

SIDELINING THE PUBLIC

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This Article challenges the widely held view that Congress is the American government’s institution closest to the people, while administrative agencies are unaccountable and unresponsive. Providing a systematic, side-by-side institutional analysis, we compare the actual practices and capacities of these two institutions to engage affected publics in policymaking. We find that despite the democratic bona fides of an elected legislature, agencies possess superior capacities, more evolved practices, stricter rules, and stronger incentives for meaningful public engagement. Yet these capacities have been eroded—particularly over the last 50 years—by intensifying legal, political, and managerial obstacles. The Supreme Court and political actors have increasingly curbed agency authority, often in the name of democratic accountability. But as we show, agencies are uniquely positioned to enable democratic deliberation in policymaking. By taking stock of how Congress often fails to deliver meaningful public engagement—especially compared to agencies’ more developed participatory practices—this Article sounds the alarm, offering both a warning and a blueprint for institutional reform. Rather than sidelining agencies, we should recognize, protect, and strengthen their role as vital engines of public participation in legitimate and effective democratic governance. Supporting agencies’ ability to convene the public, we suggest, should be an all-of-government effort.

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INTRODUCTION

Democracy takes more than voting; it requires *governance*. Legitimate and effective democratic governance demands that policymakers consider relevant information and provide reasoned justifications for their decisions.¹ Since they are not omniscient, lawmakers must engage with unaffiliated experts, citizens with situated knowledge, and other interested stakeholders who could be affected by policy choices.

The received wisdom is that Congress is the American federal government’s premier institution for engaging with interested members of the public, while administrative agencies are unaccountable and unresponsive.² Congress is portrayed as normatively and empirically “the people’s branch”;³

1. See *infra* Part I.

2. See, e.g., *Biden v. Missouri*, 595 U.S. 87, 105 (2022) (Alito, J., dissenting) (noting that the Constitution gives lawmaking authority to Congress, “whose Members are elected by the people,” claiming that “[e]lected representatives solicit the views of their constituents, listen to their complaints and requests, and make a great effort to accommodate their concerns,” and lamenting that most of today’s federal law “is not made by Congress” but “comes in the form of rules issued by unelected administrators”).

3. See, e.g., Maya Kornberg, *The People’s Branch*, LEGBRANCH (Oct. 16, 2021), <https://www.legbranch.org/the-peoples-branch/> [<https://perma.cc/C68T-UQVV>]; Caitlin

agencies, on the other hand, are often portrayed as detached from the interests and views of the electorate.⁴ These entrenched representations shape public perceptions of government, fuel popular suspicions of agency rulemaking, and help justify calls to reassert legislative primacy and constrain the administrative state.⁵ Indeed, the current President has declared, in ways large and small, a war on the administrative state—a campaign largely premised on the claim that agencies are unresponsive to the needs of the people.⁶

This vision of Congress as the public’s representative has deep roots. In *Federalist No. 52*, James Madison argued that the House of Representatives’ “[f]requent elections” would create “an immediate dependence on, and an intimate sympathy with, the people.”⁷ American students are taught that the Framers designed Congress to be not only the most powerful branch but also the one “closest to the people.”⁸ Classic studies of Congress reinforce this view, examining how it mirrors public opinion.⁹ And even when Americans express frustration with Congress, they still see it as the institution most meant to represent them.¹⁰

Agencies, by contrast, have long been criticized because their insulation from voters supposedly deprives them of democratic accountability. Before Congress enacted the Administrative Procedure Act (“APA”) in 1946, critics routinely argued that broad statutory delegations had created a fourth branch of government shielded from popular control and oversight.¹¹ Post-APA procedural

MacNeal, *Where Is Congress?*, PROJECT ON GOV’T OVERSIGHT, (Mar. 24, 2025), <https://www.pogo.org/analysis/where-is-congress> [<https://perma.cc/KU8S-UWW9>] (characterizing Congress as “the branch closest to the people”).

4. See, e.g., JASON CHAFFETZ, *THE DEEP STATE: HOW AN ARMY OF BUREAUCRATS PROTECTED BARACK OBAMA AND IS WORKING TO DESTROY THE TRUMP AGENDA* 4–5 (2018) (tracing the alleged unaccountability of bureaucracy).

5. See *id.* at 185, 217.

6. See, e.g., *id.* See generally KASH PATEL, *GOVERNMENT GANGSTERS: THE DEEP STATE, THE TRUTH, AND THE BATTLE FOR OUR DEMOCRACY* (2023) (tracing the alleged unaccountability of bureaucrats and the need for the White House to exert control to redress the lack of accountability); LIBERTY’S NEMESIS: *THE UNCHECKED EXPANSION OF THE STATE* (Dean Reuter & John Yoo, eds., 2016) (alleging that the administrative state undermines liberty and democratic accountability).

7. THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

8. See, e.g., *Legislative Branch*, HISTORY (May 21, 2025), <https://www.history.com/articles/legislative-branch> [<https://perma.cc/TZ6G-BQRF>]; see also *Separation of Powers*, PAC. LEGAL FOUND., <https://pacificlegal.org/separation-of-powers/> [<https://perma.cc/TJ6D-754D>] (last visited Apr. 14, 2026) (claiming that the growth of federal regulatory power has eroded the separation of powers by diminishing Congress’s role in lawmaking).

9. See, e.g., RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 136 (1978); Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45, 46, 56 (1963).

10. See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY* 3–6 (2012).

11. See, e.g., LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 576–85 (1965) (discussing decline of public faith in agency expertise after New Deal); Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 309–19 (1983) (same).

innovations have not dispelled this charge: critics contend that “[i]n many important respects, we no longer live in a constitutional republic—we’re subject to the rule of an unaccountable administrative state.”¹² These critiques are echoed daily in public discourse.

Yet a closer look at reality complicates both images. Scholars have discovered that, in practice, Congress is often not an effective or responsive public-facing institution,¹³ while agencies sometimes provide important fora for meaningful public engagement.¹⁴ This literature, however, has yet to provide a systematic comparative audit of the two institutions. Most scholarship isolates one institution, catalogs its deficits, and proposes reforms limited to that institution.¹⁵ Commentators generally do not position these two institutions side by side, comparing how, and how well, each can engage affected publics.

Building a scorecard for these institutions’ engagement capacities is not just academic bookkeeping. It matters for at least two reasons. First, the current Supreme Court is steadfastly undermining agencies’ authority by expanding private parties’ power to challenge regulations,¹⁶ expanding judges’ authority to reject agencies’ interpretations of the statutes they implement,¹⁷ and demanding increasingly herculean levels of forethought from both agencies and statutes.¹⁸ Much of this has been justified through a rhetoric of empowering Congress. The agencies must be curbed, the line goes, so that Congress may be allowed—or perhaps forced—to do its job.¹⁹ That reasoning might make sense if we presume that Congress presents our best hope for engaging with the public. That presumption, we argue, is wrong.

Second, and more broadly, over the past five decades, all three branches have—both deliberately and inadvertently—limited agencies’ ability to engage

12. Allen Mendenhall, *How Unelected Bureaucrats Became ‘Liberty’s Nemesis,’* THE FEDERALIST (Apr. 30, 2016), <https://thefederalist.com/2016/04/30/how-unelected-bureaucrats-became-libertys-nemesis/> [https://perma.cc/9GM9-ZVZE].

13. See *infra* Part II.

14. See *infra* Section III.A.

15. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 159–60 (1994) (making this critique throughout the book with multiple examples).

16. See, e.g., *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 603 U.S. 799, 809 (2024); *SEC v. Jarkesy*, 603 U.S. 109, 140–41 (2024).

17. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411–12 (2024).

18. See, e.g., *Ohio v. EPA*, 603 U.S. 279, 293–94 (2024); *West Virginia v. EPA*, 597 U.S. 697, 725 (2022); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 117 (2022); see Jack Lienke, *Every Court Everywhere All at Once*, 135 YALE L.J.F. 32, 34–35 (2025); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 651 (2023) (explaining that the current Court justifies shifting power to itself based on a purported obligation to “protect[] Congress from its own worst impulses”).

19. See, e.g., *West Virginia*, 597 U.S. at 742 (Gorsuch, J., concurring) (explaining that agencies must point to “clear congressional authorization” for highly significant regulatory power to ensure Congress and not the agencies make these important decisions); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 490 (2023) (observing that the Roberts Court is using alleged problems with Congress as a reason to shift power to itself).

meaningfully with affected publics. While the sheer volume of public participation has remained high since the “participation revolution” of the 1970s,²⁰ the quality and impact of that engagement has shifted as costs and barriers steadily increased, often tilting the playing field toward well-financed and sophisticated participants. Moreover, some impediments to broad civic participation have been incorporated in ways that appear deliberately designed to benefit industry.²¹ The second Trump Administration’s immediate revocation of innovative and highly regarded public-engagement efforts initiated by the Biden Administration is only one recent example in a long history of such retrenchment.²² Ironically, in fact, the “deep state” trope obscures the extent to which presidential control itself generates precisely the kind of insulation that critics decry.

These patterns make it vital to understand how Congress and administrative agencies actually compare in their public engagement practices and capacities. Does relying on Congress as the primary site of democratic engagement—and sidelining agencies in the process—reflect a clear-eyed assessment of each institution’s real capacities? This Article takes up that question through a systematic comparative institutional analysis of Congress and administrative agencies, focusing on their practical capacities to convene and collaborate with the broader public. Our core findings are straightforward: notwithstanding the democratic pedigree of an elected legislature, in reality agencies possess stronger formal mechanisms, more developed participatory practices, and more consistent legal obligations to engage the public—and they are easier to improve. But those strengths are under threat. The institution best positioned to incorporate public input into national policymaking is being progressively disabled from doing so.

The stakes are high. Today, agencies face a growing array of obstacles that hinder their ability to engage affected publics—obstacles that have become more numerous and entrenched over time. Agencies’ capacity and incentives to meaningfully engage with affected stakeholders have been weakened, while legal and managerial impediments accumulate. The result is a cumulative erosion of the most accessible and deliberative space in federal policymaking: the administrative state.²³ “Bowling alone” is at risk of becoming a structural feature of American governance.²⁴

This Article does not claim that agencies should displace Congress as the central site of democratic deliberation. Our aim is not to crown a winner, but to correct a widespread and consequential error: the assumption that agencies are inherently unresponsive to the public. In fact, as we show, agencies make contributions that Congress is not institutionally equipped to offer. As the political

20. Burdett A. Loomis & Allan J. Cigler, *Introduction: The Changing Nature of Interest Group Politics*, in *INTEREST GROUP POLITICS* 1, 11 (Allan J. Cigler & Burdett A. Loomis eds., 1983).

21. *See infra* Section III.B.

22. *See infra* Subsection III.B.3.

23. *See infra* Part II and Section III.B.

24. *Cf.* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (arguing that community involvement in the United States declined dramatically in the latter part of the twentieth century, creating a society of increasingly isolated people and diminishing social capital).

branches grow more centralized, more opaque, and less responsive, the loss of agencies' deliberative role is especially alarming. And to make matters worse, over the past half century, Congress, the executive branch, and the courts have steadily layered on roadblocks that hinder—rather than support—agencies' efforts to engage the public in their work.

We ring the alarm, showing the administrative state's unique contribution as convener of the public in policy development. Part I explains why legitimate and effective democratic governance requires policymakers to consider relevant information and views and to justify their choices in ways that require engaging with affected publics. Part II shows how Congress's capacity to engage the full range of affected publics is weak: its rules rarely mandate responsiveness, its practices are enfeebled, and its incentives tilt toward partiality and secrecy. Part III demonstrates that agencies have comparatively stronger capacities for broad public engagement and, though uneven, promising practices to realize them. It also catalogs the accumulating institutional shackles that now impede agencies from achieving their full democratic potential—constraints that critics then invoke to brand agencies “unaccountable.” Part IV provides a blueprint for reform. Presidents, Congress, agencies, and courts each have tools available to enhance public engagement with agencies and shore up the democratic legitimacy and effectiveness of federal policymaking. Supporting agencies' ability to convene the public, we suggest, should be an all-of-government effort.

I. PUBLIC ENGAGEMENT AS PART OF LEGITIMATE AND EFFECTIVE DEMOCRATIC GOVERNANCE

We first substantiate the intuition that public engagement is crucial to democratic governance and explain how we pursue our comparative evaluation. Popular sovereignty demands that a democratic government take the people it rules into account, which means assessing and mediating among the divergent views and interests of multiple, differently situated publics. Government institutions need to understand their policies' implications for the real world and the real people they govern: they need input from outside. And government institutions need to stay accountable to those they govern: governance involves showing people that their views and interests have been taken into account and justifying the exercise of coercive authority.²⁵ Such inclusive, interactive policymaking helps produce decisions that are both *legitimate* and *effective*—justified both ideationally and practically.

Of course, democratic governance is, to say the least, multifaceted.²⁶ But engaging with affected publics is one crucial factor: government institutions need ways to gather, consider, and address the concerns of the governed. This suggests

25. See Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278–87 (2009).

26. See, e.g., *Democracy Index*, OUR WORLD IN DATA, <https://ourworldindata.org/grapher/democracy-index-eiu#sources-and-processing> [<https://perma.cc/X3A6-GCY6>] (last visited Mar. 10, 2026) (evaluating a wide range of factors to compare the quality of democratic governance across countries). This Article focuses specifically on public engagement in policy production. Because we seek to compare the governance capabilities of agencies and Congress, we do not address agency adjudication.

that governing institutions should seek *inclusive* input, engaging with a broad range of affected publics and circumstances. And they should produce *responsive* outcomes that account for the diverse inputs they have gathered and justify the decisions they have reached.²⁷ These values follow directly from the basic notion that democracy brings the governed population into governance, mediating among the variegated positions of a pluralistic populace to reach provisional settlements of conflicts over policy means and ends.²⁸

Accordingly, normative theories of democracy such as civic republicanism, deliberative democracy, and democratic agonism put public engagement front and center. What two of us have elsewhere called the *agonistic republican* overlap of these theories insists that government institutions account for and respond to diverse public views and interests, encouraging contestation while diminishing the arbitrary exercise of power.²⁹ Those affected by governance decisions should have opportunities to participate in their production, even when those decisions remain

27. In between, governing institutions should rigorously assess and evaluate the inputs they have received. Because this step focuses less on particular methods of engaging the public, we focus less on it here.

28. Comparative institutional analysis, too, argues that institutional processes that maximize broad and diverse participation are superior. *See, e.g.,* KOMESAR, *supra* note 15, at 8.

29. *See* Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1767–74 (2023) (showing overlaps among civic republican, deliberative democratic, and agonistic theories to formulate a notion of agonistic republicanism); *see also* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1668–69 (2023) (arguing that government accountability encompasses reasoned deliberation, pluralistic inclusivity, and responsiveness to affected publics and regulated realities); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 17–27, 51–79 (1997) (contrasting conceptions of liberty as noninterference—eliminating government constraint of private action—with liberty as nondomination, eliminating arbitrary constraints that do not consider relevant interests and views); *id.* at 13, 171–205 (arguing that republican governance involves keeping the government from being “an agent of . . . domination”); HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 213 (2002) (arguing that democratic decision-making should “allow[] for a fair hearing of all; . . . [require] majorities . . . to take account of the views of the others; and . . . encourage[] reasonable compromise among all participants”); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 81–83, 116–38 (2018) (arguing that the ability of private corporations “to arbitrarily dominate workers” exemplifies the “problem of private power” or “dyadic domination” by private parties); Patchen Markell, *The Insufficiency of Non-Domination*, 36 POL. THEORY 9, 24 (2008) (“[T]he state may—indeed, must—use its *imperium* [state power] to combat the domination that can arise from particular configurations of private *dominium* [private power]. . .”).

contestable and contested³⁰—as they often will, since irreconcilable differences are not a sign of deficit but a hallmark of democratic politics.³¹

Contestation and pluralism may have been less valued or ubiquitous when the United States started out, with a government designed to serve only a discrete and insular minority.³² But that government gradually evolved into a mass democracy: a state with a claimed commitment to and respect for the interests and views not just of a tiny group of power holders but of most of the people it governs.³³ With a population diverse along many axes, different groups, variously constituted, will be differently situated with respect to any given policy matter. A government

30. See Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 42–46 (2023) (describing deliberative democratic theory’s core commitments); Philip Pettit, *Republican Freedom and Contestatory Democratization*, in DEMOCRACY’S VALUE 163, 164, 178–80, 187 (Ian Shapiro & Casiano Hacker-Cardón eds., 1999) (recognizing that public engagement helps preserve policies’ “contestability” by those they affect); Bernstein & Staszewski, *supra* note 29, at 1770 (arguing that “public officials should give persuasive justifications for their decisions that could reasonably be accepted by citizens with fundamentally different interests or views,” and “decisions should typically be provisional . . . to allow for changing perspectives and coalitions”); Glen Staszewski, Obergefell *and Democracy*, 97 B.U. L. REV. 31, 92–98 (2017) (describing agonistic democratic theory and its relationship to deliberative democracy); Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RSCH. 745, 755–56 (1999) (“[T]he prime task of democratic politics is not to eliminate passions . . . to render rational consensus possible, but to mobilize those passions toward the promotion of democratic designs.”); BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 2 (arguing that “[m]ost political theorists are hostile to the disruptions of politics,” idealizing harmony, discounting contestation, and buying into the fiction that politics can reach equilibrium); *cf.* RICHARDSON, *supra* note 29 (emphasizing reason-giving and presenting democratic rule as an ongoing conversation about political ends and means in which participation can produce common orientations). See generally Daniel E. Walters, *The Democratic Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022) (discussing agonistic theory in the context of administration).

31. See HONIG, *supra* note 30, at 205 (“Politics consists of practices of settlement *and* unsettlement, of disruption *and* administration, of extraordinary events . . . *and* mundane maintenances.”); Mouffe, *supra* note 30, at 755 (“Politics aims at the creation of unity in a context of conflict and diversity.”).

32. See EDWARD STIGLITZ, THE REASONING STATE 21–31 (2022) (arguing that the administrative state emerged to solve the problem of trust as the federal government moved from representing a socially connected few to a large, pluralistic, and dispersed populace); Matthew Steilen, *Genteel Culture, Legal Education, and Constitutional Controversy in Early National Virginia*, 41 LAW & HIST. REV. 709, 710, 717, (2023) (explaining, in a case study of early Republic Virginia, that “[t]his was not a mass society. Persuasion in public councils would depend on underlying personal relationships” and concluding that “[c]onstitutional ideas appear less like causes than effects” precipitated by “things like social status and ‘manners’”); *cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (using the phrase “discrete and insular minorities” to describe an *unempowered*, rather than a powerful, group).

33. As with any group or category, some remain at, or outside, the periphery of this claimed sphere of concern. See generally Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2022) (arguing that the Constitution’s inclusive governance of the people it empowers is counterbalanced by an exclusionary side—one that legitimizes the colonial governance of those it subordinates).

committed to the interests of the whole must take the differing perspectives of its parts into account while also finding ways to proceed at any given moment, on any given issue.³⁴

That can be complicated. Potentially affected people may have no particular opinion, or lack informed views, about policy options. They may not even realize they will be affected by a given decision, much less how. And their views may change depending on their perception of on-the-ground realities, implementation practicalities, ideological valences, and so on. That puts the onus on policymakers to get people's input into decisions that might affect them, and to justify decisions in terms that are reasonable, understandable, and acceptable by those affected.³⁵

Public engagement can improve the sociological legitimacy of policy decisions and bolster the perceived fairness of government action, even for those who disagree with the results.³⁶ It increases the transparency and salience of the government's plans, notifying people that their interests are potentially at stake and allowing them to mobilize political networks.³⁷ And it can help build a culture of civic participation that can benefit a democracy's overall health.³⁸ Explaining and justifying a decision lets others evaluate it and keeps it open to reconsideration, pushing decision-makers not to phone it in but to really engage with differing views. Public engagement, in short, is central to legitimate governance.³⁹

34. Cf. DANIELLE ALLEN, *JUSTICE BY MEANS OF DEMOCRACY* 67–68 (2023) (emphasizing the importance of political equality in promoting a principle of difference without domination).

35. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3 (2004) (arguing that those who exercise authority should justify its use in terms “that should be accepted by free and equal persons seeking fair terms of cooperation”); Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 498 (2008) (“At the core of all theories of deliberative democracy is what may be called a reason-giving requirement.”).

36. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 117–18 (2016); Brian D. Feinstein & Daniel E. Walters, *Valuing Administrative Democracy* 53 (Dec. 6, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5876144 [<https://perma.cc/FWW9-C4QX>] (providing experimental evidence showing that the public values robust participation in agency decision-making, particularly when it involves structured deliberation or targeted outreach to underrepresented groups, and that the time devoted to such efforts is generally deemed worthwhile).

37. See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 250 (1987) (discussing “fire-alarm” functions).

38. See Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 851–54 (2021).

39. See Pettit, *supra* note 30, at 168–69 (noting that law inherently constrains people's options); Markell, *supra* note 29, at 25–26 (noting that “power [can] be problematic not only because it [is] arbitrary or unchecked . . . but also if it [is] unduly concentrated,” unavailable for influence by those it affects through “usurpation”); see also Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268, 282–83 (2001) (arguing that democratic bodies must “operate in a deliberative mode” to ensure contestability); CHANTAL MOUFFE, *FOR A LEFT POPULISM* 91 (2018) (arguing that

All this pluralistic contestation, moreover, does not happen for its own sake: government is not a debate club. Governance decisions should be effective.⁴⁰ For that, it helps to know what you are doing. Policymakers need a realistic appraisal of the regulated world: though no one can foresee the future, policymakers need good reasons to think their actions will likely yield the results they're looking for. For that, they need to gather, understand, and evaluate relevant information held by different kinds of people in different forms. Expert research and situated knowledge can help policymakers understand the slice of the world they regulate.⁴¹ And regulated parties, regulatory beneficiaries, and bearers of negative consequences, among others, can illuminate the likely effects and workability of different options.⁴² Effective governance thus requires gathering input from many different sources, not as a one-shot deal but as an ongoing process.⁴³ That helps identify issue areas requiring intervention; develop and decide among potential avenues; evaluate a policy's likely and actual effects; and decide whether to return the issue to the policymaking arena. Public engagement is thus key to making policy effective.

Effective public engagement is hard to do. As Nikhil Menezes and David Pozen have recently pointed out, public law discourse resounds with calls for public participation but falls silent on pesky details like who should compose the public, how its views can be known, what the mechanism of its political influence

democracy's aim is not to "arrive at a consensus" that equalizes everyone, but "to defuse the potential antagonism that exists in human relations so as to make human coexistence possible," leaving open the possibility that those who lose this round will win another). *See generally* AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (arguing that deliberative democracy can allow diverse groups of citizens to reason together to reach legitimate collective decisions, even when they continue to disagree); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1992) (emphasizing the role of public discourse in democracy and arguing that democratic legitimacy arises from a communicative process that allow citizens to see themselves as both authors and addressees of legal norms); JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (exploring how the concept of "public reason" can provide the foundation for a just and stable democracy despite fundamental moral, religious, and philosophical disagreements).

40. *See, e.g.*, Gillian Metzger, *Of Presidents, Democracy, and Congress*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 4, 2022), <https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-09/> [<https://perma.cc/GH4J-QM8E>]; Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185, 216. *See generally* CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? (Vicki C. Jackson & Yasmin Dawood eds., 2022) (highlighting the vital role of effective government in sustaining democratic constitutionalism).

41. For discussions of the value of situated knowledge, see Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1187 (2012) and Elizabeth Fisher & Sidney Shapiro, *Rulemaking, Storytelling and the Expertise of Administrative Agencies* 31 (Feb. 25, 2025) (unpublished manuscript), <https://papers.ssrn.com/sol3/papers.cfm?abstractid=5153832> [<https://perma.cc/C9YC-VC8M>].

42. *See* Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 TEX. L. REV. 921, 956 (2025).

43. *See* Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 197 (2017).

might be, and how to make it all happen.⁴⁴ That is, these discussions leave unexplored what is needed to allow a group to “make credible claims on behalf of ordinary people,”⁴⁵ as well as what is arrayed against that eventuality.⁴⁶

For our purposes, the relevant public is everyone who could be interested in or affected by a policy decision. That does not require universal participation in governmental decision-making; that is neither necessary nor, indeed, possible. But policymakers should consider all the relevant interests and views and provide reasoned justifications for their decisions—that is, the positions of those affected by policy decisions should be *represented* in, even if those people do not themselves participate in, the decision-making process. In short, the public that matters for policymaking is the public it affects.⁴⁷

Perhaps the paradigmatic form of public engagement in a democracy is voting. Elections give the public input into decisions made in its name and demonstrate a modicum of support for decisions not everyone agrees with—which, in a pluralistic environment, includes more or less all decisions.⁴⁸ Because of this, an elected body like Congress would logically seem better at public engagement than unelected bodies like agencies. But presupposing either institution’s superiority based on its formal place in the governmental system begs the very question it purports to answer.

We instead take a pragmatist approach: we look at the ways these institutions actually work and the things they are reasonably capable of achieving.⁴⁹ We consider not so much how officials reach their positions, but what they do once they get there. Our reasoning is that democratically enacted decisions need to be

44. Nikhil Menezes & David E. Pozen, *Looking for the Public in Public Law*, 92 U. CHI. L. REV. 971, 976–77 (2025) (“The public is everywhere and nowhere in contemporary public law: everywhere, in that the term is constantly invoked to justify and explain existing arrangements; nowhere, in that serious attempts to identify a coherent public and ascertain its views are few and far between.”).

45. *Id.* at 1011–12.

46. *Id.* at 990–91 (discussing critiques arguing “that the so-called public comprises too many citizens who are too ignorant, distracted, and diverse to be a credible agent of control over government,” or that “appeals to the public tend to be . . . deliberately misleading bids to legitimate government activities that are, in fact, geared toward elites and specific private interests”); *id.* at 1103 (discussing the “centrifugal forces of party polarization, media fragmentation, and epistemic fracture that have undermined existing appeals to the public”).

47. We discuss promising ways to construct and access what Menezes and Pozen call “credible publics” *infra* Part IV.

48. See Pettit, *supra* note 30, at 173 (recognizing the electoral dimension of republican democracy).

49. See Susan Haack, *The Pragmatist Tradition: Lessons for Legal Theorists*, 95 WASH. U. L. REV. 1049, 1050 (2018) (“Unlike analytic philosophy, pragmatism invites us to focus, not exclusively on our language or our concepts, but on the world; and so, in the legal sphere, not exclusively on the *concept* of law but on the *phenomenon* of law—law as embodied in real legal systems.”); Charles Sanders Peirce, *The Nature of Meaning*, in 2 THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS 208, 217 (Nathan Houser et al., 1998) (“Consider what effects that might conceivably have practical bearings we conceive the object of our conception to have. Then, our conception of these effects is the whole of your conception of the object.”).

realized in practice, which requires considering relevant information and justifying decisions—something elections simply cannot achieve.⁵⁰ While Congress and agencies have differing relationships to voting, both are key institutions of governance.

In this Article, we therefore ask about each institution’s *capacities* for, and *practices* of, inclusively gathering input and producing responsive outcomes. What channels does each institution have for engaging with the publics it affects, and how does it use those channels? What resources does it have to help it gather and analyze information, and how does it deploy them? How does each institution structure its decision-making, and where does the public fit in? Capacities determine the available range of ways an institution can engage with the public, while patterns of practice indicate the extent to which those capacities are actualized.⁵¹

We also ask about the *rules* and *incentives* that structure these institutions’ work. Who judges officials, on what kinds of actions or results, with what effects? How can outsiders evaluate, pressure, or reward decision-makers—or even find out what decision-makers are doing in the first place? What constraints govern officials’ actions, and what sanctions exist for violating them? Rules structure the ways an institution engages with its publics, while incentives push participants to choose particular paths.

In Part II, we assess the public-engagement capacities and practices of Congress. Part III turns to the capacities and practices of agencies.

II. PUBLIC ENGAGEMENT WITH CONGRESS

Commentators routinely assume that Congress is best positioned for public engagement.⁵² That makes sense, given that legislators are elected. Since their reelection turns on how well they do their work, these *Madisonian statespersons* should be highly motivated to consider relevant information and make broadly acceptable policy decisions.⁵³ And when they fail, the public can vote to replace them with someone else. Public engagement and policy justification are, in this vision, already built into the electoral system.

That’s the idea, anyway. But ideas about how things ought to work should be evaluated by reference to how things do, and plausibly could, work. In this Part, we go beyond heroic assumptions about Congress, exploring both its operations and its limits. How well does—and how well can—Congress engage with interested members of the public, consider and respond in a reasoned fashion to disparate interests and views, and provide broadly acceptable justifications for its policy

50. See Menezes & Pozen, *supra* note 44, at 995 (“[A]lmost all contemporary commentators take it as given that electoral accountability is insufficient for democratic legitimation . . .”); Christian List, *Social Choice Theory*, STAN. ENCYCLOPEDIA PHIL. (Oct. 14, 2022), <https://plato.stanford.edu/entries/social-choice/> [<https://perma.cc/Q4DN-H7UR>].

51. See Anya Bernstein, *Differentiating Deference*, 33 YALE J. ON REGUL. 1, 29–30 (2016) (distinguishing “actual” from “potential competence”).

52. See *supra* notes 2–10 and accompanying text.

53. See, e.g., DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6 (2d ed. 2004) (arguing that reelection incentives shape legislative behavior and responsiveness).

choices? We consider three pathways that could give Congress input helpful to delivering legitimate, effective governance for the nation.

The first pathway follows the ideal, asking how well a body of Madisonian statespersons can make legitimate and effective policy choices without additional public-engagement efforts. How much can representative structures alone teach Congress about the views and interests of those it represents and the information needed to resolve policy problems? The second involves unmediated communication between congressional representatives and members of the public. How does Congress hear directly from stakeholders, and how broad an opportunity does that provide for the public to participate in policy decision-making? On the third pathway, information and views from the outside world are mediated through other institutional actors or arrangements. How much can such mediated communications ensure that Congress has all the relevant information and provides reasoned justifications for its policy decisions? Even taken together, we conclude that these pathways provide only limited, sporadic support for legitimate and effective democratic governance. Our analysis raises serious challenges for the conventional assumption that Congress is the American government institution best suited for making policy. Congress is at least as much a sideliner as a convenor of the publics it serves.

A. Madisonian Representation

At first blush it may seem reasonable to assume that Congress can make legitimate and effective policy choices simply by virtue of being elected. As Madisonian statespersons following legislative procedures, members of Congress should be sufficiently knowledgeable, diverse, and public spirited to consider all relevant information and views and provide reasoned justifications for their policy decisions. There is thus no need for additional public-engagement efforts.

Representative democracy, one of the Constitution's principal structural safeguards, was indeed "intended to ensure that lawmaking was the product of thoughtful deliberation by elected representatives, rather than the passions or narrow self-interests of the people."⁵⁴ Madison further claimed that representation by elected officials—our "Madisonian statespersons"—would help protect against "factions," and especially the tyranny of the majority.⁵⁵ Representation would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."⁵⁶ Representatives would be exposed to a

54. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 402 (2003).

55. THE FEDERALIST NO. 10, at 78–82 (James Madison) (Clinton Rossiter ed., 1961) (defining "faction" as "a number of citizens . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"); see also Staszewski, *supra* note 54, at 402 nn.23–24 (discussing Madison's views); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31–49 (1985) (providing historical context for the Framers' views on factions).

56. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

variety of different perspectives that would limit any one group's ability to impose its will on others.⁵⁷ Moreover, professional representatives would have time to learn about contemporary problems, deliberating and debating appropriate solutions, allowing the common good to emerge.⁵⁸

The Constitution also guards against majoritarian tyranny by incorporating internal checks like bicameralism and presentment, which prevent policymaking absent a high level of consensus.⁵⁹ Employing two—or, including the President, three—separate representative bodies, with different compositions and electoral cycles, to deliberate over legislation diversifies the constituencies served by the lawmaking process.⁶⁰ That should generate a deliberative process: members must work with one another to find common ground and pass needed policies and are, in turn, held accountable by constituents and colleagues for providing reasoned justifications for their policy choices. The resulting statutes can be understood to reflect legitimate collective decisions.

Our legal system typically presumes that enacted legislation satisfies these normative ideals—and if it doesn't, that the proper recourse is to elect different public officials. The Supreme Court has adopted a strong presumption of regularity for legislation and will generally uphold a statute rationally related to any legitimate public purpose.⁶¹ Congress faces no legal requirement to consider relevant information and views, nor to provide reasoned justifications for its policy choices. This doctrine “conclusively presumes,” in other words, that federal legislation is a product of deliberative procedures, which, “as much as possible, objectively develop the relevant facts and legal standards so that people are not deprived of important rights or interests based on erroneous assumptions,” and allow interested stakeholders meaningful chances for “participation and dialogue”—opportunities to provide input to decision-makers who treat them with concern and respect.⁶² Federal

57. *See id.* at 83 (“Extend the sphere [of the Republic] and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a motive exists, it will be more difficult for all who feel it to discover their own strength and act in unison with each other.”).

58. Staszewski, *supra* note 54, at 402–03, 402 n.24; Sunstein, *supra* note 55, at 41.

59. Staszewski, *supra* note 54, at 402–03.

60. *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 30–32 (1989) (describing the purposes of bicameralism and the different composition of Congress's two chambers).

61. *See, e.g., Harris v. McRae*, 448 U.S. 297, 322 (1980) (recognizing the “presumption of constitutional validity” ordinarily attributed to acts of Congress—absent suspect classifications or infringements of fundamental rights).

62. Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 444 (1998). Frickey reasoned that these presumptions, though unrealistic, “are probably . . . essential for . . . republican government” and that we are “better off” on balance “[i]f we view the world as if these things are true” for the purposes of constitutional law. *Id.* Our analysis here, however, is not bounded by the terms of judicial review; we are concerned with the practical workings of democratic engagement.

courts therefore generally do not enforce a “[d]ue process of lawmaking.”⁶³ As Justice Gorsuch has phrased it, “the framers went to great lengths to make lawmaking difficult,” facilitating and even demanding deliberation “by directing that legislating be done only by elected representatives in a public process” that would protect political minorities and establish clear lines of electoral accountability so that “[t]he sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.”⁶⁴

Much has changed since Madison sketched out his ideal. For one thing, the eighteenth-century federal government purported to represent the interests of only a tiny subset of the people it governed: only a small, relatively insular minority of America’s inhabitants had the right to vote.⁶⁵ Today’s representatives owe their representation to a much larger and more diverse set of constituents. The purview of the federal government’s concerns has increased, too, as successive Congresses and Presidents have enacted legislation through the constitutionally prescribed process.⁶⁶ However astute Madison might have been in describing the representatives of his own time, the Madisonian ideal needs to be considered in its contemporary context.

The current structure of legislation poses a number of obstacles to the Madisonian ideal. A legislator’s constituents are much more numerous and diverse than they were in Madison’s day, so introspection and personal experience provide less insight into constituent views and interests than they once might have. Many contemporary legislative problems are bewilderingly complex. Elections and other occasional interactions with select constituents are unlikely to give a legislator a full picture of the real-world situation that legislation regulates. And since other legislators are equally limited, interacting with them does not suffice to alert the legislator to alternative policies, possibilities, and concerns. In sum, a legislator’s introspection, personal experience, and sporadic interactions with fellow elected officials and subsets of constituents are surely useful to deliberation but cannot cover the ground of input needed on a contemporary legislative topic. So modern Congresses are not, after all, model public engagers simply by virtue of being elected.

63. See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 245 (1976) (coining this term).

64. *Gundy v. United States*, 588 U.S. 128, 154–56 (2019) (Gorsuch, J., dissenting).

65. See, e.g., STIGLITZ, *supra* note 32, at 21–26 (noting that the political and voting class of the early Republic was small and socially networked, and concluding that, because many of the players traveled in the same social circles, understood one another’s interests, and often shared a limited set of views, abuses of trust were relatively easy to recognize); Steilen, *supra* note 32, at 717.

66. See LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* 12, 16–41 (2015) (arguing that Civil War policies significantly expanded the role of the federal government as the Union government “centralized legal authority at the federal level by solidifying the connections between the nation and its people”).

B. Unmediated Public Engagement

One way to help Congress get the input it needs is to have representatives communicate directly with relevant members of the public. And since the public controls the members' electoral fates, it is not surprising that Congress has historically engaged in such unmediated communications. A petition process, informal lobbying, and constituent services have all served this purpose. Yet each falls well short of ensuring inclusive public engagement.

1. The Rise and Fall of Congress's Petition Process

Maggie Blackhawk's pathbreaking work documents how early Congresses used a petition process for directly engaging with interested members of the public.⁶⁷ Originating in England and the American colonies,⁶⁸ the right to petition is explicitly protected by the Bill of Rights.⁶⁹ Petitioning involved a formal process: petitioners filed a written document that included a statement of grievance and a list of signatories.⁷⁰ Petitioning was also transparent and public, as petitions were read aloud on the floor by members of Congress before being referred to a committee or delegated to another government institution for consideration.⁷¹ Anyone could file a petition, including women, free and enslaved African Americans, Native Americans, and members of other disempowered groups; petitions were subject to equal consideration regardless of the number and identities of their signatories.⁷² Although no one had a right to have petitions granted, Congress was obligated to consider and respond to every petition, affording every person the potential to affect national politics.⁷³ This important form of public engagement with Congress informed the legislative agenda, facilitated agonistic contestation, and operated in a nonmajoritarian or even countermajoritarian fashion.⁷⁴

However, as the nation grew and federal policy became increasingly complex, Congress's ability to consider and respond to every petition diminished. Congress increasingly delegated responsibility for redressing such grievances to the federal courts and administrative agencies.⁷⁵ In 1946, the APA moved petitioning out of Congress entirely, providing instead a legal right for anyone to file a petition for rulemaking with federal agencies, to affect how agencies implement legislation.⁷⁶ The APA also set the administrative procedures for notice-and-

67. See Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1142–47 (2016).

68. *Id.*

69. U.S. CONST. amend. I.

70. McKinley, *supra* note 67, at 1136–37.

71. *Id.*

72. *Id.* at 1136–37, 1144–46, 1183–85.

73. *Id.* at 1184–85.

74. *Id.* at 1193–94, 1205 (recognizing that in contrast to elections, “the mechanism of petitioning rejected a majoritarian decision rule and instead established a platform for engagement during the lawmaking process, like that of a court, to give meaning to individual and minority grievances”).

75. Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1579–1600 (2018); see also *id.* at 1568–75 (chronicling “[t]he [r]ise and fall of Congressional petitioning”).

76. See 5 U.S.C. § 553(e); McKinley, *supra* note 75, at 1548.

comment rulemaking.⁷⁷ Also in 1946, the Legislative Reorganization Act (“LRA”) bolstered Congress’s capacity to legislate: it allowed congressional “committees to retain professional political staff” and “expanded the size and role of Congress’s internal nonpartisan institutions.”⁷⁸ At the same time as the LRA increased Congress’s legislative competence, it decreased Congress’s role in the petition process. The LRA “banned the passage of certain private bills that Congress had used to resolve petitions” and cut the number of legislative standing committees, which had been “the core loci for petition review and processing.”⁷⁹

Between them, the APA and the LRA “dismantled the last vestiges of the petition process in Congress,” and “transferred much of that existing infrastructure to the administrative state and to the courts.”⁸⁰ These developments also established the framework for the textbook legislative process that would emerge in the 1970s, conventionally referred to as Congress’s “regular order.”⁸¹ As explained further below, these changes made agencies more reliable fora than Congress for people without substantial political influence to have their voices heard on policy questions. By mid-century, then, the mandate, as well as the capacity, for engaging directly with relevant publics had largely shifted to agencies.

2. *The Rise and Rise of Informal Lobbying*

As the congressional petition process declined, informal lobbying increased. This form of unmediated communication between stakeholders and lawmakers was already ubiquitous by the mid- to late-nineteenth century. By the Progressive Era, lobbying had started to edge out petitioning as Congress’s primary form of unmediated public engagement.⁸² Although lobbying, too, lets people give lawmakers input, it is in many ways the polar opposite of petitioning.⁸³

While the right to petition was explicitly protected by the Bill of Rights, lobbying was generally disfavored and viewed with disdain early in American history.⁸⁴ Instead of a formal process with a written grievance or request, lobbying

77. McKinley, *supra* note 75, at 1575–76, 1603; see 5 U.S.C. § 553.

78. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1557 (2020).

79. McKinley, *supra* note 75, at 1548.

80. *Id.*

81. See Cross & Gluck, *supra* note 78, at 1640 (describing regular order as “the now-traditional process that emerged in the 1970s to publicly vet a bill through committee, hearings, floor debates, bicameral conference, and more,” in a way “designed to ensure that legislation was studied, deliberated, transparent, precise, and error-free”); see also Peter C. Hanson, *Abandoning the Regular Order: Majority Party Influence on Appropriations in the U.S. Senate*, 67 POL. RSCH. Q. 519, 521 (2014) (describing the “textbook procedure known as the ‘regular order’” for appropriations bills).

82. See McKinley, *supra* note 67, at 1154–56.

83. See *id.* at 1137 (arguing that “the lobbying market functioned (and still functions) as the antithesis of the formal petition process”).

84. *Id.* at 1137–38; see also Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, in *THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT* 57, 60–61 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) (claiming that petitioning’s demise and the national government’s growth fueled the rise of lobbying in the mid-nineteenth century and “the

often involves informal discussions and generally occurs off the books.⁸⁵ Petitions were read aloud on the floor of Congress as part of a transparent and public process; lobbying typically occurs behind the scenes, in the shade.⁸⁶ The petition process was open to anyone, including members of politically powerless groups, while lobbying provides selective access to the wealthy and influential.⁸⁷ Congress was legally obligated to consider and respond to every petition, but lobbying does not guarantee members of the public any hearing, much less a formal response.⁸⁸ True, both provide nonmajoritarian or countermajoritarian opportunities to challenge the prevailing status quo. Yet petitioning provided those opportunities to *everyone*, including the marginalized, whereas informal lobbying disproportionately involves, and appears to benefit, those with the greatest wealth and power.⁸⁹ Campaign donors and other politically powerful people have greater access to members of Congress.⁹⁰ This money-and-power-based unequal access to elected representatives is so ubiquitous as to be rendered “profoundly uncontroversial,” a matter of “settled doctrine in political science.”⁹¹

Given that lobbying happens mostly off the record, establishing a direct link between lobbying expenditures and substantive policy outcomes can be difficult.⁹² Still, we do know something. The number of organizations with representation in Washington more than doubled between the outset of the Reagan

popular distaste for lobbyists that quickly appeared in response”); Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 ELECTION L.J. 4, 7 (2014) (arguing that, before the mid-twentieth century, judicial doctrines and laws largely treated lobbying as illegitimate).

85. McKinley, *supra* note 67, at 1198 (“[O]ur current lobbying system consists entirely of informal and opaque norms, customs, and practices.”).

86. *Id.* (“[N]o procedure is guaranteed and there are no clear rules.”).

87. *Id.* at 1197 (“[T]hose who are able to muster the political capital to secure access to lawmakers are afforded wholly arbitrary, informal, and unequal process. . . . [s]o the less politically powerful can expect far less time and . . . less process devoted to their issues. . . .”).

88. *Id.* at 1198.

89. *Id.*; cf. Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 79 MD. L. REV. 415, 426–44 (2019) (discussing several concerns that arise when legislation provides special treatment to particular constituents).

90. See McKinley, *supra* note 67, at 1196–97. One pathbreaking study found that the likelihood that an interest group would gain access to lawmakers increased significantly with PAC contributions, estimating that the cost of time with a lawmaker during the 1980s ranged from \$6,400 for less than twenty-five minutes to over \$70,000 for an hour. Laura I. Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1059–61 (1986). A more recent study found that senior policymakers in congressional offices were three to four times more likely to make themselves available for a meeting with persons identified as campaign donors. Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 545, 553 (2016).

91. McKinley, *supra* note 67, at 1197 (describing “[t]he presumption that access to lawmakers is contingent on a relationship with that member, built through campaign contributions and other forms of electoral power,” and “the fact that Congress affords access and process unequally and based on political power”).

92. See *id.* at 1195–96 (canvassing generations of political science literature).

Administration and George W. Bush's second term.⁹³ Lobbying expenditures increased from approximately \$200 million in 1983 to \$3.31 billion in 2012, a nearly seven-fold increase, controlling for inflation.⁹⁴ The explosion of spending on lobbying activities indicates that the access to legislators that money and political power buy is valuable. Moreover, “[m]ore than three-quarters of that money has consistently gone towards representing corporate America”⁹⁵—not the marginalized or powerless communities that could get Congress's ear through petitions.

Informal lobbying distorts the deliberative process: as powerful people get access and others are excluded from it, lawmakers get input that is selective, biased, and potentially unreliable. Policymaking, meanwhile, has grown exponentially more complex than even just a few decades ago.⁹⁶ A logical solution is for legislators to rely on their friends—and often their financiers or former colleagues—on K Street.⁹⁷ Making matters worse, Congress is not required to justify its policy decisions at all—much less in a reasoned fashion based on a complete and balanced record. Perhaps not surprisingly, the literature reveals that powerful interest groups dominate Congress's internal deliberations and even regularly draft the bills it considers, a fact sometimes kept from other members of Congress themselves.⁹⁸ Informal lobbying thus undercuts legitimate and effective democratic governance, sidelining many publics affected by legislation in favor of a privileged few.

3. *Constituent Services*

Members of Congress need constituent votes to stay in office. Research suggests that electoral pressures push members to dedicate considerable energy and resources to constituent services and campaigning.⁹⁹ That could incentivize meaningful public engagement,¹⁰⁰ but mounting evidence suggests that

93. See Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/> [<https://perma.cc/W53Z-PANT>].

94. See LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 8–9 (2015).

95. *Id.*

96. See Drutman & Teles, *supra* note 93.

97. See DRUTMAN, *supra* note 94, at 40–41; TIMOTHY M. LAPIRA & HERSCHEL F. THOMAS III, *REVOLVING DOOR LOBBYING: PUBLIC SERVICE, PRIVATE INFLUENCE, AND THE UNEQUAL REPRESENTATION OF INTERESTS* 15–16 (2017).

98. See DRUTMAN, *supra* note 94, at 40.

99. See *generally* THE PERMANENT CAMPAIGN AND ITS FUTURE (Norman J. Ornstein & Thomas E. Mann eds., 2000) (dedicating book-length treatment to examining the “perpetual” campaign members of Congress must run to stay reelected).

100. See, e.g., CONG. MGMT. FOUND., *FACE-TO-FACE WITH CONGRESS: BEFORE, DURING, AND AFTER MEETINGS WITH LEGISLATORS* 4 (2014), <https://www.congressfoundation.org/revitalizing-congress/communicating-with-congress/face-to-face> [<https://perma.cc/HJ7Z-H6XM>] (reporting that 94% of staff report that undecided representatives learn from constituents); see also CONG. MGMT. FOUND. & SOC'Y FOR HUM RES. MGMT., *LIFE IN CONGRESS: THE MEMBER PERSPECTIVE* 18–19 (2013), https://www.congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-the-member-perspective.pdf [<https://perma.cc/8Z22-3UAQ>] (reporting based on surveys that members dedicate roughly a third of their time to constituent services).

congressional polarization significantly lessens the impact of such connections, focusing members on party leaders instead.¹⁰¹ As a variety of forces lead to more “safe” seats, moreover, members of the House in particular have become increasingly responsive only to the few constituents who make a difference in their elections, such as those at their party’s extremes who could make a primary challenge successful.¹⁰²

Ironically, devoting time and attention to reelection also ultimately undermines members’ representative capacity¹⁰³: spending significant effort on direct interactions with constituents leaves less time for research, self-education, and advocacy about legislation.¹⁰⁴ For instance, members routinely miss committee meetings and floor debates to campaign.¹⁰⁵ Gerrymandered districts, legislative centralization, and even constituent wooing itself thus decrease deliberative capacity, incentives to incorporate disparate interests and views, and the need to provide broadly acceptable justifications for decisions.

Further, there is little evidence that constituents have much meaningful influence on members’ views on specific policy issues. Legislation is national, while constituent services tend to be local. The political science literature suggests that most legislators rely instead on interest groups and other lawmakers, including party leaders, for information about pending legislation.¹⁰⁶

101. See, e.g., Hugh Hecla, *Campaigning and Governing: A Conspectus*, in THE PERMANENT CAMPAIGN AND ITS FUTURE 1, 19–20 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

102. See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 298, 308–09 (2011).

103. See AMY GUTMANN & DENNIS THOMPSON, THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT 3 (2012) (tracing how never-ending campaigning can undermine the caliber of democratic governance and members’ inclination to compromise); see also JAMES M. CURRY, LEGISLATING IN THE DARK: INFORMATION AND POWER IN THE HOUSE OF REPRESENTATIVES 25–26 (2015) (recognizing that campaigning occupies members’ time in ways that conflict with gaining expertise and playing a meaningful role in policymaking).

104. See, e.g., Jonathan Lewallen, Sean M. Theriault & Bryan D. Jones, *Congressional Dysfunction: An Information Processing Perspective*, 10 REGUL. & GOVERNANCE 179, 181–83 (2015) (discussing how members of Congress generally prioritize constituent services and reelection campaigns over legislative responsibilities); R. ERIK PETERSON, PARKER H. REYNOLDS & AMBER HOPE WILHELM, CONG. RSCH. SERV., R41366, HOUSE OF REPRESENTATIVES AND SENATE STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977–2010, at 15 (2010) (same).

105. See, e.g., Niels Lesniewski, *Why Senate Attendance Attacks Are Usually Bogus (Video)*, ROLLCALL (Oct. 8, 2014, at 12:17 MT), <https://rollcall.com/2014/10/08/why-senate-attendance-attacks-are-usually-bogus-video-2/> [<https://perma.cc/JP3T-4Y8L>] (noting that senators “miss committee meetings and hearings . . . [a]ll the time”); Simone Pathé, *Do Attacks for Missing Committee Hearings Still Work?*, ROLLCALL (Sep. 29, 2016, at 05:00 MT), <https://rollcall.com/2016/09/28/do-attacks-for-missing-hearings-still-work/> [<https://perma.cc/VW97-HFKW>].

106. See, e.g., JOHN W. KINGDON, CONGRESSMEN’S VOTING DECISIONS 29–71 (3d ed. 1989) (providing a dated but still robust empirical account of how members generally advance the views of their favored constituents, while also taking account of the views of other members); CURRY, *supra* note 103, at 27 (summarizing the relevant literature).

C. Mediated Public Engagement

Appreciating that unmediated communications with members of the public will fall short, Congress has developed additional mechanisms for *mediated* public engagement to provide information and analysis. Mediating institutions include congressional committees, the congressional bureaucracy, and administrative agencies. Though these mediating institutions help make up for deficits in public engagement, they do not ensure that Congress considers all the relevant information and views, nor that it provides reasoned justifications for its collective decisions. And even the limited salutary influence of these mechanisms has waned in recent decades.

1. The Rise and Fall of Congressional Committees

Congress's primary formal pathway for policymaking input historically has been its committee process. Once assigned to committees by party leadership, members can and often do develop expertise on relevant topics.¹⁰⁷ They can assign research projects to their own or committee staffs. Committees can hold hearings and invite (or subpoena) witnesses to provide otherwise missing input.¹⁰⁸ Bipartisan committees occasionally even provide interested stakeholders with notice and an opportunity to comment on potential legislation.¹⁰⁹ Committee members can also use mark-up sessions and recommendations to deliberate, negotiate, compromise, and persuade. Committees can therefore greatly improve the legitimacy and effectiveness of legislative decision-making.

Congress has always relied on committees to gather information and develop legislation,¹¹⁰ but the heyday of congressional committees—and the textbook legislative process—occurred roughly from the enactment of the LRA in 1946 through the 1980s or early 90s.¹¹¹ The 1946 LRA was enacted with bipartisan support based on concerns that Congress had become too reliant on lobbyists and

Constituents also lack ways to monitor whether representatives actually advocated for their positions during legislative deliberations.

107. See, e.g., Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 87–90 (1987) (describing committees as institutions designed to promote specialization and informed policymaking).

108. See, e.g., Pamela Ban, Ju Yeon Park & Hye Young You, *How Are Politicians Informed? Witnesses and Information Provision in Congress*, 117 AM. POL. SCI. REV. 122, 124 & n.1 (2023).

109. See Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 99–100 (2015) (discussing “legislative notice-and-comment” processes used by committee staff for some legislation produced by bipartisan committees).

110. See Rachel E. Barkow, *The Wholesale Problem with Congress: The Dangerous Decline of Expertise in the Legislative Process*, 90 FORDHAM L. REV. 1029, 1035–36 (2021) (noting that “Congress used standing and investigatory committees to gather information” from early in American history and “by the mid-1800s, committees had become the default point of entry for new legislation”); CHARLIE ROSE, HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 103-324, at 144 (1994) (providing examples of the early creation of several standing committees that continue to exist today).

111. The precise dates are subject to debate in the literature, but the general arc of these developments is essentially undisputed.

agency officials and needed to develop its own internal capacity.¹¹² The 1946 LRA restructured and strengthened Congress's committee system, reducing the number of standing committees and clarifying their jurisdiction, increasing their staff, and significantly expanding the congressional bureaucracy, which provides research and drafting support.¹¹³ The 1970 LRA and related post-Watergate legislation roughly tripled this research and staff support and modified "the committee system to empower the use of expert committee staffers."¹¹⁴ It also increased the number of subcommittees, again to address concerns that Congress was outmatched by the executive branch.¹¹⁵ This was an era when, according to Lee Drutman and Steven Teles, Congress "had the time and resources to get together and think through legislation and oversee the rest of the government."¹¹⁶

The Reagan era unleashed a political and ideological attack on government: "From the 1980s to the mid-1990s, congressional capacity flatlined."¹¹⁷ In 1994, a Republican majority took control of the House for the first time in four decades to implement their "Contract with America"; this concerted effort to limit spending deemed "wasteful" involved reducing Congressional capacity, including nonpartisan staff, which Newt Gingrich characterized as "a third column of liberals pretending to be experts."¹¹⁸ Indeed, Gingrich's goal was reportedly "to ma[k]e Congress dumb on purpose."¹¹⁹ Co-occurring with increased political polarization,

112. See Barkow, *supra* note 110, at 1038–39. As Representative Everett M. Dirksen famously implored his colleagues, "Let us spend a little money on ourselves; let us provide legislative tools to get the facts, the data, the information, and then control, supervise, and survey the operations of the Government." *Id.* (citing Cross & Gluck, *supra* note 78, at 1557).

113. *Id.* at 1039.

114. Cross & Gluck, *supra* note 78, at 1558–59.

115. See Barkow, *supra* note 110, at 1039–40; Drutman & Teles, *supra* note 93; see also Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 UTAH L. REV. 703, 705–06 (describing changes to the House's operations in the 1970s).

116. Drutman & Teles, *supra* note 93. Research from the 1970s and 80s even credits Congress and individual representatives with sometimes exemplifying the Madisonian ideal. See generally RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973) (examining the work of six House committees and their Senate counterparts); STEVEN KELMAN, MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT 60–66 (James Q. Wilson ed., 1987) (arguing that the American public-policy system performs better than commonly portrayed due to the public-regarding motivations of many participants); ARTHUR MAASS, CONGRESS AND THE COMMON GOOD (1983) (analyzing Congress's policymaking role, including its use of committees, its relationship with the Executive Branch, and its orientation toward the public interest); RANDALL B. RIPLEY, CONGRESS: PROCESS AND POLICY 3–26 (1975) (describing the institutional processes and mechanisms through which Congress operates). *But cf.* Sinclair, *supra* note 115, at 704–05 (recognizing that while the 1950s Congress has been "portrayed as some sort of golden age of effective bipartisan decision making," it was in fact "a body controlled by independent and often conservative committee chairs, chosen on the basis of seniority and not accountable to anyone").

117. Drutman & Teles, *supra* note 93.

118. Barkow, *supra* note 110, at 1043–48.

119. *Id.* at 1043–44 (alteration in original) (quoting Ed O'Keefe, *When Congress Wiped an Agency Off the Map*, WASH. POST (Nov. 29, 2011), <https://www.washingtonpost.com/blogs/federal-eye/post/when-congress-wiped-an-agency-off-the->

this reduced capacity undermined the quality and influence of the committee process, as evidenced by several related developments.

First, Congress has drastically reduced the budgets, staff, and professional expertise of its committees.¹²⁰ Republicans cut the professional staff of House committees by a third in 1995 and have modified the chamber's committee structure to undermine independent research capacity by members and staff, concentrating power in the Speaker's office.¹²¹ Indeed, *leadership* staff grew exponentially in both chambers between 1979 and 2009,¹²² even as committee staff has been slashed by 50% in the House and 20% in the Senate since 1985.¹²³ Whereas committee staff tend to have specialized expertise in their subject areas, leadership staff, like members' personal staffs, tend to be generalists with less experience who share their employers' ideological outlook and focus primarily on advancing their electoral prospects or partisan goals.¹²⁴

Second, the function of many committee hearings has changed: rather than bipartisan efforts to gather reliable information and solicit a range of different views, committee hearings have increasingly become partisan tools for promoting the majority party's political agenda.¹²⁵ Partisan committee hearings present lawmakers with binary choices rather than genuine, balanced information, frequently serving as a venue for performative politics. Indeed, committee members increasingly have predetermined views and avoid open-minded engagement with the substance of policy questions; they frequently skip committee hearings entirely or show up for only a few minutes to ask a few questions or make a brief statement to preen for the cameras.¹²⁶ Similarly, the witnesses invited to testify are increasingly partisan activists; the hearings tend to present "only one side of the debate" in which "the discussion is aimed at advocacy rather than fact gathering."¹²⁷

map/2011/11/29/gIQAIt0J9N_blog.html?utm_term=.2f2e2e2716b9 [https://perma.cc/29U2-JES2]; Drutman & Teles, *supra* note 93.

120. See Barkow, *supra* note 110, at 1052.

121. *Id.*

122. *Id.* ("Between 1979 and 2009, House leadership staff grew by 253 percent, and Senate leadership staff grew by 340 percent.").

123. *Id.*; see also Drutman & Teles, *supra* note 93 (including a pretty telling graph).

124. See Barkow, *supra* note 110, at 1052. See generally Jesse M. Cross, *Legislative History in the Modern Congress*, 57 HARV. J. ON LEGIS. 91 (2020) (describing different types of legislative staffers and their portfolios and attributes).

125. Barkow, *supra* note 110, at 1048–52 ("Previously, hearings were considered methods for lawmakers to gather information, engage in debate, and help staff get up to speed on a policy issue, but now hearings are used to 'structure a binary choice and highlight the dimension most amenable to partisan advantage.'" (quoting Lewallen, Theriault & Jones, *supra* note 104, at 183)). See generally MAYA L. KORNBERG, *INSIDE CONGRESSIONAL COMMITTEES: FUNCTION AND DISFUNCTION IN THE LEGISLATIVE PROCESS* (2023) (providing a comprehensive examination of the workings of modern congressional committees).

126. Barkow, *supra* note 110, at 1049.

127. *Id.* at 1050. Committee hearings typically involve a small number of well-connected insiders as witnesses, yielding input that is systematically skewed away from those marginalized or not adequately represented by influential interest groups. See Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 814 (1990) (finding a strong

Third, the number of congressional committee hearings has dramatically declined. Congressional committees met almost three times more often in 1958 than they did in 2010.¹²⁸ Moreover, while before the 1970s nearly every piece of legislation considered on the floor was reported out of a committee, more bills now bypass committee consideration altogether as Congress increasingly uses “unorthodox” legislative procedures.¹²⁹

Bills that bypass committees typically involve significantly larger legislative packages covering a much broader range of subjects, negotiated among party leaders. That makes the legislative process essentially a black box with little meaningful legislative history for evaluating the nature, content, or quality of the underlying deliberations and scant justification for policy choices—beyond being politically acceptable deals.¹³⁰ Party leaders largely control both legislative priorities and the information members get about specific proposals.¹³¹ Leaders deploy numerous tactics to exclude rank-and-file members—even in their own party—from legislative deliberations,¹³² even keeping them in the dark about bill contents until hours before the final vote.¹³³ Other tactics are more subtle, such as drafting

correlation between campaign contributions and access to attention from congressional committees). Committee testimony tends to prioritize sympathetic and compelling stories designed to draw attention to seemingly egregious problems, rather than comprehensive data or careful analysis of the likely impact of different policy approaches. Congressional committees therefore have limited capacity to respond flexibly and incrementally to practical realities on the ground.

128. Barkow, *supra* note 110, at 1051.

129. *Id.*; see BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 88, 141 (5th ed. 2017); see also Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800 (2015) (reporting that in 2011 “fewer than 10% of enacted laws proceeded through the ‘textbook’ legislative process” while “40% of enacted statutes did not go through the committee process in *either* chamber, but proceeded directly from the floor or were shepherded though by party leadership or the White House”).

130. See SINCLAIR, *supra* note 129, at 265; GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS 1–7* (2001) (explaining that omnibus packages “typically contain a nucleus that has widespread support in Congress” and that controversial attachments can be “tucked away” in such measures because members “are seldom aware of the minutiae of omnibus packages”); Gluck, O’Connell & Po, *supra* note 129, at 1803.

131. See Jonathan S. Gould & Rory Van Loo, *Legislating for the Future*, 92 U. CHI. L. REV. 375, 388 (2025) (documenting the role of party leaders in dictating priorities and controlling the agenda in financial legislation).

132. Republican congresspersons in the 115th Congress who were in the majority in both chambers, for example, complained that party leaders “jam[med]” legislation through. Jack O’Brien, *Ron Johnson on Senate Healthcare Bill: Leadership Wants ‘to Jam this Thing Through’*, WASH. EXAM’R (June 26, 2017, at 16:27 MT), <https://www.washingtont Examiner.com/news/1367721/ron-johnson-on-senate-healthcare-bill-leadership-wants-to-jam-this-thing-through/> [<https://perma.cc/AN5V-5W8Z>]. Furthermore, those same party leaders regularly came “up with a proposal behind closed doors” only to “spring[] it on skeptical members.” *John McCain’s Speech on the Senate Floor*, CNN (July 25, 2017, at 21:06 ET), <https://www.cnn.com/2017/07/25/politics/john-mccain-speech-full-text-senate/index.html> [<https://perma.cc/6N5N-JKZX>].

133. See WENDY WAGNER & WILL WALKER, *INCOMPREHENSIBLE!* 225–28 (2019) (documenting numerous techniques like “negotiating behind closed doors while keeping the

incomprehensible legislation or combining multiple issues in a single, complex omnibus bill.¹³⁴ With these tactics, party leaders expand their own control but “undermine the quality of legislative deliberations and . . . representation” by individual members, who struggle to even know, much less deliberate about, what proposed bills say.¹³⁵ These developments sideline the publics affected by legislation, who cannot rely on ordinary legislators to even be aware of relevant views and interests, much less represent them in the legislative process.

2. *The Congressional Bureaucracy*

Aside from committees of elected members, Congress has an internal “bureaucracy”: in-house expert offices that provide data and analyses to inform legislative deliberations.¹³⁶ Congress first started setting up these bureaus in the 1920s as a way to lessen its dependence on the executive branch and private interest influence.¹³⁷ Approximately a dozen in-house organizations now provide wide-ranging advice.¹³⁸ In their detailed investigation, Jesse Cross and Abbe Gluck conclude that these expert offices “share a fierce commitment to objectivity and nonpartisanship” and high professional standards for their work—not least to ensure their survival in a polarized partisan climate.¹³⁹ Indeed, the neutrality of Congress’s expertise may not be matched anywhere else in government.

Nonetheless, several characteristics limit the congressional bureaucracy’s usefulness for mediated public engagement. First, most of the expert advice is

legislative language secret up until the very last minute, changing the legislation immediately before its consideration, and manipulating the complexity of the legislative language itself” (citing CURRY, *supra* note 103)); SINCLAIR, *supra* note 129, at 18.

134. See WAGNER & WALKER, *supra* note 133, at 226–27.

135. CURRY, *supra* note 103, at 4; see also SINCLAIR, *supra* note 129, at 265–69 (describing the increased centralization of decision-making in Congress over time); Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 958–62 (arguing that federal bills should be limited to a single, clearly expressed subject).

136. Cross & Gluck, *supra* note 78, at 1543–44.

137. *Id.* at 1555–56.

138. See *id.* at 1555–60 (describing the history of the congressional bureaucracy, which not only helps Congress check the expertise of the executive branch but also disperses power within Congress).

139. *Id.* at 1605–08, 1613–16 (discussing these qualities). Beyond their nonpartisan nature, these offices have wide variations in services and functions, size, scope, policy focus, and confidentiality. *Id.* at 1548, 1616–22; see BRUCE BIMBER, *THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT* 60–68 (1996) (discussing nonpartisanship as partly explaining the Office of Technology Assessment’s (“OTA”) success in remaining above the political fray until its demise); see also Lawrence McCray, *Doing Believable Knowledge Assessment for Policymaking: How Six Prominent Organizations Go About It* 4–10 (Feb. 11, 2004) (unpublished manuscript), <https://www.files.ethz.ch/isn/19524/McCray-DoingBelievableKnowledgeAssessment.pdf> [<https://perma.cc/L9TK-EEWW>] (exploring how “high end” independent scientific organizations maintain credibility on contested regulatory science issues by instituting very high standards).

provided only at the behest of Congress;¹⁴⁰ if a member doesn't ask for analysis, Congress will not receive this independent, expert information.¹⁴¹ Moreover, this solicitation is sometimes channeled through party leaders.¹⁴² Thus, even if the ultimate advice is nonpartisan, the choice of *whether* legislative deliberations should be informed by expert analyses often rests on party politics. More harmfully, Congress has at times curtailed or even terminated the offices it has created. During the mid-1990s, Republican leaders cut professional staff budgets by a third and dropped staffing in important organizations like the Congressional Research Service ("CRS"), the Congressional Budget Office ("CBO"), and the Government Accountability Office ("GAO") by 40%.¹⁴³ Congress even eliminated the Office of Technology Assessment ("OTA") entirely;¹⁴⁴ to this day, Congress has no expert advisory body to provide scientific advice.¹⁴⁵ The expert agencies serving Congress remain significantly less well staffed and funded than they were before 1994.¹⁴⁶

Second, much expert advice remains confidential: "Congress has written specific confidentiality obligations into the organic statutes of CRS, House Legislative Counsel, and the CBO," report Cross and Gluck, and "private consultations with all of the nonpartisan offices that we studied are totally confidential—a practice that, for many offices, extends even to when members commission reports."¹⁴⁷ Such confidentiality allows members to frame queries and requests in ways that bias the ensuing research, while obscuring the conditions under which expert advice is obtained.

Additionally, this expert advice is "not binding" on Congress¹⁴⁸: members need neither solicit it nor use it, even when considering complex policies that would seem to require expertise. Instead, Congress can decide on facts in ways that can be quite nontransparent and arbitrary; if Congress wishes to change the formula for pi or to alter the calculation of the speed of gravity, there is no stopping it.¹⁴⁹

140. See Cross & Gluck, *supra* note 78, at 1606. Only rarely, as with the CBO's statutorily required cost estimates, is expert advice offered independent of congressional requests. *Id.* at 1628–30.

141. On the plus side, once an inquiry is triggered it appears that the expert organizations are usually equally available to both parties. See, e.g., *id.* at 1606–08 (giving examples from GAO and CRS); *id.* at 1621–24 (giving examples from OLC and Legislative Counsel).

142. See Barkow, *supra* note 110, at 1031. But see Cross & Gluck, *supra* note 78, at 1612 ("CRS has the obligation to answer every call with equal attention.").

143. See Barkow, *supra* note 110, at 1044.

144. *Id.*

145. See *id.* at 1045.

146. *Id.* at 1052–53; see also *id.* at 1047–48 (describing some Democratic attacks on expert offices).

147. Cross & Gluck, *supra* note 78, at 1625–28. "Even when official public input is ultimately the goal, members and staff frequently first consult informally—and confidentially—with all parts of the congressional bureaucracy." *Id.* at 1626

148. *Id.* at 1606.

149. Cf. Kiona N. Smith, *Indiana's State Legislature Once Tried to Legislate the Value of Pi*, FORBES (Feb. 5, 2018, at 02:09 ET), <https://www.forbes.com/sites/kionasmith/2018/02/05/indianas-state-legislature-once-tried-to-legislate-the-value-of-pi/> [https://

Notwithstanding its excellent work, the congressional bureaucracy cannot ensure that Congress considers all relevant information and views or provides reasoned justifications for its policy decisions. Congress's expert bureaucracy can thus play only a limited role—a role that has become only more limited over time. That makes room for other, less neutral players: “as the congressional sources of expert judgment diminish, the power of . . . interest groups increases.”¹⁵⁰ The congressional bureaucracy provides one important channel for mediated public engagement, but Congress has kept that channel narrow.

3. *Collaboration with Agency Officials*

A final mechanism for mediated public engagement involves collaborating with agency officials who themselves regularly interact with affected stakeholders.¹⁵¹ Agency officials can let Congress know about relevant information and views, improving the democratic legitimacy and effectiveness of legislation. Yet this approach has shortcomings and pitfalls of its own.

Agency officials participate in the legislative process in two primary ways. First, in an apparently long-standing practice,¹⁵² members of Congress routinely ask agency personnel to draft proposed legislation,¹⁵³ taking substantive policy positions.¹⁵⁴ Second, agency officials often provide “technical” assistance on statutory drafting, reviewing and revising proposed legislation.¹⁵⁵ Such “agency review involves substantial negotiation with Congress and frequently results in

perma.cc/K9DH-BC3P] (reporting how Indiana’s state representatives in 1897 voted to change the legal value of pi to 3.2 through the “blunt force of legislative fiat”).

150. Barkow, *supra* note 110, at 1053.

151. *See infra* Part III.

152. *See* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 *YALE L.J.* 266, 282, 339–40 (2013) (documenting the prevalence of this practice during the New Deal era); Sitaraman, *supra* note 109, at 104.

153. *See* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 *GEO. WASH. L. REV.* 451, 455, 467–76 (2017); Sitaraman, *supra* note 109, at 103–05; Christopher J. Walker, *Legislating in the Shadows*, 165 *U. PA. L. REV.* 1377, 1382–84 (2017) [hereinafter Walker, *Legislating in the Shadows*]. The White House’s Office of Management and Budget (“OMB”) must clear proposed legislation that originates in executive agencies for compatibility with presidential priorities, but agencies are the driving force behind many of these proposals. *See* CHRISTOPHER J. WALKER, *FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING* 6–9 (2015) [hereinafter WALKER, *FEDERAL AGENCIES*]. Agencies typically have designated offices of legislative affairs and legislative counsel to communicate their policy positions and coordinate with Congress to draft proposed legislation, respectively. *See* Shobe, *supra*, at 464–66; Walker, *Legislating in the Shadows*, *supra*, at 1394; *see also* WALKER, *FEDERAL AGENCIES*, *supra*, at 37–38 (discussing the importance of maintaining distinct roles and strong working relationships among these officials).

154. *See* WALKER, *FEDERAL AGENCIES*, *supra* note 153, at 6–9 (reporting to the Administrative Conference of the United States).

155. *See* Sitaraman, *supra* note 109, at 107–09; Shobe, *supra* note 153, at 476–85; WALKER, *FEDERAL AGENCIES*, *supra* note 153, at 12–35; Walker, *Legislating in the Shadows*, *supra* note 153, at 1387–96.

extensive changes to statutory language.”¹⁵⁶ Recent empirical work also makes clear that agencies are consulted on nearly all proposed legislation that directly affects them, especially if it stands a realistic chance of enactment.¹⁵⁷

It is widely believed that Congress cannot craft legislation “that is both detailed and effective without significant agency input.”¹⁵⁸ This symbiotic relationship is not terribly surprising. Since agencies have far greater subject-matter expertise than congressional staff, agency officials can help Congress avoid pitfalls.¹⁵⁹ For instance, members of Congress commonly propose legislation giving agencies authority they already have or solving problems that don’t exist.¹⁶⁰ Using their subject-matter expertise and practical experience, agencies can also advise Congress on how proposed legislation can better accomplish Congress’s objectives.¹⁶¹ Agencies’ regular engagement with a wide variety of stakeholders informs their perspectives on both the workability and the consequences of statutory programs.¹⁶² Such collaboration also allows agency officials to alert legislators to judicial decisions that disrupt or undermine statutory implementation, making agencies a conduit for dialogue between the federal courts and elected officials.¹⁶³ Collaborating with Congress allows agencies to share this information during the drafting process, which can improve the legitimacy and effectiveness of legislation.

However, this form of mediated public engagement also has significant limitations. Congress is not required to collaborate with agency officials, nor need it consider or respond in a reasoned fashion to their input. Agencies’ substantive positions are channeled through the Office of Management and Budget (“OMB”) and not subject to transparency requirements.¹⁶⁴ So although, as we discuss further below, agencies have historically had superior capacity for public engagement, there is no way to ensure that communications between agencies and Congress reflect it.

156. Shobe, *supra* note 153, at 455.

157. *See id.* at 482–83; WALKER, FEDERAL AGENCIES, *supra* note 153, at 13–16; Walker, *Legislating in the Shadows*, *supra* note 153, at 1389–90.

158. Shobe, *supra* note 153, at 496–97.

159. *See* Sitaraman, *supra* note 109, at 104; Shobe, *supra* note 153, at 497–504; WALKER, FEDERAL AGENCIES, *supra* note 153, at 21; Walker, *Legislating in the Shadows*, *supra* note 153, at 1394.

160. *See* Shobe, *supra* note 153, at 498.

161. *See id.* at 477 (“[Agency officials] try to figure out what Congress thinks [the legislation] does and then redraft it for them in a way that actually does what they think it does.”).

162. *See infra* Part III; *cf.* Wagner et al., *supra* note 43, at 185–87 (describing various executive and congressional mandates for agencies to reexamine existing regulations, review their workability, and make revisions where necessary).

163. *See* Shobe, *supra* note 153, at 516–18.

164. Indeed, Congress may not seek—and agencies may be reluctant to provide—technical legislative assistance if it must be placed on the record. *See* Walker, *Legislating in the Shadows*, *supra* note 153, at 1425–30 (arguing that the costs of increased transparency and OMB review of agencies’ technical legislative assistance would outweigh the benefits partly for this reason).

D. Conclusion: Congress's Constrained Engagement with its Publics

The foregoing discussion paints a bleak picture of Congress's ability to gather inclusive public input and produce responsive outcomes. The scope and complexity of modern legislation require thorough information for deliberation. Yet our audit shows that Congress's processes regularly fall well short of ensuring that members receive or consider all relevant information and views or provide reasoned justifications for their decisions. This does not mean that all congressional processes fail with regard to meaningful public engagement, but some—and perhaps many—are afflicted with significant shortcomings.

At the input stage, Congress not only has difficulty accessing relevant information in many settings but is sometimes incentivized to remain ignorant. The legislative process provides outside publics no right to engage, much less have their views considered. In practice, this means that those who offer the most assistance in reelection tend to have the greatest influence over members' legislative decisions. Soliciting broader input may only get in the way of this mutually beneficial arrangement.¹⁶⁵

Rather than correct members' perverse incentives, many of Congress's existing methods tend only to exacerbate them.¹⁶⁶ The lack of a meaningful substitute for petitioning deprives affected publics of opportunities to give Congress relevant input, while widespread lobbying lends legislators' ears to the powerful, and constituent services have little impact on legislative decisions. Congress's mediated public engagement is not much better. Purposely reduced committee budgets and staffing have impaired Congress's capacity to gather and process relevant information.¹⁶⁷ And with power centralized in party leaders, Congress's bureaucracy and committees are increasingly controlled by only a few elite members, leaving others with insufficient information for deliberation.¹⁶⁸ “By restricting information and accelerating the legislative process, leaders are minimizing the voices and influence on policymaking of representatives, interests, and ultimately constituents. The process becomes decisively top-down, driven by the goals and interests of those in leadership posts.”¹⁶⁹

Just as Congress has hobbled its already limited ability to collect public input, so has it failed to secure the integrity of its communications with the public:

165. See generally Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 278–79 (1991) (describing the impoverished policy analysis in a case study of the Truth in Lending Act).

166. See generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (modeling how “repeat players” with sufficient resources and long-term interests can shape legal development).

167. See *supra* notes 118–21 and accompanying text.

168. See *supra* notes 121–23, 132–34, 143 and accompanying text; see, e.g., PETERSON, REYNOLDS & WILHELM, *supra* note 104, at 9, 14. Rank-and-file members generally also lack the incentive to question party leaders. In the current partisan Congress, party loyalty is essential to a member's survival. See, e.g., Davis Brady & Morris Fiorina, *Congress in the Era of the Permanent Campaign*, in *THE PERMANENT CAMPAIGN AND ITS FUTURE* 134, 149–150 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

169. CURRY, *supra* note 103, at 139.

with minimal record-keeping requirements or transparency mandates, Congress need not reveal its deliberations or justify their outcomes, much less respond to the concerns of those affected.¹⁷⁰ We often cannot know whether anyone considered the relevant views, solicited the needed expertise, exercised reasoned judgment, or carefully considered and debated (or even read) the draft legislation before voting.¹⁷¹ Nor can we know who wrote a law or how.¹⁷² Congress and its members get to decide whether and when to share information with the public, and they share what they want to. That leaves almost no paper trail to assess their performance. Even members who want to fulfill their obligations in Madisonian style can find themselves blocked by the modern Congress's unorthodox processes and centralized power structure.¹⁷³

In sum, despite widespread assumptions, Congress's public engagement appears more theoretical than real. Not only is Congress's capacity to convene the public severely limited, but its incentives are often skewed in the opposite direction. The best hopes for improvement would be reinvigorating a strong committee system, beefing up the congressional bureaucracy, and deepening collaboration with agencies. But even such salutary changes would likely have a limited impact. With no requirements for inclusive input or responsive justifications, Congress engages with the public at its discretion. And in the end, members of Congress depend on elections to stay in power. This leaves them with few incentives to listen, much less respond to, the interests and views of the powerless. Contemporary society's increasingly complex and dynamic policymaking landscape can only exacerbate these limitations.

170. Congress does provide some public information but not enough to allow outsiders to understand much about the underlying considerations that drive its decisions. For example, the Congressional Record documents floor debates, notices of committee action, and statements submitted by members, but much of this can be produced in a post-hoc way that is largely performative and omits recognition of difficult issues or gaps in the analysis. *See, e.g.,* Richard J. McKinney, *An Overview of the Congressional Record and Its Predecessor Publications: A Research Guide*, L. LIBRS.' SOC'Y OF WASH., DC (May 2020), <https://www.llsdc.org/congressional-record-overview> [<https://perma.cc/5E2V-K5BE>] (describing the contents of the Congressional Record). Committees also provide transparency on bills as they move through the committee process, but even these materials provide only partial records of debates and information sources collated by the committee. *See, e.g., In Committee: Consideration by Committee*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process/in-committee> [<https://perma.cc/EU7B-GDL6>] (last visited Mar. 1, 2026) (describing the contents of committee reports that include "the purpose and scope of the measure and the reasons for recommended approval").

171. *See generally* Linde, *supra* note 63, at 226 ("A bill need not declare any purpose nor recite any legislative findings. It may be enacted by members whose minds are wholly closed to reasoned argument because of prior commitment to one point of view, ignorance and misinformation, lack of interest and lack of time, or simply because of absence of any opportunity for inquiry and debate.").

172. *See, e.g.,* Lauren Richter, Alissa Cordner & Phil Brown, *Producing Ignorance Through Regulatory Structure: The Case of Per- and Polyfluoroalkyl Substances (PFAS)*, 64 SOCIO. PERSPS. 631, 638–39 (2020) (describing how industry negotiated a chemical regulation law with congressional drafters behind closed doors, as revealed more than three decades later by one of the congressional staff in a Science History Institute oral history).

173. *See* CURRY, *supra* note 103, at 2.

III. PUBLIC ENGAGEMENT WITH AGENCIES

The preceding Part describes a Congress whose ability to engage in a meaningful way with the publics it governs is severely limited. This limitation stems in part from the underlying structure of legislative action, in which generalist legislators, focused on the interests of particular constituencies, enact complex laws on specialized topics affecting everyone. And it is exacerbated by recent political choices, like centralizing legislative power and defunding the congressional bureaucracy, that undermine legislators' information-gathering and deliberative abilities.

Recognizing its own limitations, Congress began more than a century ago to outsource public engagement to others—in particular, to administrative agencies. Congress acknowledged and ameliorated its public-engagement deficits through delegations that provided interested stakeholders with multiple avenues to petition, track, review, and potentially veto—under court order—significant agency decisions. Best known is the APA's mandate for public engagement in agency rulemaking,¹⁷⁴ but the APA is only one example. Agency responsibilities for convening the public, memorialized in various legislative directives, run the gamut from education and outreach to providing the public an opportunity to collaborate in proposal drafting, and the Executive has added its own requirements as well.

Indeed, in the three decades following the APA's passage, Congress's design for public engagement generated what scholars would later characterize as a "participation revolution" marked by unprecedented citizen involvement in regulatory proceedings.¹⁷⁵ In 1972, EPA Administrator William Ruckelshaus observed how "an aroused public" was "demanding governmental action and . . . participating in regulatory proceedings at local, state and federal levels."¹⁷⁶ Several book-length studies of interest-group politics from the 1970s documented the significant levels of engagement of diverse citizens and public-interest groups seeking "collective material benefits" for the general public.¹⁷⁷ Litigation during the early years of environmental legislation similarly reflected relatively balanced engagement between public-interest groups and industry.¹⁷⁸ Even Richard Stewart's

174. See 5 U.S.C. § 553(c).

175. See Loomis & Cigler, *supra* note 20, at 10–11.

176. William D. Ruckelshaus, *The Citizen and the Environmental Regulatory Process*, 47 *IND. L.J.* 636, 636 (1972).

177. Loomis & Cigler, *supra* note 20, at 11; see also CHRISTOPHER J. BOSSO, *PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE* 245 (1987) (noting that in pesticide policy "[b]y the mid-1980s . . . we find a diversity in representation that, on the surface at least, gives pluralists some vindication"); James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 385 (James Q. Wilson ed., 1980) ("EPA has had to deal with as many complaints and lawsuits from environmentalists as from industry, despite the economic and political advantages industry presumably enjoys.").

178. For example, Dr. Wenner's research on interest group use of the courts to challenge agency rules revealed that environmental groups initiated the greatest number of cases in the federal courts of appeals during the early 1970s. See LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* 41 tbl. 7, 43 fig. 1 (1982); Lettie McSpadden Wenner, *Interest Group Litigation and Environmental Policy*, 11 *POL'Y STUD. J.* 671, 673–74 (1983). By the late 1970s, however, business interests had caught up, eventually exceeding the

widely influential critique of the administrative state expressed concern not about too little public participation, but of the potential complications posed by too much.¹⁷⁹ Anxieties about participatory processes during this era centered on the fear that agencies would not be able to keep up with the volume of public input they were receiving.

However, not everyone welcomed robust public engagement in the administrative state. Industry, in particular, often found itself on the defensive—losing major cases that led to bans on profitable pesticides, experiencing costly restrictions on pollution discharges, and confronting the looming threat of more regulatory burdens.¹⁸⁰ Heightened public participation also imposed significant administrative costs on agencies—increasing their workloads—and strained the judicial system.¹⁸¹ Meanwhile, public attitudes towards the administrative process began to grow more ambivalent about the benefits of regulation and more skeptical of agencies' integrity.¹⁸²

These overlapping forces—though often operating unevenly and episodically—appear over time to have made the more balanced deliberative processes that characterized agency decision-making in the 1960s and 1970s increasingly inaccessible to credible publics.¹⁸³ In what follows, we first revisit the meaningful participatory processes designed into administrative law and practice, many of which flourished during this earlier period of robust public engagement. We then trace how meaningful public participation in contemporary administrative processes was marginalized over time. Although public participation is the APA's "one-trick pony,"¹⁸⁴ credible publics—broadly defined as representative groups of interested or affected stakeholders—are too often absent from much of agencies'

volume of environmental appeals. *See* WENNER, *supra*, at 43 fig. 1. Notably, in terms of success rates on appeal, the two groups remained relatively evenly matched. *Id.* at 61 tbl. 10.

179. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1778–79 (1975) (expressing concern about how excessive participation might make it difficult for court rulings to follow "regular ordering," making it difficult for courts to develop coherent criteria for resolution).

180. *See generally* THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* (2013) (describing industry opposition/backlash to the modern regulatory state across environmental/health domains, including the legal and political strategies used to resist restrictions on profitable products and practices).

181. *See, e.g.*, Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1323–24, 1372–1403 (2010) (explaining how expanded participation and judicial review generate excessive information, increase agency processing burdens, and strain both administrative and judicial oversight).

182. President Reagan's famous quote during his 1981 inaugural address that "government is not the solution to our problem; government is the problem" epitomized (and stoked) some of the public sentiment growing during this time. *See* President Ronald Reagan, Inaugural Address 1981 (Jan. 20, 1981).

183. *See* Menezes & Pozen, *supra* note 44, at 976; WAGNER & WALKER, *supra* note 133, at 158–203 (discussing the high costs and related barriers to participating in rulemakings, many of which increased over time); *supra* notes 44–47 and accompanying text.

184. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORN. L. REV. 95, 101 (2003).

work today, at least in regulatory programs meant to protect the public from undue industrial domination.

A. Engagement Capacities, Practices, Rules, and Incentives

As a structural matter, the APA offers great promise for meaningful public participation in the policies agencies make to implement legislation. Beyond basic notice-and-comment requirements, agencies—unlike Congress or the Chief Executive—are subjected to heightened transparency regarding virtually all phases of their work so that the public can access key information.¹⁸⁵ Agencies are also required, under threat of judicial enforcement, to respond to public petitions¹⁸⁶ and must invite the public to review their rules.¹⁸⁷ Numerous program-specific mandates embellish on these deliberative responsibilities, such as requiring agencies to consult with affected publics or particular groups.¹⁸⁸

As mentioned above, mid-twentieth-century legislation moved the petitioning process from Congress over to agencies.¹⁸⁹ The APA provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”¹⁹⁰ The agency is not required to grant a petitioner’s request, but it does need to engage with the petition, if only to explain why it will not pursue the requested action.¹⁹¹ Refusing to respond to a petition at all is considered a “final agency action . . . subject to judicial review” as “agency action unlawfully withheld or unreasonably delayed.”¹⁹² Thus, the right to petition an agency, and the availability of judicial review for an agency’s failure to engage, is secured by statute, not subject to change by presidential order. Petitioning offers one way for private parties to get an agency’s ear without relying on personal connections, financial contributions, or a lobbying outfit. While agencies vary in how they engage with petitions, they share a structural capacity and a legal mandate

185. The Freedom of Information Act, 5 U.S.C. § 552 (2016), for example, shines a light on agency records but does not apply to Congress or internal executive deliberations that meet exceptions such as the “deliberative process privilege.”

186. *Id.* § 553(e).

187. *Id.* § 553(c).

188. See Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 34–41 (2022).

189. McKinley, *supra* note 75, at 1603; see also Daniel Carpenter, *On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 349, 349 (Nicholas R. Parillo ed., 2017); 92 CONG. REC. 5651 (1946) (statement of Rep. Francis Walter), reprinted in SENATE, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at 359 (1946) (“Every agency possessing rule-making authority will be required to set up procedures for the receipt, consideration, and disposition of these petitions. The right of petition is written into the Constitution itself. This subsection confirms that right where Congress has delegated legislative powers to administrative agencies.”).

190. 5 U.S.C. § 553(e).

191. See *Massachusetts v. EPA*, 549 U.S. 497, 511–13 (2007).

192. 5 U.S.C. §§ 704, 706(1).

for doing so.¹⁹³ This differentiates them from Congress, whose responses to petitions are neither legally mandated nor judicially reviewable.¹⁹⁴

The notice-and-comment process, the standard means for promulgating an agency regulation, mandates engagement from the other direction.¹⁹⁵ Agencies wishing to regulate must generally publish their proposed regulatory language in the Federal Register and leave time for anyone who wants to comment on the proposal to do so.¹⁹⁶ People outside the agency thus get an opportunity to participate in governance by presenting information, views, interests, and experiences. While the agency is statutorily required to respond with only a “concise general statement of [the] basis and purpose” of the regulation it ultimately settles on,¹⁹⁷ intervening case law has imposed a much greater duty. Agencies are now required not just to gather but to incorporate and respond substantively to public comments, explaining how a final rule incorporates (or why it rejects) them.¹⁹⁸ Agencies undertaking notice-and-comment rulemaking thus not only have to solicit public input, but must articulate how they took it into account.¹⁹⁹

Notice-and-comment rulemaking again contrasts with congressional public engagement. Congressional bills, like notices of proposed rulemaking, are made public—eventually, anyway, since there are few constraints on the timing of

193. Sant’Ambrogio & Staszewski, *supra* note 38, at 801 (finding that agencies’ “existing efforts” with respect to rulemaking petitions, among other things, “tend to be relatively unstructured, unsystematic, and ad hoc”).

194. *See supra* Subsection II.B.1.

195. 5 U.S.C. § 553.

196. *Id.*

197. *Id.*

198. *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (requiring agencies to provide all evidence for a rule); Nat’l Tire Dealers & Retreaders Ass’n, Inc. v. Brinegar, 491 F.2d 31, 40 (D.C. Cir. 1974) (requiring agencies to respond to comments).

199. *See* Bernstein & Rodríguez, *supra* note 42, at 962 n.190 (quoting an agency official as explaining, “[W]e had spreadsheets basically where we categorized the comments by issue, [with] keywords about which stakeholders it was, which provisions of the rule they addressed, which issue they were responding to, [and at] twice-weekly meetings . . . [staff would share] a synopsis of the comments . . . , and they proposed recommendation[s] for my review.” (alterations in original)); *see also id.* (quoting an agency official as saying, “We got a huge number of comments in that rulemaking, and I think I read every one.”). Comment-assessment systems like this likely limit the impact of mass-produced comments, since agencies respond to the comments’ contents, not their quantity. *See* Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1363 (2011) (“Agencies have frequently treated . . . multiple postings briefly and with little real engagement.”); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 959 (2006) (“According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule, less than 1 percent of these comments reportedly had anything original to say.”).

publication.²⁰⁰ But Congress has no process for gathering public input on the bill.²⁰¹ And not only is it not expected to respond to public views, it lacks a means to collate and consider them. One might argue that Congress has no need to collect public input: being elected, the argument goes, is input enough. Yet elections “pose periodic yes-or-no, all-or-nothing choices.”²⁰² They do not reveal constituents’ views about any of the various matters that might come before an elected official during their time in office. And elections certainly can’t alert elected officials to the ways that a given legislative proposal would affect constituents’ interests. So although elections instantiate one kind of engagement with the public, they neither require nor entail public engagement on policy questions. And Congress lacks other means of providing “formal, public, and nonarbitrary access to the lawmaking process without regard to the political power of the petitioner,”²⁰³ as opposed to access through campaign donations, lobbying, and the like.

As Brian Feinstein has recently demonstrated, agencies are also subject to a host of engagement requirements, including “representational mandates and consultative requirements” that explicitly bring into the decision-making process relevant groups that are otherwise easily left out.²⁰⁴ For instance, “throughout the administrative state,” statutes mandate that “specific economic sectors or other groups be represented” in agency decisions and on agency boards, while other statutes impose “requirements pertaining to appointees’ ethnicity, gender, or geography,” require “that boards be ‘fairly balanced’” among different interests, or prohibit the appointment of “individuals from certain backgrounds.”²⁰⁵ Congress has also created a slew of “offices tasked with representing ‘the public interest,’” such as “ombudsmen, public advocates,” and similar positions.²⁰⁶

Beyond directly regulating participants, a number of statutes require agencies “to convene and respond to government-supported advisory committees”

200. See, e.g., Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 135–36 (2011) (describing a situation in which “even by the time the vote” on a congressional bill took place, “there was no complete copy of the . . . bill in existence anywhere”).

201. Bipartisan committees occasionally seek public comment on proposed legislation, see *supra* note 109 and accompanying text, but this is decidedly the exception within Congress, whereas it is literally the rule for agencies.

202. Bernstein & Rodríguez, *supra* note 29, at 1615–16. Indeed, elections have a tenuous connection even to majority preferences. See, e.g., David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 123 (2000) (“Even if voters do choose politicians who share their personal values, politicians’ policy choices are not always driven by those personal values. Rather, the relative immediacy and complexity of the electoral connection for politicians offers a great deal of opportunity for values that differ from those of the median voter to influence the policy choices of elected politicians.”); *id.* at 124 (noting that politicians may cater to “particular constituencies,” play off the high or low salience of particular issues to particular groups, and generally let “self-interest [and] the desire for re-election . . . contaminate the policy choice”); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2134 (2005).

203. McKinley, *supra* note 75, at 1550.

204. Feinstein, *supra* note 188, at 20.

205. *Id.* at 21–22.

206. *Id.* at 28.

and “to consider the views of specific outside groups.”²⁰⁷ Agencies are, for instance, generally required by statute to “take affirmative steps to solicit comments from small businesses on proposed rules” that might affect them,²⁰⁸ while some are additionally “required to meet with small-business panels to hear their recommendations prior to issuing a proposed rule.”²⁰⁹ Statutes thus require agencies to engage both with the public at large and with particular slices of the populace affected by their regulations or historically left out of policy decision-making. These kinds of requirements could somewhat alleviate the problems of uninvolved or dispersed publics that plague self-selective public-engagement efforts in general.²¹⁰

In addition, as a result of the incentives created by these participatory requirements, agencies also engage in a kind of mediated public engagement as they endeavor to assess and limit litigation risks.²¹¹ Evaluating how likely it is that a rule will be successfully challenged in litigation pushes agencies to consider the attitudes some parties will have toward the rule and the effects the rule will likely have on people in a position to sue.²¹² Recent Supreme Court jurisprudence also implies a new requirement for agencies to consider how a rule will fare in the face of partial vacatur, effectively tasking agencies with treating possible future court decisions as yet another kind of public input.²¹³ Thus, although no statute mandates that an agency consider litigation risk or try to avert litigation, the costs of litigation, the difficulties caused by a loss at court, and Supreme Court nudging all incentivize it

207. *Id.* at 34. For example, “[o]f the nineteen committees that counsel agencies on financial regulatory matters, eight have charters that require their memberships to be drawn from groups that are conventionally perceived as underrepresented.” *Id.* at 35.

208. *Id.* at 37 (citing the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601–12)).

209. *Id.* at 38 (discussing the Consumer Financial Protection Bureau, Environmental Protection Agency, and Occupational Safety and Health Administration).

210. *See* Menezes & Pozen, *supra* note 44, at 984–87.

211. *See, e.g.*, Bernstein & Rodríguez, *supra* note 42, at 981.

212. *Id.* Nicholas Bagley has argued persuasively that much of the basis for litigation about agency action has bought into a “procedure fetish” that stymies agencies’ implementation of Congress’s statutes without a corresponding improvement in public responsiveness or legitimacy. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 354 (2019) (“Rules about standing were relaxed. Statutes precluding judicial review were read into oblivion. Guidance documents were . . . invalidated for failing to pass through notice and comment. . . . [T]he Supreme Court brushed aside finality and ripeness concerns to endorse preenforcement review of agency rules.” (citations omitted)); *see also* ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 182 (2001) (“American . . . processes for making regulatory policy . . . are more legalistic and more adversarial [than those of similar countries]. Adversarial legalism . . . makes American regulation more costly, more inefficient, and more inflexible.”). And indeed, in practice as discussed in Section III.B, this kind of mediated engagement often does involve a fairly narrow slice of the population: given who can bring suit and how much it costs, it privileges regulated industries and similarly situated well-resourced parties.

213. *See* *Ohio v. EPA*, 603 U.S. 279, 298 (2024).

to do so.²¹⁴ Despite all its failings, litigation remains a form of mediated engagement with at least some publics: those that have standing and can afford to sue.²¹⁵

In another form of mediated engagement, agencies regularly get input from other agencies as well as from state, local, and Tribal governments.²¹⁶ Before a significant rule proposal hits the Federal Register, it is sent out for comment across the executive branch before being funneled through the bottleneck of the Office of Information and Regulatory Affairs (“OIRA”).²¹⁷ Among other things, this interagency review process helps bring to an agency’s attention the ways its proposed rule would affect things that fall under the purview of other agencies.²¹⁸ Conflicts and negotiations are common at this stage, during which agencies have to find ways to accommodate, and sometimes prioritize, among differing missions and regulatory structures grounded in different statutes.²¹⁹ This all happens before the Notice of Proposed Rulemaking (“NPRM”) requesting public comment can be published in the Federal Register.²²⁰ And—after the NPRM soliciting commentary, after the agency works out its responses to public input, after revisions to the original proposal—the draft final rule then travels through that interagency review process once more, again taking input from other agencies and the Executive Office of the President (“EOP”).²²¹ As agencies weigh in on a given proposal, they bring to bear their expertise in the views and interests of various publics they affect and the likely effects of a given regulation on real-world situations under their purview. In this way, while the interagency review process stays within the confines of the executive branch, it also instantiates a mediated engagement with affected publics and the regulated world.

This interagency review process is largely mandated by executive orders, not statutes or caselaw.²²² It is thus subject to change with an incoming

214. See Bernstein & Rodríguez, *supra* note 42, at 974–75.

215. See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1336, 1339 (2014) (arguing against pre-enforcement judicial review).

216. See ADMIN. CONF. OF THE U.S., RECOMMENDATION 2025-2, CONSULTATION WITH STATE, LOCAL, AND TRIBAL GOVERNMENTS IN REGULATORY POLICYMAKING 1 (2025).

217. See Exec. Order No. 12,866, 58 Fed. Reg. 51735, 51738–39 (Sep. 30, 1993). See generally Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1767–70 (2013) (discussing history of OIRA review); Bernstein & Rodríguez, *supra* note 42 (describing the interagency review process from the standpoint of agency personnel).

218. See, e.g., Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1874 (2013) (underscoring key role of OIRA in coordinating agencies under President’s executive power).

219. See generally *id.* (arguing that OIRA convenes agencies to make decisions through negotiation); Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV’T L. REV. 325 (2014) (discussing internal negotiations and stakeholder favoritism that can emerge during regulatory review).

220. See sources cited *supra* notes 216–18.

221. Exec. Order No. 12,866, 58 Fed. Reg. at 51739–40, § 6(a)(3)(A), 6(b)(1) (requiring agencies to submit draft regulatory actions, including draft proposed and draft final rules, to OIRA for review prior to Federal Register publication and prior to taking effect).

222. See *id.*

administration. At the same time, some version of interagency review has been standard for decades, developing patterns that may be resistant to quick alteration.²²³ Still an administration entering this system can fairly easily exert power over the process without fundamentally changing it by instructing or encouraging OMB to prioritize or obstruct certain rules, and by ensuring that OMB sides with some agencies over others in conflict areas.²²⁴

Agencies have also employed a variety of ways of engaging with the public outside of statutory mandates or judicial requirements. For instance, although no law requires it, many agencies have developed a range of means to involve affected publics in developing their rules and even their agendas, where agencies “decide which issues or problems they will and will not address.”²²⁵ Agencies have piggybacked on existing regulatory processes to stimulate public commentary, using the notice-and-comment process to float ancillary “trial balloons,” issuing advance notices of proposed rulemaking to gauge public reaction to policy ideas,²²⁶ and engaging in negotiated rulemaking as provided for in various statutes.²²⁷

But agencies have also used a host of other approaches, of greater and lesser formality, to get public input into regulatory plans, such as “federal advisory committees, focus groups, requests for information, listening sessions and other public hearings, hotlines or suggestion boxes, public complaints, [and] various forms of web-based outreach.”²²⁸ Such differentiated approaches give agencies the means to find and interact with “traditionally absent stakeholders”—people not engaged in ongoing interaction with an agency, and not in a position to monitor the Federal Register for signs of agency movement.²²⁹

223. See Exec. Order No. 12,291, 3 C.F.R. 127, §§ 2–3 (1981) (requiring covered agencies to submit draft proposed and draft final rules to OMB for review).

224. This power is based on the historical transfiguration of presidential authority that started in the Reagan years, which, though it “sparked fierce resistance” from Congress, has been largely naturalized. See Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2159 (2024) (“Congressional Democrats responded aggressively to what they viewed as an unconstitutional power grab and bid to neuter regulatory statutes.”).

225. Sant’Ambrogio & Staszewski, *supra* note 38, at 798; see also MICHAEL SANT’AMBROGIO & GLEN STASZEWSKI, PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 7 (Nov. 19, 2018), <https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf> [<https://perma.cc/LY4A-ZJBN>] (report to the Administrative Conference of the United States); Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 114–15 (2016) (discussing ways that public engagement in agency agenda-setting might enhance administrative decision-making); William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC’Y 576, 583–84 (2009) (arguing that agenda-setting is a crucial, but neglected, phase of regulation).

226. Bernstein & Rodríguez, *supra* note 42, at 962; Sant’Ambrogio & Staszewski, *supra* note 38, at 801.

227. Sant’Ambrogio & Staszewski, *supra* note 38, at 801.

228. *Id.*

229. *Id.* at 805–06.

Members of Congress vote on legislation that affects the entire nation but tend to focus on the preferences of geographically bounded constituents, financially implicated donors and lobbyists, or the larger party apparatus; in contrast, agencies often actively seek input from across the population affected by their regulations.²³⁰ Agency staffing practices can also support public engagement: agency decision-making throws subject-matter experts in with those whose focus lies on law, policy, economics, and related issues, and supports (or requires) collaboration between long-term civil servants and short-term political appointees.²³¹

These factors also give agencies grounding to explain their decisions in ways responsive to public input, showing participants why participation can be worthwhile. But since they tend to be ad hoc and informal, the impact of these more voluntary efforts at convening the public has been somewhat limited and not predictable.²³² And because they tend to be voluntary, they ultimately rest in the hands of political appointees and the presidential administrations that appoint them. Still, research suggests that agencies have often used at least some of these approaches to engage with the publics they affect.²³³

Some Presidents have even encouraged more vigorous agency engagement with the public, with a number of executive orders nudging agencies to consult with affected stakeholders.²³⁴ The Biden Administration, in particular, made public engagement an explicit focus. A 2023 Executive Order told agencies to “clarify” and strengthen their petition regimes and “to proactively engage interested or affected parties” to “inform the development of regulatory agendas and plans,” with the aim of designing “[o]pportunities for public participation” that “promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities.”²³⁵ OMB and OIRA expanded on and specified these instructions, requiring agencies to articulate plans to improve their public-engagement practices.²³⁶ These memos enunciated a set of best practices,

230. The forms of engagement that exceed the notice-and-comment process are generally not legally required and tend to be “relatively unstructured, unsystematic, and ad hoc.” *Id.* at 801.

231. See generally Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57 (1991) (documenting how EPA develops integrated units of staff—ranging from technical to legal—to work through rulemaking and related programmatic decisions).

232. Sant’Ambrogio & Staszewski, *supra* note 38, at 801; see THE WHITE HOUSE, FIFTH U.S. OPEN GOVERNMENT NATIONAL ACTION PLAN 1–4 (2022), <https://www.gsa.gov/system/files?file=NAP5-fifth-open-government-national-action-plan0.pdf> [<https://perma.cc/6KYZ-5Z9D>] (pledging to increase public engagement to rectify historical unequal access).

233. See generally Sant’Ambrogio & Staszewski, *supra* note 38 (surveying public engagement in the early stages of rule development across agencies).

234. See *infra* note 284.

235. Exec. Order No. 14,094, 88 Fed. Reg. 21879, 21879–80, § 2 (Apr. 6, 2023), (revoked). This order instructed agencies to use multiple forms of “outreach,” including “alternative platforms and media,” to “expan[d] . . . public capacity for engaging in the rulemaking process.” *Id.* at 21880.

236. See Memorandum from Richard L. Revesz, Adm’r, Off. Info. & Regul. Affs., to Regul. Pol’y Officers at Exec. Dep’ts and Agencies, Implementation of Modernizing

often drawn from approaches developed by individual agencies around “proactively seeking early input, supporting robust participation during the public comment process, developing inclusive participation including through the use of intermediaries, and demonstrating the impact of participation.”²³⁷ OMB has also encouraged agencies to “mak[e] clear how public participation has influenced their regulations” to ensure participants see that their contributions are not merely for show.²³⁸

Beyond promoting engagement, these materials gave agencies a glimpse of what successful efforts might look like, providing a kind of engagement toolkit suitable for use across dispersed administrative programs.²³⁹ At the same time, these

Regulatory Review Executive Order 1–2 (Apr. 6, 2023), <https://www.reginfo.gov/public/jsp/EO/fedRegReview/ModernizingEOImplementation.pdf> [<https://perma.cc/CA64-ED7T>]; Memorandum from Richard L. Revesz, Adm’r, Off. Info. & Regul. Affs., to the Heads of Exec. Dep’ts and Agencies, Broadening Public Participation and Community Engagement in the Regulatory Process 1 (July 19, 2023) [hereinafter Revesz, *Broadening Public Participation*], <https://public-archiving.s3.us-east-1.amazonaws.com/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf> [<https://perma.cc/N7XY-ALWT>]; OFF. INFO. & REGUL. AFFS., WITH THE PEOPLE, FOR THE PEOPLE: STRENGTHENING PUBLIC PARTICIPATION IN THE REGULATORY PROCESS 30 (2024), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2024/08/OIRA-2024-Public-Participation-Report.pdf> [<https://perma.cc/W7GK-E9QN>]; see also Memorandum from Shalanda D. Young, Dir., Off. Mgmt. & Budget, & Dominic J. Mancini, Deputy Adm’r, Off. Info. & Regul. Affs., to Heads of Exec. Dep’ts and Agencies, M-22-10, Improving Access to Public Benefits Programs Through the Paperwork Reduction Act (Apr. 13, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf> [<https://perma.cc/ES9T-4WJT>] (discussing burdens of public participation in regulatory decision-making and proposing methods to alleviate them); Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36989–90 (July 9, 2021) (instructing agencies to consider regulatory effects on competition); Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (instructing agencies to take into account broad normative values like dignity, equity, and fairness). These Executive Orders have since been rescinded, and their attendant memoranda removed from federal websites.

237. OFF. INFO. & REGUL. AFFS., *supra* note 236, at 23–30 (describing multiple means agencies had used to publicize the key policy issues, including web pages, meetings in person and online, posted meeting recordings, bilingual slides, sessions where members of the public can submit questions in advance, and materials that help members of the public understand proposed rules and how to produce meaningful comments to influence agency action); see *id.* at 28 (discussing language services that enable the participation of those with limited English proficiency and consultation sessions with Indian Tribe members in the development of relevant rules). Revesz, *Broadening Public Participation*, *supra* note 236, at 15–18; *HHS Announces Historic Child Welfare Package to Expand Support and Equity in Child Welfare System*, ADMIN. FOR CHILD. & FAMS. (Sep. 27, 2023) (on file with authors) (describing convening of numerous, differently situated groups of people affected by regulations); Ensuring Safe Accommodations for Air Travelers With Disabilities Using Wheelchairs, 89 Fed. Reg. 17766-01, 17771 (Mar. 12, 2024) (describing work with civil society groups to reach traditionally absent stakeholders).

238. OFF. INFO. & REGUL. AFFS., *supra* note 236, at 29.

239. See THE WHITE HOUSE, *supra* note 232, at 2; *About the Office of Public Engagement and Environmental Education (OPEEE)*, EPA (Jan. 19, 2017), https://19january2017snapshot.epa.gov/aboutepa/about-office-public-engagement-and-environmental-education-opeee_.html [<https://perma.cc/GK2G-3YVX>]; *Office of*

guidelines and practices were developed entirely from within the executive branch, subject to easy change by future Presidents and political appointees. The Trump Administration rescinded the 2023 Executive Order in its first week,²⁴⁰ among other efforts to undermine public engagement with agency decision-making, some of which we document below.

B. Shackles, Shortcomings, Limitations

Despite a strong institutional foundation for administrative agencies to serve as the central conveners of the public, realistic opportunities for meaningful, broad-based public deliberations have been gradually eroding. Legislative, executive, and judicial developments have impeded public participation in agency decision-making. The fact that public engagement has been marginalized is not terribly surprising—politically and economically powerful actors have little incentive to share regulatory influence with the broader public. But the consequences are significant: a marked disconnect between the participatory ideals embedded in the legal framework and the constrained, often symbolic, public deliberations that characterize a large body of administrative decision-making today. And during the second Trump Administration the sidelining of the public is only getting worse.

Some of this shortfall reflects limitations in institutional design and judicial doctrine, which failed to anticipate the distorting effects of perverse incentives and the economic burdens that create unequal opportunities for participation. Other shortcomings stem from Congress's own decisions, which have increasingly structured participation in ways that favor particular constituencies and “stack the deck.”²⁴¹ Still other constraints arise from the evolving structure of the administrative state, particularly the consolidation of power within the executive branch, which amplifies existing asymmetries by supporting well-resourced stakeholders over thinly financed communities. We examine each of these dynamics in turn.

1. The Perverse Effects of Institutional Design and Judicial Doctrine

The APA adopts an implicit “if you build it, . . . they will come” approach to public engagement, assuming that merely providing participatory opportunities will attract informed and constructive input from affected publics.²⁴² This has, however, proved inadequate for fostering meaningful public participation by credible publics. The substantial costs associated with organizing, accessing

Collaborative Action and Dispute Resolution, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/pmb/cadr> [<https://perma.cc/37BR-P5CN>] (last visited Mar. 7, 2026); Sam Berger, *The 2023 Fall Regulatory Agenda*, THE WHITE HOUSE (Dec. 6, 2023), <https://web.archive.org/web/20231206230706/https://www.whitehouse.gov/omb/briefing-room/2023/12/06/the-2023-fall-regulatory-agenda/> [<https://perma.cc/6ZTP-FZ39>] (noting that “this is the first Regulatory Agenda in which agencies discuss their efforts to encourage public participation and engagement in the rulemaking process and share how this engagement has informed the development of regulatory priorities” and citing examples).

240. See Exec. Order No. 14,148, 90 Fed. Reg. 8237, 8239 (Jan. 20, 2025).

241. McCubbins, Noll & Weingast, *supra* note 37, at 264–71.

242. See, e.g., Wagner, *supra* note 181, at 1409; Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1139–40 (2014).

relevant information, navigating complex regulatory processes, and even becoming aware that such processes are underway significantly deter participation—particularly among under-resourced groups that nonetheless bear the consequences of agency decisions.²⁴³ Compounding these barriers, agency materials are often dense and opaque, as though “written in hieroglyphics.”²⁴⁴ This opacity is partly due to internal pressures to preempt litigation by anticipating every stakeholder nitpick, yet it raises the cost of entry still further, impeding credible publics from participating in regulatory decision-making.²⁴⁵

As a result, in many areas of rulemaking, the empirical research reveals a “bias towards business.”²⁴⁶ Better-resourced and better-organized parties, like regulated industries, have greater capacity and proclivity to participate in agency decision-making processes.²⁴⁷ The danger of agency capture—in which regulated entities come to control the agency charged with regulating them—is at its height when an agency lacks resources to acquire, prioritize, evaluate, and incorporate information about the regulated world and input from other affected parties. That leaves agencies even more dependent on input from those who have financial stakes in controlling the rules.²⁴⁸ Powerful or litigious groups easily become the squeaky wheels that get an agency’s limited grease, particularly when agencies themselves lack the bandwidth to proactively engage those who are affected by their regulations but not organized into clearly defined groups with cleanly articulated interests.²⁴⁹

243. See Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1, 23–24 (2023).

244. Cynthia R. Farina, Mary J. Newhart & Cheryl Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1365 (2015).

245. Some efforts have been undertaken within the administrative state to counteract these dynamics. See, e.g., ADMIN. CONF. OF THE U.S., RECOMMENDATION 2017-3, PLAIN LANGUAGE IN REGULATORY DRAFTING 1 (Dec. 14, 2017), <https://www.acus.gov/sites/default/files/documents/Recommendation%202017-3%20%28Plain%20Language%20in%20Regulatory%20Drafting%29.pdf> [<https://perma.cc/9A6H-D8U5>].

246. Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POLITICS 128, 130 (2006).

247. Wagner, *supra* note 181, at 1378–79; Feinstein, *supra* note 188, at 5–6 (“[W]ell-resourced groups make better use of formally neutral public-involvement provisions”); Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENV’T L. REV. 175, 183–90 (2019) (discussing literature showing that business interests dominate policy participation); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 951 (2006).

248. See, e.g., Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 281–88 (2004) (outlining regulators’ informational dependence on those they regulate).

249. See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 29–52 (2008) (providing a thorough overview of public-choice concerns about collective-action barriers); RONALD J. HREBENAR, INTEREST GROUP POLITICS IN AMERICA 329–30 (3d ed. 1997) (discussing the impediments faced by representatives of the diffuse public in relation to more concentrated interests, as well as their struggles to keep up in recent times).

Access to an agency's ear, similarly, is often resource dependent. Much agency work is done through pre-NPRM deliberations as well as subregulatory guidance, which lacks a legal mandate for public engagement and often involves interactions with industry representatives, as opposed to more diverse affected parties.²⁵⁰ The OMB memos introduced in the preceding Section praise a variety of agency efforts that employ creative, multi-modal, multi-platform strategies to reach affected parties.²⁵¹ But such efforts take not just motivation and creativity, but human and financial resources.²⁵² Public engagement efforts tend to be hampered by limits on each.

Aside from the APA's own limitations, judicial doctrines written in the name of transparency, accessibility, and fairness have paradoxically worked to diminish the deliberative potential of the notice-and-comment process.²⁵³ Rather than incentivizing agencies to meaningfully engage with the full spectrum of affected publics, these doctrines often discourage such efforts by increasing the legal risks associated with broader participation.²⁵⁴

Judicial review itself can perversely encourage avoidance strategies.²⁵⁵ In some settings, agencies bypass rulemakings and their corresponding participation requirements to pursue alternative policymaking pathways—such as issuing guidance documents, recalls, or other nonlegislative actions—which do not trigger these more burdensome requirements.²⁵⁶ When notice-and-comment rulemaking is unavoidable, agencies may stretch the boundaries of the “good cause” exception to circumvent public-participation requirements and the accompanying litigation exposure.²⁵⁷

Within the notice-and-comment process itself, some judicially imposed requirements amplify the influence of well-financed, regulated industries at the expense of the general public. For example, parties who are themselves regulated generally have standing to sue, while those who benefit from the regulation—the broad publics that reap the rewards of cleaner air and water, say, or more competitive

250. See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 168 (2019); Farber & O'Connell, *supra* note 242, at 1160–62 (discussing agencies forgoing the rulemaking procedures that allow public comment).

251. See *supra* notes 236–38 and accompanying text.

252. See Nicholas R. Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV. 823, 830–31 (2025).

253. See, e.g., Wagner, *supra* note 181, at 1321–22, 1355–65 (explaining that judicial doctrines designed to promote transparency and participation have paradoxically encouraged information excess and strategic behavior that undermines meaningful deliberation in notice-and-comment rulemaking).

254. *Id.* at 1356–62, 1396–1403 (showing that expansive participation rights, reinforced by judicial-review doctrines, increase litigation risk and processing burdens, thereby discouraging agencies from broader or more inclusive engagement).

255. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 6–7 (1990).

256. See *id.* at 151–64.

257. See, e.g., James Yates, “Good Cause” Is Cause for Concern, 86 GEO. WASH. L. REV. 1438, 1445, 1450 (2018); Farber & O'Connell, *supra* note 242, at 1161.

market practices—have fewer avenues for litigation.²⁵⁸ Industry players can even sue to prevent a regulation from going into effect at all, preventing those broad publics from ever experiencing the benefits of constraints on industry activity—but not vice versa.²⁵⁹ Judge-made justiciability doctrines thus advantage industries opposing regulations that constrain them but discourage or prevent suits by communities that benefit from those regulations. Cumulatively, these doctrines limit agencies’ incentives for real engagement with the publics they affect and incentivize agency underreach.²⁶⁰

The “logical outgrowth” doctrine, which “asks whether an agency’s final rule was so different from its notice of proposed rulemaking that interested parties could not have anticipated the content of the final rule,” also perversely disincentivizes public engagement.²⁶¹ The idea is to prevent an agency from diverging significantly from the ideas floated publicly during the rulemaking process—a bait-and-switch that can negate the meaningful “opportunity to participate in the rule making” required by the APA.²⁶²

The logical outgrowth approach sounds democratic: one pictures it swinging open the closed door to the back room where deals are cut, dissipating the cigar smoke. Yet in practice, the doctrine makes it harder for agencies to put public input to use. New information and ideas introduced in the rulemaking process cannot have much influence, lest the final rule stray too far from the NPRM to count as a logical outgrowth for a reviewing court.²⁶³ The overall effect has been to move key decision-making increasingly to the agenda setting and policy idea development stages that precede the NPRM—stages where agencies are not required to interact with the public or log their engagement when they do meet with select groups at the expense of others.²⁶⁴ The public-engagement practices described in the preceding

258. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562, 575–78 (1992); *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985); see also Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 375–85 (2009) (discussing the asymmetrical judicial treatment of agency action and inaction and proposing a new agency to address the concerns of regulatory beneficiaries).

259. See *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 138–39 (1967).

260. See David E. Pozen & Kim Lane Scheppele, *Executive Underreach*, in *Pandemics and Otherwise*, 114 AM. J. INT’L L. 608, 609 (2020) (defining “underreach” as the “executive branch’s willful failure to address a significant problem that the executive is legally and functionally equipped (though not necessarily legally required) to address” (emphasis omitted)).

261. Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 NOTRE DAME L. REV. 2071, 2102–03 (2023); see Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 214 (1996) (“If the APA procedure did not allow the agency to learn from the comments and alter its course, the procedure would be . . . a sham.”).

262. 5 U.S.C. § 553(c); see Hickman & Thomson, *supra* note 261, at 2104.

263. See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 750–51, 765 (D.C. Cir. 1991) (holding that agency failed to provide meaningful notice-and-comment opportunities on issues in final rule because issues were first raised by commenters during notice-and-comment process).

264. See Rossi & Stack, *supra* note 243, at 23–24 (elaborating on literature identifying influential nature of stakeholder engagement, particularly industry participation,

Section can help, but the lack of mandates, standards, and resources cramp those benefits, once again leaving well-resourced groups that can proactively reach out to agencies in a stronger position.

Even the APA's petition processes have been rendered increasingly ineffectual under the weight of accreting judicial doctrine.²⁶⁵ Although the legislative history of the APA suggests that members of Congress expected agencies to “fully and promptly consider” petitions,²⁶⁶ in practice, “few agencies have . . . official procedures for accepting, processing, and responding to” them, and the process of dealing with petitions “varies across—and even within—agencies.”²⁶⁷ Judicial interpretations have further undermined the petition process by granting agencies broad deference in denying petitions, effectively insulating such decisions from meaningful review.²⁶⁸ Only in rare instances—typically when Congress has expressly limited agency discretion—have courts been willing to intervene.²⁶⁹

2. Shackling by Congress

Congress has failed to provide the resources agencies need to meaningfully engage credible publics—or even to fulfill the level of engagement Congress itself has mandated. Despite clear evidence of significant imbalances in public deliberations over many years, Congress has steadfastly declined to legislate procedural adjustments or adequate funding to ensure broader participation. Bills proposed to address these inequities have all failed to pass.²⁷⁰ Similarly, Congress has failed to enact proposed legislation curbing extensive pre-NPRM agency consultation with industry or reversing the kinds of counterproductive judicial doctrines discussed in the preceding Section.²⁷¹ Resource gaps both constrain agency action and provide an excuse: agencies can often shrug off petitions for

during the pre-NPRM stages); West, *supra* note 225, at 588–90 (noting that “most participation in proposal development occurs at [an] agency’s specific invitation”).

265. See, e.g., Daniel E. Walters, *Symmetry’s Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 493–95 (2020) [hereinafter Walters, *Symmetry’s Mandate*]; Daniel E. Walters, *A Step Toward Meaningful Petition Rights*, YALE J. ON REGUL.: NOTICE & COMMENT (June 1, 2023) [hereinafter Walters, *Meaningful Petition Rights*], <https://www.yalejreg.com/nc/a-step-toward-meaningful-petition-rights-by-daniel-e-walters/> [<https://perma.cc/WM49-4EDV>]; Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1820–22, 1837–39 (2019).

266. 92 CONG. REC. 5651 (1946) (statement of Rep. Francis Walter), *reprinted in* SENATE, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at 201 (quoting Senate Judiciary Committee report on the APA).

267. Adoption of Recommendations, 79 Fed. Reg. 75114, 75117 (Dec. 17, 2014).

268. See, e.g., Walters, *Meaningful Petition Rights*, *supra* note 265.

269. See, e.g., Walters, *Symmetry’s Mandate*, *supra* note 265, at 481–82.

270. See, e.g., Anti-Corruption and Public Integrity Act, H.R. 9029, 116th Cong. (2020).

271. See, e.g., *Federal Regulation: A Review of Legislative Proposals, Part II, Hearings Before the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. 75–76 (2011) (statement of Sen. Sheldon Whitehouse); Regulatory Capture Prevention Act of 2011, S. 1338, 112th Cong.; Walters, *Meaningful Petition Rights*, *supra* note 265; see H.R. 9029, § 313 (2024).

rulemaking by arguing, without elaboration or support, that they lack the resources given other priorities.²⁷²

Exacerbating these problems, Congress has added participation requirements that stack the deck in favor of business interests. The Small Business Regulatory Enforcement Fairness Act (“SBREFA”), for instance, enhances participatory opportunities for small businesses but not for thinly financed public-interest organizations.²⁷³ Other legislative commands impose more indirect but equally effective impediments on agencies’ ability to engage the general public, again skewing in favor of regulated industry. For example, the Freedom of Information Act (“FOIA”) allows industry to shield trade secrets from public disclosure, making it difficult to collect some relevant information and undermining the broader public’s ability to participate.²⁷⁴ The transparency and reliability constraints on agency-generated information also do not generally apply to most information the agency acquires from regulated industry, even when that industry information is central to policy decisions and justifications.²⁷⁵

Congress has also limited agencies’ capacity to seek out broader engagement by limiting the resources available for this outreach. Since it is unlawful, indeed criminal, for agency personnel to spend funds not properly appropriated for some purpose,²⁷⁶ the lack of congressional authorizations can effectively block the very kind of public engagement Congress purports to mandate.²⁷⁷ Moreover, even with flexible budgets, scarce resources may have to be directed elsewhere to try to comply with statutory mandates, leaving agencies unable to analyze arguments or experiences articulated through public outreach. In other words, congressional directives and funding decisions constrain agencies in ways that can undermine public engagement.

272. See, e.g., Walters, *Symmetry’s Mandate*, *supra* note 265, at 477–78.

273. See Small Business Regulatory Enforcement Fairness Act (“SBREFA”), 5 U.S.C. §§ 601(3), 612; see also Barry A. Pineles, *The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief*, 5 *COMMLAW CONSPICUOUS* 29, 41–42 (1997) (reviewing the Act and showing its focus on small businesses).

274. See, e.g., Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 *AM. J.L. & MED.* 119, 129–34 (2004) (describing this capacious interpretation of trade secret in protective regulation); see also Paperwork Reduction Act, 44 U.S.C. §§ 3501–21 (2002) (subjecting agency information collection to OMB review, which can impose delay and centralize White House control over data-gathering efforts); Jeffrey S. Lubbers, *Paperwork Redux: The (Stronger) Paperwork Reduction Act of 1995*, 49 *ADMIN. L. REV.* 111, 119 (1997) (describing these challenges).

275. Wagner & Michaels, *supra* note 274, at 138 (noting these inequitable features).

276. Anti-Deficiency Act, 31 U.S.C. §§ 1341–42, 1517.

277. See, e.g., NOAH GREENWALD ET AL., *CTR. FOR BIOLOGICAL DIVERSITY, SHORTCHANGED: FUNDING NEEDED TO SAVE AMERICA’S MOST ENDANGERED SPECIES* 3 (2016), <https://www.biologicaldiversity.org/programs/biodiversity/pdfs/Shortchanged.pdf> [<https://perma.cc/YD5P-487R>] (discussing how budget cuts to the Fish and Wildlife Service exacerbated the Service’s inability to complete recovery plans for 22% of its listed species); see also Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 120, 132 Stat. 348, 661 (forbidding any federal funds from being used to fulfill protections or potential protections for the sage grouse).

3. *Presidential Administration*

The increasing consolidation of executive power within the presidency has helped marginalize broad-based public engagement in agency decision-making. Direct engagement with a wide range of stakeholders may be seen as a source of delay or interference with the President's ability to advance what he understands to be the public interest. Moreover, some presidential agendas may be at odds with inclusive deliberation. For example, Presidents may have little interest in encouraging broad public participation when pursuing policies that roll back public protections.

Because the President enters office through a democratic election, such executive intervention in agency decision-making may, to some, appear as a form of democratic accountability on its own.²⁷⁸ The President's status as the nation's shared elected representative can make additional public input seem unnecessary—or even obstructive. Yet what may seem desirable from a narrow electoral point of view can seem more contingent, arbitrary, or downright unaccountable from the broader perspective of democratic engagement. A President, after all, usually lacks particular expertise in, or personal experience with, any given area of regulation. And although Presidents need to mobilize enough voters in enough places to pass the gate of the Electoral College, Presidents have no clear way to solicit broad input on any particular policy question, much less to process and evaluate it. And the electorate simply cannot know a candidate's preferences on the incredibly broad range of specific questions agencies regularly truck in. Presidential preferences thus may have little to do with inclusive public engagement, and presidential nudges can actually detract from the influence public engagement has on an agency's policy decisions, lowering engagement's value for all concerned.

Agencies are also staffed by a President's political appointees, who generally (though not always) occupy positions with the most decision-making authority and interact with career civil servants in ways that are largely protected from public view.²⁷⁹ Still, scholars have gained some insights about the respective roles of these two sets of employees and the ways they interact with their two

278. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (claiming that “[t]he diffusion of power carries with it a diffusion of accountability” and that “[w]ithout a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or a series of pernicious measures, ought really to fall’” (quoting *THE FEDERALIST* NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961))).

279. See generally DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008) (providing comprehensive examination of presidents' use of appointments to gain political control over bureaucracy). Agency-internal deliberations tend to be classified as deliberative process and are exempt from FOIA as long as they are predecisional. See, e.g., *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 271–73 (2021) (holding that Fish and Wildlife Service's draft biological opinion fell within FOIA's deliberative process exemption purely because it was marked “draft”).

primary principals: Congress and the President.²⁸⁰ Though this research suggests that career staff tend to embrace public-engagement mandates when both principals agree with them,²⁸¹ it is less clear how staff reconcile conflicting messages from Congress and the President. In general, research indicates that political appointees are responsive to the expressed preferences of the President;²⁸² we can thus imagine that presidential orders about public engagement will find some footing in the Administration.²⁸³ This should be the case with directives either to increase public engagement or to pull back on it.

A President, or those in the presidential bureaucracy, may be motivated to improve public engagement as a way to foster legitimacy and demonstrate responsiveness—whether because prioritizing such practices might bring electoral advantages, enhance bureaucratic capacity, or simply support good government or their own preferred policies.²⁸⁴ But a President who is more concerned with promoting the interests of narrow constituencies can be expected to direct agencies to engage with broad publics no more than legally required, opting instead to nurture informal communications with favored constituents.²⁸⁵

280. See generally Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731 (2022) (providing an empirical examination of the respective roles and positions of political appointees and staff within agencies).

281. In general, research finds that career staff tend to behave in ways that maximize compliance with the directives they receive from the political branches. See generally MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 150, 154–55, 166–67 (2000); JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 196–99, 202 (1999). Thus, career staff tend to treat congressional mandates as binding and to follow White House directives that conflict with their own ideological preference but do not violate the law. *But see* Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 350–54 (2019) (examining departures from these norms of compliance during the first Trump Administration).

282. See, e.g., LEWIS, *supra* note 279, at 26–27.

283. There may, of course, be some pushback. See Nou, *supra* note 281; Emma Gardner & Sam Hess, *EPA Appears to Sidestep White House Push to Skip Notice and Comment*, INSIDE EPA (Nov. 20, 2025), <https://insideepa.com/daily-news/epa-appears-sidestep-white-house-push-skip-notice-and-comment> [<https://perma.cc/U4GQ-VKK7>].

284. Presidents Clinton, Obama, and Biden regularly extolled the virtues of public participation in regulation and directed agencies to engage more with the public, though most of these initiatives were largely unenforceable and incomplete. See, e.g., Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1998) (encouraging agencies to actively consider the needs of poor and minority communities); Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021) (revoked Jan. 20, 2025). For instance, these directives did not track agenda-setting engagement with stakeholders or loosen deliberative-process privileges. If anything, they encouraged pre-NPRM engagement with regulated parties. See, e.g., Exec. Order No. 12,866, § 6(a), 3 C.F.R. 638, 644–45 (1994) (encouraging pre-NPRM negotiations).

285. See Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 518 (2015) (finding that with respect to OIRA's role, “business interests . . . hold [disproportionate] influence across both Republican and Democratic administrators” (emphasis omitted)).

It is thus not surprising that some Presidents have endeavored to limit broad public engagement to the extent possible, legally or otherwise. President Trump currently serves as a poster child in this regard. In the first days of his second term, he eliminated all the previous Administration's public-participation initiatives, as well as revoking a Clinton-era environmental justice Executive Order mandating adequate engagement with low-income communities.²⁸⁶ These orders were not replaced with any added public deliberative processes. Indeed, the Trump Administration is moving aggressively in the opposite direction, undertaking numerous efforts to limit or undermine agency public engagement, at least some of which are likely unlawful.²⁸⁷

Most notably, these tactics stretch the APA's notice-and-comment exemptions far beyond their traditionally narrow bounds to avoid public notice and comment on proposed or final agency action.²⁸⁸ For example, President Trump has directed agencies to repeal existing regulations they deem unlawful based on ten recent Supreme Court decisions, calling notice and comment on such actions "unnecessary."²⁸⁹ The Administration frequently invokes the "good cause" exemption based solely on presidential directives or Supreme Court decisions—an approach for which there is no legal foundation.²⁹⁰ These APA exemptions,

286. See Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 20, 2025); Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

287. See Feinstein & Walters, *supra* note 36, at 3–4 (observing that "the Trump administration has turned decisively against public participation norms," noting that there may be "no legal basis" for some of its orders, and concluding that "there is no question that the Trump administration is interested in reforms that would streamline agency decision-making at the expense of opportunities for the public to provide input").

288. See Robert Iafolla & Erin Slowey, *Trump Agencies Lean Into Shortcuts for Public Comment Process*, BLOOMBERG L. (Sep. 29, 2025, at 02:05 MT), <https://news.bloomberglaw.com/daily-labor-report/trump-agencies-lean-into-shortcuts-for-public-comment-process> [<https://perma.cc/A5KE-4S9P>].

289. See Memorandum on Directing the Repeal of Unlawful Regulations, 2025 Daily Comp. Pres. Doc. 1 (Apr. 9, 2025).

290. See, e.g., Reed Shaw, *Setting the Record Straight on the APA's "Good Cause" Exception*, YALE J. ON REGUL.: NOTICE & COMMENT (May 16, 2025), <https://www.yalejreg.com/nc/setting-the-record-straight-on-the-apas-good-cause-exception-by-reed-shaw/> [<https://perma.cc/U7UN-LERG>]; Exec. Order No. 14,264, § 2, 90 Fed. Reg. 15619 (Apr. 15, 2025); see also *Pinos y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018) ("A new administration's simple desire to have time to review, and possibly . . . repeal, its predecessor's regulations falls short of [the good cause exemption's] exacting standard."); JACK JONES, CHRIS MYKRANTZ & MAX SARINSKY, PREVENTING PUBLIC PARTICIPATION: THE TRUMP ADMINISTRATION'S MISUSE OF THE GOOD CAUSE EXCEPTION TO FAST-TRACK DEREGULATION 5–7 (2025) (explaining why a presidential directive cannot justify the good cause exemption or substitute for reasoned decision-making). For example, the Department of Energy ("DOE") repealed a Biden-era definition of "showerhead," which was adopted pursuant to notice-and-comment procedures, without providing any opportunity for public input based on an executive order from President Trump that claimed that "[n]otice and comment is unnecessary because I am ordering the repeal." Exec. Order No. 14,264, § 2, 90 Fed. Reg. 15619 (Apr. 9, 2025); Dep't of Energy, Repeal of the Definition of Showerhead, 90 Fed. Reg. 15647, 15647–48 (May 15, 2025) (codified at 10 C.F.R. § 430.2).

traditionally “narrowly construed and only reluctantly countenanced,”²⁹¹ have now become a default justification for avoiding public input across a wide range of agency actions, from repealing prior rules to creating new programs—even for policies that are based on substantive value judgments and have a substantial impact on the public.²⁹²

Trump Administration agencies have also relied heavily on “direct final rulemaking” to avoid using public notice-and-comment procedures.²⁹³ When the Department of Energy received adverse public comments on several such proposals, the agency claimed that the opportunity to comment on its direct final rules satisfied its legal obligations to provide opportunities for public notice and comment on the

291. See, e.g., *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)). Because several of the APA’s exemptions from notice-and-comment procedures are broadly drafted, agencies often commit to providing opportunities for public notice and comment anyway, and ACUS has issued recommendations endorsing such practices. See MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 355–69 (6th ed. 2025) (discussing the APA’s rulemaking exemptions and agencies’ proclivity for waiving reliance thereon); ADMIN. CONF. OF THE U.S., RECOMMENDATION 92-1, THE PROCEDURAL AND PRACTICE RULE EXEMPTION FROM THE APA NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS, 57 Fed. Reg. 30101 (June 18, 1992), <https://www.acus.gov/sites/default/files/documents/92-1.pdf> [<https://perma.cc/D5NX-JFKP>] (recommending that agencies generally provide opportunities for public notice and comment before issuing procedural rules).

292. The Trump Administration’s apparent aversion to public participation runs through many other decisions as well. As one example, the U.S. Citizen and Immigration Service (“USCIS”) created an armed police force to investigate alleged civil and criminal immigration violations without providing public notice and comment based on the APA’s procedural exemption, notwithstanding the substantive value judgments seemingly underlying the policy and its substantial impact on the public. See U.S. Citizenship and Immigration Services (DHS), *Codification of Certain U.S. Citizenship and Immigration Services Law Enforcement Authorities*, 90 Fed. Reg. 42797, 42798 (Sep. 5, 2025) (codified at 8 C.F.R. § 287.2). Federal courts, by contrast, have sometimes required agencies to use public notice-and-comment procedures for rules ostensibly involving agency practice and procedure that encode substantive value judgments or have a substantial impact on the public. See, e.g., *Pub. Citizen v. Dep’t of State*, 276 F.3d 634, 640–41 (D.C. Cir. 2002) (adopting the former test); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620–21 (5th Cir. 1994) (applying the latter test). Secretary of State Marco Rubio invoked the foreign affairs functions exemption to preclude public notice and comment on any border-related efforts by federal agencies. Dep’t of State, *Determination: Foreign Affairs Functions of the United States*, 90 Fed. Reg. 12200 (Mar. 14, 2025). In a similar vein, the Department of Health and Human Services (“HHS”) rescinded a policy enacted in 1971 to use the good cause exemption sparingly and proclaimed that it will no longer waive the APA’s exemptions from public notice and comment for “matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” See Dep’t of Health and Hum. Servs., *Policy on Adhering to the Text of the Administrative Procedure Act*, 90 Fed. Reg. 11029, 11029 (Mar. 3, 2025) (quoting 5 U.S.C. § 553(a)(2)).

293. See generally Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995) (analyzing “direct final rulemaking,” a variation of APA notice-and-comment rulemaking in which a rule takes effect unless objections are submitted).

substance of the underlying proposals.²⁹⁴ The Office of the United States Trade Representative (“USTR”) did provide public notice and an opportunity to comment on a proposal to suspend actions taken in response to an investigation of China, based on a recent trade agreement between Presidents Trump and Xi Jinping.²⁹⁵ But the USTR gave interested parties just one day to submit their comments.²⁹⁶ And the notice announcing this invitation appeared in the Federal Register three days *after* that deadline had expired.²⁹⁷

Beyond undermining public participatory processes, Presidents have also intervened in agency decision-making in ways that elevate favored constituencies over others. Scholars have found public advisory board members to have a statistically significant ideological lean toward the preferences of their appointing President.²⁹⁸ Even though the Federal Advisory Committee Act (“FACA”) requires “balanced” representation in these advisory committees,²⁹⁹ Presidents have used their executive prerogative to stack them in ways that align with their political goals.³⁰⁰ The Trump Administration has gone a step further, eliminating approximately 160 federal advisory committees, often over the objection of the agencies that benefit from their expertise, in what is reportedly the largest purge of such nonpartisan advice in the almost 30 years that relevant records have been maintained.³⁰¹ Many of the federal advisory committees established by Congress,

294. See Dep’t of Energy, Revisions to the Office of Hearings and Appeals Procedural Regulations, 90 Fed. Reg. 31139 (July 14, 2025). This argument runs contrary to the whole point of direct final rulemaking. See ASIMOW & LEVIN, *supra* note 291, at 361 (“Under this procedure, the agency publishes the rule and announces that if no adverse comment is received within a specified time period, the rule will become effective as of a specified later date. But if even a single adverse comment is received, the agency withdraws the rule and republishes it as a proposed rule under the normal notice-and-comment procedure.”).

295. See Off. of the U.S. Trade Representative, Request for Comments on Suspending Section 301 Action for One Year: China’s Targeting of the Maritime, Logistics, and Shipbuilding Sectors for Dominance, 90 Fed. Reg. 50762 (Nov. 10, 2025).

296. *Id.* at 50763.

297. *Id.*

298. See Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1165–66 (2020).

299. Federal Advisory Committee Act, 5 U.S.C. § 1004(b)(2) (requiring advisory committees to be “fairly balanced in terms of the points of view represented and the functions to be performed”).

300. See Feinstein & Hemel, *supra* note 298, at 1204 (“The advisory committee structure allows Presidents and their political appointees to enlist the assistance of sympathetic outside experts without having to contend with the cumbersome restrictions on hiring and firing federal employees.”).

301. See Robert Iafolla, Andrew Wallender & Austin Ramsey, *Trump Axes Expert Panels at Historic Clip, Defying Agency Advice*, BLOOMBERG L. (Nov. 3, 2025, at 03:00 MT), <https://news.bloomberglaw.com/daily-labor-report/trump-axes-expert-panels-at-historic-clip-defying-agency-advice-53> [<https://perma.cc/XH5M-58QK>]. This purge was carried out pursuant to an Executive Order issued by President Trump to eliminate “unnecessary” federal advisory committees. See Exec. Order No. 14,217, 90 Fed. Reg. 10577 (Feb. 19, 2025). Trump issued an Executive Order during his first term that instructed agencies to eliminate almost one-third of the federal advisory committees that were not required by law. See Exec. Order No. 13,875, 84 Fed. Reg. 28711 (June 14, 2019).

which cannot be eliminated by executive fiat, have stopped meeting or have no remaining members.³⁰² The White House has replaced some of these advisory committees with panels subject to greater presidential control, or appointed new members known to be loyal to the President, such as Rudy Giuliani.³⁰³

Presidents since Reagan have also consistently used OIRA to oversee significant rulemakings promulgated by agencies at both the proposed and final rulemaking stages.³⁰⁴ OIRA, which is not subject to public-deliberation requirements and is notoriously nontransparent,³⁰⁵ routinely pressures agencies to alter rules after they have gone through notice and comment.³⁰⁶ OIRA has historically exerted a systematic pro-industry bias, resulting in rules that are more favorable to industry across presidential administrations.³⁰⁷

C. Conclusion: Agencies' Unfulfilled Promise

Despite an institutional design committed to public deliberation, agency public engagement has not only failed to live up to its full potential but appears to be gradually retreating from the participatory ideals of the 1960s and 1970s. Developments in the courts, executive branch, and Congress continue to undermine agencies' ability to provide a dependable forum for meaningful public engagement. As a result, the promise of open doors and sunlight on agency processes is becoming more façade than function: a participatory forum that is often underutilized or not meaningfully accessible to credible publics. Yet these deliberative spaces are far from empty. Instead, they have become increasingly crowded arenas for elite participation, offering powerful groups multiple opportunities to propose, and potentially even coauthor or revise, the administrative state's output.

IV. CONVENING THE PUBLIC

Legitimate and effective democratic governance requires policymakers to consider all relevant information and views and to reasonably justify their decisions. Our comparative institutional analysis demonstrates that Congress fares poorly on this score. Moreover, structural impediments make substantial improvement unlikely. Congress does a better job identifying pressing social problems and delegating authority to make provisional, incremental judgments about how to address them. Congress is also reasonably adept at requiring agencies to engage credible publics—even though in practice it often undermines its own engagement mandates.³⁰⁸ Such legal requirements, along with agencies' long and varied

302. See Iafolla, Wallender & Ramsey, *supra* note 301.

303. *Id.*

304. See *supra* notes 217–22 and accompanying text.

305. See, e.g., Nina A. Mendelson, *Disclosing 'Political' Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1157 (2010) (finding little transparency in OIRA's suggested policy changes to agency rules).

306. See, e.g., Haeder & Yackee, *supra* note 285, at 515–16.

307. *Id.* at 518 (finding that with respect to OIRA's role, "business interests . . . hold [disproportionate] influence across both Republican and Democratic administrators" (emphasis omitted)).

308. See *supra* Subsection III.B.1.

experience seeking input from otherwise-missing stakeholders, make agencies the American federal government's premier institution for convening credible publics.

But convening credible publics is challenging under the best of circumstances. As the logic of collective action would imply, organized special interests participate more than ordinary members of affected publics, unaffiliated experts, individuals with situated knowledge, and other frequently absent stakeholders, who face resource limitations that prevent them from participating in many decisions that affect them, as well as steep learning curves that can hamper the quality of their contributions.³⁰⁹ Agencies' own resource limitations make counteracting these problems difficult even with the relevant know-how.

And of course, federal agencies do not currently operate under the best of circumstances. Congress gives agencies too much to do and not enough resources to do it. Judicial doctrine sometimes undermines agency efficacy. And presidential consolidation falsely implies that the President can implement the unified will of the American people without meddlesome intermediaries. This Part outlines steps each participant in this system could take to support the government's public-engagement capacities—which, as we have explained, really rest on the public-engagement efforts of agencies. We then suggest that a less formalist, more collaborative vision of separation of powers would be a crucial aid in this endeavor.

A. Improving Public Engagement

Our comparative institutional analysis shows that Congress lacks key capacities to conduct the public engagement necessary to make legitimate and effective policy decisions; it is probably unrealistic to expect Congress to satisfy our normative ideals in this regard. Congress and other public officials have worked together, however, to create an administrative state that—at least on paper, and sometimes in practice—comes substantially closer to meeting these ideals. But shortcomings in that structure lead to imbalanced public participation and inhibit agencies' ability to live up to the model's promise. While we cannot resolve all the challenges facing American democracy, this Section suggests specific things each branch could do to improve the quality of public engagement with the administrative state—and thus the legitimacy and effectiveness of federal policymaking.

I. Congressional Reforms

Congress could improve agency public engagement in three primary ways. First, Congress could push back against the Supreme Court's anti-administrative jurisprudence and (re)open the door to judicial deference to agency decision-making based on sound deliberative processes. For instance, it could amend the APA to override *Loper Bright*, compelling federal courts to defer to agencies' reasonable exercises of interpretive discretion.³¹⁰ It could draft regulatory statutes to give

309. See, e.g., Rossi & Stack, *supra* note 243, at 1–3, 6–7, 11–12 (observing that notice-and-comment rulemaking is “not a representative process,” that participation is left to those who choose to engage, and that as a result “industry voices dominate” most proceedings while many proposed rules receive no participation by individual citizens or public-interest groups).

310. See, e.g., Scott Dodson, *Restoring Chevron Deference by Statute*, 75 DUKE L.J. ONLINE 1, 2, 8–9 (2025).

agencies clear authority to resolve questions of major significance. And it could streamline the legislative process to facilitate delegations of such authority when judicial decisions invalidate regulatory initiatives on major questions doctrine grounds.³¹¹ These moves would start to shift power from courts and Presidents back to Congress and the agencies it delegates to.

As Blake Emerson has argued, Congress could pursue this power shift in other ways as well.³¹² It could make public rights explicit in statutes.³¹³ It could constrain the scope of judicial review to maximize the benefits of public engagement and restrict preenforcement review to maximize the benefits of regulations.³¹⁴ And it could increase agency obligations to engage with credible publics.³¹⁵

Second, Congress could amend key statutes to facilitate meaningful public engagement by agencies. For instance, Congress could narrow the good cause exemption from notice-and-comment procedures, eliminate exemptions for procedural rules, and narrow exemptions for proprietary matters and agency guidance.³¹⁶ Similarly, it could amend FACA and the Paperwork Reduction Act to eliminate disincentives or perceived barriers to robust or innovative public-engagement efforts.³¹⁷ It could amend FOIA to limit the deliberative process privilege, which currently shields access to too much predecisional information.³¹⁸ Congress could require agencies to provide financial support for “equitable representation in the administrative process, including through officially designated proxy organizations.”³¹⁹ And it could require that agencies rather than courts evaluate the sufficiency of an agency’s response to public feedback.³²⁰ These latter suggestions, in particular, would help ensure that agencies consider all the relevant information and views and provide reasoned justifications for their policy choices.

Third, and most important, Congress must provide sufficient resources for agencies to engage meaningfully with their publics. That means providing sufficient funding for agencies to engage with the people they affect and pushing back against

311. See, e.g., Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL’Y 773, 778–84 (2022).

312. See Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. 1263, 1325–31 (2025).

313. *Id.* at 1326–27.

314. *Id.* at 1327–30.

315. *Id.* at 1330.

316. See *supra* notes 288–93 and accompanying text.

317. FACA and the PRA contain fewer hurdles than many agency officials appear to perceive, and OIRA has already provided guidance and established procedures to minimize these disincentives or barriers. See MICHAEL SANT’AMBROGIO & GLEN STASZEWSKI, PUBLIC PARTICIPATION IN AGENCY ADJUDICATION 10 (2025), <https://www.acus.gov/sites/default/files/documents/Public%20Participation%20in%20Agency%20Adjudication%20Final%20Report%202025.05.22.pdf> [<https://perma.cc/6TFJ-2CME>] (discussing this issue and collecting sources).

318. See 5 U.S.C. § 552(b)(5) (incorporating, under FOIA’s Exemption 5, the deliberative process privilege for predecisional, deliberative agency materials).

319. Emerson, *supra* note 312, at 1330; see also Rossi & Stack, *supra* note 243, at 45–49 (arguing that contemporary rulemaking does not sufficiently represent the interests of the people it affects and offering such a proposal).

320. Emerson, *supra* note 312, at 1330.

arbitrary, indiscriminate, and frequently unlawful presidential efforts to dismantle the administrative state. Congress should also consider codifying the pro-engagement efforts of some agencies and presidential administrations, entrenching public-engagement reforms into law so they cannot easily be eliminated by anti-agency presidential administrations. This final suggestion is emblematic of our broader observation that meaningful public engagement—and legitimate and effective democratic governance—takes a village.

2. Presidential Reforms

Although the President's ability to engage with credible publics himself is limited, he can do a lot to support meaningful public engagement by agencies. He should encourage and enable agencies to follow public engagement best practices. He should work with Congress to provide agencies with the resources needed to convene credible publics. And he should help create a stronger, more durable infrastructure for public participation within agencies and promote transparency and accountability in policy development.

White House reforms should include executive orders and guidance encouraging participation by unaffiliated experts, people with situated knowledge, and affected stakeholders who do not typically participate in the regulatory process—especially early in the process when agencies set agendas and develop proposals, and in retrospective review after agencies promulgate rules. The EOP should also practice what it preaches by following transparency requirements and ensuring that its own decision-making processes promote legitimate and effective democratic governance.³²¹

Improving public-engagement capacities would include rebuilding the civil service and strengthening its role; partnering with state, local, and Tribal governments; and nurturing civil society.³²² While the White House could help to disperse policymaking influence and insulate agencies from arbitrary political control, agency officials should continue their longstanding practice of “grounding their actions and expressing their commitments in terms of fundamental public interests recognized in statutory law and their own official judgment, rather than in the unilateral authority of presidential directive.”³²³ When agency officials exercise independent judgment that grows out of an accountable, engaged process, they highlight the pluralistic nature of the executive branch.³²⁴

Most of these White House reforms would focus on “the intra- and inter-agency processes that structure the exercise of [agency] judgment and authority” in

321. See Exec. Order No. 12,866, § 6, 3 C.F.R. 638, 644–48 (1993) (requiring disclosure of changes in regulatory actions “that were made at the suggestion or recommendation of OIRA” and “all documents exchanged between OIRA and the agency”); Mendelson, *supra* note 305, at 1148–54 (reporting that despite disclosure requirements, public information about executive supervision of agency decision-making “is surprisingly rare”).

322. See 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, 119–23, 129–33 (2021).

323. Emerson, *supra* note 312, at 1333–35.

324. See *id.* at 1334–35.

ways that are more granular than an agency's statutory mission but more general "than individual regulatory decisions."³²⁵ They can thus shape "the ways in which [individual] regulators prioritize issues, conceptualize problems, develop interventions, deploy their expertise, and exercise their judgment."³²⁶ Sabeel Rahman explains that reforms adopted at this "meso-level" can improve the internal processes, analyses, and data that inform agency decision-making, including by enhancing meaningful opportunities for participation by members of communities underrepresented in rulemaking.³²⁷ We agree that such reforms should prevent the concentration of power within the presidency without unduly hampering agencies' ability to promote their statutory missions.³²⁸

One need not look too far back to find a presidential administration that used these very strategies.³²⁹ As noted above, the Biden Administration issued executive orders and guidance instructing that regulatory policy "should be informed by input from interested or affected communities; State, local, territorial, and Tribal officials and agencies; interested or affected parties in the private sector and other regulated entities; those with expertise in relevant disciplines; and the public as a whole," and encouraging agencies to provide opportunities "to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities."³³⁰ These initiatives also sought to broaden access to OIRA for regulatory stakeholders "who have not historically requested such meetings" and to improve regulatory analysis by giving greater weight to distributive effects and equity than traditional cost-benefit analysis.³³¹ OIRA provided detailed guidance on how to promote equitable and meaningful participation, especially by those from marginalized communities, throughout the rulemaking process, including at the agenda-setting stage.³³²

325. K. Sabeel Rahman, *Anti-Domination and Administration*, 100 N.Y.U. L. REV. 1984, 2033–34 (2025).

326. *Id.* These are examples of "internal administrative law." See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1249–50 (2017).

327. See Rahman, *supra* note 325, at 2033–42.

328. *Id.* 2035–36. See generally Jane Mansbridge, *On the Importance of Getting Things Done*, 45 P.S.: POL. SCI. & POL. 1 (2012) (arguing that legitimate democratic governance requires not just representation but also effective action that inevitably relies on some coercion).

329. See James Goodwin, *The Quiet Resurgence of the Administrative State*, THE NEW REPUBLIC (Aug. 30, 2023), <https://newrepublic.com/article/175239/biden-save-civil-service-2024> [<https://perma.cc/Z3ZH-YPYF>] (reporting that the Biden Administration "has quietly instituted several reforms that would help bring the administrative state even closer to its democratic potential"); Rahman, *supra* note 325, at 2035 (recognizing that "one of the central themes of regulatory reform in recent years has been the attempt to rework the inner machinery of the administrative state to reorient more intentionally toward often-overlooked forms of domination").

330. Exec. Order No. 14,094, § 2(a), 3 C.F.R. 369 (2023) (revoked 2025).

331. *Id.* §§ 2(e), 3.

332. See Revesz, *Broadening Public Participation*, *supra* note 236, at 4; Goodwin, *supra* note 329 (discussing this guidance).

There were encouraging signs that these efforts were beginning to bear fruit by the tail end of Biden's presidency,³³³ and it is not implausible that such reforms could have become widely adopted as best practices across the executive branch had they continued. Similar efforts could, of course, be renewed by another presidential administration or, better yet, codified into law by Congress.

3. Agency Reforms

Agencies can promote legitimate and effective democratic governance by following best practices for public engagement. Many of the tools and methods for achieving this goal are already available and reasonably well understood.³³⁴ Within agencies, the primary challenges include the ad hoc nature of existing public-engagement efforts, the limited incentives for agency officials to do more, and the imbalanced nature of public participation. Strengthening agencies' existing public-participation infrastructure to help ensure that all interests and views are represented in agency decision-making would go a long way toward addressing these shortcomings.

Successful public engagement about agency decision-making takes advance planning. Agencies should adopt general policies that address why they seek public participation, which affected stakeholders they hope to reach, what types of information they will seek, how public input will inform decision-making, when public engagement will occur, and what methods they will use to facilitate it.³³⁵ Agencies should then adopt specific plans for engaging with the public in each significant policymaking initiative.³³⁶

Planning for public engagement is a collaborative process that involves many people and offices, so it is vital to assign dedicated personnel with training and experience to oversee these efforts. While existing employees or specialized consultants could play this role, it would be better for agencies to create "offices of public participation" responsible for agencies' public-engagement plans. Public-engagement offices already carry out some of this work at several agencies, including the Consumer Financial Protection Bureau, Department of Interior, Department of Transportation, Environmental Protection Agency, and Federal Energy Regulatory Commission.³³⁷

Agencies should also ensure that each rulemaking team includes someone responsible for public engagement or, at the very least, that rulemaking teams are given specific "checklists" of the types of public engagement they should conduct and the stakeholder groups they should include. These efforts could be supplemented by "representation floors," where agencies identify early on which

333. See OFF. OF INFO. & REGUL. AFFS., *supra* note 236, at 4.

334. See *supra* Section III.A; see, e.g., ADMIN. CONF. OF THE U.S., OFF. OF THE CHAIR, STATEMENT OF PRINCIPLES FOR PUBLIC ENGAGEMENT IN AGENCY RULEMAKING 1–8 (2023) [hereinafter ACUS, *Principles for Public Engagement*], https://www.acus.gov/sites/default/files/documents/Statement_of_Principles_for_Public_Engagement_in_Rulemaking_2023.09.01.pdf [<https://perma.cc/Y6US-43MB>].

335. See ACUS, *Principles for Public Engagement*, *supra* note 334, at 4–5.

336. *Id.* at 5.

337. See SANT'AMBROGIO & STASZEWSKI, *supra* note 317, at 37–38 (discussing existing Offices of Public Participation and collecting sources).

stakeholders should be represented, and then use final rule preambles to candidly evaluate related public-engagement efforts.³³⁸ This would promote balanced public participation and potentially render agencies' public-engagement plans judicially enforceable.

Agencies must also educate the public about opportunities to participate and how to do so effectively. This means explaining the issues in ways that rulemaking novices can understand and being specific about the information that would most benefit the decision-making process. Even with such efforts, some interests or views are likely to be unrepresented because of insurmountable collective-action problems or heavy information loads required to get rulemaking novices up to speed.³³⁹ In such cases, agencies should consider appointing interest representatives to participate on behalf of otherwise missing individuals or groups.³⁴⁰ Jim Rossi and Kevin Stack have recently suggested that agencies could even hold "proxy contests" to select those representatives for a term of years, which would provide economies of scale and potentially create new opportunities for social movement activism.³⁴¹ The federal government could even consider adopting stakeholder compensation programs to reimburse public-interest groups that successfully perform this function.³⁴²

Finally, we think it is important for agencies to use more public-engagement tools that are *not* self-selecting.³⁴³ This would include federal advisory committees composed of balanced groups of professional or lay stakeholders and focus groups that are either randomly selected or established

338. See Rossi & Stack, *supra* note 243, at 40–45.

339. See CYNTHIA R. FARINA & MARY J. NEWHART, IBM CTR. FOR THE BUS. OF GOV'T, RULEMAKING 2.0: UNDERSTANDING AND GETTING BETTER PUBLIC PARTICIPATION 19, 38–40 (2013), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1014&context=ceri> [<https://perma.cc/T6DH-CZKW>] (discussing the concept of information load and suggesting strategies that can help agencies educate rulemaking novices to participate effectively).

340. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 62 (2010); Sant'Ambrogio & Staszewski, *supra* note 38, at 842–43; Wagner, *supra* note 181, at 1414.

341. See Rossi & Stack, *supra* note 243, at 45–49. For discussion of how public engagement with agencies can create new levers for social movement activism to help counteract public and private domination, see K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 315 (2018).

342. Such efforts have occasionally been attempted in the context of federal agency adjudication, and several states have recently established intervenor compensation programs. See, e.g., Sharon Jacobs, *The Challenges of Participatory Administration*, 58 U.C. DAVIS L. REV. 323, 351–52, 359–61 (2024); Carl Tobias, *Reviving Participant Compensation*, 22 CONN. L. REV. 505, 508–10 (1990).

343. To be clear, self-selecting forms of public participation have their place, but they should be supplemented by other tools that involve representative groups of stakeholders or "mini-publics." Aside from notice-and-comment rulemaking, other self-selecting forms of public participation that can be useful include rulemaking petitions, requests for information, listening sessions and other public meetings, and advance notices of proposed rulemaking. See SANT'AMBROGIO & STASZEWSKI, *supra* note 225, app. C at 175 (listing available modes of public engagement and their attributes).

through a process of targeted recruitment.³⁴⁴ And agencies could use the tools of deliberative democracy to construct “mini-publics” to inform their decision-making—probably the most ambitious, but also the most promising, innovation in this area.³⁴⁵

Mini-publics, including citizen assemblies and deliberative polls,³⁴⁶ are specifically designed to facilitate robust participation by balanced groups of ordinary citizens, generating detailed information about what interested stakeholders or the general public would think about a policy matter if they were fully informed about the relevant issues and had meaningful opportunities to engage in reasoned deliberation about what should be done.³⁴⁷ Mini-publics are relatively resource intensive to design and implement, and they will not always produce substantial new information. Nonetheless, we think they offer considerable promise for convening the kind of “credible publics” that Menezes and Pozen envision.³⁴⁸ Agencies should therefore experiment with them when setting their agendas and formulating significant policy initiatives.

While we would hesitate to give mini-publics decision-making authority over most regulatory issues, we think such bodies could provide valuable advice to agency officials that would help them to make legitimate collective decisions. Giving a balanced cross-section of the people a meaningful say in policy decisions that will profoundly affect their lives could also help to rebuild trust in the administrative state and in American democracy more broadly.

4. *Judicial Reforms*

The Supreme Court has done a lot in recent years to sideline the policymaking influence of credible publics.³⁴⁹ Overriding or otherwise working

344. See, e.g., Reeve T. Bull, *Making the Administrative State “Safe for Democracy”*: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking, 65 ADMIN. L. REV. 611, 640–47 (2013) (proposing the use of citizen advisory committees to inform agency decision-making).

345. See Menezes & Pozen, *supra* note 44, at 1012–17 (arguing that “mini-publics deserve serious consideration in any agenda to make the public an active agent, and not just a gauzy abstraction, in the everyday practice of public law”). See generally HÉLÈNE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY* (2020) (proposing a model of “open democracy” emphasizing randomly selected citizen assemblies and participatory representation).

346. For detailed descriptions of these respective processes, see, for example, John Ferejohn, *The Citizens’ Assembly Model*, in *DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS’ ASSEMBLY 192, 196–200* (Mark Warren & Hilary Pearse eds., 2008); JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK 25–26* (2009).

347. See Glen Staszewski, *Interpreting Initiatives Sociologically*, 2022 WIS. L. REV. 1275, 1295–97 (describing the central features of mini-publics and advocating that they be used by states to resolve ambiguities in successful ballot initiatives).

348. See *supra* notes 44–50 and accompanying text; Menezes & Pozen, *supra* note 44, at 1021–22 (advocating experimentation with the use of mini-publics in the administrative state and collecting prior reform proposals along these lines); SANT’AMBROGIO & STASZEWSKI, *supra* note 225, at 32, 48–50, 128–38 (recommending enhanced deliberative exercises that include the use of mini-publics in a final report to ACUS).

349. See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024); *West Virginia v. EPA*, 597 U.S. 697, 735 (2022).

around some of its most harmful decisions would support public engagement,³⁵⁰ and so might court reforms altering the Court's personnel or—preferably—its authority.³⁵¹ While dissenting justices have called out the majority for shifting power from Congress and agencies to the President and the Court,³⁵² we agree with Blake Emerson that judges could do a better job of highlighting how the administrative state affirmatively promotes democracy.³⁵³ Adopting the reform proposals described above could further fuel this fire.

While we hope the federal judiciary will “first, do no harm,” several reforms could affirmatively promote public engagement with agencies. First, federal courts could modify the logical outgrowth test, which discourages agencies from making significant changes to their proposed rules based on public comments.³⁵⁴ Second, federal courts could give agencies credit for using exemplary deliberative procedures or otherwise dial back the stringency of hard-look judicial review in appropriate circumstances.³⁵⁵ Third, federal courts could relax the requirements that prevent regulatory beneficiaries and other traditionally absent stakeholders from challenging agency rules, thereby inviting countervailing litigation pressures from outside regulated industry.³⁵⁶

Of course, if federal courts are not interested in such reforms, Congress could amend the APA to adopt these proposed changes. While we have already

350. For examples of recent scholarly proposals along these lines, see Lisa Schultz Bressman, *The Ordinary Questions Doctrine*, 92 GEO. WASH. L. REV. 985, 1012–16 (2024); Dodson, *supra* note 310, at 1; Adrian Vermeule, *Chevron by Any Other Name*, THE NEW DIGEST (June 28, 2024), <https://thenewdigest.substack.com/p/chevron-by-any-other-name> [<https://perma.cc/7E3T-8EHA>]; Walker, *supra* note 311, at 733.

351. See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1720–28 (2021); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2108–10 (2022).

352. See, e.g., *Loper Bright*, 603 U.S. at 448–50 (Kagan, J., dissenting); *West Virginia*, 597 U.S. at 753 (Kagan, J., dissenting); *Trump v. United States*, 603 U.S. 593, 657 (2024) (Sotomayor, J., dissenting); *McMahon v. New York*, 145 S. Ct. 2643, 2643–44 (Mem.) (2025) (Sotomayor, J., dissenting).

353. See Emerson, *supra* note 312, at 1335–37.

354. See *supra* notes 261–64 and accompanying text (discussing the perverse incentives created by the logical outgrowth doctrine).

355. See, e.g., Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 421–24 (2022); David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 81–84 (2005); Sant'Ambrogio & Staszewski, *supra* note 38, at 849–50; Wagner, *supra* note 181, at 1407–08. Inversely, where the agency has not engaged in a participatory process, courts should relax exhaustion requirements, at least for thinly financed members of the public, so that litigation can become a useful forum for public engagement.

356. See, e.g., *supra* notes 258–60 and accompanying text (explaining how justiciability doctrines favor regulated entities over regulatory beneficiaries); Gabriel H. Markoff, Note, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 TEX. L. REV. 1065, 1086–89 (2012) (advocating for changes to the exhaustion requirement).

emphasized that public engagement takes a village, the village elders sometimes need to take action to deal with a community's recalcitrant members.

B. Dispersing Policymaking Influence and Encouraging Interbranch Collaboration

As we have emphasized, public engagement is crucial to legitimate and effective democratic governance. That means policymaking institutions should generally be transparent and susceptible to influence from anyone affected by their decisions. Policymaking influence should, in turn, be broadly dispersed rather than narrowly concentrated. The consolidation of executive power in the President undermines both these imperatives. That consolidation has received its clearest theoretical justification in unitary executive theory, which maintains that the original plan of the Constitution gave the President untrammelled authority over the entire executive branch.³⁵⁷ Unitary executive theory argues that, as the nationally elected representative, the President is the ultimate Madisonian statesman: he can and will faithfully implement the will of the people, and can simply be replaced if he fails.³⁵⁸ Yet, as our discussion above suggests, this theory runs aground on the realities of presidential service—not least in terms of a President's public-engagement capacities and incentives.

The problems we have shown with Congress's public-engagement abilities apply with even greater force to the President. Congress has at least some degree of internal diversity: different representatives represent different constituents. And it is highly constrained, legislating only through cumbersome procedures requiring significant collective action. The President is a single person with numerous—and increasing—opportunities for unilateral action and a highly limited ability to access or assess input from the numerous publics he affects. So it is unlikely that the President will, or even can, consider all the relevant information he should. Nor does he have any enforceable obligation to reasonably justify his decisions. The presidential consolidation urged by unitary executive theory would have the President substitute his judgment about what a hypothetical people must want for the conclusions of numerous agency officials in touch with numerous groups of actual people. Perhaps counterintuitively, empowering the President sidelines the public.

Agencies can be influenced by the priorities and views of an elected President without being completely beholden to them; they can respond in a reasoned fashion to the views of interested stakeholders both inside and outside the federal government. Balancing decision-making among these different nodes allows public input to influence government action and supports government accountability to affected publics.³⁵⁹ That involves diffusing authority “away from the office of the president in ways that empower the federal bureaucracy, state, local, and tribal

357. See Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 131–32 (2022) (describing unitary executive theory); Anya Bernstein & Cristina Rodríguez, *The Diffuse Executive*, 92 FORDHAM L. REV. 363, 363 (2023) [hereinafter Bernstein & Rodríguez, *The Diffuse Executive*] (same).

358. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1995).

359. See Bernstein & Rodríguez, *supra* note 29, at 1650–54.

officials, and civil society.”³⁶⁰ Rather than pretending that a single President can adequately represent the (nonexistent) unified will of the whole people, this “civic” style of administration recognizes that the President is best situated to help agencies make legitimate collective decisions by supporting their public-engagement efforts and pushes for an executive branch dedicated to best practices for public engagement.³⁶¹ Giving agency to agencies creates the conditions for a *plural* or *diffuse executive*—which is better positioned to engage the public than a unitary one.³⁶²

As the discussion in this Part indicates, meaningful public engagement depends on all government institutions doing their part. That conclusion, born of a concern with effective and legitimate governance, suggests a collaborative understanding of the separation of powers: the branches working together, each playing to its strengths, to produce collective policy goals and promote the public good.³⁶³ That vision departs from the more combative model currently prevalent in formalist jurisprudence, where each branch jealously protects its exclusive authority against encroachment. Aside from the practical implausibility of the formalist model,³⁶⁴ our work here suggests that the combative approach to separation of powers is not good for public engagement—the keystone of legitimate and effective democratic governance.

CONCLUSION

American democracy is at a critical inflection point. We have argued that meaningful public engagement is not a theoretical nicety—it is a core requirement of legitimate and effective democratic governance. Our comparative institutional analysis shows that Congress lacks both the structural capacity and practical incentives to meaningfully engage affected publics in much of its policymaking. Administrative agencies—in part thanks to Congress’s own design—have stepped in to fill some of the gap, offering a range of deliberative vehicles for bringing the public back into national policymaking.

360. See Emerson & Michaels, *supra* note 322, at 104.

361. See generally ACUS, *Principles for Public Engagement*, *supra* note 334 (identifying best practices for federal agencies to solicit public input to improve the legitimacy and quality of agency decision-making).

362. See Bernstein & Rodríguez, *The Diffuse Executive*, *supra* note 357, at 363–64; see also Emerson, *supra* note 312, at 1266 (explaining that the essence of the administrative state involves making legally binding decisions based on the exercise of independent authority).

363. This collaborative vision of governance builds on ideas that were prominent within the progressive movement and that animated the New Deal. See, e.g., BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 115–16 (2019); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 52, 62–63 (2017). It is also a vision that is starting to generate renewed scholarly interest. See, e.g., AILEEN KAVANAUGH, *THE COLLABORATIVE CONSTITUTION* 1 (2023).

364. See, e.g., M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603–04 (2001); Shalev Gad Roisman, *Balancing Interests in the Separation of Powers*, 91 U. CHI. L. REV. 1331, 1352–59 (2024) (describing separation of powers formalism).

Today, however, administrative forums for public deliberation are under threat. Regulated industries and a growing bloc of political actors increasingly exploit institutional vulnerabilities to further insulate national policymaking from public input. Rather than restrain these forces, the Supreme Court is clearing the path and cheering them toward the finish line. Against this effort to undermine agencies' ability to engage the public, we offer both a warning and a blueprint for institutional reform to put our federal government back on the right course and help us achieve our highest aspirations as a sovereign nation. Implementing this vision will not be easy, and it will take a village.