain jurisdiction over the distribution of electricity and gas and retail sales.[77] Most states also task

[73] For a description of each state's energy agency landscape, see Sharon B. Jacobs, *Agency Genesis and the Energy Transition*, 121 COLUM. L. REV. 835, app. at 915-35 (2021).

[74] State-level commissions operate under a variety of names. *See id.* (identifying each state's commission by name).

[75] *See* William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1640-41 (2014) (describing the rise of expert public utility commissions in the early 1900s).

[76] The Federal Power Act ("FPA") and Natural Gas Act ("NGA") each contain sections describing the Commission's jurisdiction. FPA section 201 limits the Commission's authority over electricity to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Within these limits, FERC must determine whether rates and charges are "just and reasonable." 16 U.S.C. § 824e(a). Jurisdictional divisions under the Natural Gas Act are comparable. *See* 15 U.S.C. § 717c(b).

[77] *See* 16 U.S.C. § 824(a) (reserving to the states responsibility for regulating electricity generation, local distribution, and transmission in intrastate commerce); 15 U.S.C. 717(b) (reserving to the states responsibility for regulating the local distribution of natural gas). State commissions continue to set retail rates for electricity and gas only in states that have not 'restructured' their industries by moving away from monopoly

utility commissions with reviewing utility plans for meeting future customer demand (whether through the construction of generation, the purchase of power, or the institution of conservation policies) and utility compliance with state mandates such as renewable energy standards.[78]

In some states, PUCs are also responsible for permitting and approving the siting of energy assets and infrastructure.[79] Other state agencies may also have permitting authority, as in California where the California Energy Commission issues permits for all generation facilities over 500 MW in size.[80] Hydropower and nuclear power facilities are permitted by FERC and the Nuclear Regulatory Commission ("NRC"), respectively.[81] FERC also issues permits for interstate natural gas pipelines and liquefied natural gas terminals, while states control permitting for most electric transmission lines and for oil pipelines.[82]

The sheer variety of decision-making fora in energy regulation make it difficult for all but the best-resourced groups to participate in regulatory proceedings across the board. A better strategy is to target the proceedings, and the regulators, with the most impact on the

utility control to competitive markets. *See* Severin Borenstein & James Bushnell, *The US Electricity Industry After 20 Years of Restructuring*, 7 ANN. REV. ECON. 437, 438-439, 445 (2015) (describing the process of restructuring in the U.S. electricity sector).

[78] *See* Michael Dworkin, David Farnworth, Jason Rich & Jason Salmi Klotz, *Revisiting the Environmental Duties of Public Utility Commissions*, 7 VT. J. ENV'T L. 1, 2-7 (2006) (reviewing the statutory authority of state utility commissions).

[79] *See, e.g.*, CAL. PUB. UTIL. CODE § 1001(a) (2023) (requiring approval from the California Public Utilities Commission before construction of new electric or gas facilities may be constructed). Some states leave this responsibility primarily in the hands of local governments. *See, e.g.*, Shawn Enterline & Andrew Valainis, LAWS IN ORDER: AN INVENTORY OF STATE RENEWABLE ENERGY SITING POLICIES 8-9 (2024) (identifying siting and permitting authorities for large scale wind and solar projects in each state).

[80] *See* Jacobs, *supra* note 73, at 915-35 (listing each state's energy agencies).

[81] *See* Federal Power Act, 16 U.S.C. §§ 791–825r (granting FERC authority to regulate hydropower); Atomic Energy Act of 1954, 42 U.S.C. §§ 2011–2297g-4 (authorizing the NRC to license nuclear power plants).

[82] *See* FED. ENERGY REGUL. COMM'N, *What FERC Does*, https://www.ferc.gov/what-ferc-does (last updated Feb. 12, 2024) [https://perma.cc/2HQR-FUB5] (describing FERC's jurisdiction and areas where state commissions retain authority).

questions about which one cares most deeply. But even this more targeted approach can be challenging and costly.[83]

To make matters worse, many key decisions in energy law are made in relatively formal proceedings. Informal agency rulemakings are the most obvious loci of participation. Under the federal Administrative Procedure Act, the public may participate in these proceedings by submitting written comments to the agency.[84] But while energy regulation has its rulemakings, key decisions are disproportionately made in proceedings that do not fall neatly into the two primary categories of administrative action set out in the federal Administrative Procedure Act ("APA"): rulemaking and adjudication. Under the APA, agency review of utility rates and practices is technically rulemaking[85] while licensing is technically adjudication.[86] But neither is a paradigmatic case. Moreover, both types of proceedings tend to be relatively formal and complex, involving discovery, expert witnesses, and strict ex parte limitations.[87] While energy agencies do engage in informal rulemaking,[88] in which broader, forward-looking policies are crafted through processes that allow for more public input, ratemaking and licensing are crucial parts of their dockets. As Part IV will argue, the

[83] *See, e.g.*, Welton *supra* note 7, at 583-84 ("Despite such visible outcries from the public on energy policy, much of our decision-making on energy policy in the United States occurs within complex layers of bureaucracy.").

[84] 5 U.S.C. § 553(c).

[85] 5 U.S.C. § 551(4) (defining "rule" as including "the approval or prescription for the future of rates"). *See also* Melvin G. Dakin, *Ratemaking as Rulemaking — the New Approach at the FPC: Ad Hoc Rulemaking in the Ratemaking Process*, 1973 DUKE L.J. 41, 41 (1973) (observing that the APA includes ratemaking within rulemaking).

[86] The Administrative Procedure Act includes everything that is not a rulemaking in the definition of adjudication, including licensing. *See* 5 U.S.C. §§ 551(7) (defining adjudication as an agency process for the formulation of an order); 5 U.S.C. § 551(6) (defining an order as the whole or a part of a final disposition of an agency in a matter other than rulemaking but including licensing).

[87] *See* Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 YALE J. REGUL. 257, 275-276 (1995) (describing procedures for ratemaking); Zhongmin Wang, *Settling Utility Rate Cases: An Alternative Ratemaking Procedure*, 26 J. REGUL. ECON. 141, 141 (2004) (observing that public utility rate cases are typically resolved by formal regulatory hearing processes).

[88] *See* FED. ENERGY REGUL. COMM'N, *Major Orders & Regulations*, https://www.ferc.gov/major-orders-regulations (last updated Oct. 20, 2023) [https://perma.cc/RU9V-33B2] (listing regulations).

nature of these proceedings make broad public engagement in energy regulation especially challenging.

Take ratemaking. Historically, electric and gas utilities were granted monopoly service territories.[89] At the same time, government rate-setting was instituted to prevent those utilities from charging customers monopoly rents.[90] In some states, these monopolies have now been broken apart in favor of competition between the legacy utilities and new market entrants. In such markets, regulators largely allow utilities to charge whatever rates the market will bear as long as they can show that their markets are adequately competitive.[91] Even where competition prevails, however, distribution remains a regulated monopoly and distribution system prices therefore continue to be set in traditional ratemaking proceedings. Meanwhile, in states that have not moved to competitive markets, regulators continue to set rates for the commodities themselves.[92]

Federal ratemaking is more complicated still. Following the restructuring of the industry to permit greater competition,[93] FERC encouraged transmission system operators to band together into regional transmission organizations called ISOs or RTOs. Like other entities subject to FERC's jurisdiction, these entities formulate "tariffs," which include not only the rates that their member transmission organizations may charge, but the rules, regulations, and

[89] *See* JOEL B. EISEN, EMILY HAMMOND, JOSHUA MACEY, JIM ROSSI, DAVID B. SPENCE & HANNAH J. WISEMAN, ENERGY, ECONOMICS, AND THE ENVIRONMENT 61, 69 (5th ed. 2019) (identifying monopoly power as one of the key features of the electric utility model in the twentieth century).

[90] Rates for monopoly utility companies are still largely set using a cost-of-service ratemaking approach, under which the utility may recover its costs and receive a set return on its investments. However, as discussed in the context of the Hawaii PUC's proceeding on performance-based rates, some states are experimenting with new approaches. *See infra* Part IV.C.3.

[91] *See* EISEN ET AL., *supra* note 89, at 696 ("FERC currently allows nearly all utilities that sell wholesale power (sale of power from one utility to another for eventual resale to customers) to charge market-based rates — whatever rate the market will bear.").

[92] *See* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 836 (2016).

[93] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities ("Order 888"), 61 Fed. Reg. 21540 (Apr. 24, 1996) (to be codified at 18 C.F.R. pts. 35, 385).

practices affecting those rates.[94] As discussed in greater detail in Part II, critics assail decision-making at these institutions as opaque and preferencing the interests of their industry members over those of other stakeholders.[95]

Licensing of new or expanded facilities is done under a variety of statutes, each with its own standards and procedures. These proceedings, too, are adversarial and formal. For example, FERC issues licenses for interstate natural gas pipelines in a multi-stage process, often beginning with an informal pre-filing followed by a formal application, hearings, environmental review, preliminary determinations, and final permit decisions.[96] Disappointed parties may seek rehearing before the agency and subsequently challenge the agency's decision in court.[97]

State commissions make a variety of decisions beyond ratemaking and licensing, including ruling on utilities' procurement or integrated resource plans.[98] In resource planning, utilities are asked to predict how much customer demand they will need to meet in the future and to identify a mix of generation, purchased power, or demand reduction strategies to meet that need.[99] Commission evaluation of resource plans is done via adjudication.[100] The technical aspects of these proceedings

[94] *See* 16 U.S.C. § 824d(e) (outlining the filing requirements of jurisdictional entities and the power of the commission to fix rates and charges for jurisdictional entities).

[95] *See* Dworkin & Goldwasser, *supra* note 66, at 583-86 (2011) (collecting complaints from stakeholders who felt excluded from RTO and ISO decision-making).

[96] *See* PAUL W. PARFOMAK, CONG. RSCH. SERV., R45239, INTERSTATE NATURAL GAS PIPELINE SITING: FERC POLICY AND ISSUES FOR CONGRESS 4-7 (2021) (describing Commission review process).

[97] 16 U.S.C. § 825l(a).

[98] *See, e.g.*, ENV'T PROT. AGENCY, AN OVERVIEW OF PUCS FOR STATE ENVIRONMENT AND ENERGY OFFICIALS 2-3 (2010) (describing state utility commission responsibility over resource planning, procurement, and management).

[99] *See* ENV'T PROT. AGENCY, STATE ENERGY AND ENVIRONMENT GUIDE TO ACTION: ELECTRICITY RESOURCE PLANNING AND PROCUREMENT 7-9 (2022) (offering overview of resource planning process).

[100] *See* Julia Eagles, *In Pursuit of Equitable Clean Energy: The Power of Coalitions for Utility Regulatory Transformation*, INST. FOR MKT. TRANSF., (Mar. 30, 2021) https://imt.org/news/in-pursuit-of-equitable-clean-energy-the-power-of-coalitions-for-utility-regulatory-transformation/#:~:text=Traditionally%2C%20utility%20resource%

can create barriers to participation. According to industry veteran Julia Eagles, "[T]raditionally, utility resource plan proceedings are dominated by industry insiders who are familiar with the modeling tools and economic analysis used in the process."[101] "This is a problem," Eagles continues, "because utility resource planning determines where customers' electricity will come from over the next decade, and therefore how much pollution and energy costs might be shouldered by communities already overburdened by both."[102]

A final point that compounds the challenge of effective participation in energy regulatory proceedings is that the applicable statutory standards are open-textured. At the federal level, and in most states, rates must be "just and reasonable" and must not be unduly preferential or prejudicial to any entity.[103] Meanwhile, infrastructure licenses are granted where the public "convenience and necessity" so requires.[104] The breadth of these statutory standards means that detailed knowledge of commission rules and precedent is required to argue effectively in a ratemaking, licensing, or other commission adjudication.

B. Participatory Efforts in Energy Administration

This Section first examines the Federal Energy Regulatory Commission's efforts to establish an Office of Public Participation ("OPP"). It then offers a taxonomy of participatory programs at state utility commissions. These vary significantly in terms of both approach and ambition.

20plan%20proceedings,input%20by%20those%20that%20participate [https://perma.cc/KG59-UD6D].

[101] *Id.*

[102] *Id.*

[103] *See, e.g.*, 16 U.S.C. §§ 824d(a), (b) (Federal Power Act); 15 U.S.C. §§ 717c(a), (b) (Natural Gas Act).

[104] *See, e.g.*, 15 U.S.C. § 717f(c) (Natural Gas Act); ARIZ. REV. STAT. § 40-281(a) ("A public service corporation . . . shall not begin construction . . . without first having obtained from the commission a certificate of public convenience and necessity."); WYO. STAT. ANN. § 37-2-205(a) ("Except as provided in this subsection, no public utility shall begin or complete the purchase of a line or plant . . . without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction or purchase.").

1. The Federal Energy Regulatory Commission ("FERC")

When it comes to public participation, FERC is looking forward by looking backward. In a 1978 statute, Congress directed the Commission to establish an Office of Public Participation to assist members of the public with engagement in Commission proceedings.[105] However, the office was never established. In 2021, members of Congress required the Commission to submit a report on its progress toward establishing the office to the House and Senate appropriations committees.[106]

The 1978 statute provides few details about the Office of Public Participation. The office is to be headed by a director appointed by the Chairman with the approval of the Commission.[107] That director may appoint employees of the OPP and assign duties to them.[108] The office is responsible for coordinating assistance to the public and to persons intervening or participating in proceedings before the Commission.[109] Perhaps most significantly, the office may, but is not required to, provide compensation to intervenors and participants in significant Commission proceedings.[110]

The process of designing an OPP itself reveals some of the benefits and challenges of public participation in agency decision-making. FERC staff "conducted an extensive stakeholder engagement process to hear directly from the public" on the OPP, including six listening sessions, a full-day virtual workshop, and a sixty-three-day period for the

[105] Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 212, 92 Stat. 3117, 3148 (codified at 16 U.S.C. § 825q-1). Congress made minor amendments to the statute in 2021 by removing for-cause removal restrictions for director, updating the director's pay structure, and removing out-of-date appropriations language. *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, Div. D, § 40432, 135 Stat. 429, 1049 (2021).

[106] *See* FERC, No. AD21-9-000, Notice of Workshop and Request for Panelists (Feb. 22, 2021).

[107] 16 U.S.C. § 825q-1(a)(2).

[108] *Id.* § 825q-1(a)(3).

[109] *Id.* § 825q-1(b)(1).

[110] There are limits on such compensation. It may only be paid if the person's intervention or participation would constitute a significant financial hardship to them *and* if their intervention or participation substantially contributes to the approval, in whole or in part, of a position they advocated. *Id.* §§ 825q-1(b)(2)–(b)(3).

submission of written comments.[111] This comprehensive scoping process took time and resources but allowed the agency to benefit from a diverse array of public perspectives.

The Commission's report to Congress observed that "members of the public — especially communities that have been historically underrepresented before the Commission — need OPP to assist with participation in Commission proceedings" in order to place them "on equal footing with well-resourced industry stakeholders."[112] At one of the public listening sessions, Commissioner Alison Clements was more specific, noting that "[i]t is an unfortunate historic reality that . . . some stakeholder voices and especially those at the low-income communities, indigenous, Black, and other peoples of color have been largely sidelined in Commission stakeholder processes."[113]

The new OPP's mission is to "coordinate and provide assistance to members of the public to facilitate participation in Commission proceedings."[114] The Office conducts outreach and education about Commission processes, encourages participation in Commission proceedings, provides assistance to those who wish to participate, and advises other Commission offices about improvements to their processes.[115] The Office will also collaborate with other Commission staff and offices, including the Senior Counsel for Environmental Justice and Equity and the Office of Energy Projects, to "better ensure that the concerns of Tribal members, environmental justice communities, and other historically marginalized communities are fully and fairly considered in Commission proceedings."[116]

The Office currently has approximately one dozen employees[117] and expects to reach full operational status by the close of Fiscal Year

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[111] *See* FED. ENERGY REGUL. COMM'N, THE OFFICE OF PUBLIC PARTICIPATION 9 (2021) [hereinafter 2021 OPP REPORT].

[112] *Id.* at i.

[113] Transcript of Tribal Governments Listening Session at 8, No. AD21-9-000 (2021).

[114] 2021 OPP REPORT, *supra* note 111, at 10.

[115] *See id.*

[116] *Id.*

[117] *See* OFF. OF PUB. PARTICIPATION, FED. ENERGY REGUL. COMM'N, 2022 OUTREACH AND EDUCATION REPORT 2 (2023) [hereinafter 2022 OPP REPORT] (observing that there were eleven full time employees in 2022 and that the Office anticipated having thirteen full-time employees by February 2023).

2024.[118] Even with limited staff, during its first several months of operation, the Office held "148 outreach meetings with organizations and individuals among OPP's core constituent groups," addressed 426 inquiries,[119] conducted 7 workshops and 4 "explainers," and conducted a pilot of expanded notice outreach.[120] The priority for 2022 was "building trust with OPP constituents that have traditionally been under-represented in or largely unfamiliar with FERC processes" in order to establish OPP as a trusted resource and to "begin a long-term dialogue with community leaders."[121] The Office also sought to "solicit[] broader participation in FERC matters."[122]

One of OPP's actions has been to post "explainers" on FERC's website that aim to demystify FERC's processes and tasks. The explainer on "Formula Rates in Electric Transmission Proceedings: Key Concepts and How to Participate" demonstrates both why simplified explanation might be needed and why it is so difficult to do effectively. The explainer begins with an accessible definition of electricity transmission but quickly gets lost in the weeds of cost of service ratemaking, represented by the formula R + O&M + DE + OE + IT + OT-OR.[123] While the Office's effort to make these rates understandable to the general public is admirable, the very nature of the process means that it may inevitably remain opaque to those without either a background in utility regulation or accounting or sufficient time to devote to self-education.

[118] 2021 OPP REPORT, *supra* note 111, at i.

[119] 2022 OPP REPORT, *supra* note 117, at 2. The Commission also receives numerous form letters about hydraulic fracturing and natural gas certification requirements. *See id.* at 4.

[120] 2022 OPP REPORT, *supra* note 117, at 2.

[121] *Id.* at 3.

[122] *Id.* Of the Office's first 148 meetings, 40 were with environmental justice and marginalized community advocates and environmental advocates, 9 were with members of tribes, 11 were with landowners, 48 were with "energy consumers, industry, and consumer advocates," and 40 were with "cross-interest groups." *See id.*

[123] FED. ENERGY REGUL. COMM'N, *Formula Rates in Electric Transmission Proceedings: Key Concepts and How to Participate*, https://www.ferc.gov/formula-rates-electric-transmission-proceedings-key-concepts-and-how-participate (last updated July 5, 2022) [https://perma.cc/VPL8-76FU].

2. State Commissions

FERC is not alone when it comes to enhancing participatory mechanisms. This Section details efforts by state utility commissions to open up their proceedings to greater stakeholder participation. NARUC identifies "more than a dozen" states that are using stakeholder engagement processes of various kinds in public utility proceedings,[124] and more make at least minimal efforts to facilitate public participation. Thus, the examples below should be seen as representative rather than as a comprehensive list.

State efforts to enhance direct public participation in energy agency proceedings fall into four broad categories: accessibility, outreach and education, compensation, and other mechanisms for engagement of stakeholders in decision-making.[125]

a. Accessibility

The first category of participatory mechanisms involves measures to make utility commission proceedings more accessible to a wide range of stakeholders. Some commissions provide print and online materials in more than one language.[126] The California PUC provides language interpreters at no cost for public hearings.[127] Public hearings in many states are livestreamed. [128] Some commissions are also attempting to

[124] NARUC, STAKEHOLDER ENGAGEMENT, *supra* note 54, at 7.

[125] This Section will focus on strategies to enhance direct public participation rather than increased government representation for particular individuals or groups. Representation will be discussed separately in Part V.

[126] For example, in 2021 the Texas PUC created a multi-language team to help specifically with communication with Spanish-speaking customers. PUB. UTIL. COMM'N OF TEX., BIENNIAL AGENCY REPORT TO THE 88TH TEXAS LEGISLATURE 9 (2023). Some members of the team's bilingual staff are experts in utility regulation or law. *Id.*

[127] CAL. PUB. UTILS. COMM'N, *Language Interpretation and Translation*, CA.GOV, https://www.cpuc.ca.gov/about-cpuc/divisions/news-and-public-information-office/public-advisors-office/language-interpretation-and-translation (last visited Sept. 7, 2024) [https://perma.cc/8KCK-B7B9].

[128] *See, e.g.*, FLA. PUB. SERV. COMM'N, 2021 ANNUAL REPORT 14 (2022), https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Reports/General/AnnualReports/2021.pdf [https://perma.cc/T5XK-YVQE] (noting that all meetings attended by two or more Commissioners are live-streamed); PUB. UTILS. COMM'N, COLO. DEP'T OF REGUL. AGENCIES, A GUIDE TO PUBLIC PARTICIPATION IN PUBLIC UTILITIES

make their dockets and other materials more accessible through digitization of records.[129]

b. Outreach and education

Some commissions have established offices dedicated to public engagement and participation. For example, the Illinois Commerce Commission's Office of Diversity and Community Affairs conducts outreach and awareness activities to help communities, local governments, and businesses understand energy issues.[130] In 2022, the Texas PUC created an Office of Public Engagement to "provide a single point of contact for consumers, stakeholders, legislators, and other affected parties to make their voices heard at the PUC."[131]

Some commissions undertake more extensive public education projects. The Connecticut Public Utilities Regulatory Authority ("PURA") holds "PURA 101 Workshops" presented by the Commission Chairman and senior staff at the request of community organizations,

COMMISSION PROCEEDINGS 1 (2022) (observing that Commission hearings and meetings are webcasted); KAN. CORP. COMM'N, https://kcc.ks.gov/index.php?option=com_content&view=article&id=31:consumer-information&catid=20:quick-links (last visited July 24, 2024) [https://perma.cc/577L-APQ3] (noting that Commission Business Meetings, Hearings, and Workshops are broadcast live for public viewing); S.C. Pub. Serv. Comm'n, *South Carolina Public Service Commission Establishes Livestream and Listen Line Options for Broadcasting PSC Events*, PR NEWSWIRE (Mar. 27, 2023), https://www.prnewswire.com/news-releases/south-carolina-public-service-commission-establishes-livestream-and-listen-line-options-for-broadcasting-psc-events-301782362.html [https://perma.cc/T7ZP-UWQW] (explaining that the South Carolina PSC broadcasts their meetings and hearings live to the public as well as offering a toll-free listen-only line).

[129] *See, e.g.*, WYO. PUB. SERV. COMM'N, BFY2025–2026 STRATEGIC PLAN 4 (2024) (establishing objective of improving digital accessibility of Commission dockets and archives).

[130] *Office of Diversity and Community Affairs*, ILL. COM. COMM'N, https://www.icc.illinois.gov/home/diversity-and-community-affairs (last visited Sept. 7, 2024) [https://perma.cc/9C57-3QHM]. The office is also tasked with improving the ICC's culture of diversity and inclusion. *Id.*

[131] PUB. UTIL. COMM'N OF TEX., *Public Utility Commission Creates Office of Public Engagement* (Aug. 25, 2022), https://www.puc.texas.gov/agency/resources/pubs/news/2022/puc_creates_office_of_public_engagement.pdf [https://perma.cc/X983-9A2Y].

local governments, and state legislators.[132] In Florida, the Public Service Commission provides a "Rate Case Overview" online that explains each rate case in which the public may participate and encourages participation.[133] The South Carolina Public Service Commission offers synopses after Commission meetings to better explain the outcomes of Commission decisions.[134] Some commissions also use social media to educate consumers.[135]

c. Compensation

Public engagement and education may not be sufficient to permit effective public participation if the barriers are financial in addition to informational. For that reason, a few states offer compensation to intervenors in agency adjudications. This compensation enables individuals and groups to hire attorneys and expert consultants to represent them in regulatory proceedings.[136] Commissions in California, Idaho, Michigan, Minnesota, Oregon, and Wisconsin all have active intervenor compensation programs,[137] and Illinois and Washington are in the process of establishing programs of their own.[138]

Key questions in establishing intervenor compensation programs concern which proceedings will be affected, eligibility for compensation, the amount of compensation available, and the timing of compensation. Compensation is not necessarily available in all utility commission proceedings. In Minnesota, for example, the compensation is limited to general rate case proceedings.[139] Moreover, compensation is not available to all participants. Intervenors must generally show that

[132] *See* Conn. Pub. Utils. Regul. Auth., *PURA 101 Workshops*, CT.GOV, https://portal.ct.gov/PURA/About/PURA-101 (last visited Sept 7, 2024) [https://perma.cc/DY4W-8P75].

[133] FLA. PUB. SERV. COMM'N, *supra* note 128, at 14.

[134] PUB. SERV. COMM'N OF S.C., ANNUAL REPORT TO THE STATE REGULATION OF PUBLIC UTILITIES REVIEW COMMITTEE: FISCAL YEAR 2020-2021 23-24 (2022).

[135] *See, e.g.*, ME. PUB. UTILS. COMM'N, 2021 ANNUAL REPORT 47 (2022) (describing the practice of using social media to educate consumers about assistance programs and customer choices in response to challenges related to the Coronavirus pandemic as well as the rising costs of electricity and complaints about investor-owned utilities).

[136] *See* NARUC, INTERVENOR COMPENSATION, *supra* note 12, at 4.

[137] *Id.* Eight additional states have inactive programs. *See id.*

[138] *Id.*

[139] *See id.* at 8.

another party to the proceeding cannot adequately represent their position and that their participation is relevant and important.[140] Some states also require a showing of financial hardship.[141] The timing of compensation varies as well, with some states providing grants up front[142] while others permit recovery only once it has been shown that the intervenor contributed meaningfully to the proceeding.[143]

Intervenor compensation programs are not cheap. Some state programs place upper limits on total compensation per intervenor or per proceeding, while others cap the annual amount available across all proceedings. In Wisconsin, for example, the annual program budget in 2022 was $542,500, while in Minnesota, compensation for a single intervenor is capped at $50,000 per proceeding.[144] These programs are funded by regulated utilities,[145] which by extension means that their costs are borne by the utility's ratepayers.[146]

d. Other mechanisms

Some commissions hold regular public meetings or listening sessions to hear from members of the public. The California PUC holds Public Participation Hearings, also called Public Forums.[147] Another form of participatory initiative is the creation of stakeholder boards or councils to advise on or participate in commission decision-making. Michigan's Low-Income Energy Policy Board advises the Commission on energy affordability, accessibility, and other issues of interest to low-income

[140] *Id.* at 12.

[141] *See, e.g.*, *id.* at 19 (describing Minnesota's financial hardship requirements).

[142] Michigan awards grants to public interest intervenors. *See id.* at 17.

[143] In California, intervenors file claims for reimbursement after an administrative order in the proceeding has been issued and must show that they have made a "substantial contribution" to the proceeding's outcome. *Id.* at 14 (observing that this "can lead to uncertainty for intervenors when planning their costs of intervention").

[144] *Id.* at 13.

[145] *Id.*

[146] *See, e.g.*, CAL. PUB. UTIL. CODE § 1807(a) (2022) (providing intervenor compensation awards paid by public utilities shall be recoverable by the utility through its rates).

[147] CAL. PUB. UTILS. COMM'N, *CPUC Public Participation Hearings*, https://www.cpuc.ca.gov/proceedings-and-rulemaking/cpuc-public-participation-hearings (last visited Sept. 7, 2023) [https://perma.cc/D6YY-MBXP].

communities and individuals. [148] The Board includes leaders of various stakeholder groups, policy leaders, staff members, and participants with "lived experience."[149]

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It bears emphasis that not all state commissions are moving in the direction of greater public access and participation. Consider the New Mexico Public Service Commission, which recently announced that it was reducing the number of its meetings that would be open to the public.[150] Moreover, while each of the above programs can lead to incremental increases in public engagement with utility commission decision-making, most fall short of the democratic ambition described in Part II. The most robust engagement measures — intervenor compensation and advisory boards — are limited to a handful of commissions. The next Part seeks to explain why.

III. SOME REALISM ABOUT PARTICIPATION

Why have we not seen more ambitious reforms of energy agency decision-making? This Part argues that, however sympathetic the argument for greater public participation in administrative proceedings, advocates both in the energy regulatory space and beyond are too sanguine about its prospects. One reason to be realistic about the likely success of participatory projects is historical. Over the last century, there have been two notable achievements in expanding administrative participation: notice-and-comment rulemaking, on the one hand, and the liberalization of intervention standards for agency adjudications, on the other. By contrast, more ambitious efforts to open the regulatory process up to public engagement have faltered. The first Section below surveys these efforts.

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[148] MICH. PUB. SERV. COMM'N, *Low-Income Energy Policy Board*, https://www.michigan.gov/mpsc/commission/workgroups/low-income-energy-policy-board (last visited Sept. 7, 2024) [https://perma.cc/VEB6-62J2].

[149] *See id.*

[150] Robert Walton, *New Mexico PRC Cuts Number of Open Meetings, Adds Closed Sessions*, UTILITYDIVE (June 27, 2023), https://www.utilitydive.com/news/new-mexico-public-regulation-commission-prc-cuts-number-of-open-meetings-/653980/ [https://perma.cc/VEX7-R7H3].

The second reason for skepticism is practical. The project of regulation seeks to balance multiple goals. Public engagement is one of these, but trade-offs must be made between participation and other administrative values such as effectiveness, expertise, and non-arbitrariness. These trade-offs are more pronounced in areas of administration, like energy regulation, that rely on more complex, formal, and adversarial proceedings. The second Section below explores these tensions.

None of this is to say that expanding public involvement in the work of agencies is impossible. But if these efforts come at too high a cost to other administrative values, they are less likely to succeed. Making these trade-offs explicit and exploring how they operate in areas of administration that have proven stubbornly resistant to expanded participation — like ratemaking and formal adjudication — can help create more realistic expectations about programmatic success. Importantly, as Part V will argue, it can also point to more promising pathways for ensuring that agencies consider the perspectives of all stakeholders affected by their actions.

A. Historical Efforts to Expand Participatory Administration

Efforts to increase public participation in government administration are not new. Indeed, they have been a recurring theme in federal administrative law and practice.[151] There have been two relative successes: the notice-and-comment process in informal rulemaking and the expansion of participatory rights in the 1960s and 70s. Since then, however, efforts to "democratize" administrative decision-making have had little enduring impact.

[151] In his seminal article on the *Reformation of American Administrative Law* in the 1960s and 70s, for example, Richard Stewart wrote of growing efforts to treat administration as a "surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision." Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975).

1. Notice-and-Comment Rulemaking

The notice-and-comment process in informal rulemaking is familiar to all students of administrative law. Enshrined in the federal Administrative Procedure Act ("APA"), the process requires that agencies provide public notice of proposed rules and give the public "an opportunity to participate in the rule making through submission of written data, views, or arguments."[152] When promulgating the final rule, agencies must then provide a concise statement of the rule's basis and purpose.[153] Over time, the courts have elaborated the meaning of those requirements. Crucially, they have specified that agencies must respond to significant comments as part of their "concise statement" alongside the final rule.[154]

The notice-and-comment process is not perfect. Well-organized and deep-pocketed interests can take better advantage of the process than those with fewer resources.[155] Agencies may ignore comments deemed insubstantial.[156] Agencies may also receive mass comments that are

[152] 5 U.S.C. §§ 553(b)–553(c).

[153] *Id.* § 553(c).

[154] *See, e.g.*, United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252-53 (2d Cir. 1977) (identifying "vital questions" raised by commenters to which the agency failed to respond and invalidating the rule).

[155] *See* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 950-952 (2006) (reviewing the literature on rulemaking comments and observing that most rules elicit no comment at all and that few comments are from ordinary citizens); Mariano-Florentino Cuéllar, *Notice, Comment, and the Regulatory State: A Case Study from the USA Patriot Act*, 28 ADMIN & REG. L. NEWS 3, 3-4 (2003) (observing that one significant rule on the sharing of records for people suspected of terrorism and money laundering received few comments of any kind and none from privacy, civil liberties, or other public interest organizations); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414-416 (2005) (finding that while public comments make up the majority of comments for some regulations, agencies tend to respond more readily to the more sophisticated comments that generally come from industry and other organized interest groups); Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 683, 688-691 (2012) (documenting this imbalance).

[156] Stewart, *supra* note 151, at 1775 ("[T]he agency is not bound by the comments filed with it, and many such comments may be ignored or given short shrift."); *see also* Cynthia R. Farina, Dmitry Epstein, Josiah Heidt & Mary J. Newhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1188

virtual duplicates of one another,[157] fraudulent comments,[158] or comments generated by machines rather than by humans.[159] Some take a dim view of the whole process, as David Fontana did in observing that "all of the empirical research on public participation in agency rulemaking demonstrates that participation is minimal, of low quality, and dominated by powerful interests."[160] Perhaps most famously, E. Donald Elliott asserted that "[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions — a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[161]

Despite these criticisms, notice-and-comment remains the key way in which the public can make its views known to federal agencies.[162] Some commentators have even proposed shifting more agency action to this form of rulemaking in order to enhance democratic accountability.[163]

(2012) (proposing that agencies take more seriously public comments that represent situated knowledge).

[157] *See* Steven J. Balla, Reeve Bull, Bridget C.E. Dooling, Emily Hammond & Michael A. Livermore, *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 97, 106 (2022) ("Mass comment responses and mass comment campaigns have grown in frequency and scope as information and communication technologies, including e-mail and the Internet, have reduced the cost of participating in the notice-and-comment process.").

[158] *See* Michael Herz, *Fraudulent Malattributed Comments in Agency Rulemaking*, 42 CARDOZO L. REV. 1, 5-6, 9-10 (2020) (documenting the phenomenon of submission of phony comments but cautioning against overestimating its significance).

[159] *See* Balla et al., *supra* note 157, at 107.

[160] David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 85 (2005).

[161] *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992). Elliott suggested that genuine public engagement take place instead in informal meetings or roundtables, by appointing advisory committees, or in negotiated rulemaking. *See id.* at 1492-93.

[162] This is the case notwithstanding Emily Bremer's compelling argument that the Administrative Procedure Act's drafters intended notice-and-comment rulemaking primarily to serve as a conduit for the views of organized interest groups rather than a mechanism of democratic accountability. *See* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 74-77 (2022).

[163] Wadhia & Walker, *supra* note 31, at 411 (proposing that notice-and-comment rulemaking be selected as default when it comes to major policy decisions). Others assert that agencies are shifting too much policymaking activity away from notice-and-comment rulemaking to informal actions like the issuance of guidance documents and

For all of its flaws, and although work remains to be done to improve the process,[164] notice-and-comment rulemaking can justly be identified as one of the success stories of public engagement in administration.

2. Expanded Participation Rights in the 1960s

In the face of concern that regulated interests had come to dominate the administrative process,[165] the 1960s gave rise to a preference for inclusive, participatory administration policed by a public-regarding judiciary.[166] As described by Richard Stewart in his seminal article *The*

through the use of procedures such as direct final rulemaking. *See, e.g.*, Michael Kolber, *Rulemaking Without Rules: An Empirical Study of Direct Final Rulemaking*, 72 ALBANY L. REV. 79, 79 (2009) (suggesting that the use of direct final rulemaking should be limited in favor of notice-and-comment rulemaking); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893, 904 (2004) (proposing that a shift away from informal rulemaking threatens the more deliberative, democratic notice-and-comment process); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 402-403 (1999) (raising concerns about the availability of substantive judicial review of direct final rulemaking).

[164] *See, e.g.*, Cynthia Farina & Mary J. Newhart, IBM CENTER FOR THE BUSINESS OF GOVERNMENT, RULEMAKING 2.0: UNDERSTANDING AND GETTING BETTER PUBLIC PARTICIPATION 21-38 (2013) (proposing outreach, educational, and informational strategies to lower participation barriers and to enhance the quality of participation). *See also* Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIAMI L. REV. 1001, 1002-1003 (2011) (discussing the use of information technologies to improve public participation in rulemakings); Lauren Moxley, *E-Rulemaking and Democracy*, 68 ADMIN. L. REV. 661, 663-64 (2016) (suggesting that online notice-and-comment has democratized rulemaking). *But see* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 944-945, 949 (2006) (expressing doubts that e-rulemaking can deliver on expectations).

[165] *See* Reuel Schiller, *Enlarging the Administrative Polity*, 53 VAND. L. REV. 1389, 1413-14 (2000). *See also* JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 70-72, 87 (1960) (expressing concerns about industry capture of agencies).

[166] *See* Schiller, *supra* note 165, at 1390-92; *see also* JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 247 (Univ. of Mo. Press, 2017) (discussing the new doctrines created in the 1960s and 1970s "in response to . . . new theories of participatory democracy"). In energy regulation, individuals and public interest groups increasingly sought to intervene in public utility commission proceedings. *See* Wray C. Hiser, *Public Interest Right to Participate in Federal Administrative Agency Proceedings: Scope and Effect*, 47 IND. L.J. 682, 682 (1972). One concern was that agencies were proving insufficient safeguards of the public interest, perhaps especially due to concerns that regulators were "captured" by industry. Wray

Reformation of American Administrative Law,[167] during this period federal judges gradually expanded participation rights for members of the public in administrative proceedings.[168] Changes to the laws of standing, justiciability, administrative process, and intervention expanded the set of individuals and groups that could participate in the initiation, formulation, and subsequent challenge of agency decisions.[169] Some of the influence hitherto exercised almost exclusively by regulated industry was thus extended to a broader array of stakeholders, including environmental and consumer groups.[170]

Stewart's primary aim was to chart a transformation rather than to critique it. Nevertheless, it was clear that he had some questions — possibly even concerns — about expanded participation. He observed, for example, that "the political tug and pull arising from participation might well threaten the impartiality and rationality of the decisional process."[171] He questioned whether "a judicially implemented system of interest representation is an adequate or workable response" to the need to correct "serious perceived inadequacies in agency performance."[172] Moreover, Stewart raised concerns about the "resource and delay costs that could result if broadened participation rights were effectively exercised."[173] Those costs might be justifiable,

C. Hiser, *Public Interest Right to Participate in Federal Administrative Agency Proceedings: Scope and Effect*, 47 IND. L.J. 682, 688-89(1972).

[167] Stewart, *supra* note 151, at 1716.

[168] *See id.* at 1716. *See also* United Church of Christ v. F.C.C., 359 F.2d 994, 1004 (D.C. Cir. 1966) (holding that listening members of the public had standing to intervene in FCC radio license renewal proceedings); Sidney A. Shapiro, United Church of Christ v. FCC*: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 939, 954 (2006) ("In the 1960s and 1970s, the courts fashioned several administrative law doctrines that empowered regulatory beneficiaries to participate in administrative proceedings . . . .").

[169] *See* Stewart, *supra* note 151, at 1670.

[170] *See id.* at 1716, 1729. Lisa Schultz Bressman describes these changes as effecting the reinvention of "the administrative process as a perfected political process," with an attempt "to legitimate it by affording access to a wider range of affected interests." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 475 (2003).

[171] Stewart, *supra* note 151, at 1708-09.

[172] *Id.* at 1762.

[173] *Id.* at 1774; *see also id.* at 1764 (observing that "the resources presently available for private representation of fragmented 'public' interests fall woefully short of those

Stewart felt, if "representation substantially improved the quality and fairness (however those terms may be defined) of the resulting decisions." But, he concluded, "the impact of such representation on agency decision is at best problematic."[174]

The reforms Stewart chronicled were, in hindsight, real but limited. Some, such as expanded standing to challenge agency action, have been chipped away at by the courts.[175] Agencies have found ways to lessen the impacts of others, such as the formalization of proceedings, by locating new channels of discretion.[176] More generally, interest representation has been limited by the very concerns that Stewart raised: cost, delay, and limited impact on decision outcomes.[177]

3. Intervenor Compensation Programs

In the mid-1970s federal agencies began to experiment with a more robust support for public participation in agency proceedings: intervenor compensation. These programs paid the costs of

necessary to ensure adequate representation of all those interests significantly affected by agency decisions"). There were immediate criticisms that liberalized intervention standards had produced burden and delay at regulatory agencies like the Federal Power Commission. Hiser, *supra* note 166, at 695-697 (setting out criticisms but noting that more information about the frequency of intervention and its possible use to obstruct proceedings was needed before conclusions could be drawn).

[174] Stewart, *supra* note 151, at 1776.

[175] *See generally*, Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 349-350 (2021) (arguing that judges have interpreted standing requirements increasingly narrowly over the past fifty years).

[176] *See* Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 661 (2008) (noting that agencies often make policy through informal guidance rather than through notice-and-comment rulemaking); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165-166 (2000) (observing that since the 1960s the trend has been for agencies to make policy in less formal ways). *See also* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007) ("[F]ederal regulatory agencies regularly bypass the requirements of the Administrative Procedure Act (APA) public notice-and-comment process for issuing legislative rules.").

[177] On the latter concern, see Stewart, *supra* note 151, at 1779 (noting the continued pressure on agencies exercised by regulated or client groups and noting that "[s]ince there is generally no agreed-upon criterion of what constitutions a 'best solution,' decision-making will normally be a question of preferring some interests to others").

participation for members of the public who met specified criteria. In all, approximately fourteen agencies developed some kind of intervenor compensation program,[178] and others expressed interest.[179] Some of the programs were statutory, while others were devised by the agencies themselves.[180]

While intervenor compensation programs vary by agency, they share a set of common features. Agencies designate certain proceedings in which the program will apply and establish criteria for who is eligible.[181] Programs typically condition compensation on the provision of a viewpoint that is not adequately represented by another participant.[182] Sometimes participants are compensated up front, while in other cases they must seek reimbursement after proceedings have concluded.[183] Expenses for direct costs of participation, including for attorneys and other experts, are typically paid, while some programs include compensation for indirect costs such as lost wages.[184] These costs can be significant.[185]

[178] Carl Tobias, *Great Expectations and Mismatched Compensation: Government Sponsored Public Participation in Proceedings of the Consumer Product Safety Commission*, 64 WASH. U. L.Q. 1101, 1117 (1986).

[179] *See id.* at 1108 (noting that the Federal Communications Commission, Department of Interior, Nuclear Regulatory Commission, and Commerce National Telecommunication and Information Administration issued Notices of Inquiry on intervenor compensation programs).

[180] *See id.* at 1108, 1117.

[181] *See* NARUC, INTERVENOR COMPENSATION, *supra* note 12, at 11-12.

[182] *Id.* at 12.

[183] *Id.*

[184] Tobias, *supra* note 178, at 1113-14 (describing the payment of lost wages in one Consumer Product Safety Commission program).

[185] *See, e.g.*, Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 389 (1972) ("Frequently the cost of participation in an administrative proceeding mounts into tens of thousands of dollars, and prolonged, multiple party proceedings cost even more."). *See also* Robert N. Mayer & Debra L. Scammon, *Intervenor Funding at the FTC: Biopsy or Autopsy?*, 2 POL. STUD. REV. 506, 507 (1983) (documenting Federal Trade Commission expenditures on intervenor compensation of about $22,212 per participant on average, with total cost of intervenor compensation program from 1975-1980 of about $2,045,000 (not adjusted for inflation)).

The enthusiasm for intervenor compensation was short-lived, at least at the federal level.[186] In the words of one commentator, by 1986, "[p]articipant compensation effectively ha[d] been discontinued and most agency proceedings in which there was reimbursed public involvement ha[d] been completed."[187] There were no doubt multiple reasons for the lack of sustained interest in these programs. One was almost certainly political. While the Carter administration had encouraged intervenor compensation programs,[188] the Reagan administration swept into office with a "government is the problem"[189] mentality and likely deprioritized the intervenor compensation programs.[190] But cost also played a role.[191] Programs were criticized for causing delay in agency proceedings.[192] Further, it was difficult to measure the success of these programs or whether specific testimony had any impact on agency decisions.[193]

4. Negotiated Rulemaking

Another well-known effort to involve members of the public in the formation of agency policy was negotiated rulemaking. Negotiated rulemaking became popular in the 1980s and 1990s as an adjunct to the traditional notice-and-comment process.[194] The idea is straightforward:

[186] Intervenor compensation programs are active in six states. *See* NARUC, INTERVENOR COMPENSATION, *supra* note 12, at 14-21 (identifying California, Idaho, Michigan, Minnesota, Oregon, and Wisconsin as states with active programs and Illinois and Washington as states with programs in development).

[187] Tobias, *supra* note 178, at 1101.

[188] *Id.* at 1109.

[189] Ronald Reagan, Inaugural Address (Jan. 20, 1981).

[190] Tobias, *supra* note 178, at 906 n.2, 1101.

[191] *See* Carl Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906, 955 (1982) (citing "budget-cutting" as one cause of program decline in addition to "judicial interpretation, antiregulatory reaction . . . and bureaucratic caution"). However, Tobias also found that reimbursement programs imposed "relatively little strain on agency budget[s]." *Id.* at 952.

[192] Mayer et al., *supra* note 185, at 508.

[193] *Id.* at 508.

[194] *See* Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. REG. 133, 133 (1985) (tracing negotiated rulemaking's ideological

prior to beginning a rulemaking, agencies convene a group of stakeholders and agency staff.[195] Through facilitated discussion, the group seeks to reach consensus on a proposed rule that the agency then publishes for traditional notice-and-comment.[196]

An initial wave of excitement about negotiated rulemaking's prospects culminated in the Negotiated Rulemaking Act of 1990, which codified the procedures to be used and encouraged agencies to deploy negotiated rulemaking where appropriate.[197] President Clinton supported the effort in Executive Order 12,866, in which he directed agencies "to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[198] Advocates of negotiated rulemaking emphasized its potential to minimize opposition to proposed and final rules, thereby shortening the rulemaking process and reducing the potential for legal challenge.[199]

foundations to the late 1970s but observing that federal agencies had begun experimenting with the approach in the few years prior to the article's publication).

[195] *See* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 922 (2006) ("In negotiated rulemaking, agencies begin a rulemaking by establishing a committee comprising representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff."). *See also* Philip J. Harter, *Assessing the Assessors*, 9 N.Y.U. ENV'T L.J. 32, 33 (2000) (explaining that the stakeholders invited to participate in negotiated rulemaking are those who represent interests that would be substantially affected by the rule).

[196] Susskind et al., *supra* note 194, at 136-37; *See generally*, CONG. RSCH. SERV., NEGOTIATED RULEMAKING: IN BRIEF 3 (Apr. 12, 2021) [hereinafter CRS, NEGOTIATED RULEMAKING].

[197] Negotiated Rulemaking Act of 1990, 5 U.S.C. §561–570. The Act was amended and extended permanently in 1996. Charles Pou, Jr., *Federal ADR and Negotiated Rulemaking Acts Receive Permanent Reauthorization*, 22 ADMIN & REG. L. NEWS 4, 13-14 (Winter 1997).

[198] Exec. Order No. 12866, 58 Fed. Reg. 51735, (Sept. 30, 1993).

[199] Fontana, *supra* note 160, at 115-16 (summarizing the arguments in favor of negotiated rulemaking); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 7 (1982) ("A regulation that is developed by and has the support of the respective interests would have a political legitimacy that regulations developed under any other process arguably lack."). Professor Harter also argued that negotiated rulemaking could reduce agency costs by limiting the need for the agency's own factual research. Harter, *supra* note 195, at 390.

Notwithstanding the initial enthusiasm, negotiated rulemaking was never widely adopted and remains at the margins of agency practice today.[200] Cary Coglianese attributes fading interest in the process to the empirical research showing "that formal negotiation of rules makes little difference, or certainly fails to accomplish anything like what proponents had promised."[201] Others point to the 1995 defunding of the Administrative Conference of the United States ("ACUS"), which had been a strong proponent of the practice, as well as a lack of buy-in from the White House Office of Information and Regulatory Affairs.[202]

It is possible that negotiated rulemaking was the victim of unreasonable expectations. Having emphasized its potential to reduce litigation, thereby reducing the cost and duration of rulemaking,[203] proponents were vulnerable to subsequent studies that failed to confirm these effects.[204] Of course, the Negotiated Rulemaking Act itself only

[200] *See* CRS, NEGOTIATED RULEMAKING, *supra* note 196, at 7 ("[F]ew agencies appear to engage in negotiated rulemaking voluntarily."). According to one calculation, negotiated rulemaking "has been used far less than one percent of the time in rulemaking." Fontana, *supra* note 160, at 83; Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 996 (2008).

[201] Coglianese, *supra* note 164, at 944-45.

[202] CRS, NEGOTIATED RULEMAKING, *supra* note 196, at 6-7. The author notes that although ACUS was re-established in 2010, the use of negotiated rulemaking had waned by that time. *Id.* at 7.

[203] Not all agreed that these were negotiated rulemaking's primary benefits. Philip Harter emphasized that his interest in negotiated rulemaking was "in developing 'better' rules and policies through direct involvement" via "a full, robust debate among the parties." Philp J. Harter, *A Plumber Responds to the Philosophers: A Comment on Professor Menkel-Meadow's Essay on Deliberative Democracy*, 5 NEV. L. REV. 379, 380 (2005).

[204] In fact, the evidence was mixed. Cornelius Kerwin and Scott Furlong found that negotiated rulemakings at EPA "show a much smaller elapsed time than for other regulations." Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 124 (1992). Cary Coglianese compared traditional rules and negotiated rules at the Environmental Protection Agency and found that negotiated rulemaking did not result in a shorter rulemaking process. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1258-59 (1997). However, Philip Harter took issue with Professor Coglianese's methodology and asserted that, when measured correctly, EPA's negotiated rulemakings "produced a one-third reduction in time, knocking a full year off the typical schedule." Harter, *supra* note 195, at 40-41. Professor Harter critiqued Professor Coglianese's research as "significantly flawed and therefore misleading,"

required that agencies determine that negotiated rulemaking be in the public interest.[205] That concept is expansive, and could include a finding that, while it is more (or equally) expensive and time consuming, negotiated rulemaking produces more responsive regulations and increases public satisfaction.[206] Agencies, however, might have been unwilling to expend the additional resources required to achieve these aims. And members of the public may have been unwilling or unable to devote the time and resources required to participate in a large number of negotiated rulemakings on a regular basis.[207] Ultimately, the resource

accusing Coglianese of "misapply[ying] his own methodology" and "incorrectly measur[ing] the duration of several negotiations." *Id.* at 32. Harter also asserted that EPA's negotiated rules were not "the subject of a substantive judicial review" even though they tended to be more complex and controversial than other rules. *Id.* at 40-41. Others have pointed out that negotiated rulemaking does not *slow* rulemaking, even while adding more opportunity for stakeholder engagement. *See* Havasy, *Relational Fairness*, *supra* note 27, at 828. Havasy was particularly impressed by the Department of Energy's recent use of negotiated rulemaking to formulate efficiency standards for consumer appliances. *Id.* at 825-28.

[205] Negotiated Rulemaking Act of 1990, 5 U.S.C. § 563(a). However, Professor Coglianese cited the legislative history of the Negotiated Rulemaking Act to emphasize that the procedure's primary goals were to reduce rulemaking time and court challenges to the rules. Coglianese, *supra* note 204, at 1260.

[206] There is not much empirical support for either of these claims. However, a small study of participants in six conventional and eight negotiated rulemakings found higher levels of satisfaction with negotiated rulemaking as well as a belief that negotiated rulemaking produced better quality rules. *See* Benjamin, *supra* note 195, at 922-23, 923 n.68 (citing Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 625 (2000)). In responding to Professor Coglianese's critique, Professor Harter observed that negotiated rulemaking produced "benefits beyond the savings of time and judicial review." Harter, *Assessing the Assessors*, *supra* note 195, at 40.

[207] Philip Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389, 1420-21 (1997) ("Reg negs are intense activities: participating in one can be expensive and time consuming."); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1285 (1997) ("[N]egotiated rulemaking demands much more concentrated amounts of time on the part of agency and non-agency participants."); Fontana, *supra* note 160, at 115 n.183 ("EPA managers who have been the Agency's negotiators have devoted far more time to the negotiations in which they were involved than they ordinarily would spend on a single rulemaking effort." (citing EPA Program Evaluation Div., *An Assessment of EPA's Negotiated Rulemaking Activities* (1987), *reprinted in* DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 23, 30 (1995)); Laura I. Langbein & Cornelius M.

costs of negotiated rulemaking required an observable payoff, either in terms of efficiency, substance, or legitimacy. Some of these payoffs are difficult to measure, which may in part explain why none have been demonstrated satisfactorily to date.

In the face of this stalemate, negotiated rulemaking remains a tempting prescription for legal commentators who continue to advocate for its use in a variety of contexts.[208] Agencies, however, seem less than eager to oblige.

5. Citizen Boards

Citizen boards are used in some areas of state regulation.[209] While they are typically advisory, one of the best-known citizen boards, run by

Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 620 (2000) (concluding that negotiated rulemaking uses twice as many agency resources as typical rulemakings).

[208] *See, e.g.*, Marie Boyd, *Unequal Protection Under the Law: Why FDA Should Use Negotiated Rulemaking to Reform the Regulation of Generic Drugs*, 35 CARDOZO L. REV. 1525 (2014) (proposing that the Food and Drug Administration use negotiated rulemaking to create new regulations for generic drug labeling); Drew M. Derco & Dayan M. Hochman, *Negotiated Rulemaking in the Context of Part 382: A Worthy Alternative to Traditional Rulemaking or an Impossible Dream?*, 29 NO. 2 AIR & SPACE L. 1 (2016) (concluding that negotiated rulemaking could be an effective alternative to traditional notice-and-comment rulemaking concerning the nondiscriminatory transportation of passengers with disabilities); Diona Howard-Nicolas, *Negotiated Federal Sentencing Guidelines: A Cure for the Federal Sentencing Debacle*, 65 ADMIN. L. REV. 665 (2013) (proposing the use of negotiated rulemaking in the development of federal sentencing guidelines); Sean Nolan, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, 12 CARDOZO J. CONFLICT RESOL. 327, 366-68 (2011) (suggesting the use of negotiated rulemaking in forming policy around wind energy siting); Akasha C. Perez, *Addressing an Evolution in America's Workforce: A Call for Negotiated Rulemaking in the Ridesharing Industry*, 59 HOW. L.J. 787 (2016) (suggesting that negotiated rulemaking be used to establish rules to govern ridesharing).

[209] There are some state-level examples. *See* MD. DEP'T OF HUM. SERV., *Citizens Review Board for Children*, https://dhs.maryland.gov/citizens-review-board-for-children/ (last visited Aug. 5, 2024) [https://perma.cc/4G35-NY2U] (supporting state child welfare programs); *Mo. Citizens' Comm'n on Comp. for Elected Off.*, MO.GOV, https://boards.mo.gov/userpages/Board.aspx?33 (last visited Aug 5, 2024) [https://perma.cc/AUL7-W887] (establishing compensation for state officials); N.Y. STATE DEP'T OF STATE, *Long Island South Shore Estuary Reserve Program: Citizens Advisory Committee*, https://dos.ny.gov/citizens-advisory-committee (last visited Aug 5, 2024) [https://perma.cc/4H2Y-5ZRM] (assisting the Long Island South Shore Estuary Reserve

the Minnesota Pollution Control Agency ("MPCA") from 1967-2015,[210] made actual decisions regarding pollution in the state.[211] Its members were required to be "broadly representative of the skills and experience necessary to effect the policy" of the relevant statute, and one had to be knowledgeable about agriculture.[212] The governor appointed the board members with the consent of the senate for four-year terms.[213]

Former board member (and law professor) Marcia Gelpe, reflecting on her experience, found the board helpful in requiring staff to better articulate and defend their recommendations, in making the public more comfortable about sharing their views, in depoliticizing and legitimating agency decisions, and in taking a "big picture" view given their "relative ignorance of the details of an agency's program."[214] On the other hand, Gelpe highlighted the challenges for citizen board members of understanding technical issues before an agency as well as

Council in implementing recommendations and promoting public education). Local government examples are more numerous. *See* Marcia R. Gelpe, *Citizen Boards as Regulatory Agencies*, 22 URB. LAW. 451, 452 (offering examples of the use of citizen boards in the environmental and land-use areas). *See also* George W. Dougherty, Jr. & Jennifer Easton, *Appointed Public Volunteer Boards: Exploring the Basics of Citizen Participation Through Boards and Commissions*, 41 AM. REV. PUB. ADMIN. 519, 519 (2011) (finding citizen boards "widely used" in local government administration).

[210] In 2015, the Governor of Minnesota established the Governor's Committee to Advise the Minnesota Control Agency. Exec. Order 15-15, https://www.lrl.mn.gov/archive/execorders/15-15.pdf [https://perma.cc/6FE7-3YNV]. Bills have also been introduced to reinstate a similar board. Walker Orenstein, *Critical of Minnesota Pollution Control Agency, Some DFLers Want to Revive Citizens Board Idea*, MINN. POST (Mar. 15, 2023) https://www.minnpost.com/environment/2023/03/critical-of-minnesota-pollution-control-agency-some-dflers-want-to-revive-citizens-board-idea/ [https://perma.cc/X5NZ-5F43]. The new board would need to reflect the racial, gender, and geographic diversity of the state, with at least three members who live in environmental justice communities, at least one enrolled tribal member, at least one labor union member, and at least one small livestock or crop farmer. *Id.*

[211] *See* Elizabeth Dunbar, *MN Lawmakers Pull the Plug on Pollution-Fighting Citizens' Panel*, MPR NEWS (Jun. 16, 2015) https://www.mprnews.org/story/2015/06/16/citizens-board [https://perma.cc/87UF-MAHD].

[212] Gelpe, *supra* note 209, at 453.

[213] Board members received minimal compensation. *See id.* at 455 n.23 (observing that MPCA board members made $48 per day they spent on agency work, and that local mass transit boards generally did not compensate their members).

[214] *See id.* at 457-62.

complex legal authority.[215] She also worried that board members might vote based on the narrow interests of their communities or constituencies.[216] And she concluded that "[t]he presence of a citizen board draws out the time it takes to reach a final decision,"[217] although she suggested that it "rarely causes significant hardships" and in fact forces staff to take their time on decisions rather than rushing them.[218] Significantly, Gelpe also worried about the tendency for the board to run afoul of open meeting laws and prohibitions on ex parte contacts,[219] though she believed education could help.[220] Finally, Gelpe questioned whether agency staff could prepare effective background materials for board members given time constraints and whether both staff and third party educational materials might be biased in favor of particular results.[221]

While good data on the number of federal and state agencies that employ citizen boards is difficult to find, it seems clear that the Minnesota board was an outlier in terms of its decisional responsibility. It is more common for boards to serve in an advisory capacity,[222] and such boards may run into fewer of the problems discussed by Gelpe.

6. Other Forms of Citizen Engagement

Various other forms of participation have been tried but not widely replicated. One was an experiment by EPA that brought stakeholders

[215] *Id.* at 462-65.

[216] *Id.* at 469.

[217] *Id.* at 475.

[218] *See id.*

[219] *See id.* at 475-76 ("Citizen board members probably have a tendency to ignore these requirements.").

[220] *Id.* at 476.

[221] *See id.* at 479-80.

[222] *See, e.g.*, N.Y. DEP'T OF STATE, *Citizens Advisory Committee*, https://dos.ny.gov/citizens-advisory-committee (last visited Jan. 1, 2024) [https://perma.cc/5NJD-SYEB] (observing that the Committee's purpose is to assist the Long Island South Shore Estuary Reserve Council in implementing a Comprehensive Management Plan); STATE OF CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING, *Advisory Committee Members*, https://post.ca.gov/Advisory-Committee (last visited Jan. 1, 2024) [https://perma.cc/2ZS5-ZB4P] (noting that the Committee's role is to provide input to the California Commission on Peace Officer Standards and Training).

together to recommend environmental controls for a copper smelter in Tacoma, Washington.[223] EPA held three public workshops that included environmental groups, employees at the affected facility, and local citizens. The agency provided participants with details about health risks from the facility[224] and the impacts of various regulatory responses.[225] It then broke participants into smaller groups for discussion facilitated by agency staff. While the facility went out of business before the process could be completed,[226] nearly two-thirds of participants expressed satisfaction with their deliberations.[227] Nevertheless, the press and some participants objected that EPA was asking laypeople to make "an impossible choice."[228] EPA Administrator William Ruckleshaus had been personally involved in the project and was irked by the press response.[229] He observed that people had demanded to be involved in the decision-making process but did not want to confront the hard questions once they were included.[230] EPA never replicated the experiment.

Another proposed intervention (one that has yet to be adopted in the United States) is the citizen jury. EPA defines citizen juries as "a representative sample of citizens (usually selected in a random or stratified manner) who are briefed in detail on the background and current thinking relating to a particular issue or project."[231] Like a jury in a civil or criminal trial, citizen juries receive information about

[223] *See* Robert Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1632-633 (1985).

[224] EPA had determined that allowing emissions of hazardous air pollutants to continue at existing levels would result in four new cases of lung cancer per year, as compared to one case per year with the best available pollution control technology installed. *Id.* at 1632.

[225] EPA had also found that the smelter would close if additional pollutant controls were required, at a cost of 570 jobs and additional costs to the local economy. *See id.* at 1633.

[226] *Id.* at 1634.

[227] *See* Arkush, *supra* note 30, at 1486.

[228] Reich, *supra* note 223, at 1634.

[229] *See id.*

[230] *See id.*

[231] EPA, *Public Participation Guide: Citizen Juries*, https://www.epa.gov/international-cooperation/public-participation-guide-citizen-juries (last updated March 26, 2024) [https://perma.cc/QPC2-LDSL].

government policy decisions and then deliberate to reach a decision or set of recommendations.[232] Examples from abroad include the use of a citizen jury in South Australia in relation to a proposal to build a high-level nuclear waste facility (the jury refused to back the proposal),[233] and the creation of a citizen jury convened to consider the impact of food on obesity and present a report to the health agency in Victoria, Australia.[234] Commentators have promoted their use to supplement or even supplant agency decisions in the United States.[235] However, these proposals have not been adopted.

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What conclusions can we draw from this history? First, avenues for public participation in agency proceedings already exist. This is the lesson of notice-and-comment rulemaking. Even in adjudication, the public can engage by meeting intervention standards. These avenues should remain available notwithstanding the tensions described in the next Section. This is because they represent a consensus about the way in which those tensions should be resolved: by allowing for written comments on rules in informal proceedings, and by permitting intervention by those with meaningful, demonstrable interests in the outcome of more formal rulemakings and adjudications. Moreover, the public has come to rely on these mechanisms.

The second lesson is that more ambitious efforts to involve the public in agency decision-making have not been widely adopted. Intervenor compensation, negotiated rulemaking, and the use of citizen boards remain limited in scope, and most agencies and jurisdictions have not

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[232] *See* N.Z. DEP'T OF THE PRIME MINISTER, *Citizen Juries*, https://www.dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/community-engagement/citizen-juries (last updated June 13, 2023) [https://perma.cc/8DG9-UJZM].

[233] Austl. Assoc'd Press, *Citizens' Jury Rejects Push for South Australian Nuclear Waste Dump*, THE GUARDIAN (Nov. 6, 2016, 2:53 PM), https://www.theguardian.com/environment/2016/nov/07/citizens-jury-rejects-push-for-south-australian-nuclear-waste-dump [https://perma.cc/Q42T-95QH].

[234] *See* VICHEALTH — CITIZEN'S JURY ON OBESITY, REPORT OF THE COMMITTEE (2015), https://www.vichealth.vic.gov.au/sites/default/files/VicHealth-Citizens-Jury-on-Obesity---Final-Report---October-18th-2015.pdf [https://perma.cc/9L4B-QFPA].

[235] *See* Arkush, *supra* note 30, at 1494 (proposing the use of administrative juries to decide discrete questions of regulatory policy).

embraced them. Other ideas such as citizen juries are largely aspirational. The next Section explains why this might be so, emphasizing the frictions between expansive public participation in agency decision-making (especially outside of rulemaking) and other administrative law values.

B. Tensions Between Participation and Other Administrative Law Values

This Section argues that participation can be in tension with other administrative law values. These tensions are not new: they have faced the proponents of every participatory effort described in the previous Section. However, enthusiasm for more public engagement tends to eclipse the reality of trade-offs, and it is thus worth revisiting those trade-offs when considering new participatory proposals. This Section also explains why some trade-offs are more pronounced in particular domains of administration, like energy administration, that are relatively complex and that tend to rely on formal, adversarial proceedings. This does not make energy administration an outlier. Most agencies proceed through a mix of rulemaking and adjudication.[236] Agency adjudications fall along a spectrum of formality.[237] Other federal agencies, such as the Federal Communications Commission[238] and the Surface Transportation Board, engage in ratemaking.[239] State public utility commissions set rates not only for energy but for water, communications, and transportation.[240] The point is that administrative proceedings are diverse and that many share the characteristics associated here with energy regulatory agencies. We should therefore

[236] *See* Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 530-31 (2005).

[237] *See* MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 3-4 (2019) (categorizing federal agency adjudications as falling into one of three 'types' depending on the level of procedural formality).

[238] *See* MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS & UTILITIES LAW AND POLICY 147 (2022) (describing the prevalence of rate regulation).

[239] *See* BEN GOLDMAN, THE SURFACE TRANSPORTATION BOARD (STB): BACKGROUND AND CURRENT ISSUES 4 (2022) (detailing the STB's ratemaking authority).

[240] RICKS, *supra* note 238, at 133 (explaining that while public utility commission jurisdiction varies by state, their responsibilities may include the regulation of energy, communications, transportation, water, or sewage).

expect to find the tensions identified in this Section outside of energy regulation.

Three tensions are explored here. The first tension is between participation and agency effectiveness. Effectiveness encompasses notions of efficiency, including timely resolution of proceedings and an eye to resource constraints, but is not solely defined in those terms. Crucially, effectiveness is linked to statutory articulation of an agency's responsibilities: an effective agency is one that achieves the tasks and goals that the legislature sets for it. In other words, it remains a core goal of administration to get things done. More comprehensive democratic engagement at the agency level can also be in tension with agency expertise and obligations to render non-arbitrary decisions.

The tensions described here have not gone completely unremarked.[241] Yet the way in which they pose challenges to expanding democratic engagement with agencies deserves more careful consideration. The intent is not to suggest that expanded participation is either undesirable or unachievable. Rather, it suggests why that expansion might be so challenging and highlights the administrative values that may be compromised by a single-minded focus on public engagement. The magnitude of these trade-offs is difficult to know in the abstract, and future work that examines the actual cost of participatory interventions would be welcome. Even without precise information about the magnitude of the trade-offs, however, reflection on the realities of administration can help advocates for greater participation determine where in the process participatory interventions are likely to be most effective and where they are likely to founder. It can also help administrators faced with general participatory mandates tailor those mandates to their particular circumstances. Part IV turns to those possibilities.

[241] *See, e.g.*, Shelley Welton & Joel B. Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENV'T L. REV. 307, 343 (2019) ("We find that there are acute challenges to participation in energy governance, for two reasons. First, the legal frameworks and proceedings in which clean energy justice concerns arise are particularly technical and adjudicative in nature."). Welton and Eisen also point to the "dense, technical, and time- and resource-intensive processes" at state public utility commissions. *Id.* at 345.

1. Effective Administration

Expecting agencies to serve as sites of fulsome democratic deliberation ignores a crucial fact: agencies are created to get things done.[242] They are tasked by the legislature with particular responsibilities.[243] The tasks assigned to each agency are many, and the resources allocated to them can be too meagre.[244]

Scholars have recognized myriad ways in which procedural obligations can impede agency action.[245] The project of procedural constraint is logical, Nick Bagley concludes, from the perspective of those who find that agencies do "too much and with too little care."[246] But the strategy is more perplexing if the goal is to enable, rather than

[242] *See* JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 8 (2012) ("[M]uch of the law of administration is concerned with promoting effective governance.").

[243] As discussed above, in the case of energy agencies, these responsibilities may include the setting of energy rates, the certification and siting of energy facilities, and the approval of utility plans. *See supra* Part II.A.

[244] *See, e.g.*, Ellen A. Black, *Keep Out FDA: Food Manufacturers' Ability to Effectively Self-Regulate Front-of-Package Food Labeling*, 17 DEPAUL J. HEALTH CARE L. 1, 11-12 (2015) (describing the FDA as overtasked and under-resourced); Jan C. Ting, *Unobjectionable but Insufficient — Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145, 1161 (2002) (describing overtasking and underfunding at the Immigration and Naturalization Services); Craig Hooper, *Biden Administration Snubs Coast Guard in Emergency Funding Request*, FORBES (Oct. 23 2023, 10:04PM), https://www.forbes.com/sites/craighooper/2023/10/23/biden-administration-snubs-coast-guard-in-emergency-funding-request/ [https://perma.cc/TRP5-Q3EE] (describing the Coast Guard as under-funded and overtasked); *see also* Jody Freeman and Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 612 (2021) ("'[O]vertasking' can sap an agency's limited resources."); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 257 (1992) ("[P]ublic bureaucracies in the United States . . . are almost always given huge, even utopian, goals and are then saddled with a large number of constraints that prevent them from achieving these goals efficiently — or even at all.").

[245] Nicholas Bagley chastises the left for becoming too enthralled with procedural restrictions, citing "[t]he judicially imposed rigors of notice-and-comment rulemaking," among other procedural hurdles, as ripe for reconsideration. Nick Bagley, *supra* note 16, at 348. In his description of an over-proceduralized world, Bagley specifically expresses concern about requiring agencies to "engage every identifiable stakeholder . . . before any of its actions, however trivial, could take effect." *Id.* at 351.

[246] *Id.* at 346.

restrain, administrative problem-solving.[247] Bagley also reminds us that procedural constraint can impede public-interested regulation. He proposes "a positive vision of the administrative state — one in which its legitimacy is measured not by the stringency of the constraints under which it labors, but by how well it advances our collective goals . . . ."[248] In essence, Bagley offers support for active, effective administration.

Lisa Heinzerling delivers a similar warning about the perils of procedural constraint when she states bluntly that "we often do not let [agencies] do their jobs."[249] Whether by imposing repeated obligations to comply with Congressional inquiries,"paralyz[ing] [agencies] with endless analytical prerequisites to taking action" or requiring them to submit to White House oversight and coordination, she argues, the current system produces "a vast gulf between the promises of law and the realities we face."[250] She concludes that the time agencies spend complying with various procedural obligations limits the time they can devote to statutory directives to address "problems like air pollution, water pollution, climate change, toxic chemicals, food hazards, workplace risk, consumer deception, and more . . . ."[251]

The democratic theorist Jane Mansbridge argues that similar problems plague our government more generally.[252] In 2011, Mansbridge delivered New York University's annual James Madison Lecture. She titled the lecture "On the Importance of Getting Things Done." In it, she promoted a political theory of "democratic action,"[253] emphasizing that solving the vast problems facing our nation and our planet requires

[247] *See id.* at 347.

[248] *Id.* at 350.

[249] Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 GEO. L.J. ONLINE 59, 59 (2013-2014).

[250] *Id.*

[251] *Id.*

[252] Mansbridge's focus was on our democratic system as a whole. Drawing on the work of Robert Dahl, she identified our constitutional system of checks and balances, calcified over time with veto-gates and opportunities for delay, as a key impediment to a more active democracy. But her critique has just as much purchase at the level of administration. *See* Jane Mansbridge, *On the Importance of Getting Things Done*, 45 POL. SCI. & POL. 1, 1 (2012).

[253] *Id.*

collective action rather than collective resistance.[254] Mansbridge recognized that delegated authority can be supplemented through deliberative legitimacy via citizen input "when time permits."[255] But the caveat is crucial. Deliberative legitimacy comes with costs, one of which is a reduction in an agency's ability to make the decisions that execute the laws passed by Congress.

Participatory procedures strain agency resources in two primary ways. First, engagement, when made meaningful, takes time.[256] Second, it costs money.[257] Legislatures could conceivably resolve both problems by increasing agency staff and appropriating more funding for participatory initiatives. However, Congressional enthusiasm for expanded participatory programs has proven decidedly limited.[258]

The problem of resources is exacerbated by the reality that agencies may already be over-tasked and under-funded.[259] For an agency that is already over-stretched, the time and resources required for

[254] *See id.* at 4-5.

[255] *Id.* at 7.

[256] *See, e.g.*, TANYA PASLAWSKI, NAT'L ASS'N OF REGUL. UTIL. COMM'R., STATE ENERGY JUSTICE ROUNDTABLE SERIES: PARTICIPATION IN DECISION MAKING 10 (2023), https://pubs.naruc.org/pub/2BA909C8-1866-DAAC-99FB-5D07D02A8AF9 [https://perma.cc/JV7Y-MFHM] ("Authentic engagement takes time, which requires a commitment by decision-makers and participants, and recognition that processes may need to be longer.").

[257] While precise numbers are difficult to locate, participation costs can run to the millions of dollars depending on the program. The FTC spent more than $2 million on intervenor compensation during the five-year period between 1975 and 1980, for example. *See* Mayer & Scammon, *supra* note 185, at 507.

[258] For example, as discussed in Part II.A. while Congress appropriated funding for intervenor compensation trials in the 1970s, it lost interest in these programs and failed to maintain them.

[259] *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV'T L. REV. 1, 3 (2009) (explaining that agencies must balance multiple, sometimes conflicting responsibilities). Agencies may be under-funded in general or in particular cases. *See, e.g.*, Bret Kupfer, *Agency Discretion and Statutory Mandates in a Time of Inadequate Funding: An Alternative to* In Re Aiken County, 46 CONN. L. REV. 331, 335 (2013) (discussing the challenges facing the Nuclear Regulatory Commission in siting nuclear waste absent appropriated funds). The problem of over-tasking was exacerbated by the Trump Administration's attempted purge of civil servants. *See* Freeman & Jacobs, *supra* note 244, at 594-600 (analyzing the ways in which presidents can undermine agency capacity).

participatory mechanisms will come directly out of the time and resources available for other tasks.

2. Expertise

The notion of democratic decision-making within agencies is also in some tension with the vision of agencies as expert bodies. James Landis described as agency expertise as "knowledge of the details of [an industry's] operation."[260] This kind of expertise, he suggested, must spring "from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem."[261] According to this view, members of agencies, and the agencies themselves, acquire important understandings of problems and industries that they deal with on a regular basis. This expertise assists agencies in executing their assigned regulatory tasks.[262]

Since the New Deal era, however, faith in administrative expertise has wavered.[263] The critiques of expertise are varied. It has been attacked as a sterile component of Weberian technocracy and is sometimes invoked as a proxy for the outmoded view that administrators can dispassionately execute statutory commands without the need for policy judgment.[264] Some argue that expert judgment plays a minor role in agency decision-making, and that key agency decisions are the product of politics rather than expertise.[265] Sometimes the critique is

[260] JAMES LANDIS, THE ADMINISTRATIVE PROCESS 23-24 (1938).

[261] *Id*. at 23.

[262] *Id*. at 23-24. Landis also invoked the notion of expertise as a safeguard against the corruption of agency judgment. Landis found professional expertise "rather more a guarantor of administrative independence, and a *constraint* on administrative discretion, than it is a goal to be achieved for its own sake." Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2466 (2017).

[263] *See* Wendy Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2024-25 (2015); Reich, *supra* note 223, at 1618.

[264] On this more technocratic view of administration, see MAX WEBER, ECONOMY AND SOCIETY: A NEW TRANSLATION 345 (Keith Tribe, ed. 2019) (observing that specialist training of bureaucratic staff is necessary for rational administration); *see also* Stewart, *supra* note 151, at 1678 (laying out the argument for administrative expertise).

[265] *See* Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 2 (2013) (associating this

extended to argue that traditional expertise is itself inescapably value-laden.[266] Still others criticize the idea of expertise in governance as insufficiently broad, valuing scientific and technocratic skills at the expense of more traditional or "lived" forms of knowledge,[267] including indigenous knowledge.[268]

While there is some merit to each of these critiques, none should lead us to discard the core notion of something called agency "expertise" that consists of the detailed knowledge of particular targets of regulation. It should also not lead us to dismiss the various forms of vocational expertise — including legal, economic, technical, and scientific expertise — that members of the agency's staff bring to their jobs. Cary Coglianese and Dan Walters put the point succinctly: while "administrators' decision-making simply cannot be based on technocratic judgment alone," that does not mean that "expertise ought not to matter."[269]

"displacement of expertise" critique with greater White House involvement in agency decision-making); *see also* Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 475 n.71 (2012) (citing the work of scholars who worry that expertise can be invoked by agencies whose decisions are actually the result of capture by regulated interests).

[266] *See* Ben Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2811 (2022) (summarizing challenges to traditional notions of administrative expertise); Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 496 (2019) ("[S]cientific knowledge is by its nature uncertain and open to revision. Policy-relevant science also incorporates value judgments and assumptions, blurring the line between political reasoning and scientific reasoning.").

[267] Ben Levin details such critiques in the criminal justice context. *See generally* Levin, *supra* note 266. He observes that the broad term "expertise" can be used to mean either vocational expertise, educational expertise, or lived expertise. *Id.* at 2782. Levin describes "lived expertise" as focusing on "experience as granting authority to make a claim," privileging those with "everyday knowledge" over "scholars, policymakers, or other outsiders." *Id.* at 2822, 2824.

[268] *See* Memorandum from Arati Prabhakar, Assistant to the President and Director, Office of Science and Technology Policy and Brenda Mallory, Chair, Council on Environmental Quality, on Uniform Standards for Tribal Consultation (Nov. 30, 2022).

[269] Cary Coglianese & Dan Walters, *Antipolitics and the Administrative State*, 29 COMMON KNOWLEDGE 368-69 (2023) (embracing a version of "antipolitics" that "aspires toward an administrative state devoid of self-interested decision-making by administrators and their political superiors"); *see also id.* at 371 ("Administrative

For example, energy agency decision-making calls for various forms of expert judgment, including fact gathering ("how much generation is currently available in this service territory?"; "what is the geological composition of the rock underneath the proposed site for this power plant?") and predictive judgments ("how much electricity demand can we expect from this service territory in the next five years?"; "what is the risk that this transmission line component will fail?"). To determine these facts and to make judgments based on them requires skills in economic modeling, in the machinery of the energy system (including both hardware and software), and in the laws that govern it.

It is also true that facts and models cannot answer all questions facing agencies, especially given the breadth of some of the statutory language they must implement. Once regulators have determined that a utility's proposed resource plan would meet projected demand and satisfy the relevant statutory requirements, for example, are they to approve it over the objection that only a mix of lower-carbon generation assets would meet the statutory "just and reasonable" standard?

In short, agency decision-making involves both expert analysis and policy judgment. It is therefore worth considering the impacts of expanding public participation on agencies' deployment of their expert capacity. A major benefit cited by advocates of expanded participation is the introduction of new factual information for agency consideration.[270] The enlargement of the agency record in this way can enhance the agency's own internal expertise.[271] Outside participants can

agencies do generally have a greater capacity than other governing institutions to develop, digest, and deliberate over expert knowledge relevant to policy.").

[270] *See, e.g.*, Cuéllar, *Rethinking Regulatory Democracy*, *supra* note 155, at 490 (2005) (suggesting that organized interests may not raise all relevant concerns before agencies); Fontana, *supra* note 160, at 117 (arguing that agencies can use participatory processes to generate helpful information that strengthens their technocratic expertise); *see also* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 618 (2017) (observing that local agencies are especially well-positioned to aggregate information about local conditions and policy implications).

[271] Of course, participants might also overwhelm agencies with information. *See* Fontana, *supra* note 160, at 113 (2005); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 N.W. L. REV. 173, 214 (1997) ("[L]arge numbers of participants may present too much information to decisionmakers, overwhelming the ability of decisionmakers to focus in depth on specific problems.").

also identify flaws in the agency's methodology or reasoning that can help the agency to correct missteps.

But expanding public participation in agency proceedings can also threaten agency expertise. Participants may themselves introduce inaccurate information or flawed reasoning into the record. While the agency should be capable of separating fact from fiction and identifying errors in public submissions, doing each takes time. Under the APA's arbitrary or capricious standard of review, courts require agencies to consider and respond to significant comments in informal rulemaking proceedings.[272] In formal rulemakings and adjudications, agencies must support their factual determinations with "substantial evidence" based on the record as a whole.[273] Responding to evidence introduced by parties or commenters may be required to survive judicial review under these standards. Again, this requires resources.

The more serious risk, however, is that more "democratic" proceedings can undermine trust in the agency as an expert body. In the name of zealous advocacy, all parties to a proceeding have an interest in claiming that their views are the correct ones. Especially in today's society where allegations of "fake news" abound, where science has come under attack, and where truth sometimes appears to be a moving target, significantly expanding public participation in agency proceedings risks undermining, rather than enhancing, agency legitimacy. Consider the recent challenge to the FDA's approval of the abortion drug Mifepristone. Challengers introduced their own evidence into the judicial record questioning the agency's finding that the drug could be prescribed safely and effectively under the conditions of its approval.[274] The generalist district court judge sided with the

[272] *See* U.S. v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252-53 (2d. Cir. 1977) (requiring agencies to respond to major comments in its final rule).

[273] U.S.C. § 706(2)(B) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence.").

[274] *See* Complaint at ¶ 66 n.17, ¶ 70 n.22, Alliance for Hippocratic Med. v. U.S. Food and Drug Admin., 668 F.Supp.3d 507 (N.D. Tex. 2023) (No. 2:22CV00223), 2022 WL 17091784 (citing studies by James Studnicki et al. that were later retracted on adverse events after medical abortions).

challengers against the expert agency,[275] relying at least in part on science that has been criticized as unreliable.[276] While this example took place in a court of law, there are ample opportunities for record-blurring of this sort in administrative proceedings as well.

3. Non-Arbitrariness

A third hard-wired feature of administration that can be in tension with increased public participation is the emphasis on nonarbitrary decision-making. [277]

The administrative requirement of non-arbitrariness obligates agencies to identify and consider information relevant to their decision and to articulate a rational connection between that information and their ultimate choice.[278] Relevance is dictated by statute, and the dominant framing of the federal judicial test for agency arbitrariness stresses that agencies must not base their decisions on factors that Congress did not authorize them to consider.[279]

In other words, agencies are more constrained than the legislature or the president when it comes to their decision-making. This means that they are not the right forum for more general arguments about policy. Broad public participation, however, can encourage these more general

[275] *See* Alliance for Hippocratic Med. v. U.S. Food and Drug Admin., 668 F.Supp.3d 507, 560 (2023) (N.D. Tex. 2023).

[276] *See* Liz Szabo, *Flimsy Abortion Studies Cited in Case to Ban Mifepristone Are Retracted*, SCIENTIFIC AMERICAN (Feb. 23, 2024), https://www.scientificamerican.com/article/flimsy-antiabortion-studies-cited-in-case-to-ban-mifepristone-are-retracted/ [https://perma.cc/H5NS-XW7W] (noting the retraction of two key studies cited by the district court opinion); *see also* Rachel Rothschild, *The Origins of the Major Questions Doctrine*, 100 IND. L.J. (forthcoming 2024) (describing the same phenomenon in the context of the Supreme Court's decision in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*).

[277] Jed Stiglitz concludes that an agency's public display of rationality is essential to produce public confidence in administrative action. EDWARD H. STIGLITZ, THE REASONING STATE 83 (2022). Lisa Bressman suggests that many administrative procedures are best understood as bulwarks against arbitrary decision-making. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470 (2003).

[278] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

[279] *See id.*

discussions.[280] As Kristen van de Biezenbos notes, "[D]istance . . . often exists between what communities want and what regulators are permitted to consider in approving [energy] projects . . . ."[281] Transforming agency proceedings into democratic fora may result in suasion by stakeholders that invites regulators to consider criteria outside the scope of statutory authorizations. Certainly, it is possible for agency decisionmakers to filter comments for statutory relevance. However, this is likely to produce participant frustration. It also imposes a burden on the agency.[282]

One way to guard against a flood of public engagement outside the parameters of the individual proceeding is to maintain existing participatory filtering mechanisms. While there might be pressure to relax such mechanisms because of the burden they impose on would-be participants, they serve important functions. Intervention standards are a good example. As described above, in order to become full-fledged participants in any commission ratemaking, licensing, or adjudication, groups or individuals must make a formal motion to intervene. That motion must meet certain legal standards in order to succeed, as set forth by statute or in commission rules.[283] Compliance with these standards can be difficult for a layperson to navigate, and the burden on potential intervenors can be significant.[284] However, intervention

[280] As Kristen van de Biezenbos points out, "[t]he administrative process, including energy regulations, is intended to be apolitical" and with "independence from popular opinion." Kristen van de Biezenbos, *Negotiating Energy Democracy*, 33 J. LAND USE & ENV'T L. 331, 338 (2018).

[281] *Id.* In part for this reason, van de Biezenbos concludes, contracting between communities and energy companies provides a promising opportunity for communities to achieve some of their goals. *Id.* at 337-341.

[282] On the relationship between resource constraints and meaningful review of public comments in notice-and-comment rulemaking, see Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1371 (2011) ("[R]esource constraints may impede agencies from fully considering the thousands of public comments they may receive in some rulemakings.").

[283] *See, e.g.*, Fed. Energy Regul. Comm'n, Intervention Standards, 18 C.F.R. § 385.214 (setting out the requirements for interveners).

[284] *See, e.g.*, Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688, 1728 (2023) (emphasizing the barriers that members of structurally disadvantaged groups face in accessing administrative proceedings). Effective participation may require the assistance of legal counsel, which creates additional expense. *See* Luther Caulkins,

standards have important benefits as well. These include ensuring that those with the greatest stake in the proceeding are the ones to shape the issues before the agency and preserving scarce agency resources.[285]

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The potential tensions between substantial public engagement with agency decision-making and other administrative law values can be concisely summarized. Extensive public engagement can stretch agency resources and delay agency action required by Congress. This includes action that has significant public benefit.[286] In some cases, it might also dilute the work of agency experts and enhance the risk of arbitrary decisions. Such tensions are inevitable. Writing nearly a half-century ago, Richard Stewart recognized that "the political tug and pull arising from participation might well threaten the impartiality and rationality of the decisional process." [287] Importantly, policymakers may ultimately decide, as Stewart did, that these costs are sometimes worth paying in order to capture benefits from certain forms of expanded participation.[288] Yet the costs should be weighed and measures taken to ensure they do not become excessive.

IV. MOVING FORWARD

Where does all of this leave us? The goal of expanding stakeholder engagement with administrative agencies is a laudable one, especially to

Funding and Facilitating Public Participation at FERC, 51 ENV'T L. REP. 10605, 10605 (2021) (identifying barriers to effective participation before FERC); *see also* Jonathan Skinner-Thompson, *Procedural Environmental Justice*, 97 WASH. L. REV. 399, 438 (2022) (going further to argue that participation in certain types of administrative proceedings requires the support of technical experts).

[285] *See* A. Everett MacIntyre & Joachim J. Volhard, *Intervention in Agency Adjudications*, 58 VA. L. REV. 230, 255-256 (1972) (discussing the costs and benefits of relaxing agency intervention standards).

[286] *See* STIGLITZ, *supra* note 277, at 90 (citing the fears of those who believe that restrictions imposed on agencies frustrate public-regarding action by agencies).

[287] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1708-09 (1975).

[288] *Id.* ("Some mechanism for broader participation, direct or representative, may . . . be desirable in order to enhance the public acceptability of resulting policies and foster that sense of involvement in, and responsibility for, government which is itself a good.").

the extent that it serves to redress imbalances in access that have skewed agency records or produced biased decisions. At the same time, significant expansion of participatory mechanisms within agency proceedings can create friction with other administrative values. If we agree that those values — effectiveness, expertise, and non-arbitrariness — are themselves worth preserving, the question becomes how to do so while addressing the concerns raised by advocates of enhanced public engagement in agency decision-making.

This Part offers thoughts about where to go from here. The problem has no easy answers. Instead, this Part offers a menu of options for advocates and energy policymakers who wish to engage with and respond to the latest participatory wave. None is a silver bullet, and each has its own set of advantages and costs. This presentation is necessarily less elegant than the embrace of a single intervention such as a shift to more informal rulemaking,[289] devolving actual decision-making to ordinary citizens,[290] or searching for consensus among stakeholders.[291] Yet it has the advantage of highlighting, rather than papering over, the very real tradeoffs inherent in implementation of lofty participatory goals within the messiness of administration.

The first Section asks whether some of the specific challenges to the procedures governing energy agency decision-making may be better addressed through substantive changes to the underlying law. In other words, the first Section proposes that some of the urge for more 'democracy' in administration may reflect frustration with our democratically elected lawmakers rather than with administration per se. It therefore asks whether that frustration can be better answered by focusing on statutory amendment as opposed to regulatory implementation.

The second Section suggests that some of the tensions identified in Part III can be better navigated through representation rather than direct public input. It gives examples from federal agencies and state commissions that have either broadened the role of their consumer advocates or have created new offices to represent communities and

[289] *See* Wadhia & Walker, *supra* note 31, at 399.

[290] *See* Fairchild, *supra* note 68, at 429.

[291] *See supra* Part III.A.4 (on negotiated rulemaking).

individuals whose perspectives have been underrepresented in energy agency proceedings. It also points out that environmental and consumer groups, which benefitted from the achievements of earlier participatory movements, have begun to incorporate a broader range of perspectives into their advocacy.

The final Section explores commission creation of fora where participants can share input and deliberate with other stakeholders without having to surmount so many of the procedural and technical barriers inherent in ratemakings or adjudications. Key characteristics of such proceedings are that they occur alongside rather than within specific proceedings, that they provide an opportunity for both agency and stakeholder education and engagement, that they do not depend on consensus, and that they can build trust and respect among stakeholders and between stakeholders and the agency over time. This Section names these efforts *deliberation alongside administration*.

A. Legislative Engagement

One cannot avoid the impression that some of the frustration currently directed at energy bureaucrats for being insufficiently attentive to particular interests and perspectives reflects a frustration with legislative bodies.[292] Energy statutes are notoriously open-textured, asking regulators to make certification and siting decisions in the "public interest"[293] or to ensure that utility rates and practices are "just and reasonable."[294] Shelley Welton argues that, for a long time, regulators have displayed an "obsession with economic efficiency" in their implementation of these statutes to the exclusion of social priorities such as racism and inequality.[295] But even if regulators have

[292] Professor Chris Havasy makes a similar charge that proponents of civic republicanism targeted agencies "only because of present congressional deficiencies." Havasy, *Relational Fairness*, *supra* note 20, at 773.

[293] For example, Montana's energy facility siting statute requires state regulators to determine that the facility "will serve the public interest, convenience, and necessity" after considering its benefits as well as its effects on public health, welfare and safety and "any other factors that it considers relevant." MONT. CODE ANN. § 75-20-301 (2022).

[294] Federal Power Act, 16 U.S.C. § 824d(a).

[295] *See* Shelley Welton, *The Bounds of Energy Law*, 62 B.C. L. REV. 2339, 2344-45 (2021).

more space to consider the kinds of claims made by, for example, energy justice advocates, there are obvious benefits to legislative cover.

Consider FERC's recent efforts to update its internal guidance on the siting of natural gas infrastructure. FERC may not grant a Certificate of Public Convenience and Necessity ("CPCN") for the construction of gas facilities unless it finds that the facility "is or will be required by the present or future public convenience and necessity."[296] FERC elaborated these requirements in a 1999 policy statement explaining how it would assess CPCN applications. In 2022, FERC proposed to revise this guidance for the first time in more than two decades.[297] One aim of this effort was to explain how agency staff should account for carbon emissions in assessing a project's environmental impact.[298] Another was to better account for the impacts of new infrastructure on communities — particularly environmental justice communities that have borne a disproportionate share of the environmental impacts of energy infrastructure.[299] FERC faced immediate pushback from supporters of domestic natural gas extraction[300] and ultimately

[296] 15 U.S.C. § 717f(e).

[297] Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 87 Fed. Reg. 11548 (Mar. 1, 2022); Interim Policy Statement on Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14104 (Mar. 11, 2022).

[298] *See* FED. ENERGY REGUL. COMM'N, *News Release: FERC Updates Policies to Guide Natural Gas Project Certifications* (Feb. 17, 2022), https://www.ferc.gov/news-events/news/ferc-updates-policies-guide-natural-gas-project-certifications# [https://perma.cc/NDE2-LE59] (providing the statement of Chairman Richard Glick: "We have witnessed the impact on pipeline projects when federal agencies, including the Commission, fail to fulfill their statutory responsibilities assessing the potential effects of a project on the environment, landowners and communities."); *see also* Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 87 Fed. Reg. at 11549-50 (2022) (noting the evolution of the Commission's consideration of climate change and greenhouse gas emissions and an increasing focus by federal agencies on environmental justice and equity).

[299] Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 87 Fed. Reg. at 11559 (2022) (explaining that the new policy will look beyond economic impacts on neighboring landowners and communities to include environmental justice and equity concerns).

[300] *See* Statement of Senator John Barrasso, FERC Must Start Over on Natural Gas Policy Statements (Mar. 24, 2022), https://www.energy.senate.gov/2022/3/barrasso-ferc-must-start-over-on-natural-gas-policy-statements [https://perma.cc/BH8D-CJM8]; *see*

redesignated both updated policy statements "drafts."[301] At the time of this Article's publication, neither policy statement had been finalized.

Adapting long-standing practices to new conditions, or shifting emphasis under long-standing statutes, may be especially challenging for federal energy agencies given the Supreme Court's recent articulation of a "major questions doctrine" that requires clear congressional authorization before agencies may read significant authorities into existing statutory language.[302] Under this new substantive canon of interpretation, courts "hesitate" before finding that statutory text contains "an extraordinary grant[] of regulatory authority."[303] In *West Virginia v. EPA*, the Court balked at EPA's argument that a provision of the Clean Air Act granted the agency authority to set carbon pollution standards for new power plants based on the reductions that could be achieved by shifting from one form of electricity generation to another.[304] The full extent of the major questions doctrine is not yet clear,[305] but the doctrine may prompt lawsuits challenging federal energy agencies' interpretation of their broad statutory mandates to consider either the impacts of climate change or environmental justice.

In sum, agency discretion to incorporate stakeholder perspectives into their decisions is bounded. Those frustrated with an agency's approach to weighing particular interests in energy decision-making may therefore be better served by seeking to amend the agency's

also Letter from Rep. Michael Burgess et al. to Chairman Richard Glick, FERC (Apr. 21, 2022), https://burgess.house.gov/uploadedfiles/4.21.2022_ferc_letterfinal.pdf [https://perma.cc/NPW4-MXEH] (opinion that natural gas projects produce reliable energy and a clean and healthy environment).

[301] Order on Draft Policy Statements, 178 FERC ¶ 61,197 (Mar. 24, 2022) ("Upon further consideration, we are making the Updated Policy Statement and the Interim GHG Policy Statement draft policy statements.").

[302] West Virginia v. EPA, 597 U.S. 697, 700 (2022).

[303] *Id.* at 721-23.

[304] *Id.* at 734-35.

[305] *See, e.g.*, Carson Turner, Julia Englebert & Narintohn Luangrath, *Lingering Questions About the Major Questions Doctrine*, REGUL. REV. SATURDAY SEMINAR (Jan. 6, 2024), https://www.theregreview.org/2024/01/06/saturday-seminar-lingering-questions-about-the-major-questions-doctrine/ [https://perma.cc/Y3K9-5BSK] (citing scholarly arguments and predictions).

statutes. In Oregon, for example, the legislature recently gave its PUC express authority to consider greenhouse gas reduction goals.[306] Several state legislatures have also amended PUC mandates to require the consideration of equity in their decision-making.[307]

Legislatures are also a more natural locus of democratic accountability than are agencies. As democratically elected bodies, legislatures should be responsive to the concerns of the people.[308] Moreover, the tensions described in Part III either do not apply or apply with much less force to Congress than they do to administrative agencies.

Ultimately, agency democracy is an imperfect substitute for a functional legislature. Notwithstanding his enthusiasm for administrative democracy, even Sabeel Rahman acknowledges that, "at some point, we will have to address the larger crisis of democratic dysfunction in twenty-first century American politics" if administration is to work.[309] Or, as Shoba Wadhia and Christopher Walker put it, Congress needs to "play its proper role in modern governance when it comes to questions of deep economic, moral, and political significance."[310] Whether the federal Congress will in fact do so is of course an open question.[311] But state legislatures can be much more

[306] *See* Marguerite Behringer, *Equity at the Public Utility Commissions: Recent Research and Lessons*, CLEAN ENERGY ACTION: CITIZEN POWER (Feb. 22, 2022), https://www.cleanenergyaction.org/blog/equity-research-2021 [https://perma.cc/X8UN-SYB5]. The legislature acted after the PUC observed that it lacked such authority. *Id.*

[307] *Id.*; *see also* JASMINE MCADAMS, NARUC, STATE ENERGY JUSTICE ROUNDTABLE SERIES: ENERGY JUSTICE METRICS 3 (2023), https://pubs.naruc.org/pub/2BD402A3-1866-DAAC-99FB-446FA2E021B9 [https://perma.cc/E5MJ-NQ4G] (listing examples of recent state legislation on energy justice).

[308] The question of legislative responsiveness is complex. But "most [scholars] accept some degree of public responsiveness as a core part of representation." Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 776 (2021).

[309] K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1704 (2018).

[310] Wadhia & Walker, *supra* note 31, at 393.

[311] *See, e.g.*, Lisa Askarinam, *Why Dysfunction in Congress Could be Here to Stay*, ABC NEWS (Oct. 25, 2023), https://abcnews.go.com/538/dysfunction-congress-stay/story?id=104278326 [https://perma.cc/TF4E-HLJL] (predicting that Congressional paralysis will continue due to ongoing narrow majorities and uncompetitive districts).

functional.[312] And, even at the federal level, legislative reform should be the primary objective of critics who believe regulators are insufficiently responsive to particular aspects of the public interest. With clear mandates to consider particular perspectives, agencies will be better-able to respond to the problems identified by climate and environmental justice advocates, among others.

B. Representation

Recognizing that legislative change is challenging — especially at the federal level — this Section turns to opportunities for making stakeholder perspectives heard within agencies. Rather than advocating direct participation, however, it returns to the idea of interest representation.

Representation at some level is inevitable. In large, complex societies like ours, direct democracy for every decision made by government is a literal impossibility, even if it were desirable.[313] When advocates talk about enhancing "democracy" and "public participation" in administration, therefore, we have to understand those arguments as incorporating some level of representative democratic or participatory theory. Even notice-and-comment rulemaking, as Professor E. Donald Elliott observes, must "promote the substance of dialogue through the process of representation."[314]

Part III chronicled the tepid reception of proposals for expansive participatory mechanisms within agencies. By contrast, enhanced

[312] *See* NAT'L CONF. OF STATE LEGISLATURES, *State Legislative Policymaking in an Age of Political Polarization* (Feb. 1, 2018), https://www.ncsl.org/cls/state-legislative-policymaking-in-an-age-of-political-polarization [https://perma.cc/YK6H-954B] (finding that despite political polarization and divided government, most state legislatures were still able to reach settlements on major policy issues).

[313] *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1495-96 (1992) ("No large community makes all its laws through town meetings; similarly, legislatures cannot function as a committee of the whole on most issues. Even courts have found that in complex, multi-party cases, genuine dialogue is frustrated rather than promoted if every interested party files a separate brief."). Elliott cites Chief Justice Oliver Wendell Holmes for the proposition that "[w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption." *Id.*

[314] *Id.*

representation of previously excluded perspectives has been a relative success story, from the rise of consumer counsel offices in public utility regulation to the growth in sophistication of environmental and consumer advocacy organizations.

This Section suggests that many of the goals of the participatory movement described in Part II can be met by doubling down on representation by enhancing existing mechanisms, such as independent advocates, and by ensuring that agency appointees and staff are representative of the interests impacted by their decisions. Because of the current participatory movement's focus on community- and justice-focused stakeholders, the subsections that follow describe existing institutions that might effectively represent those positions in energy proceedings. They seek to avoid a naïve view of representation or ignore its problems.[315] Yet they suggest that, on the whole, a representational approach can lessen many of the tensions identified in Part III while providing underrepresented interests the opportunity for genuine input into administrative decision-making.

1. Consumer Counsel

Offices of consumer counsel are staffed by independent state officials who represent the needs of public utility consumers.[316] As I have written

[315] Miriam Seifter has persuasively documented problems of representativeness in interest groups, for example. *See* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1304-1305 (2016) (identifying the problem and proposing disclosure of internal group structure and governance as a remedy). The concern about interest group representativeness is not new, with the D.C. Circuit emphasizing in a landmark 1966 decision on administrative intervention that such groups must be "responsible and representative." Off. of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966).

[316] *See, e.g.*, William T. Gormley, *Public Advocacy in Public Utility Commission Proceedings*, 17 J. APPLIED BEHAV. SCI. 446 (1981) (describing the emergence of offices of consumer counsel at the state and federal levels). There is no federal consumer representative, although attempts were made in the late 1970s to establish one. *See* Sharon B. Jacobs, *The Energy Prosumer*, 43 ECOLOGY L. Q. 519, 554 (describing history of such efforts). It is also worth noting that the name of these offices varies. In California, for example, the office is called the Public Advocate. *See About*, PUB. ADVOCS. OFF., https://www.publicadvocates.cpuc.ca.gov/about (last visited July 25, 2024) [https://perma.cc/4KVB-R2C7] ("We are the only State entity charged with helping

elsewhere, although these offices have historically focused on keeping rates low, consumer counsel in some states have begun to advocate for a broader array of interests.[317] In Colorado, the consumer counsel's office was recently rebranded the Utility Consumer Advocate and received new legislative authorization to represent the public on climate, energy transition, and environmental justice questions.[318] These offices are an example of successful interest representation that could be replicated elsewhere in administration.[319]

Representation of consumer interests can pose challenges, however, where there are tensions among particular interests. For example, a goal of increasing renewable generation might be in tension with a goal of lower electric rates. In a recent proceeding at the Colorado PUC on Tri-State Generation and Transmission Association's electric resource plan, for example, the Utility Consumer Advocate agreed with the Utility's selection of only one wind project from its solicitation, arguing that prices for wind power had been driven up by supply-chain issues and that it was prudent to wait for these costs to decrease before the utility procured more renewable resources.[320] Because of these potential tensions, a better option for representation of particular interests — such as the interests of marginalized communities — in utility regulatory proceedings might be to establish separate representation. Those representatives, which might be called Utility Justice Advocates, — could coordinate closely with consumer counsel offices, but would

ensure Californians are represented at the California Public Utilities Commission and in other forums.").

[317] Jacobs, *supra* note 316, at 554-55.

[318] Michael Booth, *Colorado's Consumer Advocate Gets Wider Climate Powers and a New Name*, COLO. SUN (Sept. 2, 2021), https://coloradosun.com/2021/09/02/utility-consumers-colorado-new-advocate-office/ [https://perma.cc/8BEK-47BT].

[319] Professors Glen Staszewski and Michael Sant'Ambrogio propose using ombudspersons or similar individuals to represent the concerns of absent stakeholders in rulemaking proceedings across administration, for example. Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 842-43 (2021).

[320] Colo. Pub. Util. Comm'n, Proceeding No. 20A-0528E, Application of Tri-State Generation and Transmission Association, Inc. for Approval of its 2020 Electric Resource Plan, Office of the Utility Consumer Advocate's Comments Relating to Tri-State Generation and Transmission Association, Inc's 150-Day Report 1 (Mar. 30, 2023).

ultimately be free to advocate different policies and to represent different voices.

2. Offices of Goodness

New staff positions within agencies might also be created to elevate particular interests. Oregon, for example, created a Diversity, Equity and Inclusion Program Director within its Public Utilities Commission.[321] California created Environmental & Social Justice ("ESJ") liaisons within each division of its Public Utilities Commission who form a larger ESJ Working Group to promote the goals of the agency's ESJ Action Plan.[322] These are the kinds of position that Professor Margo Schlanger describes as "Offices of Goodness": subsidiary agency offices designed to ensure that core values that may not be obviously central to an agency's mission are given weight.[323]

Another version of this approach is Blake Emerson and Jon Michaels' vision of "regulatory public defenders" who could "identify[] absent stakeholders, translat[e] their stated needs and values into applicable regulatory language, and certify[] that rule-drafting processes have given a fair consideration to regulatory beneficiaries"[324] While this intervention is aimed primarily at the rulemaking process, it could be adopted in adjudications as well if the defender were given authority to intervene in certain proceedings as of right. The language of "public defense" suggests a more adversarial posture than a "working group" or a "program director," but states should be free to experiment with characterizations that best meet their needs.

[321] SERENA STOUDAMIRE-WESLEY, SOPHORN CHEANG, CHIAO-YUN ANNY HSIAO, JENNIFER KOTTING & APRIL CALLEN, STATE OF OREGON, DIVERSITY, EQUITY, AND INCLUSION ACTION PLAN: A ROADMAP TO RACIAL EQUITY AND BELONGING 26 (2021).

[322] CAL. PUB. UTILS. COMM'N, ENVIRONMENTAL & SOCIAL JUSTICE ACTION PLAN 13 (2022).

[323] Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 53 CARDOZO L. REV. 54, 55 (2014).

[324] Blake Emerson & Jon. D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISC. 418, 446 (2021).

3. Representative Decisionmakers

A third option, which could be pursued on its own or alongside any of the previous suggestions, is to ensure that agency decisionmakers are themselves representative of the various stakeholders their decisions affect. Currently, more state public utility commissioners have backgrounds in utility regulation or the utility industry than in any other field.[325] While it is not known if this background affects commissioner decision-making,[326] it stands to reason that commissioners with environmental or environmental justice backgrounds might be more sympathetic to those perspectives. If this is true, statutes that specify professional requirements could strengthen representation of particular viewpoints on commissions.

That approach is workable. Brian Feinstein suggests that identity-conscious agency design can help to both redress inequities and improve decision-making within agencies.[327] He also suggests that it is feasible, given that there are fifty-eight existing statutory requirements across twenty-five agencies that specify particular vocational or demographic requirements or prohibitions for agency leaders.[328]

A possible retort is that agencies themselves — both leadership as well as staff — are tasked with representing the public interest, and that selecting commissioners for particular characteristics is not necessary to that endeavor. Some have even gone so far as to suggest that administrators stand in a kind of fiduciary relationship to the public.[329]

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[325] Jared Heern, *Who's Controlling Our Energy Future? Industry and Environmental Representation on United States Public Utility Commissions*, 101 ENERGY RSCH. & SOC. SCI. 101, 4-5 (2023). This is especially true for commissioners who are appointed rather than elected.

[326] *Id.* at 5.

[327] Brian D. Feinstein, *Identity-Conscious Administrative Law*, 90 GEO. WASH. L. REV. 1, 3 (2022).

[328] *Id.* at 21.

[329] *See, e.g.*, Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) (proposing that federal officers act as fiduciaries for the public's benefit); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) (identifying what Criddle characterizes as the fiduciary foundations of administrative law). *But see, e.g.*, Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014)

Yet to the extent that agencies are not seen as giving sufficient weight to important perspectives, requiring representation of those interests among the agency's leadership remains a possibility.

C. Deliberation Alongside Administration

This Section begins to outline an alternative approach that provides for direct input while minimizing some of the frictions identified in Part III. It suggests that, if statutory amendment is unavailable and representation enhancements are not strong enough medicine, agencies might establish a process of *deliberation alongside administration*. This approach would have agencies constitute long-term stakeholder bodies that would convene regularly with agency staff to deliberate on everything from the agency's mission and agenda to policy in specific areas. For energy agencies, this could include infrastructure siting, ratemaking, and planning, as well as other topics. Participation in individual proceedings would continue, but with the understanding that those proceedings would not offer the same kind of opportunity for deep and ongoing engagement available in the deliberative stakeholder groups.

The first subsection below outlines the proposed intervention and addresses potential legal barriers to implementation. The second explains the benefits of such an approach relative to expanding participatory opportunities in individual agency proceedings. The third describes existing energy agency efforts that gesture at deliberation alongside regulation and that might be expanded or modified to better fit the paradigm. This is necessarily a beginning rather than a full statement of the approach; to work out fully the details of such a proposal would require a separate article.

1. Commission Creation of Stakeholder Bodies

Energy regulatory agencies are largely free to experiment with the creation and maintenance of stakeholder bodies that can engage in

(concluding that the fiduciary model imposes unworkable constraints on government decision-making).

ongoing deliberations with each other and with the agency.[330] These bodies are in some ways distinguishable from advisory committees, which are generally focused on particular types of expertise,[331] and which may provide more targeted input as opposed to making space for more general discussions.[332] However, the distinction is not a vital one. Indeed, some existing advisory committees, such as California's Disadvantaged Communities Advisory Group, which offers input on CPUC and California Energy Commission programs and policies, already permit more direct participation by citizens and communities in energy decision-making.[333] Agencies could call these bodies stakeholder groups, task forces, or anything they prefer.

While the creation of these bodies is unlikely to require separate authorization from the legislature, statutory authorization could be helpful. At the federal level, the groups would need to comply with the requirements of the Federal Advisory Committee Act and other transparency obligations,[334] while at the state level they would have to

[330] On agency freedom to experiment with procedure more generally, see Emily S. Bremer and Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. LAND USE & ENV'T L. 523 (2017).

[331] *See* MEGHAN M. STUESSY, CONG. RSCH. SERV., FEDERAL ADVISORY COMMITTEES: AN INTRODUCTION AND OVERVIEW 1 (2016) (describing advisory committees as bringing together experts to recommend policy actions to government officials).

[332] *But see* Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, 1 I/S: J.L. & POL'Y 59, 66 (2005) ("Advisory committees are organizations of nongovernmental officials established [by the government] to provide advice and recommendations to decision makers in the executive branch.").

[333] The Advisory Group was established in 2015 to ensure that clean energy and pollution production programs at the Public Utilities Commission and the Energy Commission benefitted disadvantaged communities across the state. CAL. PUB. UTILS. COMM'N, DISADVANTAGED COMMUNITIES ADVISORY GRP. (2024), https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/infrastructure/disadvantaged-communities/disadvantaged-communities-advisory-group [https://perma.cc/G9T2-F2J6]. The Group meets several times per year and submits recommendations to both Commissions. *Id.* It has submitted comments and recommendations on energy storage, solar access, transportation and building electrification, achieving climate goals, biomethane, and public safety power shutoffs, among other issues. CAL. PUB. UTILS. COMM'N, DISADVANTAGED COMMUNITIES ADVISORY GRP., 2020-2021 ANNUAL REPORT OF THE DISADVANTAGED COMMUNITIES ADVISORY GROUP 6-8 (2021).

[334] Federal Advisory Committee Act, 5 U.S.C. Appendix § 14.

follow any similar provisions of state law.[335] Beyond those requirements, however, agencies would have ample room to experiment with internal organization and procedure.[336]

Importantly, in order to avoid ex parte limitations, subject-matter limitations, and undue adversarialism, the deliberations envisioned here would not be keyed to individual proceedings. They would instead target broader topic areas such as transmission line siting, distributed energy compensation, and the like. However, conversations about individual proceedings could of course be part of the larger discussion.

Representation of key stakeholder positions will be vital, but it is not the only important design element. The Rocky Mountain Institute, which has facilitated multiple utility commission stakeholder processes and has studied many more, has identified several additional characteristics of a successful process. These include the use of an independent facilitator with knowledge in the relevant topic areas, sufficient time for stakeholder education by experts, low costs of participation, and maximizing trust among participants.[337] This subsection discusses each aspect in turn.

First, agencies should seek to have key viewpoints represented in stakeholder bodies. Stakeholders might self-select into the process, but affirmative outreach may also be needed to ensure adequate representation of particular perspectives,[338] especially when it comes to under-resourced groups. This is easier said than done. But while the details of ensuring adequate representation are challenging, identifying

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[335] *See, e.g.*, Bagley-Keene Open Meeting Act, CAL. GOV'T CODE §§ 11120–11132 (2021) (requiring state agencies to conduct their meetings in public;); Florida Sunshine Law, Fla. Stat. § 286.11 (2024) (same).

[336] *See* Bremer & Jacobs, *supra* note 350, at 526 (discussing agencies' freedom to adopt their own procedures within statutory constraints).

[337] DAN CROSS-CALL, CARA GOLDENBERG & CLAIRE WANG, ROCKY MOUNTAIN INST., PROCESS FOR PURPOSE: REIMAGINING REGULATORY APPROACHES FOR POWER SECTOR TRANSFORMATION 25 (2019) [hereinafter ROCKY MOUNTAIN INST., PROCESS FOR PURPOSE], https://rmi.org/wp-content/uploads/2019/02/rmi-process-for-purpose.pdf [https://perma.cc/5MSB-92YA].

[338] *See* JAMES FISHKIN, DEMOCRACY WHEN THE PEOPLE ARE THINKING: REVITALIZING OUR POLITICS THROUGH PUBLIC DELIBERATION 16 (2018) ("The more general lesson is that self-selected participation is virtually certain to be unrepresentative and hence offer a distorted form of inclusion.").

the relevant interests in broad strokes is not. Stakeholder groups should include, at a minimum, representatives from regulated industry, consumer groups, local community groups, governments (including tribal governments, local governments, and other state agencies), justice groups, non-utility private sector interests, and the environmental community. Agencies should also be open to modifying and expanding these categories over time.

At the same time, there is a need to keep the group from expanding so massively that actual deliberation becomes impossible. In most states this should not present problems, but in the most populous states, and at the federal level, the enthusiasm for participation might be greater than the process can accommodate. In such cases, a screening mechanism akin to that used for the intervention process,[339] or for intervenor compensation,[340] could be implemented so that viewpoints are adequately represented but not duplicated. Alternatively, stakeholders could be divided into subgroups for deliberation, with the larger group coming together to report back subgroup ideas and progress. Even if larger structures are needed to accommodate more participants, the process can still provide avenues for relationship-building and informal conversations between stakeholders.

Second, while the use of independent facilitators creates expense, it is likely well worth the effort. Stakeholder deliberations are not necessarily as adversarial as negotiations between opposing parties in a contractual or other dispute, but there will be strong views about how to proceed and resentments may have built up over years of engagement in certain types of regulatory activity. Agency expertise does not generally run to facilitating this kind of dialogue. By contrast, independent facilitators are experts in navigating difficult conversations and in channeling deliberation more productively.

Third, the need for participant education could be met by agency staff materials and presentations. Staff could prepare briefing booklets, videos, or other materials for stakeholders to absorb in advance of the deliberations. It may also be important to allow stakeholders to submit portions of the briefing materials, similar to the way that election

[339] *See* supra note 181 and accompanying text.

[340] *See* supra notes 283–284 and accompanying text.

booklets include statements by parties for or against particular propositions.[341] Experts representing a variety of viewpoints should also be on hand to answer questions in plenary sessions.

Fourth, some stakeholders may need support to participate, as capacity and resource constraints currently prevent many groups from advocating effectively at the regulatory level.[342] One way to overcome such constraints is for smaller or more diffuse groups with overlapping interests to collaborate on engagement.[343] Yet the agency may also need to provide compensation and other forms of support for participation by stakeholders who can demonstrate both a need for resources and that their perspective would not otherwise be adequately represented in deliberations.[344] This might include providing childcare in addition to transportation and lodging costs. Participants could also be paid a small stipend, akin to that awarded for jury service, to compensate them for their time.

Finally, it is important to build trust among participants. The goal of keeping participation costs low is in some tension with the need for sustained deliberations where participants can connect with one another as individuals as well as stakeholders. Ideally, stakeholder meetings would be held in-person over the course of several days, with opportunities for informal engagement between participants during meals and other activities.

Especially in states where stakeholders are not used to working together, it will take time to identify those who should have a seat at the

[341] This approach was taken in a 1996 Texas experiment with utility ratepayers. *See* Mike McGrath, *Deliberative Polling and the Rise of Wind Power in Texas*, 109 NAT'L CIVIC REV. 34, 35-37 (2020) (describing deliberative experiment run by James Fishkin with Texas electric ratepayers in 1996).

[342] *See* Eagles, *supra* note 100 ("Capacity is a primary barrier to participation in the utility regulatory process, for both local governments and community groups.").

[343] *Id.*

[344] The lesson here from experience with intervenor compensation programs is that the application process for compensation should not be too arduous. For an example of an overly complicated and burdensome application process, see NHTSA Final Rule and ANPRM on Financial Assistance to Participants in Administrative Proceedings, 42 Fed. Reg. 2864, 2865-67 (Jan. 13, 1977) (requiring an explanation of how participation would enhance the decision making process and why funds could not be secured elsewhere, an itemized statement of requested funds and the evidence or submissions to be produced with them, and a statement of total assets and liabilities).

table and to build relationships between participants. This is one reason why sustained discussions over a longer period of time can be preferable to one-off interactions in individual agency proceedings. The goal of the process should be to build trusting working relationships, not merely to provide an opportunity for the articulation of pre-formed positions.

Shielding deliberations from public scrutiny can also promote trust. Here, the virtues of insulating deliberation from publicity must be balanced against the benefits of transparency. A lack of transparency can of course lead to criticism, as it has in RTO and ISO stakeholder processes.[345] In addition, laws like the Federal Advisory Committee Act, the Government in the Sunshine Act, the Freedom of Information Act, and state counterparts might require transparency as a condition of operation. Yet stakeholders might not feel free to express their true opinions, or to experiment with new approaches if they are aware that their remarks will appear in print.

2. Defending Deliberation Alongside Administration

While it will not answer all calls for "administrative democracy," the virtues of deliberation alongside administration, especially in energy decision-making, are many. The first set of benefits comes from reducing the frictions described in the previous section. The second set is related to the nature and quality of the deliberations themselves.

First, by moving some (but not all) participation out of individual proceedings, this approach enhances the opportunities for stakeholder engagement while reducing the potential for delayed administration of statutes.[346] Second, while focusing on out-of-proceeding deliberations does not avoid the problem of resource constraints entirely, it channels resources to a process that has the potential to produce real and systemic change within agencies and whose impacts can be felt across a variety of agency programs and proceedings. Thus, it may prove more

[345] *See supra* notes 62–65 and accompanying text.

[346] In other words, it creates more space for the kind of "democratic action" advocated by democratic theorist Jane Mansbridge and described in Part IV. As emphasized in that Part, while it might be tempting to conclude that inaction preserves the status quo, or leaves us in some way "free," Mansbridge underscored that government inaction simply leaves us open to "the unimpeded trajectory of any externally caused phenomenon." *See* Mansbridge, *supra* note 252, at 3.

cost-effective than programs that attempt to expand participation in each individual proceeding. The costs of such a program may also be more predictable and stable over time than extensive support for proceeding-by-proceeding engagement.

Third, providing some space between deliberations and individual proceedings avoids some of the procedural and statutory constraints identified in Part III. In stakeholder deliberations, there would be few procedural formalities to navigate.[347] Intervention standards, for example, would not pose a barrier to participation. Dialogues outside of dockets also avoid ex parte rules that "can have a counterproductive consequence of inhibiting effective collaboration and progress."[348]

In addition, viewpoints or arguments that would not be germane to individual proceedings could be raised without issue in out-of-proceeding deliberations. Deliberation alongside administration might thus make space for genuine paradigm-redefining ideas and proposals.[349] Where necessary, stakeholders can be redirected to agencies with the relevant authority. Opportunities for collaboration across agencies might also be discovered. Moreover, these deliberations could help to identify areas where existing statutory language prevents regulators from responding to stakeholders' concerns and could even produce proposals for legislative reform.

Deliberation alongside regulation can also enhance the impact of the dialogue itself and produce trusting relationships.[350] Public engagement

[347] The Rocky Mountain Institute notes that "non-docketed" stakeholder processes can be preferable "since they have fewer procedural requirements and could be more accessible to stakeholders who are less familiar with utility commission dockets" and because they "may allow for more open dialogue around transformational utility questions." ROCKY MOUNTAIN INST., PROCESS FOR PURPOSE, *supra* note 337, at 26.

[348] *Id*. As the Rocky Mountain Institute notes, however, in some states, rules around ex parte contacts and other formal niceties in docketed proceedings are relaxed. This makes it easier for states to conduct stakeholder discussions within such proceedings. *Id*.

[349] On the challenges of making space for proposals that fall outside hegemonic discourses, see Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 POL. THEORY, 670, 685-687 (Oct. 2001).

[350] In this way, the goals of deliberation alongside administration differ markedly from those of the administrative agonism proposed by Dan Walters. *See* Walters, *supra* note 30, at 1. While democratic agonism offers a better description of the current state of administrative affairs, the modified form of deliberative democracy proposed here is

may have the greatest impact on agency decision-making where it occurs at early stages of policy formation.[351] Deliberation alongside regulation enables this by removing engagement from the timeline of particular proceedings. Some degree of isolation from the push and pull of everyday decision-making might also enable participants to build genuine relationships that would not form in the context of more formal or adversarial proceedings.[352]

One concern is that these bodies would become a mere box-checking exercise for agencies, and the views emerging from deliberations would be ignored. There are several reasons, however, to think this would not be the case. First, agency staff members who participate in deliberations would have a vested interest in making outcomes heard within the agency more broadly. Second, stakeholders would still have the option to participate in individual agency proceedings and could themselves elevate proposals and viewpoints from the stakeholder groups in rulemakings or adjudications. A compelling analog comes from the settlement process. Various stakeholder groups have banded together on their own initiative to propose settlements in utility proceedings such as ratemakings, and commissions have been receptive to these proposals.[353] Commissions are similarly likely to be sympathetic to ideas

much more likely to produce lasting, trusting relationships between stakeholders that could ultimately lead to beneficial collaboration. However, the distinction should not be overstated. Like agonism, deliberation alongside administration should make space for disagreement. It should also recognize that all agency decisions are in at least some sense provisional. Because participants can live to fight another day even if their individual proposals, or even the proposals of the deliberative group, are not adopted by the agency in a particular instance, they have an incentive to remain engaged in the discussion. On the importance of provisionality to agonism, see *id.* at 58-59.

[351] For an overview of the role of agenda-setting in policy making generally, see Daniel Carpenter, *Agenda Democracy*, 26 ANN. REV. POL. SCI. 193, 195-197 (2023). On the importance of participatory agenda-setting in the administrative rulemaking context, see Sant'Ambrogio and Staszewski, *supra* note 319, at 806-08.

[352] Jim Rossi suggests that, even in the absence of consensus, participants in deliberative agency processes can achieve an "ethos of respect" that impacts not only stakeholders but also agency decisionmakers. Rossi, *supra* note 271, at 232. By contrast, he finds, more formal processes like commenting on an Environmental Impact Statement can "breed distrust and cynicism about government, encouraging even more selfishness and strategic behavior on behalf of participants." *Id.* at 240.

[353] For an analysis of settlement in utility regulation, see Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 YALE J.

that are generated in deliberative stakeholder processes, which might be even more representative of a wide array of views than are non-unanimous settlements.

If these incentives are deemed insufficient, requirements that an agency consider or respond to the products of these deliberations could be adopted. To avoid excessive proceduralization, agency compliance should be subject to deferential judicial review. Yet obligating the agency to acknowledge the product of deliberations, whether they yield a consensus position or not, could assure participants that their views are not being ignored.

3. Existing Efforts

As described in Part II, energy agencies are already experimenting with different forms of stakeholder engagement. Although none is an exact analog to the deliberation alongside regulation proposed here, these experiments demonstrate the feasibility of similar approaches. They also show that agencies have broad discretion to design and implement such processes within existing statutory and budgetary authorizations. Agencies serious about deliberation alongside administration should take these efforts as starting points but give special attention to the design considerations raised in the previous subsection.

a. FERC technical conferences

The closest that FERC comes to the kind of deliberation alongside administration proposed here is in its technical conferences. These conferences are conducted by FERC staff, although individual commissioners may attend if they so choose. They are not part of dockets related to specific rulemakings or adjudications even though

ON REGUL. 257 (1995) (expressing concern about the effects of nonunanimous settlement on captive ratepayers). *But see* Alan P. Buchmann & Robert S. Tongren, *Nonunanimous Settlements of Public Utility Rate Cases: A Response*, 13 YALE J. ON REGUL. 337 (1996) (arguing that the problems identified by Krieger do not arise in practice).

they may raise topics at issue in those proceedings. Some conferences are broad and preliminary in scope[354] while others have a narrow focus.[355]

The conferences allow for presentations and submissions by FERC-chosen panelists in response to staff solicitations. Members of the public are generally invited to attend the meetings, but not to participate. However, interested parties are sometimes invited to submit post-technical conference comments.[356]

Some of the conferences are indeed concerned with technical detail. However, even conferences ostensibly focused on regulatory minutiae touch on larger issues. An April 2022 conference on financial assurance measures for hydroelectric projects, for example, considered how to assess the potential impacts of those projects on local communities.[357]

In some ways, technical conferences conform to the vision of deliberation alongside adjudication. They are held at an early stage in proceedings on the relevant topic. They allow for the presentation of views by selected members of the public that are not constrained by the parameters of an individual proceeding, as well as for back-and-forth questions between commissioners, staff, and speakers. Other members of the public may view the proceedings and, in some cases, may submit comments.

On the other hand, technical conferences do little to invite true deliberation. They are highly formalized and are more akin to congressional hearings than to deliberative mini-publics. The need for

354 *See, e.g.*, FED. ENERGY REGUL. COMM'N, *Technical Conference on Transmission Planning and Cost Management* (Oct. 6, 2022), https://www.ferc.gov/news-events/events/technical-conference-transmission-planning-and-cost-management-10062022 [https://perma.cc/J67J-27YP] [hereinafter FERC, *Transmission Planning and Cost*] (thinking through a variety of considerations related to transmission planning).

355 *See, e.g.*, FED. ENERGY REGUL. COMM'N, *Technical Conference Regarding North Hartland, LLC P-2816-050*, https://www.ferc.gov/news-events/events/technical-conference-regarding-north-hartland-llc-p-2816-050-06272022 (last updated Dec. 23, 2022) [https://perma.cc/N7BK-XJ4L] (regarding consultation with the Fish and Wildlife Service under the Endangered Species Act for the relicensing of the North Hartland Hydroelectric Project).

356 *See, e.g.*, FERC, *Transmission Planning and Cost*, *supra* note 354.

357 FED. ENERGY REGUL. COMM'N, *Technical Conference on Financial Assurance Measures for Hydroelectric Projects*, https://ferc.gov/news-events/events/technical-conference-financial-assurance-measures-hydroelectric-projects (last updated June 9, 2022) [https://perma.cc/G5NW-WLHV].

an invitation is a high barrier to participation, and there is nothing that obligates the agency to ensure representation of particular stakeholder perspectives.

b. Hawaii performance-based ratemaking stakeholder process

A closer analog to deliberation alongside administration might be the Hawaii PUC's collaborative stakeholder process on performance-based ratemaking.[358] The stakeholder process included utility representatives, the state's consumer advocate, local governments, clean energy companies, and environmental groups.[359] Stakeholders met in working groups to consider various performance metrics for utilities.[360]

The process included many of the elements discussed in this subsection, including independent facilitation and a genuinely collaborative framework in which stakeholders could learn from one another and build trusting relationships.[361] The primary daylight between Hawaii's stakeholder process and true deliberation alongside regulation is that the process was tied to the performance-based ratemaking proceeding and did not represent an ongoing collaboration between stakeholders. The PUC has not transformed this stakeholder group into a formal continuing body. However, the major investor-owned utility serving the state, Hawaiian Electric, itself maintains a stakeholder council with membership from local governments, local communities, state agencies, the environmental and sustainability

[358] *See Performance Based Regulation (PBR) for Hawaiian Electric Companies (Docket No. 2018-0088)*, STATE OF HAW. PUB. UTILS. COMM'N, https://puc.hawaii.gov/energy/pbr/ (last updated July 2024) [https://perma.cc/Y9NZ-Z9FE]. Unlike traditional ratemaking, performance-based ratemaking rewards utilities for achieving certain agreed-upon benchmarks. *See* Peter Navarro, *The Simple Analytics of Performance-Based Ratemaking: A Guide for the PBR Regulator*, 13 YALE J. ON REG. 105, 111-12 (1996).

[359] STATE OF HAW. PUB. UTILS. COMM'N, SUMMARY OF PHASE 2 DECISION & ORDER ESTABLISHING A PBR FRAMEWORK (2020) [hereinafter SUMMARY OF PHASE 2 DECISION].

[360] *Id.*

[361] Cara Goldenberg, *Five Lessons from Hawaii's Groundbreaking PBR Framework*, RMI (Feb. 8, 2021), https://rmi.org/five-lessons-from-hawaiis-groundbreaking-pbr-framework/ [https://perma.cc/JEU9-A2E2].

communities, and energy industries such as storage and demand response, among others.[362]

c. State commission dockets on equity and justice

Both Hawaii and Colorado's utility commissions have opened dockets to explore the integration of equity and justice considerations across the agencies' work.[363] Colorado's effort is ongoing. The state PUC has opened a "miscellaneous proceeding" on creating rules to incorporate equity into its work.[364] As part of this docket, staff have hosted several workshops and listening sessions.[365] Many of the proposals made during the session went beyond the scope of the Commission's jurisdiction.[366] However, as described above, this is one of the benefits of less restrictive conversations.

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[362] *Stakeholder Council*, HAWAIIAN ELECTRIC, https://www.hawaiianelectric.com/clean-energy-hawaii/integrated-grid-planning/stakeholder-and-community-engagement/stakeholder-council (last visited July 17, 2024) [https://perma.cc/M6H8-9XT8].

[363] In Colorado, this was the result of legislation, *see* Colorado S.B. 21-272, Measures to Modernize the Public Utilities Commission Sec. 3 (2021), while in Hawaii it was on the Commission's own initiative. *See* SUMMARY OF PHASE 2 DECISION, *supra* note 359. For another example of commission-initiated public engagement efforts, see Mass. Dep't of Pub. Utils., Interlocutory Order and Draft Policy on Enhancing Public Awareness and Participation, D.P.U. 21-50 (2022).

[364] *See* Colo. Pub. Util. Comm'n, Proceeding 22M-0171 ALL, In the Matter of the Commission's Implementation of Senate Bill 21-272 Requiring it to Promulgate Rules in Which it Considers How Best to Provide Equity in All of Its Work, Decision Opening Proceeding, Setting Objectives and Staff Direction, and Soliciting Comments and Information (Apr. 6, 2022).

[365] *See Events and Activities, Past Events & Workshops*, PUB. UTIL. COMM'N EQUITY INITIATIVES https://sites.google.com/state.co.us/pucequityinitiatives/events (last visited July 15, 2024) [https://perma.cc/A29L-7P3Y] (including workshops on Meaningful Participation and Engagement, Guiding Principles, and Work Planning). For example, staff has held multiple workshops to discuss draft Guiding Principles produced under the Commission's Equity Framework. *Id.*; *see also* Colo. Dep't of Regul. Agencies, SB 21-272 Implementation: CO PUC Equity Framework, Presentation and Discussion of Staff's Draft Guiding Principles, Summary Notes, https://drive.google.com/file/d/1BxX_iyitC8wbGjO25ZrtFn7-VDwGLS3Z/view [https://perma.cc/9J6V-3BK2] [hereinafter PUC Equity Framework].

[366] For example, participants asked when the social cost of carbon would be applied to utilities. *See* PUC Equity Framework, *supra* note 365.

The Hawaii Commission has also developed and sought comment on a stakeholder engagement approach for its work on equity and justice. As in Colorado, the Commission opened a docket to organize its equity proceedings.[367] It proposed "to actively seek broad participation from different stakeholders, including community-based organizations, marginalized communities, and those who have never participated in a regulatory proceeding."[368] In order to facilitate participation by historically excluded groups, the Commission plans to conduct proactive outreach and engagement and to lower barriers to participation, including by developing a simple form for participation rather than requiring stakeholders to file a formal motion to intervene.[369] Sessions will be held in-person and virtually, with at least one session held on each of the main Hawaiian islands.[370]

One interesting feature of the proposal is the inclusion of discussions about the equitable siting of energy infrastructure[371] notwithstanding the Commission's lack of jurisdiction over siting.[372] This demonstrates the potential for deliberation alongside regulation to extend not only outside of the specific legal parameters of particular proceedings but outside of areas of agency jurisdiction. For lay participants, and sometimes even for experts, the niceties of agency jurisdiction can be difficult to grasp, and conversations about energy policy often straddle the jurisdictions of multiple agencies.

CONCLUSION

Participation is not a binary, nor is it one-size-fits-all. Each commission or agency's answers to the latest participatory challenge will differ based on capacity, politics, and other factors. This Article's contribution has been to set out clearly the tensions inherent in such an enterprise. The goal of this realism is not to deter thinking about public involvement in energy agency proceedings, or in administration more

[367] Instituting a Proceeding to Investigate Equity, Docket No. 2022-0250, Order No. 40032 (State of Haw. Pub. Util. Comm'n. 2023).

[368] *Id.* at Exhibit A at 3.

[369] *Id.* at Exhibit A at 5.

[370] *Id.* at Exhibit A at 4.

[371] *Id.* at Exhibit A at 3.

[372] *Id.* at Exhibit A at 8.

broadly. Rather, it is to suggest that some of the more ambitious proposals for agency "democracy" are likely to run up against the reality of administration, especially in domains — like energy — that are formal and complex and where policymaking takes place for the most part outside of informal rulemaking proceedings. Hopefully, this dose of realism can enable agencies and advocates to think creatively about modes of engagement that permit agencies to continue their important work of law implementation while ensuring that the voices of all stakeholders can help to shape our energy policy.