Looking for the Public in Public Law

Nikhil Menezes† *& David E. Pozen*††

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 relevant public and elicit its input are few and far between. Scholars and officials depict the U.S. public as playing myriad roles in governance—checking, guiding, approving, repudiating—without offering an account of how public preferences are formed or how they exercise influence on questions of interest.

This Article seeks to identify and call attention to the foundational dilemmas underlying this disconnect, to clarify their normative contours and intellectual history, and to propose a pragmatic response—grounded in the recovery of the public's role as an author and not just a monitor of public law. We first detail how public law's stylized appeals to the public reflect analytic imprecision and inattention to the values, views, and votes of actual people. We then show how these omissions and obfuscations leave public law vulnerable to critiques from both the left and the right, which have been gaining force on account of broad transformations in the administrative state, social structure, and public sphere. It may not be possible to resolve these dilemmas fully or to redeem the public writ large as an agent in public law. But drawing on recent political science work on deliberative democracy, we outline a research and reform agenda for identifying, constructing, and empowering coherent publics (plural) capable of legitimating legal change.

---

† Ph.D. Candidate (Politics), Princeton University.

†† Charles Keller Beekman Professor of Law, Columbia Law School. For helpful comments on earlier drafts, we thank Nick Bagley, Chuck Beitz, Jessica Bulman-Pozen, Josh Chafetz, Adam Davidson, Liz Emens, Bridget Fahey, Lee Fennell, Jon Gould, Aziz Huq, Jeremy Kessler, Genevieve Lakier, Daryl Levinson, Pratap Bhanu Mehta, Sam Moyn, Jan-Werner Müller, Rick Pildes, Jed Purdy, Max Ridge, and Tim Wu, as well as workshop participants at the University of Chicago Law School and Columbia Law School. For excellent research assistance, we thank Abigail George.

INTRODUCTION

Few concepts are as central to public law as the public. Public opinion is said to constrain the Supreme Court, curtail executive abuse, and determine the winner of interbranch conflicts. Agencies are asked to regulate for the public welfare while complying with public records laws, public meetings laws, and public notice laws. Courts grant preliminary injunctions in the public interest. State constitutions require public monies to be spent for public purposes. The Federal Constitution continues to ground its authority in the canonical public, We the People. Throughout the study and practice of constitutional law, administrative law, and related fields, the public is invoked to justify and explain government institutions and decisions.[1]

And yet, those who invoke the public in such settings rarely do so with any precision. They depict the U.S. public as playing various roles—checking, guiding, approving, repudiating—without offering an account of how public preferences are formed or how they exercise influence on questions of interest. Much of the

[1] For elaboration of the points in this paragraph and the next, see *infra* Part I.

time, no effort is made to identify the relevant public, ascertain "its" views, or engage ordinary people. The public is a cipher at the heart of public law theory.

This slipperiness elides important difficulties. The public has been a contested concept in American political theory for at least a century.[2] Following Walter Lippmann, a long line of skeptics has maintained that the so-called public comprises too many individuals who are too ignorant, diverse, and distracted to form a coherent entity, much less an effective agent of control over government. The public on this view is a fiction, a "phantom."[3] Claims made on behalf of the public, accordingly, tend to be exercises in misdirection or mystification that conceal the extent to which an activity serves the interests of incumbents, elites, or specific private parties. Public law needs an answer to these skeptics if its vocabulary is to be meaningful and its legitimating narratives are to be credible.[4]

Meeting this challenge, moreover, has only become harder under conditions of rising partisan polarization, media fragmentation, and economic inequality, as well as declining civic participation, social trust, and epistemic authority.[5] As Professor Daryl Levinson has shown, underspecified references to power in public law debates can lead to conceptual confusion and obscure the real drivers of policy outcomes.[6] The same is true, and then some, of the underspecified appeals to the public that saturate this domain.

---

2 The public has been a contested concept for much longer than this, of course, in other countries and contexts. *See generally, e.g.*, Arthur Ghins, *"Popular Sovereignty that I Deny": Benjamin Constant on Public Opinion, Political Legitimacy and Constitution Making*, 19 MODERN INTELL. HIST. 128 (2022) (discussing Benjamin Constant's efforts to substitute the notion of public opinion for popular sovereignty in French debates over political legitimacy and constitutional reform from the 1790s onwards).

3 WALTER LIPPMANN, THE PHANTOM PUBLIC, at iii (Transaction Publishers 1993) (1925) [hereinafter LIPPMANN, PHANTOM PUBLIC]; *see infra* Part II.

4 By "public law," we refer to "[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself." *Public Law*, BLACK'S LAW DICTIONARY (12th ed. 2024). Although we interrogate the place of the public in public law—and diagnose a deep and growing mismatch between the rhetoric and the reality—we do not interrogate the concept of public law itself. *Cf.* MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 153 (2004) (arguing that public law is best understood "as an autonomous subject operating in accordance with its own distinctive method"). We engage, instead, in a kind of internal critique of that body of contemporary U.S. law known as public law, whose existence and scope we take as given.

5 *See infra* Part III.

6 *See generally* Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016). As the title of this Article reflects, Levinson's important study is in some ways a model for our own inquiry. Yet whereas Levinson urged scholars and officials to adopt a particular definition of power,

Along with a plausible theoretical account of the public, a system of public law needs institutional mechanisms that can help the public (however understood) fulfill the functions expected of it. Since Lippmann's time, U.S. policymakers have developed an array of mechanisms to enhance public oversight of executive branch agencies, including notice-and-comment procedures, open records laws, and open meetings requirements. Yet while these reforms have made segments of government more accessible to segments of society, the evidence suggests that they have largely failed to bring about a more effective, responsive, or respected regulatory state.[7] Meanwhile, over this same period, the United States has neglected or turned away from other institutional designs that give ordinary people a voice in lawmaking and interpretation, from citizens' assemblies and criminal juries to congressional petitions and constitutional conventions.[8] The public has loomed ever larger in public law theory and practice as a *monitor* of collective action, ever smaller as an *author*—a transformation in the character of U.S. governance obscured by the generic term "public."

Public law thus faces a pair of foundational dilemmas in relation to its titular subject, one concerning how to envisage the public and the other concerning how to empower it. Public law decision-making purports to derive its legitimacy, in part, from the degree to which it continually channels and advances the public's will, yet the field lacks a convincing theoretical or institutional specification of the public on which it depends. At this juncture, it is not at all clear that most of the appeals to the public made throughout this body of law are empirically well-founded or conceptually coherent. Nor is it clear that public law's biggest investments in public-empowering procedures have yielded a decent democratic return. And each dilemma is only growing more acute.

Extreme as they may sound, these claims ought to be unsurprising at some level. Countless commentators insist that the United States has been experiencing a breakdown of the public

---

see id. at 39 ("For most . . . purposes, 'power' in public law should be understood to refer to the ability of political actors to control the outcomes of contested decisionmaking processes and secure their preferred policies."), we do not offer an analogous prescription. We cast doubt on any understanding of the public in public law that ignores the values, views, and votes of ordinary people. But rather than urge scholars and officials to settle on one definition of the public, we recommend that they develop richer and more realistic accounts of the publics they invoke, along with practical techniques to bring new publics into being.

7 *See infra* Parts I.C, III.C.

8 *See infra* Part III.D.

sphere in which collective self-reflection and will formation occurs, along with a crisis of democracy that is both a cause and effect.[9] Insofar as these diagnoses have been accurate, public law's ability to draw normative authority and substantive guidance from the public was bound to suffer.

This Article seeks to identify and call attention to the foundational dilemmas posed by the status of the public in public law, to clarify their normative contours and intellectual history, and to propose a common solution grounded in the recovery of the public's role as an author and not just a monitor of public law.[10] Focusing on constitutional law and administrative law, we first detail in Part I how public law's stylized appeals to the public reflect analytic imprecision and inattention to the values, views, and votes of actual persons. We then show in Part II how these omissions and obfuscations leave public law vulnerable to a range of Lippmannite critiques. These critiques, Part III contends, have gained force in recent years on account of broad transformations in the U.S. administrative state, social structure, and public sphere. Finally, Part IV turns to possible responses. No single proposal and no single public can redeem the public as an agent in public law. But drawing on recent political science work on deliberative democracy, we outline a research and reform agenda for identifying, constructing, and empowering coherent publics (plural) capable of legitimating legal change.

Two methodological notes are in order before proceeding further. First, as this Article documents, the public is both an elusive concept and an indispensable term across a wide range of legal contexts. Virtually all of the invocations of the public that we canvass, however, share three features: they assume a meaningful

---

[9] For a small sampling of notable works on the breakdown of the public sphere, see generally YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018); THE DISINFORMATION AGE: POLITICS, TECHNOLOGY, AND DISRUPTIVE COMMUNICATION IN THE UNITED STATES (W. Lance Bennett & Steven Livingston eds., 2021); RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT (2022); and PEN AM., LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS (2019). For a small sampling of notable works on the crisis of democracy, see generally CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber et al. eds., 2018); WILLIAM G. HOWELL & TERRY M. MOE, PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY (2020); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); and ADAM PRZEWORSKI, CRISES OF DEMOCRACY (2019).

[10] The Article also provides a new map of sorts to contemporary U.S. public law. As Parts I and III explain, three canonical (if undertheorized) sources of nonelectoral input legitimacy unify much of this domain: public opinion, public participation, and the public interest.

distinction between public and private action; they purport to give serious consideration to ordinary people, not only government officials or political elites; and they insist, implicitly or explicitly, that such people can and should influence government behavior through their collective interests and exertions. To document the elusiveness of the public in public law without comparing inapposite examples or committing to any one contestable understanding of the term, we adopt these three features as a working definition—and focus on those contexts in which the present-day public is invoked to rationalize an institution or decision.[11] This thin definition of the public allows us to take a synoptic perspective without reproducing the very imprecision we identify, and it will inform our own diagnoses and prescriptions.

Second, the Article does not offer a theory of the demos and its relationship to the public. We focus on the latter both because it plugs into the vocabulary of public law and because it is a less stable category in legal and political thought. Whereas the demos is widely understood today to be more or less synonymous with the citizenry,[12] there is no comparable consensus on the nature of the public, which cannot be separated from the intermediary bodies and governmental processes that help bring it into being in any given case.[13] These bodies and processes, we argue, have increasingly failed to conjure or channel credible publics, thereby threatening not only the quality and vibrancy of American democracy but also the legitimacy and integrity of the U.S. public law system.

I. APPEALING TO THE PUBLIC

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

---

[11] Because of our focus on invocations of present-day publics, the Article does not address appeals to "original public meaning" in constitutional or statutory interpretation.

[12] *See, e.g.*, JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE 11 (1989) (stating that the "usual meaning" of demos, dating back to ancient Athens, is "the entire citizenry"); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 377 (1997) ("Citizens constitute the demos of the polity.").

[13] *See* AVIHAY DORFMAN & ALON HAREL, RECLAIMING THE PUBLIC 10 (2024) (explaining "that there are different meanings of the public, and that their existence and value are partially the product of institutional structure"). Proposals such as Deliberation Day, for example, *see infra* notes 107–08 and accompanying text, would bring about a different kind of public without necessarily having any implications for the composition of the demos.

few and far between. This Part demonstrates that imprecise and incurious appeals to the public are deployed throughout public law scholarship and practice, and it offers a typology to parse these appeals' basic forms and functions.

Before turning to the present day, it bears emphasis that puzzles over the public's place in the U.S. constitutional order are nothing new—and on the contrary are as old as the republic. The puzzles arise with the first words of the Constitution, "We the People."[14] This phrase is never defined in the canonical document.[15] And because the document was drafted and ratified exclusively by white propertied men who have been dead for two centuries, the question of who composes We the People troubles all of constitutional law.[16] Although amendments and interpretations have made the constitutional community more inclusive since the Founding, controversy continues to rage over the manner and extent to which the Constitution covers certain groups of persons, such as noncitizens, citizens in unincorporated territories, and Indigenous Peoples.[17] We might say that U.S. public law is marked by a constitutive ambiguity as to the public it is meant to serve.

---

14 U.S. CONST. pmbl.

15 *Cf.* CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 138 (2008) (observing that "while 'the people' appeared prominently in the Preamble," as well as in Article I, § 2, Clause 1, "'the people' disappeared from the text of the constitution" thereafter).

16 *See, e.g.*, JEDEDIAH PURDY, TWO CHEERS FOR POLITICS: WHY DEMOCRACY IS FLAWED, FRIGHTENING—AND OUR BEST HOPE 203 (2022):

> The sovereign people are the subject of the most portentous sentence in American history, "We the People," which opens the US Constitution. The propertied white men who ratified that document as fundamental law get further away every year, in time, demography, and the everyday sense of what makes a polity legitimate or even decent.

See also Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 306–16 (2023) (reviewing "the democratic exclusions underlying the Constitution" and "the [g]laring [g]aps in 'We the People,'" and arguing that these exclusions and gaps remain "underacknowledged and undertheorized" in constitutional interpretation).

17 *See, e.g.*, Maggie Blackhawk, *The Supreme Court, 2022 Term—Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 25 (2023) (explaining that at key moments in the development of American colonialism vis-à-vis territories and Native nations, "legal elites, jurists, and government officials debated the constitutional questions raised by extension of United States jurisdiction over these peoples and lands," including "Who are the 'We' in 'We the People'?"); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 THOMAS JEFFERSON L. REV. 367, 368 (2003) ("The difficulty of the question [whether and when foreign nationals are entitled to the same constitutional protections as U.S. citizens] is reflected in the deeply ambivalent approach of the Supreme Court . . . .").

In addition, the Constitution's ostensible commitment to We the People remains troubled by a scheme of governance that, as James Madison famously proclaimed in *Federalist No. 63*, achieves "the total exclusion of the people, in their collective capacity, from any share."[18] Reflecting the Framers' "deep distrust of the people,"[19] a welter of structural features impedes the ability of national majorities to rule. These features include the Electoral College, the presidential veto, the apportionment of senators, bicameralism, judicial life tenure, and Article V's rules for formal revision.[20] Although amendments and interpretations have arguably made our system more majoritarian since the Founding, controversy likewise continues to rage over the extent to which the Constitution reflects, retards, or advances popular sovereignty.[21] We might say that U.S. public law is also marked by a constitutive ambiguity as to how much power the people—whoever they are—ought to wield.

These ambiguities have been the subject of extensive literatures. Deep as they are, however, they account for only a portion of the difficulties borne of public law's simultaneous need for and fear of a sovereign public. In the contemporary context, we see imprecise notions of the public put to a variety of justificatory and explanatory uses in constitutional law, administrative law, and related fields.

A. Public Opinion: The Public as a Check on Government Decision-Makers

A first category of appeals to the public concerns the effects of *public opinion* on high-level legal and political decision-making. In this discourse, the public's views, values, and preferences are said to constrain the feasible decision set for government officials. How the public's views, values, and preferences

---

[18] THE FEDERALIST NO. 63, at 355 (James Madison) (Clinton Rossiter ed., 1999) (emphasis omitted).

[19] MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 608 (2016) ("[D]espite the Framers' regular professions of devotion to popular sovereignty, their deep distrust of the people was evident . . . in nearly every substantive choice made in the Constitution that bore on the new federal government's susceptibility to popular influence.").

[20] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 25–166 (2006).

[21] *See generally, e.g.*, ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed. 2003); STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT (2023).

emerge and exert such constraint generally goes unspecified. This discourse is the province of scholars. Although most claims about public opinion's checking capacity are positive in character, these claims also serve the normative role of vouching for the democratic bona fides of the checked institution.

The most famous claims of this sort involve the Supreme Court. In a 1957 article that has been cited more than three thousand times, Robert Dahl argued that despite the Justices' life tenure, the Court hardly ever deviates from the preferences of national majorities.[22] Since 1957, "a vast successor literature" has built on Dahl's argument.[23] Legal scholars, historians, and political scientists have "emphasized" again and again that "on issues of significant public consequence," the Court "has never strayed very far for very long from mainstream public opinion."[24] The countermajoritarian difficulty, accordingly, "is perhaps not so difficult after all."[25] Even if the Justices themselves disclaim any interest in the public's views on legal questions,[26] this literature suggests that public opinion profoundly shapes and restrains their jurisprudence.

Versions of Dahl's thesis have been applied to constitutional action across government. In their book *The Executive Unbound*, for instance, Professors Eric Posner and Adrian Vermeule contended that public opinion is among the most significant constraints on presidents, especially in crises, and that it "block[s] the most lurid forms of executive abuse."[27] In other work, Posner

---

[22] *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283–95 (1957) [hereinafter Dahl, *Decision-Making in a Democracy*]; *see also* Gerald N. Rosenberg, *The Road Taken: Robert A. Dahl's* Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 50 EMORY L.J. 613, 613–14 (2001) (describing the influence of Dahl's article). According to Google Scholar, the article had been cited 3,161 times as of March 20, 2025.

[23] Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1760 n.276 (2021).

[24] RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 116–17 (2018).

[25] Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 417 (2009).

[26] *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 760–65 (2021) (discussing the norm against "popularity arguments" in constitutional decision-making).

[27] ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 5 (2010) [hereinafter POSNER & VERMEULE, EXECUTIVE UNBOUND]; *see also* DINO P. CHRISTENSON & DOUGLAS L. KRINER, THE MYTH OF THE IMPERIAL PRESIDENCY: HOW PUBLIC OPINION CHECKS THE UNILATERAL EXECUTIVE 8 (2020) ("Public opinion—not formal checks by Congress and the courts—serves as the primary check on the unilateral executive.").

and Vermeule have contended that public opinion determines which branch will prevail in any given "constitutional showdown."[28] Professor Josh Chafetz's "discursive" account of the separation of powers likewise depicts Congress and the President as competitors "in the game of public opinion."[29] As a general matter, there may be nothing surprising about the claim that elected officials tend to follow public opinion, which, in James Bryce's memorable formulation, "rules as a pervading and impalpable power, like the ether" that "passes through all things."[30] These theories, however, extend a strong and optimistic version of that claim beyond the ordinary political process to the highest levels of constitutional decision-making.

Uniting almost all of the best-known legal scholarship on public opinion's constitutional checking function is a refusal to delineate this function in detail. Dahl himself equated public opinion with "the point of view of the lawmaking majority" in Congress.[31] Most legal scholars building on Dahl have eschewed this equivalence while declining to interrogate "the mysterious process by which public opinion forms" or the mechanisms by which it guides government officials.[32] Posner and Vermeule

---

28 Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1006 (2008) [hereinafter Posner & Vermeule, *Constitutional Showdowns*] ("[T]he public will throw its weight behind one branch or the other, and the branch that receives public support will prevail.").

29 Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 772 (2012) [hereinafter Chafetz, *Congress's Constitution*]; *see also id.* ("[T]he Madisonian framework . . . provides the field upon which public opinion battles are fought.").

30 3 JAMES BRYCE, THE AMERICAN COMMONWEALTH 30 (London, MacMillan & Co. 1888). The notion that public opinion "rules" our system has been a motif in U.S. legal thought since the Founding. *See, e.g.*, JAMES MADISON, *For the* National Gazette *[ca. 19 December 1791]*, *in* 14 THE PAPERS OF JAMES MADISON 170, 170 (Robert A. Rutland et al. eds., 1983) ("Public opinion sets bounds to every government, and is the real sovereign in every free one."); 10 ANNALS OF CONG. 931 (1801) (statement of Rep. John Rutledge, Jr.) ("In a Republican Government, [ ] public opinion rules everything . . . ."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("Authority here is to be controlled by public opinion, not public opinion by authority.").

31 Dahl, *Decision-Making in a Democracy*, *supra* note 22, at 287 (emphasis omitted).

32 Posner & Vermeule, *Constitutional Showdowns*, *supra* note 28, at 1006. Professor Richard Pildes has detailed numerous ambiguities in legal scholarship characterizing the Court as constrained by public opinion, including its failure to specify "the mechanism by which this constraint is supposed to work" and "[s]urprisingly little data" with which to test any version of the thesis. *See* Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 114–54 [hereinafter Pildes, *Is the Supreme Court "Majoritarian"?*]. As a rule, political scientists who study the Court have been more attentive to these methodological matters. *See, e.g.*, THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 14–21 (2008) (describing "fifteen linkage

seemed to take public opinion's decisive role in separation-of-powers struggles as a given—more a jumping-off point for further theorizing than a hypothesis in need of empirical testing and refinement.[33] Professor Barry Friedman's claim that the Court's decisions "will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line,"[34] is similarly difficult to falsify.[35] Political scientists have conducted countless polls on Americans' views about the Court. But whether or not such polls are a good measure of public opinion,[36] the legal literature rarely relies on them in more than a passing fashion when analyzing the Justices' behavior.[37] Even those self-styled popular constitutionalists most passionate about returning interpretive authority to "the people themselves"[38]—that is, those scholars least placated by the idea that public opinion checks the Court—have by and large declined to elaborate who the people themselves are, exactly, or how they could exercise collective constitutional agency.[39]

B. The Public Interest: The Public as a Normative Ideal

When we move from public law scholarship to practice, the concept of public opinion fades in significance as a source of guidance and authority while the *public interest* comes to the fore. The

---

models" developed to "explain the relationship between Supreme Court decision-making and American public opinion").

33 *See* Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1392–1403 (2012) (book review) (discussing "the thin and indeterminate empirical case" offered by *The Executive Unbound*).

34 BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 369 (2009).

35 *Cf.* Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 280 (2010) ("[W]hether public opinion 'influences' the Court, as the subtitle of Professor Friedman's book asserts—we cannot say.").

36 For representative skepticism, see, for example, Michael E. Solimine & James L. Walker, *The Supreme Court, Judicial Review, and the Public: Leadership Versus Dialogue*, 11 CONST. COMMENT. 1, 2 (1994) ("[O]n the whole, the data does not tell us much.").

37 *Cf.* Or Bassok, *Beyond the Horizons of the Harvard Forewords*, 70 CLEVELAND STATE L. REV. 9–43 (2021) (explaining that while judicial legitimacy became increasingly associated with public opinion polls after Dahl, this "paradigm shift" has gone largely uninterrogated by legal scholars).

38 *See generally, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

39 *See* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1854–59 (2016) (explaining ways in which popular constitutionalism became "increasingly self-contradictory" in light of these ambiguities and omissions).

public interest, along with analogues such as the public welfare, serves as a normative touchstone throughout large swaths of administrative law, structural constitutional law, and civil procedure, among other fields. Although few try to define or measure it with any specificity, the public interest is routinely held out by government decision-makers as a good to be pursued, prioritized, or maximized.

Thousands of statutes direct federal and state agencies to regulate in the public interest. In a recent study, Professor Jodi Short counted "more than 1,200 public interest standards in the U.S. Code and legions more in state statutory law."[40] The Securities and Exchange Commission, to take just one example, may set rules on the solicitation of proxies "as necessary or appropriate in the public interest."[41] Statutory public interest standards became a mainstay of economic regulation in the late 1800s, were upheld by the Court against constitutional challenge as early as 1892, and proliferated during the New Deal.[42] "The public interest," one prominent political scientist wrote in 1938, "is the standard that guides the administrator in executing the law," as important to the bureaucracy as "the 'due process' clause is to the judiciary."[43] The field of "public interest law" emerged during the next generation's rights revolution, replete with organizations that litigate on behalf of marginalized causes and clients against agencies believed to be captured by private industry.[44] The public interest is thus both an organizing principle for government administrators and a defining ethic for the civil society groups that fight them in court.

Beyond the administrative arena, the public interest and cognate concepts appear ubiquitously, if less systematically, throughout public law. A plaintiff seeking a preliminary injunction must establish (among other things) that the injunction would be "in the public interest."[45] The states may use their police

---

40 Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. ON REGUL. 759, 765 (2023).

41 15 U.S.C. § 78n(a)(1).

42 *See* Short, *supra* note 40, at 768–71.

43 E. PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 23 (1936) (emphasis omitted); *see also* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 66 (1938) ("Phrases such as 'public interest' . . . abound in the law.").

44 *See* JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 24–39 (1978). *See generally* PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM (2021).

45 *E.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

powers to promote the public health and welfare,[46] including through the creation of strict liability "public welfare offenses."[47] The Court has recognized a "public safety exception" to the *Miranda* rule.[48] The overwhelming majority of state constitutions require that public monies be spent for "public purposes."[49] Public nuisance claims have become a mainstay of mass tort litigation.[50] This is an illustrative, but by no means comprehensive, catalogue of situations in which contemporary U.S. law tethers regulatory authority to a vision of the public's needs and priorities.

Across all these contexts, government officials ritualistically invoke the public interest as a normative object and criterion while declining to specify a methodology for ascertaining the same. When federal agencies implement statutory public interest standards, for example, Short found that they tend to focus on economic efficiency without considering the "common good or collective values," or making any attempt at "identifying the relevant public and determining its interest in any given decision."[51] When courts decide whether a preliminary injunction would be in the public interest, they employ "unstructured and often conflicting" approaches.[52] State constitutional public purpose requirements are at this point "largely rhetorical."[53]

In sum, regulators and judges who appeal to the public interest strive to ascertain *neither* what is in "the interest of the public" in any robust political or moral sense *nor* "what the public is

---

[46] *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 75 (1976) (Powell, J., concurring in the judgment) (stating that "the concept of the public welfare . . . defines the limits of the police power"); Chi., Burlington & Quincy R.R. v. Illinois, 200 U.S. 561, 592 (1906) ("[T]he police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.").

[47] *See* Darryl K. Brown, *Public Welfare Offenses*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 862, 863–65 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

[48] New York v. Quarles, 467 U.S. 649, 657–58 (1984).

[49] *See* Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 910–11 (2003).

[50] *See* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 721–27 (2023). Although tort is considered a private law field, public nuisance claims brought by state officials controversially straddle the public-private divide. *See id.* at 749 ("[I]f tort is the province of private wrongs, then public nuisance sits uneasily within it.").

[51] Short, *supra* note 40, at 829–34.

[52] M. Devin Moore, Note, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 940 (2019).

[53] Briffault, *supra* note 49, at 914; *see also id.* at 914–15 (describing contemporary public purpose requirements as articulating a "truism" rather than providing "a judicially enforceable constraint").

interested in" as a descriptive matter.[54] If some officials prefer to see the public interest as a term of art, it is a term with no stable referent or meaning.[55] The vacuousness of modern appeals to the public interest may help explain, in part, why Vermeule's proposed return to the classical legal tradition and one distinctive conception of the common good has found such a large audience.[56]

C. Public Participation: The Public as a Partner in the Regulatory Process

Contemporary appeals to public opinion and the public interest thus almost never involve any sustained effort to define those terms or to solicit popular input. The public is an abstraction rather than an agent, a "mysterious" force that shapes and constrains legal decision-making from the outside.[57] Since the 1960s, the United States has also established a more concrete set of roles for laypersons within the regulatory process. Pursuant to this "participatory turn,"[58] the administrative state has tied its democratic and legal legitimacy to a suite of mechanisms that enable the public to supervise its activities on an ongoing basis.

The basic mechanisms are familiar. Notice-and-comment rulemaking under the Administrative Procedure Act[59] (APA) allows the public to learn about proposed rules and participate in

---

54 C.W. Cassinelli, *Some Reflections on the Concept of the Public Interest*, 69 ETHICS 48, 48 (1958) (considering these two possible meanings of "the public interest"); *see also* Felix E. Oppenheim, *Self-Interest and Public Interest*, 3 POL. THEORY 259, 267–75 (1975) (distinguishing between "normative" and "descriptive" conceptions of the public interest).

55 *Cf.* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 893 (2020) (discussing administrative law "cases in which there is no surface upon which traditional lawyers' tools can have purchase, such as commands that the agency be 'reasonable' or act 'in the public interest' when those phrases are not terms of art").

56 *See generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022). Vermeule has described public interest standards in legal provisions as "writing the common good into the terms of the law itself." *Id.* at 15; *see also* Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103, 109 (2022) (arguing that "the common good approach worked out in the law over two millennia is the best [ ] construction" of "public interest" standards). For a broad selection of responses to Vermeule from legal scholars, see generally Symposium, *Common Good Constitutionalism*, 46 HARV. J.L. & PUB. POL'Y 937 (2023).

57 Posner & Vermeule, *Constitutional Showdowns*, *supra* note 28, at 1006; *see also* Lawrence M. Friedman, *Through a Glass Darkly: Law, Culture, and the Media*, 62 DEPAUL L. REV. 571, 589 (2013) ("[P]ublic opinion is a significant (if mysterious) force in molding the legal system.").

58 Sophia Z. Lee, *Racial Justice and Administrative Procedure*, 97 CHI.-KENT L. REV. 161, 161 (2022).

59 5 U.S.C. §§ 551–559, 701–706.

their final formulation by submitting written comments.[60] The Freedom of Information Act[61] (FOIA) allows the public to request records from executive branch agencies.[62] The Federal Advisory Committee Act[63] (FACA) and the Government in the Sunshine Act[64] (GITSA) allow the public to observe agency meetings.[65] The Legislative Reorganization Act of 1970[66] does the same for congressional committee hearings and drafting sessions.[67] Inspectors general stand in for the public behind agency doors, ferreting out fraud and abuse from within.[68] Similar laws exist throughout the fifty states.[69]

Institutionally as well as ideologically, *public participation* has become one of the "central foundations of administrative law and practice."[70] Through public participation, the architects of the 1960s–70s reforms believed, "[b]ureaucrats would become democrats"[71] and agencies would become increasingly responsive "to public needs and to the public interest."[72] The statutory schemes created in this period continue to supply the scaffolding for what

---

60 The APA was enacted prior to the 1960s, unlike the other statutes referred to in this Section, but its "notice-and-comment procedures were little used" until that decade. Lee, *supra* note 58, at 169; *see also* Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755 (1996) (discussing the "tremendous expansion . . . in the prominence, use, and development of rulemaking" that began in the Kennedy administration).

61 5 U.S.C. § 552.

62 *See id.* § 552(a)(3).

63 *Id.* §§ 1001–1014.

64 *Id.* § 552b.

65 *See id.* §§ 552b(b), 1009(a).

66 Pub. L. No. 91-510, 84 Stat. 1140 (codified as amended in scattered sections of 2 U.S.C.).

67 *See id.* §§ 103–104, 111–112, 84 Stat. 1144–45, 1151–52.

68 *See* Nadia Hilliard, *Monitoring the U.S. Executive Branch Inside and Out: The Freedom of Information Act, Inspectors General, and the Paradoxes of Transparency*, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 166, 169 (David E. Pozen & Michael Schudson eds., 2018) (discussing "the establishment of an army of [inspectors general] at the federal level" since the 1970s).

69 *See Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://perma.cc/6KF2-9SGA (compiling information on state open records and open meetings laws).

70 Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 444 (2003); *see also* Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1363 (2016) ("Administrative law is built on public participation."); *id.* at 1302 & n.1 (collecting commentary "celebrat[ing] participation as a crucial way to help legitimate the administrative state").

71 Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1497 (1983).

72 Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 359 (1972).

political theorist John Keane has called "monitory democracy," in which the public no longer influences government only through voting in periodic elections but also through continuous oversight and critique.[73] Monitory institutions transfer power to the people by "putting politicians, parties[,] and elected governments permanently on their toes" and "sometimes by smothering them in political disgrace."[74]

Which public or publics, however, is the participatory turn supposed to empower? None of the statutes referenced above provides an answer to this question. FOIA lets record requests be made by "any person,"[75] including not only individual U.S. residents but also any foreigner, "partnership, corporation, association, or public or private organization other than an agency."[76] FACA and GITSA require certain meetings to be open "to the public" or "to public observation," without further elaboration.[77] This refusal to define or prioritize any particular public is characteristic of monitory democracy more generally, which, as Keane has noted, tends to treat "interchangeably" terms such as "'people,' 'the public,' 'public accountability,' 'the people,' 'stakeholders,' [and] 'citizens.'"[78] Rather than try to ensure a representative process or assign specific roles to specific groups, our public participation laws leave it to the market to determine who will in fact participate, and with what efficacy and intensity.

While this approach may be inclusive in intent, its practical effect has been to privilege those well-organized, well-resourced actors who wield the greatest market power. At numerous agencies, for instance, the FOIA process is dominated not by curious citizens or enterprising journalists but by profit-seeking firms.[79]

---

73 JOHN KEANE, THE LIFE AND DEATH OF DEMOCRACY 648–747 (2009).

74 JOHN KEANE, POWER AND HUMILITY: THE FUTURE OF MONITORY DEMOCRACY 105 (2018) [hereinafter KEANE, POWER AND HUMILITY].

75 5 U.S.C. § 552(a)(3)(A).

76 OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 19 (2021) (available at https://perma.cc/JHH5-XNTV).

77 *See* 5 U.S.C. § 1009(a)(1) ("Each advisory committee meeting shall be open to the public."); *id.* § 552b(b) ("[E]very portion of every meeting of an agency shall be open to public observation."). Professor Lisa Blomgren Bingham found in 2010 that while "[t]he phrase 'public participation' appears over 200 times in the United States Code," this phrase "does not appear as part of [any] formal definitions section." Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 317.

78 KEANE, POWER AND HUMILITY, *supra* note 74, at 105.

79 *See* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1379–1414 (2016) [hereinafter Kwoka, *FOIA, Inc.*]; David E. Pozen, *Freedom of Information Beyond the Freedom*

Business interests likewise play a lead role in notice-and-comment rulemaking, to the point that there is "a complete lack," in many cases, "of any comment from individual citizens or from interest groups representing the public."[80] The actual functioning of our public participation regime does not necessarily reflect the input, much less advance the interests, of the overwhelming majority of Americans.

II. THEORIZING THE PUBLIC

As Part I documented, the concept of the public animates a range of theories and practices in public law even as the public in question tends to be underspecified. Should this worry us? Loose language is ubiquitous across all realms of law and life. And while the "social totality" of "*the* public" may in principle encompass the entirety of the American people, as Professor Michael Warner has observed, any particular instantiation is bound to involve only a slice thereof.[81] There will necessarily be some distance, then, between that social totality and the publics invoked in a given field. The issue is whether this distance is so great, or the appeals to the public otherwise so strained, as to call into question the work they are doing.

For all their variety, the appeals to the public that we have canvassed are joined in their ambition to confer democratic legitimacy on the institution or decision at issue. In this, U.S. lawyers follow a long tradition of turning to the public for similar ends. The origins of "public opinion" as a force in modern politics, for example, can be traced to late eighteenth-century France, where the term emerged both as a means of justifying the claims of popular reformers against the predations of monarchical rule and as a means of conceptualizing existing sentiments in favor of the monarchy.[82] From anti-Bourbon pamphleteers to U.S.

---

of Information Act, 165 U. PA. L. REV. 1097, 1112–17 (2017) [hereinafter Pozen, *Beyond the Freedom of Information Act*].

80 Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1, 3 (2023); *see also* MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 2 (2018) (explaining that "regulated entities, industry groups, and professional associations" are widely perceived to "dominate the notice-and-comment process").

81 Michael Warner, *Publics and Counterpublics*, 14 PUB. CULTURE 49, 51–52 (2002) (emphasis in original).

82 *See* KEITH MICHAEL BAKER, INVENTING THE FRENCH REVOLUTION: ESSAYS ON FRENCH POLITICAL CULTURE IN THE EIGHTEENTH CENTURY 167–200 (1990); Ghins, *supra* note 2, at 155.

agency rulemakers, those who invoke the public to guide or explain a legal-institutional practice invariably ascribe some set of desirable qualities to their object—a public capable, cohesive, and engaged enough to supply the sought-after democratic legitimation.

While contemporary legal scholars and practitioners in the United States help themselves to the normative weight of "the public" without a great deal of specification or reflection, American political theorists have wrestled with the coherence of the concept for over a century.[83] This Part briefly revisits the canonical contributions of Walter Lippmann and John Dewey during the 1920s, before considering their legacy. In Lippmann and his inheritors, we uncover two principal methods of exposing the public as a dangerous fiction, which we call *epistemic critiques* and *capture critiques*. In Dewey and his inheritors, we uncover two principal strategies for conjuring credible publics, which we call *emergent activation theories* and *designed activation theories*.

A. The Dewey-Lippmann Debate

The challenge of theorizing the public in the face of a volatile sociopolitical environment has a rich intellectual history. In the U.S. context, the contributions of Walter Lippmann and John Dewey are particularly illuminating for interrogating the concept at the dawn of the modern administrative state. Both authors wrote at a time when Progressive reformers portrayed themselves as defending "the public" against the self-seeking trusts, corporations, and other "Interests" that threatened to corrupt politics.[84] For Lippmann and Dewey, however, this public seemed uncomfortably elusive. They identified a gap between the technocratic expertise and administrative government that Progressives favored and the public that they invoked to legitimate their reforms.

Lippmann's analysis of this gap drew on the thought of his erstwhile teacher Graham Wallas. Inspired by Wallas's social-psychological analysis of industrialized mass society, Lippmann came to see modern governance as playing out in a social, economic, and material setting so complicated that it would be

---

83 For a broad historical overview and taxonomy of ways of conceptualizing the public, see generally Paul Starr, *The Relational Public*, 39 SOCIO. THEORY 57 (2021).

84 *See* Wilfred M. McClay, *Introduction to the Transaction Edition* of LIPPMANN, PHANTOM PUBLIC, *supra* note 3, at xi, xix–xx (explaining that "[n]o concept [was] more central to the Progressive vision of social reform than that of 'the public,'" while "no word was freighted with greater negative import in the vocabulary of Progressivism than the noun 'Interests'").

delusional to expect any citizen to acquire a complete understanding of important political matters.[85] Writing about the relationship between journalism and democracy in 1920, he fretted that the "vast elaboration of the subject-matter of politics" ends up being "assimilated by busy and tired people who must take what is given to them."[86] Over the course of the 1920s, this dissonance between the capacities of citizens and the complexity of politics pushed Lippmann into deeper suspicion of what he would come to call the "phantom public." Against those who wished to treat the public as a "shadowy executive of all things,"[87] Lippmann insisted on depicting society as a mix of "agents and bystanders"—with most citizens destined to remain in the latter category, incapable of formulating the myriad policies necessary for good government.[88] Modern democracies therefore required institutions that gave experts a prominent advisory role.[89]

Scholarship on the Lippmann-Dewey debate often frames the two thinkers as providing opposed views of the public and democracy. In truth, Dewey accepted Lippmann's bleak picture of a society too complex for the public to endure as an organic, empowered entity.[90] Rather than dispense with the concept of the public on epistemological grounds, however, Dewey searched for "democratically effective" publics that could be forged through better channels of communication among engaged citizens, along with an ethos of free inquiry that would maintain an open-ended space in which these citizens might learn their shared interests, identify problems, and devise responses.[91] Although the U.S. public

---

85 The key work by Wallas, dedicated to Lippmann, was GRAHAM WALLAS, THE GREAT SOCIETY: A PSYCHOLOGICAL ANALYSIS (1914). On Wallas's influence on Lippmann, see JEFFREY FRIEDMAN, POWER WITHOUT KNOWLEDGE: A CRITIQUE OF TECHNOCRACY 84 (2019); RONALD STEEL, WALTER LIPPMANN AND THE AMERICAN CENTURY 26–28 (1980); and Tom Arnold-Forster, *Walter Lippmann and Public Opinion*, 40 AM. JOURNALISM 51, 53–60 (2023).

86 WALTER LIPPMANN, LIBERTY AND THE NEWS 13 (1920).

87 LIPPMANN, PHANTOM PUBLIC, *supra* note 3, at 137.

88 *Id.* at 30–44.

89 *See* Michael Schudson, *A "Constituency of Intangibles": Walter Lippmann's Plea for a Better Democracy*, *in* THE PROBLEMATIC PUBLIC: LIPPMANN, DEWEY, AND DEMOCRACY IN THE TWENTY-FIRST CENTURY 17, 22 (Kristian Bjørkdahl ed., 2024) (explaining that Lippmann wanted experts to have "a more institutionalized place in governing," though he was "no fool about their virtues and limitations").

90 *See* FRIEDMAN, *supra* note 85, at 80–124. *See generally* Sue Curry Jansen, *Phantom Conflict: Lippmann, Dewey, and the Fate of the Public in Modern Society*, 6 COMMC'N & CRITICAL/CULTURAL STUD. 221 (2009).

91 JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY 182 (Melvin L. Rogers ed., Swallow Press 2016) (1927).

writ large may be "in eclipse," Dewey contended, avenues remained for particular publics to emerge through deliberations and debates that would allow them to gain some collective capacity in government.[92]

By 1955, Lippmann would attack the assumption "that the opinions of The People as voters can be treated as the expression of the interests of *The People* as an historic community."[93] The true public interest for Lippmann did not reside in the contingent whims of popular opinion or the pretensions of elected representatives, but rather in "what men would choose if they saw clearly, thought rationally, [and] acted disinterestedly and benevolently."[94] Believing the U.S. public to be incapable of addressing political problems in such a manner, he championed a stronger executive and the restraints of natural law.[95]

For Dewey, by contrast, effective problem-solving and responsible self-rule demanded a dynamic relationship between citizens and officeholders. Through education and reflection, citizens can come to understand the basic issues they face. Through deliberation and debate, they can not only formulate sensible plans but also build a more cohesive society, a "great community."[96] Such intersubjective critical inquiry is itself the "process whereby a public becomes a public."[97]

B. Lippmann's Legacy: Epistemic and Capture Critiques

Dewey's more hopeful response to the problem of the public echoes down through the work of deliberative democratic theorists, to which we turn in Part IV. But the force of empirical evidence has kept Lippmann's skepticism of the public alive. For many scholars in law, political science, and adjacent disciplines, invocations of the public refer to a fictional entity. This

---

92 *Id.* at 144–70. On the differences between Lippmann and Dewey on the ontological status of the public, see Steve Fuller, *The Lippmann/Dewey Debate in the History of Twentieth-Century Progressivism*, *in* THE PROBLEMATIC PUBLIC, *supra* note 89, at 111, 111–14.

93 WALTER LIPPMANN, ESSAYS IN THE PUBLIC PHILOSOPHY 32 (1955) (emphasis in original).

94 *Id.* at 42.

95 *Id.* at 49–57.

96 DEWEY, *supra* note 91, at 171–205; *see also id.* at 225 ("The essential need . . . is the improvement of the methods and conditions of debate, discussion, and persuasion. That is *the* problem of the public." (emphasis in original)).

97 Simone Chambers, *The Philosophic Origins of Deliberative Ideals*, *in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY 55, 62 (Andre Bächtiger et al. eds., 2018).

public-as-fiction argument takes two main forms. The epistemic critique maintains 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. The capture critique is more pointed. It suggests that appeals to the public tend to be not just unintentionally incoherent but deliberately misleading bids to legitimate government activities that are, in fact, geared toward elites and specific private interests.

Contemporary proponents of the epistemic critique point to studies and surveys revealing low voter knowledge and engagement, as well as evidence about how citizens view politics through in-group loyalties and narrow frames of reference that undermine prospects for enlightened collective action. In political science, this critique has followed Lippmann in condemning an unrealistically burdensome account of democratic citizenship and instead advocating either a more realistic theory of democracy or fewer constraints on empowering experts and specialists.[98] In the public law literature, scholars deploy dispiriting data on laypersons' civic competence to question the call for more direct popular involvement in regulation or interpretation. For Professor Ilya Somin, for example, this leads to a defense of judicial review as an appropriate response to a climate of "widespread general political ignorance."[99] For Professor Doni Gewirtzman, declining political engagement among the electorate puts paid to the ambitions of popular constitutionalists who want "the people" to exert ongoing influence over constitutional interpretation.[100]

What unites all these proponents of the epistemic critique is a claim about the observably deficient capacities and tribal propensities of the citizenry—and the attendant need for theories that do not rely on idealized conceptions of an engaged and informed public.

Contemporary proponents of the capture critique understand invocations of the public less as naive fantasies or lazy metaphors

---

[98] For leading works in this vein, see generally CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (2016); and JASON BRENNAN, AGAINST DEMOCRACY (2016).

[99] Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1334 (2004); *see also id.* at 1325 ("[I]t is important to stress that the widespread nature of political ignorance is a long-established fact that is unlikely to change in the foreseeable future.").

[100] Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 913–17 (2005). Gewirtzman was responding to a boomlet in popular constitutionalist scholarship around the turn of the millennium. *See generally, e.g.*, KRAMER, *supra* note 38; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

than as cynical ploys to obscure unsavory actions by government officials. Perhaps the most influential version of this critique emerges from public choice theory and its mapping of political decisions onto the incentives of individual officeholders. Invocations of the public, on this right-libertarian account, lend a civic patina to baser motives such as reelection for politicians or budget maximization for bureaucrats.[101] In political science, one often finds the capture critique associated with figures such as Theodore Lowi and E.E. Schattschneider, who faulted interest group pluralism for delegating political conflict to agencies and organized pressure groups.[102] Invocations of the public, on this left-liberal account, mask behind-the-scenes bargaining and encourage elected representatives not to take responsibility for a programmatic agenda or transformative legislation. In public law, scholars such as Lawrence Baum and Neal Devins carried forward this tradition when they argued that Supreme Court Justices do not by and large aim to track public opinion, so much as "to maintain their standing with the elite audiences that are salient to them."[103]

What unites all these proponents of the capture critique is a skepticism about the ability of publics to retain relative autonomy from, and influence over, those self-interested politicians and institutions that claim to make decisions on their behalf.

C. Dewey's Descendants: Emergent Activation and Designed Activation Theories

Taking the epistemic and capture critiques together, one finds oneself in a Lippmannite universe reinforced by reams of social-scientific evidence and new models of political behavior. Whether a naive or cynical fiction, the public remains a phantom

---

[101] *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 285 (1999) (suggesting that for most matters on which the "public interest" is invoked, "we should expect only particular or group interests"); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998) ("The public choice account holds . . . that agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public.").

[102] *See generally* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (1979); E.E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929–1930 REVISION OF THE TARIFF (1935); E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960).

[103] Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1580 (2010).

to be exorcised from clear-eyed analysis. And yet, the phantom looms larger than ever. Deweyian appeals to the public now suffuse the theory and practice of public law, even if few contemporary commentators follow Dewey in grappling with the deep difficulties that the concept poses. Among those who attempt to identify mechanisms by which the public can influence the operations of government, we find that two ideal-typical approaches predominate.

Emergent activation theories posit that coherent publics, or at least plausible proxies, already exist and are well suited to regulate high-profile government activities that draw them out. Although the public may be apathetic or asleep much of the time, a prominent constitutional controversy, presidential initiative, legislative reform, or governmental scandal can be counted on to rouse it awake.[104] Once roused, the public can be counted on to contribute to the resolution of the issue not only through the ballot box but also through existing channels of public opinion formation, social movements, advocacy groups, political parties, or other vehicles. The best-known example of such a theory may be Professor Bruce Ackerman's account of "dualist democracy," according to which citizens largely leave governance to politicians during periods of "normal politics" but then take over the reins during periods of "higher lawmaking."[105] The notion of an efficacious public-in-waiting is widespread, however. All of the commentators who depict public opinion as a check on the Supreme Court or the separation of powers presuppose some—typically much more regular and less spectacular—version of emergent activation.[106]

Designed activation theories posit that beyond the ordinary operations of constitutional government and civil society, special contrivances are needed to generate publics that can play a regulatory role. Their proponents therefore offer proposals to make a certain kind of public a reality in political life. Ackerman is exemplary of this approach as well. Together with Professor James Fishkin, he has proposed a "Deliberation Day" on which small groups of registered voters would be invited to learn and debate with one another in advance of national elections.[107] The reward

---

[104] For the image of the people as a "sleeping" democratic sovereign, see generally RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016).

[105] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3–33 (1991).

[106] *Cf.* Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 384 (2018) (observing that in this scholarship "public opinion is not simply correlated with judicial decisions, *but given causal power*" (emphasis in original)).

[107] *See generally* BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004).

would be "a more attentive and informed public,"[108] even during periods of ordinary lawmaking, forged through deliberative practices relatively unsullied by disingenuous political appeals and a degraded public sphere. Or to take a more familiar (and less Deweyian) example, notice-and-comment rulemaking is a designed activation strategy for generating publics to advise administrative agencies.[109]

Reducing these theoretical schools to their core commitments, we can map the more pessimistic and optimistic responses to the problem of the public as follows:

TABLE 1: LOCATING POLITICALLY EFFICACIOUS PUBLICS

	Emergent Publics	**Designed Publics**
Capable Citizens	Coherent publics or plausible proxies exist and are well suited to regulate high-profile government activities that draw them out (*emergent activation theories*).	Special contrivances are needed to generate publics that can reliably regulate government activities (*designed activation theories*).
Incapable Citizens	Political ignorance and collective action problems prevent citizens from exerting an informed influence on most government activities (*epistemic critiques*). Invocations of "the public" will tend, instead, to mask partisan power grabs and elite self-dealing (*capture critiques*).	The cognitive limitations and parochial perspectives of citizens cannot plausibly be overcome through special contrivances (*epistemic critiques*). Such contrivances will tend, instead, to privilege certain groups or certain forms of knowledge and communication over others (*capture critiques*).

[108] *Id.* at 3.

[109] The line between emergent activation and designed activation may be blurry in some cases. For example, while the Senate's duty to give "advice and consent" on Supreme Court nominations is hardwired into the Constitution, U.S. CONST. art. II, § 2, cl. 2, televised confirmation hearings might be seen as a designed activation strategy for generating publics that can help guide the exercise of this duty, *cf.* Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529, 551–69 (2020) (discussing forms of congressional oversight intended to communicate with voters and shape public opinion).

Although designed activation theories might seem to encourage quixotic proposals easily dismissed by the epistemic and capture critiques, their virtue lies in refusing to accept the harsh empirical realities of political ignorance, voter disengagement, and entrenched interest groups. Their proposals are often motivated by, and meant to mitigate, those very realities. Emergent activation theories are vulnerable to transformations in the contingent conditions they rely upon to rouse and empower the public; if the journalism industry falters, for instance, the plausibility of all accounts that presume a particular role for the press is liable to fall with it. Designed activation strategies, by contrast, aim themselves to create conditions under which effective publics might emerge.

III. ASCERTAINING THE PUBLIC

Surveying U.S. legal and political culture today, it would seem that Lippmann's skeptical stance on the public has lost out. In practice, institutional designs to enhance the public's influence over government have proliferated. And in principle, almost all contemporary commentators take it as given that electoral accountability is insufficient for democratic legitimation and that the public must therefore exert some sort of ongoing influence over government decision-making. Few scholars on the left or the right voice any support for curtailing monitory democracy and replacing it with, say, outright technocracy or epistocracy.[110]

Lippmann's core concerns, however, have by no means been dispelled. To the contrary, during the same late twentieth-century period in which "the public" came to colonize the discourse of public law, new reasons arose to doubt the existence of a public that can satisfactorily perform its appointed tasks. While skepticism of the public was fading, a range of developments was conspiring to revive, and intensify, the epistemic and capture critiques and to undermine the participatory turn in administrative law.

Many of these developments are familiar from the literature on democratic decline. Rising levels of ideological, geographic, and demographic polarization, for instance, make it harder to identify shared problems and devise shared solutions across party lines.[111]

---

[110] The most prominent academic outlier is BRENNAN, *supra* note 98.

[111] *See* Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 80–89 (2022). The ability of political parties "to meet public challenges" has been further strained by the proliferation of advocacy organizations, think tanks, lobbyists, megadonors, and other "[p]ara-organizations with agendas

Rising levels of economic inequality and money in politics make it harder for non-elites to influence legal and policy outcomes.[112] Declining levels of union density and mass-membership organizations make it harder for ordinary citizens to form effective counterpublics.[113] Declining levels of trust in mainstream media outlets, expert-driven institutions, and other epistemic authorities make it harder to establish a stable baseline for perceptions of politics.[114] Not only do these developments increase the difficulty of discerning and empowering a coherent public, but they also invite a brand of populist politics in which elected leaders claim to speak for the people—the "real people"—while dismantling checks on their own power.[115] Insofar as this is the case, not to reckon with the mounting difficulties involved in conceptualizing and conjuring the public is to jeopardize the long-run survival of political pluralism and liberal democracy.

This Part revisits the three main types of appeals to the public made in public law—involving public opinion, the public interest, and public participation—with an eye toward these trends. We first show how these trends have made each type of appeal increasingly implausible, if not incoherent. We then explain that even as monitory mechanisms were proliferating in recent decades, other sorts of mechanisms for empowering ordinary people in public law were vanishing from sight.

---

of their own." DANIEL SCHLOZMAN & SAM ROSENFELD, THE HOLLOW PARTIES: THE MANY PASTS AND DISORDERED PRESENT OF AMERICAN PARTY POLITICS 5, 221 (2024). On the simultaneous increase in polarization and decline in the capacity of parties to implement their programs, see SAM ROSENFELD, THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA 255–79 (2017).

112 *See generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015).

113 *See* Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 562–86 (2021). On the relationship between the decline of unions and other civil society organizations and the emergence of a "technocratic neoliberalism" in the Democratic Party more responsive to elite influence, see generally MICHAEL LIND, THE NEW CLASS WAR: SAVING DEMOCRACY FROM THE MANAGERIAL ELITE (2020).

114 *See* Brian Leiter, *The Epistemology of the Internet and the Regulation of Speech in America*, 20 GEO. J.L. & PUB. POL'Y 903, 906–18 (2022). On the relationship between expanded media choice and increased polarization, see MARKUS PRIOR, POST-BROADCAST DEMOCRACY: HOW MEDIA CHOICE INCREASES INEQUALITY IN POLITICAL INVOLVEMENT AND POLARIZES ELECTIONS 244–51 (2007).

115 On the relationship between populism and intermediation, see Nadia Urbinati, *Political Theory of Populism*, 22 ANN. REV. POL. SCI. 111, 118–24 (2019). On the idea that populism seeks to demarcate and represent the "real people," see JAN-WERNER MÜLLER, WHAT IS POPULISM? 25–32 (2016).

A. Public Opinion and Its (Growing) Problems

Public opinion may seem like a relatively rigorous concept for lawyers to draw on. Throughout the nineteenth century, it was portrayed as a constructive, if amorphous, force that could ensure responsive government in the absence of direct democracy.[116] The advent of polling techniques in the twentieth century led the concept to be reimagined in more objective terms, measurable through surveys that reveal the preferences and priorities of representative respondents.[117] Oscillating between these normative and empirical registers, appeals to public opinion now play a central role in the many emergent activation theories that call upon it to check executive overreach, adjudicate interbranch conflict, and guide judicial review.[118] Yet while we may have more sophisticated tools than ever for eliciting and quantifying people's opinions, there are growing reasons to doubt that the actual processes of public opinion formation can fulfill these roles.

Consider, for example, Posner and Vermeule's claim in *The Executive Unbound* that "the court of public opinion"—unlike actual courts—checks executive overreach while affording presidents the discretion they need to govern in an ever-changing policy environment.[119] Posner and Vermeule contended that the administrative state helps "to produce a wealthy and highly educated population[ ] whose elites continually scrutinize executive action," which in turn helps to ensure that public opinion performs this checking function.[120] As Professor Aziz Huq has pointed

---

116 For a representative study of the centrality and multivalence of public opinion during this period, see generally JAMES THOMPSON, BRITISH POLITICAL CULTURE AND THE IDEA OF 'PUBLIC OPINION', 1867–1914 (2013).

117 On the transformation of public opinion from an amorphous theoretical concept in the nineteenth century to a quantifiable entity in the twentieth century, see John Durham Peters, *Historical Tensions in the Concept of Public Opinion*, *in* PUBLIC OPINION AND THE COMMUNICATION OF CONSENT 3, 11–22 (Theodore L. Glasser & Charles T. Salmon eds., 1995). On polling techniques giving rise to a new conceptualization of public opinion, see generally SARAH E. IGO, THE AVERAGED AMERICAN: SURVEYS, CITIZENS, AND THE MAKING OF A MASS PUBLIC (2007).

118 *See supra* Part I.A.

119 POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 27, at 61; *see supra* note 27 and accompanying text.

120 POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 27, at 14. "The administrative state" thus "generates the cure for its own ills." *Id.* For the classic argument that demographic, educational, and economic change brings forth new publics with attitudes conducive to democratic participation, see generally RONALD INGLEHART, THE SILENT REVOLUTION: CHANGING VALUES AND POLITICAL STYLES AMONG WESTERN PUBLICS (1977).

out, however, this picture of public opinion not only is "poorly specified" but also ignores the difficulties that voters face "in processing the increasingly large glut of information now available through the growing range of electronic media," the possibility that "deepening ideological commitments may render voters less receptive to new information," and the evidence suggesting that the affluent exert "asymmetrical influence" over policy outcomes.[121]

In other words, rising levels of information overload, media fragmentation, affective polarization, and socioeconomic inequality undermine the plausibility of public opinion serving as a reliable brake on executive behaviors that millions of Americans might find abusive. If "reduced communication costs make it easier for the public to monitor the executive,"[122] as a technological matter, these trends cut hard in the other direction. And if issues of constitutional import seem like they ought to transcend partisan cleavages, as a normative matter, there is research to suggest that it is precisely in the realm of elite constitutional discourse where polarization has penetrated most deeply.[123]

Similar difficulties attend Chafetz's account of the separation of powers. Chafetz argued in rich detail that public opinion informally regulates interbranch conflict through each branch's "discursive engagement with the citizenry."[124] In the never-ending competition "for the affections of the people," Chafetz emphasized, Congress can stage hearings, investigations, and leaks to communicate with the public and try to win its support.[125] Yet as Professor Anita Krishnakumar has observed, such congressional strategies must reckon with an increasingly polarized electorate that is increasingly likely to learn about such matters through

---

For Professor Ronald Inglehart's adjustment of his theory in the wake of 2016, see generally PIPPA NORRIS & RONALD INGLEHART, CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM (2019).

121 Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 816–24, 833–36 (2012) (book review).

122 POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 27, at 209.

123 *See* David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 34–48 (2019) (analyzing polarization of constitutional versus nonconstitutional discourse in Congress).

124 JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 24 (2017); *see also supra* note 29 and accompanying text.

125 Josh Chafetz, *The Brennan Lecture: The Separation of Powers and the Public*, 42 OKLA. CITY U. L. REV. 309, 316–32 (2018).

"one-sided" sources and to view them "through a partisan lens."[126] The proposition that "judicious" uses of institutional power can be relied upon to win "the game of public opinion,"[127] or that this game can be relied upon to produce broadly popular policy outcomes, would seem to lose force under these political-informational conditions.

The more iconic proposition that public opinion constrains the Supreme Court has lost force as well. Dahl and his successors have tried to demonstrate how the Court is responsive to "mainstream public opinion" and, in consequence, how fears of its countermajoritarian character are overstated.[128] But the link between mainstream public opinion and the Court's outputs has become increasingly frayed in recent decades, given the increasingly ephemeral nature of dominant governing coalitions, the increasing length of Justices' tenure, and the increasingly partisan nature of their social and reputational networks.[129] "In addition," as Professor Richard Pildes has explained, "we live in a more fragmented 'public opinion culture' than in the past, which heightens the possibility for Justices, like the rest of us, to exist in a cultural and news environment preselected to confirm prior beliefs."[130] Even if one brackets all of the unanswered conceptual questions about the nature of the public opinion invoked by neo-Dahlian theories and all of the unresolved empirical questions about its historical relationship to judicial outcomes, these developments have almost certainly diminished the capacity of public opinion—however defined or measured—to control the Court.

B. The Public Interest and Its (Growing) Problems

Appeals to the public interest have likewise become more vexed under contemporary conditions. As Part I explained,

---

[126] Anita S. Krishnakumar, *How Long Is History's Shadow?*, 127 YALE L.J. 880, 918, 923–28 (2018) (book review).

[127] Chafetz, *Congress's Constitution*, *supra* note 29, at 772 (quotation marks omitted) (quoting POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 27, at 25).

[128] FALLON, *supra* note 24, at 116–17; FRIEDMAN, *supra* note 35, at 368–71; *see supra* notes 22–26 and accompanying text.

[129] For the leading account of these points, see Pildes, *Is the Supreme Court "Majoritarian"?*, *supra* note 32, at 126–42. For the leading account of the Justices' growing embeddedness in, and responsiveness to, elite partisan networks, see generally NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019).

[130] Pildes, *Is the Supreme Court "Majoritarian"?*, *supra* note 32, at 127.

administrators and judges are constantly called upon to make determinations about the public interest, public welfare, or analogous concepts.[131] Yet while these public interest standards might seem to invite ambitious philosophical inquiries into collective values or wide-ranging empirical inquiries into popular preferences, in practice they do neither. Judges invoke the public interest more or less haphazardly, in "unstructured and often conflicting" formulations.[132] Administrators, as Short has shown, "rarely consider what might be characterized as 'common good' or 'community' values" in anything more than a superficial sense—"at most providing atmospherics"—and virtually never elicit the views of ordinary people.[133] Instead, agencies charged with regulating in the public interest tend to fall back on a narrow set of economic considerations, often through some form of cost-benefit analysis.[134]

There is a significant gap, then, between the moral and rhetorical primacy of the public interest throughout public law and its actual treatment as "a vague, undelineated symbol"[135] or a shorthand for economic efficiency. As Short has observed, some part of this gap reflects the difficulties involved in "ascertaining the social fact" of what "the relevant public" desires or in settling on "some different substantive ideal" of the public interest.[136] These difficulties are long-standing. As early as 1975, the administrative law community had "come not only to question agencies' ability to protect the 'public interest,' but to doubt the very existence of an ascertainable 'national welfare' as a meaningful guide to administrative decision."[137] But overcoming these difficulties has grown even harder in an era marked by thinning social ties and growing cultural and epistemological division.

Calls to establish new public interest standards to guide the regulation of social media furnish a topical example.[138] Proponents envision these standards being used to promote balanced

---

131 *See supra* Part I.B.

132 Moore, *supra* note 52, at 940.

133 Short, *supra* note 40, at 766.

134 *See id.* at 780–834.

135 Arthur S. Miller, *Foreword: The Public Interest Undefined*, 10 J. PUB. L. 184, 187 (1961).

136 Short, *supra* note 40, at 829.

137 Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1683 (1975).

138 For an overview of these calls in historical context, see John Samples & Paul Matzko, *Social Media Regulation in the Public Interest: Some Lessons from History*, KNIGHT FIRST AMEND. INST. (May 4, 2020), https://perma.cc/8FWM-X9RN.

coverage of controversial issues; limit the spread of "fake news"; and protect "against filter bubbles, disinformation, and generally low-quality content."[139] For such standards to gain wide acceptance as being in the public interest, however, there would need to be wide agreement as to both the goals themselves and the practices that violate them. And as Professors Francis Fukuyama and Andrew Grotto have detailed, it is "not at all clear" how a goal such as balanced coverage of controversial issues could satisfy these criteria "in light of political polarization within societies" and "the global scope of service provision by internet platforms."[140] Under prevailing conditions of "rapid cultural, technological, and administrative change, along with ideologically polarized interpretation of that change," it is not even clear that a regulator could "secure broad agreement as to what counts as misinformation," much less as to what counts as low-quality content.[141]

These points generalize broadly. The combination of rising political polarization across more and more issue dimensions and declining popular trust in more and more epistemic authorities, within a liberal culture that prioritizes "self-interest over civic spirit,"[142] is apt to frustrate almost any search for consensus on the social or normative fact of the public interest. It remains possible to define the public interest in less ambitious, more stipulative terms—for example, as the absence of private self-dealing or as coterminous with the outcome of a cost-benefit analysis or fair procedure.[143] Implicitly, most agencies appear to do just this. What gets lost in these approaches is any meaningful conception of, or connection to, the public as a collective subject or the public interest as a reflection of collective values.

---

139 PHILIP M. NAPOLI, SOCIAL MEDIA AND THE PUBLIC INTEREST: MEDIA REGULATION IN THE DISINFORMATION AGE 166 (2019).

140 Francis Fukuyama & Andrew Grotto, *Comparative Media Regulation in the United States and Europe*, *in* SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM 199, 215 (Nathaniel Persily & Joshua A. Tucker eds., 2020).

141 David Pozen, *"Truth Drives Out Lies" and Other Misinformation*, KNIGHT FIRST AMEND. INST. (Feb. 9, 2022), https://perma.cc/BV7L-QBXQ.

142 PATRICK J. DENEEN, WHY LIBERALISM FAILED 155 (2018) (arguing that "liberalism's relentless emphasis upon private over public things, self-interest over civic spirit, and aggregation of individual opinion over common good" has led to "a fractured and fragmented public"). On the extension of partisan conflict to more and more issue areas, see generally Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and "Conflict Extension" in the American Electorate*, 46 AM. J. POL. SCI. 786 (2002). On the collapse of epistemic authority in the internet age, see generally Leiter, *supra* note 114.

143 *See* Short, *supra* note 40, at 772–78 (reviewing theories of the public interest).

C. Public Participation and Its (Growing) Problems

Over the past six decades, as Part I explained, public participation has become a lynchpin of administrative law and practice (and, to a lesser extent, congressional procedure).[144] The architects of this participatory turn believed that it would foster public confidence in and support for agency decisions—that laws like FOIA, FACA, and GITSA would "make the governmental process more equitable, effective, and credible" and, in so doing, "secure both public trust in government and public-interested regulation."[145] Such predictions have not been borne out. The relationship between public participation in the form of monitoring or commenting, on the one hand, and public trust or public-interested regulation, on the other, was always ambiguous and has only become more vexed under current conditions.

Substantial literatures have explored the disappointments of public records laws, public meetings laws, and public notice laws.[146] Rather than review each of these literatures, this Section draws on them to highlight several tensions in the operation of all these laws that have increasingly compromised their public-regarding aims and that reflect, in part, the failure to prioritize any substantive conception of the public or the public good. The next Section calls attention to the flip side of the participatory turn—the turn *away* from other sorts of mechanisms that afford ordinary people not just visibility into but also a voice in official decision-making.

First, it turns out that public participation can undermine regulatory capacity and, with it, understandings of the public welfare that demand robust regulation. Compliance with public participation mandates of all sorts takes time and effort, slowing down agency initiatives and diverting resources from other

---

144 *See supra* Part I.C.

145 David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 117, 122 (2018) [hereinafter Pozen, *Transparency's Ideological Drift*].

146 On the disappointments of public records laws, see, for example, MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 57–164 (2021); and Pozen, *Beyond the Freedom of Information Act*, *supra* note 79, at 1111–36. On the disappointments of public meetings laws, see, for example, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 392–94 (5th ed. 2010); and Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 355–67 (2011). On the disappointments of public notice laws, see, for example, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32; and E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992).

uses.[147] Some of these compliance costs now surpass their original levels by orders of magnitude. As the annual volume of FOIA requests has risen above the million mark, for instance, agencies find themselves paying an ever steeper "FOIA tax" for reasons beyond their control.[148] These costs are then compounded when an agency's critics enlist (or weaponize) these laws to investigate, harass, and threaten it with litigation.[149] The net result is a transfer of power as well as information from regulator to industry. Within any given institution, moreover, opening up hearings and meetings to public view makes it harder to get deals done. Government officials may be tempted to mug for the cameras and recite talking points rather than engage in a good-faith search for "multidimensional, integrative solutions."[150] As media polarization and partisan polarization have risen in recent decades, the difficulty of deal-making under the glare of publicity has risen along with them.

Second, it turns out that public access to the machinery of government can undermine public trust in government. Against the intuitive idea that transparency and trust travel together, scholars from diverse disciplines have shown that the inverse relationship is just as plausible, whether because transparency mandates create unrealistic expectations, foster a "culture of suspicion"[151] and "conflict in state–citizen relations,"[152] or leave institutions unable to "respond to the demands placed on" them.[153]

---

147 *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 363 (2019) (explaining how administrative "proceduralism," prominently including public participation rules, "drains agency resources, introduces delay, and thwarts agency action"); Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185, 210–16 (discussing related "tradeoffs that can arise between . . . values of participation and the capacity to deliver public goods effectively").

148 Pozen, *Beyond the Freedom of Information Act*, *supra* note 79, at 1123–31; OFFICE OF INFO. POL'Y, U.S. DEP'T OF JUST., SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2023, at 4 (2024).

149 *See* Bagley, *supra* note 147, at 361–62; Pozen, *Beyond the Freedom of Information Act*, *supra* note 79, at 1127–28.

150 Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, *in* NEGOTIATING AGREEMENT IN POLITICS: REPORT OF THE TASK FORCE ON NEGOTIATING AGREEMENT IN POLITICS 54, 64 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

151 ONORA O'NEILL, A QUESTION OF TRUST 77 (2002).

152 TERO ERKKILÄ, GOVERNMENT TRANSPARENCY: IMPACTS AND UNINTENDED CONSEQUENCES 25 (2012).

153 PIERRE ROSANVALLON, COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST 259 (Arthur Goldhammer trans., 2008); *see also* C. Thi Nguyen, *Transparency Is Surveillance*, 105 PHIL. & PHENOMENOLOGICAL RSCH. 331, 332 (2021) (arguing that transparency and trust "are in essential tension" and that the resulting dilemma "admits of no

"Transparency . . . thus engenders the very disillusionment it was intended to overcome."[154] Because U.S. public participation laws apply only to government institutions, and not to their private sector counterparts, this disillusionment can in turn fuel "anti–public sector bias."[155] It is impossible to prove the extent to which the participatory turn bears blame for the collapse of trust in government that the United States has experienced since the 1960s.[156] But this turn certainly did not "go a long way toward restoring public confidence and trust in the legislative and executive branches," as its legislative sponsors anticipated.[157] And even if trust in government collapsed largely for exogenous reasons, its decline, together with the rise of partisan media, means that any new information that emerges from public participation laws is liable to be reported and interpreted in ways that sow further alienation among disaffected constituencies.[158]

Finally, it turns out that opening up governmental processes to all comers can undermine the interests of less sophisticated parties. As recounted in Part I, our public participation laws offer their rights and privileges to the public, a term that is never clearly defined in the laws themselves but that has been construed to include artificial persons as well as natural persons, foreigners as well as U.S. residents, and profit-motivated rent seekers as well as civic-minded reporters and reformers.[159] This was not always the case. Some of the most significant Great Society laws of the 1960s, such as the Economic Opportunity Act,[160] prioritized the participation of the poor in their community development programs, until a "barrage of controversy and criticism"

---

neat resolution, but only painful compromise"); Pozen, *Transparency's Ideological Drift*, *supra* note 145, at 151 n.234 (collecting additional sources).

154 ROSANVALLON, *supra* note 153, at 259.

155 Irma Eréndira Sandoval-Ballesteros, *Structural Corruption and the Democratic-Expansive Model of Transparency in Mexico*, *in* TROUBLING TRANSPARENCY, *supra* note 68, at 291, 302–05 (making this point with respect to Mexico).

156 For overviews of this collapse and discussion of possible causes, see generally LEE RAINIE, SCOTT KEETER & ANDREW PERRIN, PEW RSCH. CTR., TRUST AND DISTRUST IN AMERICA (2019); and Anthony King, *Distrust of Government: Explaining American Exceptionalism*, *in* DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES? 74 (Susan J. Pharr & Robert D. Putnam eds., 2000).

157 Lawton M. Chiles, Jr., *Government in the Sunshine*, 34 FED. BAR J. 352, 355 (1975) (discussing GITSA).

158 *See* Pozen, *Transparency's Ideological Drift*, *supra* note 145, at 149–52.

159 *See supra* Part I.C.

160 Pub. L. No. 88-452, 78 Stat. 508 (1964) (codified as amended at 42 U.S.C. § 2991 et seq.).

forced legislators and administrators to abandon this openly redistributionist approach.[161] Ever since, Congress has repeatedly instructed agencies to facilitate public participation "without targeting a specific population within the general public."[162] The practical result of this formal neutrality has often been regressive. The best-funded, best-organized lobbies, generally from business, make the most intensive and effective use of public records laws, public meetings laws, and public notice laws—diminishing these laws' value for ordinary citizens in the process.[163] Giving any sort of priority to any particular public opens up these regimes to charges of subjectivity and bias. Failing to do so converts them into corporate subsidies, reinforcing preexisting asymmetries of power in civil society.

Individually and collectively, these three trade-offs—external scrutiny versus regulatory capacity, transparency versus trust, universality versus equity—limit the potential of monitory mechanisms to empower ordinary Americans or to deliver outcomes sought by popular majorities. The regime of public participation law has not given rise to self-conscious publics capable of collective action, so much as to new versions of the old capture critiques and to a culture of atomized citizen-consumers. And these trade-offs have only become starker over time.

D. From Authors to Monitors

Still less appreciated than these trade-offs within the public participation regime is the broader trade-off that this regime reflects and instantiates. The great irony of the participatory turn is that even as the United States was investing in a new suite of strategies to enhance public oversight of government, the country was neglecting or turning away from an older set of strategies that allowed ordinary people to help govern in more immediate and concrete ways. Consider, briefly, some examples from both the federal and state levels:

Constitutional conventions (and amendments). The constitutional convention was invented on our shores and has been

---

161 ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., CITIZEN PARTICIPATION IN THE AMERICAN FEDERAL SYSTEM 100 (1979); *see also* Bingham, *supra* note 77, at 316–17.

162 Bingham, *supra* note 77, at 317.

163 *See* Bagley, *supra* note 147, at 391–400 (detailing how public participation laws intended to prevent "agency capture" frequently have the opposite effect).

described as "one of America's great contributions to the constitutional learning of the world."[164] Since the Declaration of Independence, U.S. states have held approximately 233 conventions to revise or rewrite their own constitutions.[165] In their procedures, these conventions became increasingly inclusive over time, while in their outputs they became increasingly "effective at empowering statewide majorities over misaligned and recalcitrant state governments" and "wealthy private interests."[166] Until they stopped happening. Congress has never called a federal convention for proposing constitutional amendments, of course, and it has only once allowed an amendment to be ratified by state conventions rather than state legislatures, for the Twenty-First Amendment in 1933.[167] And no state has called a constitutional convention in over thirty years, the longest convention drought in U.S. history.[168] Meanwhile, a growing number of state legislatures have adopted new limits on the ability of citizens to initiate and approve constitutional amendments outside the convention process.[169]

Congressional petitions. Congressional petitions, in which laypersons appeal to Congress to enact or revise certain laws, played a central role in the U.S. lawmaking system for the Republic's first 150 years, before "essentially disappear[ing] . . . in the late 1940s."[170] Under conditions of mass disenfranchisement, the petition was a profoundly democratic force in political

---

164 Robert F. Williams, *The Florida Constitutional Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215, 220 (1998); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 342 (2d ed. 1998) ("[The constitutional convention] was an extraordinary invention, the most distinctive institutional contribution, it has been said, the American Revolutionaries made to Western politics.").

165 *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 7–9 (2006).

166 Jonathan L. Marshfield, *American Democracy and the State Constitutional Convention*, 92 FORDHAM L. REV. 2555, 2561 (2024); *see also id.* at 2577 (discussing state conventions' "deep commitment to popular constitutionalism and the principle of majority rule"). *See generally* David E. Pozen, *The Common Law of Constitutional Conventions*, 112 CALIF. L. REV. 2213 (2024) [hereinafter Pozen, *Common Law of Constitutional Conventions*] (discussing the historical development of convention procedures).

167 *See* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2358–60 (2021).

168 J.H. Snider, *Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776–2015*, 6 AM. POL. THOUGHT 256, 259 (2017).

169 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J.F. 191, 192–93, 206–16 (2023); Sara Carter, Alice Clapman & Alexi Comella, *Politicians Take Aim at Ballot Initiatives*, BRENNAN CTR. FOR JUST. (Jan. 16, 2024), https://perma.cc/5FCJ-N5ZB.

170 Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1570 (2018).

life, giving a dose of "public power" to otherwise disempowered women, Black people, Native Americans, noncitizens, and small groups united by class, trade, or moral conviction.[171] "From its earliest days," as Professors Maggie Blackhawk and Daniel Carpenter have documented, "Congress devoted an extraordinary amount of time and resources to institutionalizing and maintaining the right to petition," and it passed a "wide array" of both private bills and general laws in direct response to petitions.[172] In the early-to-mid twentieth century, however, Congress largely dismantled the petition system and rerouted what was left of it to the administrative state, leaving ordinary people to respond to proposed rulemakings through the notice-and-comment procedure (best of luck with that) while professional lobbyists picked up the slack on Capitol Hill.[173]

Criminal juries. Like the right to petition,[174] the right to a jury of one's peers in criminal cases is expressly protected by the Bill of Rights.[175] There is strong evidence, as the U.S. Solicitor General recently acknowledged, that the framers of the Sixth Amendment intended for the jury "to 'serve as the conscience of the community,'" including by "'disregard[ing] clearly applicable

---

171 Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2182 (1998); *see also* William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, *in* THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT 29, 30 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) ("Whether one was a senator or an orphaned child of a Continental soldier, all citizens claimed an equal right to justice by their right to petition.").

172 McKinley, *supra* note 170, at 1555, 1563. *See generally* DANIEL CARPENTER, DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790–1870 (2021).

173 *See* McKinley, *supra* note 170, at 1568–1600; *see also* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1198–99 (2016) ("Congress has developed through our current lobbying system an informal petitioning mechanism that is opaque and unorthodox and that provides preferential access to the lawmaking process to the politically powerful."). It has been suggested that the decline of congressional petitions was attributable, in part, to "the rise of public opinion polls and other forms of survey research, which provided 'more systematic techniques for registering public sentiment.'" Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 34–35 (2011) (quoting Richard R. John & Christopher J. Young, *Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism*, *in* THE HOUSE AND SENATE IN THE 1790S, *supra* note 171, at 100, 138).

174 U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

175 *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.").

law' with which it disagreed."[176] Since the 1960s, however, jury trials have become anomalies. Over 90% of criminal cases are now resolved by plea bargains, in which defendants waive their right to a trial in exchange for reduced charges or other concessions.[177] Since the 1960s, federal and state judges have also developed an array of policies to minimize the possibility that jurors will try to serve as the conscience of the community by engaging in "nullification" and voting to acquit because of disagreement with the law.[178] Prospective jurors who express "openness to, or even awareness of, nullification" are now struck for cause.[179] On those rare occasions when they are empaneled, contemporary juries are thus pushed to confine their inquiry to discrete questions of guilt and innocence, without considering broader issues of criminal justice and injustice.

Citizens' assemblies. Citizens' assemblies are randomly or quasi-randomly selected groups of citizens brought together to deliberate on a specific legal or policy issue.[180] Over the past two decades, interest in and use of citizens' assemblies have exploded across Western democracies, as part of what the Organisation for Economic Co-operation and Development has described as a "deliberative wave."[181] Scattered examples exist throughout the United States, such as the Citizens' Initiative Review in Oregon,

---

176 Brief for the United States at 29, Smith v. United States, 143 S. Ct. 1593 (2023) (No. 21-1576) (quoting Drew L. Kershen, *Vicinage—Part II*, 30 OKLA. L. REV. 1, 85 & n.442 (1977)).

177 *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). The Supreme Court ratified the turn to plea bargaining in 1971, describing it as an "essential" and "highly desirable" practice given the relative cost of trials. Santobello v. New York, 404 U.S. 257, 261 (1971).

178 *See generally* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998) (documenting the spread of judicial and prosecutorial mechanisms to restrict nullification advocacy and exclude potential nullifiers from juries); Jordan Paul, *How Courts Robbed Juries of a Powerful Tool for Doing Justice*, BALLS & STRIKES (Oct. 7, 2021), https://perma.cc/VY73-XW2D (reviewing judicial practices that "effectively gutted" jury nullification).

179 DAVID POZEN, THE CONSTITUTION OF THE WAR ON DRUGS 143 (2024).

180 *See* Julien Vrydagh, *Citizens' Assemblies: An Introduction*, *in* DE GRUYTER HANDBOOK OF CITIZENS' ASSEMBLIES 1, 3 (Min Reuchamps et al. eds., 2023) (defining "citizens' assembly" as "a generic term for all participatory institutions [that bring] together an inclusive group of lay citizens who deliberate together on a public issue so as to exert a public influence" (emphasis omitted)). The citizens' assembly is one type of deliberative "mini-public"; that broader category is a focus of the next Part.

181 *Id.* at 2 (quotation marks omitted) (quoting ORG. FOR ECON. COOP. & DEV., INNOVATIVE CITIZEN PARTICIPATION AND NEW DEMOCRATIC INSTITUTIONS: CATCHING THE DELIBERATIVE WAVE (2020)).

which convenes panels of twenty-four voters to review and then issue statements on pending ballot initiatives,[182] and the municipal citizens' assembly held by Petaluma, California, in 2022, which convened thirty-six residents to recommend a plan for redeveloping the city's fairgrounds.[183] But no high-profile version has been tried at the federal level, while other forms of popular political engagement with a longer history in this country, such as membership in a civic association, remain well below their mid-twentieth-century levels.[184] As the American Academy of Arts and Sciences observed in 2020, "The United States lags many of its democratic peers with respect to citizens' assemblies."[185] The participatory turn has not led to a deliberative wave.

* * *

Juxtaposing these examples of declining or underdeveloped institutions with the growth of public records, public meetings, and public notice laws, one finds that the public has loomed ever larger in our legal system as a monitor of government action, ever smaller as an author. This distinction is fuzzy at the edges, for monitory mechanisms may involve attempts to reshape policy proposals (as with notice-and-comment rulemaking) and authorial mechanisms rarely, if ever, create binding law on their own.[186]

---

[182] *See Citizens' Initiative Review*, HEALTHY DEMOCRACY (2024), https://perma.cc/6M6S-PBJ2; *Oregon Citizens' Initiative Review*, PARTICIPEDIA, https://perma.cc/9KRT-K4YV. For a broad overview of this undertaking, see generally JOHN GASTIL & KATHERINE R. KNOBLOCH, HOPE FOR DEMOCRACY: HOW CITIZENS CAN BRING REASON BACK INTO POLITICS (2020).

[183] *See* Hollie Russon Gilman & Amy Eisenstein, *It's Like Jury Duty, but for Getting Things Done*, BOS. GLOBE (Aug. 18, 2023), https://perma.cc/C3R7-HEJ7 (discussing this and other U.S. examples).

[184] For canonical studies of the decline in U.S. associational life during the latter part of the twentieth century, see generally ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000); and THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE (2003). For more recent evidence and analysis, see generally PAUL W. KAHN, DEMOCRACY IN OUR AMERICA: CAN WE STILL GOVERN OURSELVES? (2023).

[185] AM. ACAD. OF ARTS & SCI., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 45 (2020).

[186] *See, e.g.*, RICHARD BELLAMY ET AL., INT'L PANEL ON SOC. PROGRESS, INEQUALITY AS A CHALLENGE TO DEMOCRACY ¶ 282 (2018) (available at https://perma.cc/YTF9-249K) (explaining that citizens' assemblies and other "[m]ini-publics typically only have recommendatory force—they are used as consultative bodies by political decision-makers"); Pozen, *Common Law of Constitutional Conventions*, *supra* note 166, at 2229 (noting that state and federal constitutional conventions have "the power to recommend changes" to a constitution, not to change a constitution by themselves).

Further elaboration and refinement of these categories is an important task in its own right, which we hope future theorists will take up. Yet even in its basic form, the distinction captures a significant fault line in the character of institutionalized popular engagement with the lawmaking process. The late twentieth-century shift from authors to monitors means that ordinary Americans today almost never get to pose, much less decide, specific questions of law or policy through formal procedures. They get to observe and criticize. And the monitory mechanisms through which they do so have been increasingly coopted by business interests.[187] This lack of popular agency is compounded further by polarization and the inability of "hollow parties" to build effective electoral coalitions or implement cohesive policy agendas.[188]

What would it take for the United States to make *another* shift in the practice of public law, one that would engage ordinary people in more meaningful, legible, and generative ways, and thereby allow participants to see themselves as part of a coherent public?

IV. BRINGING THE PUBLIC MORE FULLY INTO PUBLIC LAW?

We have argued that long-standing anxieties about the coherence of the public continue to haunt the U.S. legal and political order—in some respects, more acutely than ever. Rising levels of partisan polarization, media fragmentation, and epistemic fracture have undermined the credibility of appeals to the public throughout public law. What follows from this deconstruction? How can scholars and reformers avoid falling into Lippmannite disenchantment and democratic despair without falling back on anachronistic notions of governance and the public sphere?

For legal scholars, the most straightforward lesson is that appeals to the public should come with evidence or hypotheses on how the public in question can fulfill its designated function. Claims about public opinion constraining the Court, for example, require some account of the mechanisms through which public opinion forms and influences judicial behavior. Such accounts, in turn, may require close engagement with media and communications studies, social psychology, and political science.[189] Or to take

---

187 *See supra* Part III.C.

188 *See supra* note 111 and accompanying text.

189 For an exemplary study to this effect, see generally Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011) (providing a fine-grained analysis of the relationship between

another example, to assess the degree to which public records laws educate and empower different segments of the public, scholars must investigate the data on who requests and receives records, for what ends, and with what consequences for the affected agencies.[190] As these examples suggest, thinking carefully about the role the public is playing in public law will often involve interdisciplinarity and empiricism, along with realism about the shortcomings of the contemporary public sphere.

For legal reformers, the most straightforward lesson is that public law is failing in its efforts to legitimate constitutional government through appeals to the public beyond the ballot box. The glut of public interest standards, public purpose requirements, public access mandates, and the like may serve important ends, just not ones that bear a clear relationship to a discernible public. None of these regimes have managed to identify collective values or incorporate popular preferences with any regularity.[191] Nor have they managed to shore up public trust in political institutions, which has been in freefall for decades.[192] Under prevailing sociopolitical conditions, we cannot count on effective monitory publics emerging either on their own or with the help of existing laws.

What to do about this situation is far from straightforward. Those who worry on democratic grounds about the mismatch between public law's rhetoric and reality must abandon "the fiction of the *one* public,"[193] in Jürgen Habermas's terms, and find ways

---

public opinion and Supreme Court decisions and finding that public opinion is likely to be most influential in nonsalient cases). Within public law scholarship, the literature on social movement constitutionalism has been relatively careful about parsing segments of the public and mapping mechanisms of influence. *See generally* Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441 (reviewing key works in this vein). As the judiciary and the broader constitutional culture have become increasingly polarized on partisan lines, however, the descriptive and prescriptive import of this literature has become increasingly unclear. From the vantage point of today, the late twentieth-century turn toward social movements to explain transformational court rulings might be seen as a desperate effort to identify a constitutionally efficacious public amidst the collapse of the Article V amendment process and the consolidation of judicial supremacy.

190 For an exemplary study to this effect, see generally Kwoka, *FOIA, Inc.*, *supra* note 79 (revealing the extent to which commercial requesters dominate the FOIA process at six agencies). On the need for greater interdisciplinarity, empiricism, and realism in the study of public records laws and other monitory mechanisms, see generally David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326 (2020).

191 *See supra* Parts I.B–C, III.B–C.

192 *See supra* note 156 and accompanying text.

193 JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 56 (Thomas Burger with Frederick Lawrence trans., MIT Press 1999) (1962) (emphasis in original); *see also* Bryan Garsten,

to empower publics that can perform the regulatory roles ascribed to them and make credible claims on behalf of ordinary people. More than that, they must find ways for these publics to stimulate and shape positive government action, so that their empowerment does not entail the disempowerment of the state that serves them. This is a generational challenge. Our aim in this Part is to identify the challenge, articulate criteria for meeting it, and put forward a set of possible responses informed by recent scholarship on deliberative democracy.

We hasten to add that these are not the only responses to the mismatch we have identified. A very different alternative would be for theorists and practitioners to ask far *less* of the public. Yet while it may be simpler to fall back on a deflated understanding of the public as, say, anything that transcends narrow special interests, the internal logic of public law discourse suggests a significantly more ambitious and dynamic conception. For better or worse, few commentators today seem prepared to accept that the public's role in shaping legal outcomes would be so limited.

Another response might focus on strengthening existing institutions that produce emergent publics. In this spirit, some critics of the deliberative proposals canvassed in this Part have stressed the indispensable role played by elections and political parties in mass democracy.[194] Yet while we would welcome reforms to electoral practices, party mechanisms, and the media environment that enhance the entire citizenry's "opportunity to exercise collective political freedom,"[195] it is not at all clear that such reforms would be easier to achieve than their deliberative counterparts. Any new strategies to empower emergent macro-publics, moreover, could be pursued alongside strategies to design new mini-publics. We do not mean to suggest that the latter set of strategies deserves to be prioritized over the former. We do mean to argue that mini-publics deserve serious consideration in any

---

Representative Government and Popular Sovereignty, *in* POLITICAL REPRESENTATION 90, 91 (Ian Shapiro et al. eds., 2009) (arguing, with reference to Benjamin Constant and James Madison, that "a chief purpose of representative government is *to multiply and challenge governmental claims to represent the people*" (emphasis in original)).

194 *See generally, e.g.*, RICHARD TUCK, ACTIVE AND PASSIVE CITIZENS: A DEFENSE OF MAJORITARIAN DEMOCRACY (2024); Stefan Rummens & Raf Geenens, *Lottocracy Versus Democracy*, RES PUBLICA (Nov. 22, 2023), https://perma.cc/KT3Q-56Q9.

195 Cristina Lafont & Nadia Urbinati, *Defending Democracy Against Lottocracy*, *in* AGAINST SORTITION? THE PROBLEM WITH CITIZENS' ASSEMBLIES 157, 169 (Geoffrey Grandjean ed., 2024).

agenda to make the public an active agent, and not just a gauzy abstraction, in the everyday practice of public law.

A. Designing Credible Publics

Barring an upheaval in the structure of U.S. politics, journalism, or civic education, there is no reason to expect that the dilemmas we have discussed will subside. It will therefore take some new set of mechanisms to make public law's use of the public as a legitimating concept more credible. These mechanisms, moreover, must be (1) relatively insulated from the centrifugal forces of party polarization, media fragmentation, and epistemic fracture that have undermined existing appeals to the public; and (2) capable of facilitating constructive collective action, above and beyond surveilling sitting officeholders and "smothering" the occasional bad actor in "disgrace."[196] In other words, the United States needs a new set of designed activation strategies that can enable broadly representative, self-conscious publics to help author, and not merely monitor, government decisions under inhospitable sociopolitical conditions. Is this conceivable even in principle? What would it take for an "authorial turn" of this sort to succeed in democratizing the practice of public law?

It will not be easy. The project of enlisting the public as a more active protagonist in public law raises at least two major dilemmas of its own. First, the publics conjured by any new mechanisms will be endogenous to their design. As a result, critics may contend that the designers are not seeking to empower the general public so much as to privilege certain groups or otherwise manipulate outcomes. Whereas emergent publics form through relatively opaque and contingent processes, designed publics rest on discernible—and therefore contestable—rules of selection, deliberation, and decision-making.

Second, and more broadly, the same forces that have undermined emergent monitory publics will complicate authorial initiatives. Mass communication and contestation regarding both their inputs and outputs will ultimately be delegated to the existing public sphere, replete with all its pathologies.[197] When a crisis

---

[196] KEANE, POWER AND HUMILITY, *supra* note 74, at 105 (describing and defending "monitory" mechanisms).

[197] Even the most direct mechanism for enlisting the public as an author of public law—a referendum on a specific subject—tends to delegate communication and contestation to the existing public sphere. For overviews of the democratic problems that may follow, see generally Lawrence LeDuc, *Referendums and Deliberative Democracy*, 38

as severe as the COVID-19 pandemic could not cohere the U.S. public,[198] and when a large percentage of voters continue to dispute the results of presidential elections years after the fact,[199] it becomes difficult to imagine authorial initiatives accruing broad-based assent.

Outside of law, there is one body of scholarship that has grappled at length with versions of these dilemmas: the deliberative democracy literature on "mini-publics." Following Dewey, this literature generally starts from the premise that publics capable of transcending partisan divides, engaging in reasoned deliberation, and reaching agreement on controversial topics must be constructed on a small scale. It confronts the first dilemma by selecting diverse participants through random or stratified random sampling and establishing rules of interaction that allow for free discussion and questioning, alongside the periodic provision of relevant information and expert testimony. James Fishkin's pioneering method of "deliberative polling," for instance, convenes a few hundred laypersons from a broader population to deliberate in a manner meant to "offer a counterfactual representation of what the people [in that broader population] *would* think" about a specified issue, "under good conditions for thinking about it."[200] Fishkin's methods have inspired a cottage industry of proposals for constructing mini-publics that can debate matters of public concern and generate recommendations reflecting the "considered judgments" of the wider populace.[201]

ELECTORAL STUD. 139 (2015); and Irene Witting, Charlotte Wagenaar & Frank Hendriks, *Improving Referendums with Deliberative Democracy: A Systematic Literature Review*, 46 INT'L POL. SCI. REV. 40 (2025).

198 *See generally, e.g.*, P. Sol. Hart, Sedona Chinn & Stuart Soroka, *Politicization and Polarization in COVID-19 News Coverage*, 42 SCI. COMMC'N 679 (2020); John Kerr, Costas Panagopoulos & Sander van der Linden, *Political Polarization on COVID-19 Pandemic Response in the United States*, 179 PERSONALITY & INDIVIDUAL DIFFERENCES 1 (2021).

199 *See, e.g.*, Jennifer Agiesta & Ariel Edwards-Levy, *CNN Poll: Percentage of Republicans Who Think Biden's 2020 Win Was Illegitimate Ticks Back Up Near 70%*, CNN (Aug. 3, 2023), https://perma.cc/D5JW-AULD.

200 James Fishkin, *Deliberative Polling*, *in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY, *supra* note 97, at 315, 321 (emphasis in original); *see also* JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 81 (1991) (stating that deliberative polls are meant to model "what the electorate *would* think if, hypothetically, it could be immersed in intensive deliberative processes" (emphasis in original)).

201 Cristina Lafont, *Can Democracy Be Deliberative and Participatory? The Democratic Case for Political Uses of Mini-Publics*, 146 DAEDALUS, no. 3, Summer 2017, at 85, 94; *see also* NICOLE CURATO, DAVID M. FARRELL, BRIGITTE GEISSEL, KIMMO GRÖNLUND, PATRICIA MOCKLER, JEAN-BENOIT PILET, ALAN RENWICK, JONATHAN ROSE, MAIJA SETÄLÄ & JANE SUITER, DELIBERATIVE MINI-PUBLICS: CORE DESIGN FEATURES 4–6

Advocates of deliberative mini-publics confront the second dilemma by linking mini-publics that do not possess ultimate policymaking authority to institutions that do. If this link is drawn too tight, the mini-public will be susceptible to cooptation by forces of the status quo and politicization in the pejorative sense.[202] If, on the other hand, the mini-public floats free of existing governance structures, its recommendations are liable to be ignored by those in power.[203] To avoid these twin dangers, scholars have advocated the "loose coupling" of mini-publics with established authorities "to encourage the movement and uptake of reasons and ideas" between the two in some dynamic fashion.[204] In this way, it is hoped, mini-publics can shape the policy process without recapitulating all of its biases and blind spots.

Over the past several decades, governments around the world have experimented with mini-publics in a variety of formats on a

---

(2021) (explaining that while deliberative mini-publics may take many forms, they are always "composed of a representative subset of the wider population" that engages in "open, inclusive[,] and informed" discussion and generates "outputs intended to inform decision-makers" (emphasis omitted)). For a broad overview of the theory and practice of mini-publics as of a decade ago, see generally DELIBERATIVE MINI-PUBLICS: INVOLVING CITIZENS IN THE DEMOCRATIC PROCESS (Kimmo Grönlund, André Bächtiger & Maija Setälä eds., 2014).

202 *See* Jane Mansbridge, James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis F. Thompson & Mark E. Warren, *A Systemic Approach to Deliberative Democracy*, *in* DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE 1, 22–23 (John Parkinson & Jane Mansbridge eds., 2012).

203 *See id.* at 23–24; Ian Shapiro, *Collusion in Restraint of Democracy: Against Political Deliberation*, 146 DAEDALUS, no. 3, Summer 2017, at 77, 80 ("If [institutionalized deliberation] is purely consultative, it is not clear why anyone will or should pay attention to it."). Perhaps the most famous example of a failure to link the micro and macro levels comes from Iceland, where a quasi-randomly selected deliberative assembly drafted a proposal for a new constitution in the early 2010s and secured two-thirds approval in a national referendum, only for the proposal to be passed over in silence by the Icelandic Parliament. *See* HÉLÈNE LANDEMORE, OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY 152–79 (2020) (reviewing this episode and arguing that it set an important precedent for more successful experiments in "open democracy" in other countries).

204 Carolyn M. Hendriks, *Coupling Citizens and Elites in Deliberative Systems: The Role of Institutional Design*, 55 EUR. J. POL. RSCH. 14, 43–47 (2016); *see also* Robert E. Goodin & John S. Dryzek, *Deliberative Impacts: The Macro-Political Uptake of Mini-Publics*, 34 POL. & SOC'Y 219, 220–21 (2006) (explaining that mini-publics generally "can have real political impact only by working on, and through, the broader public sphere, ordinary institutions of representative democracy, and administrative policy making"); Maija Setälä, *Connecting Deliberative Mini-Publics to Representative Decision Making*, 56 EUR. J. POL. RSCH. 846, 852 (2017) ("[T]he problem with current usages of mini-publics seems to be that from the systemic perspective they are either too 'tightly coupled' with authorities, which leads to problems of co-optation, or that they are 'decoupled,' which leaves them without impact in decision making.").

variety of issues. Danish "consensus conferences" and German "planning cells," for instance, have brought together randomly selected citizens to deliberate on selected questions and produce reports that, on occasion, have had "immediate and direct impact on public policy content."[205] The municipality of Porto Alegre, Brazil, developed a model of participatory budgeting that has spread to multiple continents and been institutionalized by local councils in the United Kingdom.[206] At the level of fundamental reform, a citizens' assembly convened by the government of British Columbia in 2004 to study its electoral system surprised many by recommending a switch from first-past-the-post to single transferable voting; in a referendum held the next year, this recommendation fell just short of the supermajority threshold needed to become law.[207] At the national constitutional scale, Ireland has now held two successful referenda on recommendations put forward by citizens' assemblies, leading to the legalization of same-sex marriage and the decriminalization of abortion.[208]

None of this is to suggest that the global practice of democracy has been upended by the rise of mini-publics, which remain spotty on the ground and which tend to be viewed with suspicion by sitting

---

[205] John S. Dryzek & Aviezer Tucker, *Deliberative Innovation to Different Effect: Consensus Conferences in Denmark, France, and the United States*, 68 PUB. ADMIN. REV. 864, 867 (2008) (discussing Danish consensus conferences on "legislation to restrict genetic screening in employment and insurance and the prohibition of irradiation of food"); *see also* Rikki Dean, Felix Hoffman, Brigitte Geissel, Stefan Jung & Bruno Wipfler, *Citizen Deliberation in Germany: Lessons from the 'Bürgerrat Demokratie'*, 33 GERMAN POL. 510, 512–14 (2024) (discussing planning cells and other deliberative mini-publics used in Germany). For a helpful summary of the differences among planning cells, consensus conferences, citizens' juries, citizens' assemblies, and deliberative polls, see Graham Smith & Maija Setälä, *Mini-Publics and Deliberative Democracy*, *in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY, *supra* note 97, at 300, 301 tbl.18.1.

[206] *See Participatory Budgeting*, PARTICIPEDIA, https://perma.cc/P5BD-6AN3.

[207] For thorough and largely sympathetic accounts of this undertaking, see generally DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS' ASSEMBLY (Mark E. Warren & Hilary Pearse eds., 2008); and R. Kenneth Carty, André Blais & Patrick Fournier, *When Citizens Choose to Reform SMP: The British Columbia Citizens' Assembly on Electoral Reform*, *in* TO KEEP OR TO CHANGE FIRST PAST THE POST? THE POLITICS OF ELECTORAL REFORM 140 (André Blais ed., 2008).

[208] *See* Gráinne de Búrca, *An EU Citizens' Assembly on Refugee Law and Policy*, 21 GERMAN L.J. 23, 24–25 (2020); *The Citizens' Assembly Behind the Irish Abortion Referendum*, INVOLVE (May 30, 2018), https://involve.org.uk/news-opinion/opinion/citizens-assembly-behind-irish-abortion-referendum. For a more ambivalent assessment of the Irish experience and its portability to other contexts, see Naomi O'Leary, *The Myth of the Citizens' Assembly*, POLITICO (June 18, 2019), https://perma.cc/HTR2-VGH5.

officeholders.[209] It is to say that this model has moved from theory to practice with striking speed in other liberal democracies, even though it has gained only a toehold here.[210] "Innovative mini-publics genuinely have, from time to time, had major impacts on macro-politics," political scientists have found—sometimes through direct influence on policy outcomes and other times through informing public debates, market-testing ideas, or building constituencies.[211]

Drawing on this literature and these examples, we submit that U.S. public law scholars and reformers troubled by this Article's descriptive account should look to experiment with deliberative mini-publics tied to existing government bodies. Mini-publics offer what public law currently lacks: a means of opinion- and will-formation that can be legibly traced to ordinary citizens. They come with some well-known costs and limitations, to which we will return shortly.[212] But they aspire to overcome, in one swoop, the epistemic critique (through engagement with experts and the benefits of group deliberation), the capture critique (through clear procedures and the participation of laypersons), and the pathologies of media and party polarization (through circumvention of these channels). Were they to take hold, such mini-publics would cut through the haze and pretensions of public law's rote appeals to the public, offering a more concrete instantiation of the public as a collective author and constitutional subject.

B. Institutionalizing Authorial Mini-Publics

What might it look like to incorporate mini-publics into public law? The most ambitious promoters of mini-publics claim that they represent nothing less than an alternative model of democracy, with the potential to eclipse ordinary representative bodies.[213] Others envision mini-publics serving as the basis for a new branch of government, which would deliberate on potential legislation subject to review by the other branches.[214] Although we may

---

[209] *See* Janette Hartz-Karp, Lyn Caron & Michael Briand, *Deliberative Democracy as a Reform Movement*, *in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY, *supra* note 97, at 697, 701–06.

[210] *See supra* notes 182–85 and accompanying text.

[211] Goodin & Dryzek, *supra* note 204, at 238.

[212] *See infra* notes 240–42 and accompanying text.

[213] *See, e.g.*, LANDEMORE, *supra* note 203, at 9 ("To the first point—that the sheer size of modern nation-states necessitates representation—one can reply that representation need not be electoral and tasked to those able to garner enough votes in a competitive election.").

[214] *See generally* ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT (2004).

sympathize with aspects of these proposals, we do not go this far. Rather, we suggest that designed authorial publics of various kinds—some already championed in mainstream legal scholarship, others alien to law reviews; some politically and practically infeasible in the near term, others immediately implementable—could supplement existing institutions. We call these mini-publics "authorial" because they aim to advance new ideas, agendas, or interpretations more than to monitor and discipline current officeholders. Our aim in this Section is not to make the case for any particular proposal, so much as to demonstrate what it could mean, and the kind of institutional imagination it would take, to bring credible publics into the practice of public law.[215]

This project might begin with resurrecting the paradigmatic mini-public in the U.S. constitutional tradition: the criminal jury.[216] Many commentators in recent years have advanced proposals to make jury trials more common, limit prosecutors' ability to extract plea deals, and educate jurors about their power to nullify laws they believe to be unfair.[217] These proposals are often framed as correctives to overincarceration and abusive prosecutorial tactics.[218] Beyond those potential benefits, the normalization of nullification would provide a mechanism for ordinary citizens to signal their considered desire to reform particular punitive regimes—as when widespread nullification of federal liquor laws

---

[215] We focus on strategies for incorporating mini-publics into the core functions of the branches of government, as well as the constitutional revision process. As scholars associated with the "systemic turn" in deliberative democratic theory have highlighted, the wider deliberative effects of any given mini-public will depend upon the "the highly complex and contingent interplay between the mini-public itself and the context in which it takes place." Nicole Curato & Marit Böker, *Linking Mini-Publics to the Deliberative System: A Research Agenda*, 49 POL'Y SCIS. 173, 179 (2016); *see also* Stephen Elstub, Selen Ercan & Ricardo Fabrino Mendonça, *Editorial Introduction: The Fourth Generation of Deliberative Democracy*, 10 CRITICAL POL'Y STUD. 139, 143–48 (2016) (describing this "systemic turn").

[216] *See supra* notes 175–79 and accompanying text (summarizing the jury's decline over the past half-century).

[217] *See, e.g.*, Clark Neily, Jay Schweikert & James Craven, *Restoring the Jury Trial*, *in* CATO HANDBOOK FOR POLICYMAKERS 119, 119–23 (9th ed. 2022); FAIR & JUST PROSECUTION, PLEA BARGAINING (2022); THEA JOHNSON, AM. BAR ASS'N, 2023 PLEA BARGAIN TASK FORCE REPORT (2023). For a proposal to incorporate juries into the plea bargaining process, see generally Laura I. Appelman, *The Plea Jury*, 85 IND. L.J. 731 (2010). Notwithstanding the skepticism of many judges and prosecutors toward criminal juries, Professor Rachel Barkow has noted that "[u]nlike most government institutions, which have plummeted in favorability polls, the jury is relatively well regarded by the American people." RACHEL ELISE BARKOW, JUSTICE ABANDONED: HOW THE SUPREME COURT IGNORED THE CONSTITUTION AND ENABLED MASS INCARCERATION 58 (2025).

[218] *See, e.g.*, FAIR & JUST PROSECUTION, *supra* note 217, at 4–5.

hastened the end of Prohibition a century ago[219]—as well as a highly salient, if substantively limited, model of deliberative mini-publics being integrated into a standing legal institution at scale. Additional mechanisms to expand the role of ordinary citizens in criminal procedure are already in use in some jurisdictions. As explained by Professor Jocelyn Simonson, these include community bail funds and participatory defense programs through which "community groups join together with families, friends, neighbors, and allies" to support defendants.[220]

Other possibilities for integrating mini-publics into the judicial system would not have the same historical pedigree or available infrastructure. Professor Cristina Lafont, for example, has suggested that civil society groups might "include the recommendations of mini-publics when filing *amicus curiae* briefs to the Supreme Court" and that "some form of mini-public [be] routinely convened" by the Court to furnish it "with additional information on what the considered majority opinion of the country may be at a given time."[221] Other philosophers have advanced bolder—and more constitutionally problematic—"lottocratic" schemes for Justices to delegate certain interpretive issues subject to reasonable disagreement to a randomly selected body of ordinary citizens.[222] Professor Glen Staszewski has urged that state courts refer interpretive questions regarding successful ballot initiatives, in which the state's voters have directly enacted statutes or constitutional amendments, to randomly selected "deliberative juries."[223] Rather than ask an amorphous public opinion to constrain the

---

219 *See* United States v. Dougherty, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) ("The reluctance of juries to hold defendants responsible for unmistakable violations of the prohibition laws told us much about the morality of those laws and about the 'criminality' of the conduct they proscribed."); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS., no. 4, Autumn 1980, at 51, 71 ("The repeal of [Prohibition] laws is traceable to the refusal of juries to convict those accused of alcohol traffic.").

220 Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 268 (2019); *see also id.* at 266–73 (cataloguing and theorizing existing forms of "[b]ottom-up agonistic participation in individual criminal cases" that contest the position of prosecutors as "the institutional actors who channel the will of the people into adjudication").

221 Lafont, *supra* note 201, at 96–97. More generally, Lafont has argued that mini-publics are best suited to setting political agendas and shaping public opinion, not directly shaping policy. Cristina Lafont, *Deliberation, Participation, and Democratic Legitimacy: Should Deliberative Mini-Publics Shape Public Policy?*, 23 J. POL. PHIL. 40, 47–60 (2015).

222 Adam Gjesdal, *Rights, Mini-Publics, and Judicial Review*, 9 J. AM. PHIL. ASS'N 53, 65–70 (2023).

223 Glen Staszewski, *Interpreting Initiatives Sociologically*, 2022 WIS. L. REV. 1275, 1292–93; *see also id.* at 1294–1306 (discussing possible institutional designs for such juries).

courts, these proposals seek to give the explicit recommendations of specially constituted mini-publics a more or less authoritative role in judicial interpretation. Staszewski's proposal, in particular, has the virtue of limiting the initial experiment to a class of cases in which the legal, political, and informational benefits of lay participation may be strongest.

Incorporating mini-publics into the administrative state will likely be much easier for many to imagine, given its long-standing emphasis on public participation.[224] In April 2023, President Joe Biden issued an executive order to make public participation in the rulemaking process more "equitable and meaningful" by requiring that agencies developing "regulatory agendas and plans . . . proactively engage interested or affected parties, including members of underserved communities."[225] Consistent with this goal, numerous administrative law scholars have proposed that federal and state agencies convene panels of randomly selected citizens to formulate general agendas or review particular rules or plans.[226] A recent report for the Administrative Conference of the United States gives

---

[224] *See supra* Parts I.C, III.C.

[225] Exec. Order No. 14,094, 88 Fed. Reg. 21,879, 21,879–80 (Apr. 6, 2023).

[226] *See, e.g.*, Benjamin M. Barczewski, *Politicizing Regulation: Administrative Law, Technocratic Government, and Republican Political Theory*, 100 NEB. L. REV. 424, 475–81 (2021) (proposing a mix of local and national citizen "councils" to help set regulatory policy); 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, 641 (2013) (proposing "relatively small, deliberative bodies of citizens to serve as advisory committees designed to address policy issues relevant to agency decisionmaking"); David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 88–89 (2005) (proposing that agencies that opt to rely on "administrative juries" in rulemaking receive greater judicial deference); Jerry Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 573 (1990) (proposing "a citizen group of, say, one hundred people to serve for a stated period of time as public representatives in an administrative agency"); Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 513 (1992) (proposing "administrative grand juries" with a range of roles, including "[a] voice in setting policy"); *see also* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 154–55 (2016) (cataloguing calls "for mechanisms that institutionalize countervailing power and direct stakeholder representation" within regulatory and enforcement processes); Emily Chertoff & Jessica Bulman-Pozen, *The Administrative State's Second Face*, 100 N.Y.U. L. REV. (forthcoming 2025) (available at https://perma.cc/9L2L-FE86) (manuscript at 140) (discussing a "significant body of recent scholarship," by Mariano-Florentino Cuéllar, Blake Emerson, Cynthia Farina, Jim Rossi, Michael Sant'Ambrogio, Kevin Stack, Glen Staszewski, and others, that "proposes reforms to the rulemaking lifecycle in an effort to enhance direct public engagement with agencies"); Gabriel L. Levine, *Democratically Durable Regulation*, 3 AM. J.L. & EQUAL. 283, 296–97 (2023) (arguing that the Office of Information and Regulatory Affairs "should open goal setting to greater public participation . . . , including by introducing 'lottocratic' institutions" such as citizens' assemblies).

sympathetic attention to several versions of such proposals.[227] Although most of these scholars envision the citizen panels wielding advisory powers, at least one would allow them to issue binding decisions.[228]

Various agencies have already experimented with nonbinding versions of this arrangement on an ad hoc basis;[229] these proposals would expand and regularize their use. A further expansion might enlist such administrative mini-publics to advise not only on rulemaking and regulatory agenda setting but also on the content of the statutory public interest standards that agencies must apply with minimal guidance from the legislature.[230] Against the obvious epistemic objection that ordinary citizens would be incapable of evaluating complex issues in rapidly developing fields—the heartland of expertise-based defenses of administrative government—some deliberative democratic theorists have argued that it is precisely on such issues where mini-publics can be useful for building trust, by *anticipating* future problems and concerns that have not yet garnered widespread attention.[231] And indeed, the small number of mini-publics convened by federal agencies in recent years have addressed questions of significant technical complexity.[232]

As the most representative branch of government, the legislature may seem least in need of an injection of deliberative mini-publics. Of the three federal branches, however, Congress has seen

---

[227] Sant'Ambrogio & Staszewski, *supra* note 80, at 32, 48–50, 128–38.

[228] David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEORGE WASH. L. REV. 1458, 1493–1527 (2013).

[229] *See, e.g.*, 15 U.S.C. § 7501(b)(10)(D) (directing the National Nanotechnology Coordination Office to convene "citizens' panels, consensus conferences, and educational events" on concerns raised by the development of nanotechnology); John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 905–06, 926–51 (1998) (discussing "site-specific advisory boards" of citizens convened by the Department of Energy and the Environmental Protection Agency to provide advice on "the remediation of environmentally contaminated federal facilities").

[230] *See supra* Parts I.B, III.B.

[231] *See* Michael K. MacKenzie & Mark E. Warren, *Two Trust-Based Uses of Minipublics in Democratic Systems*, *in* DELIBERATIVE SYSTEMS, *supra* note 202, at 95, 119 ("Anticipatory minipublics can give decision-makers access to potential public concerns in ways that they would otherwise simply have to imagine.").

[232] *See supra* note 229; *see also* MacKenzie & Warren, *supra* note 231, at 119–22 (discussing a mini-public convened in British Columbia to address "biobanking"); Lyn Carson, *Learnings from South Australia's Nuclear Fuel Cycle Jury*, NEWDEMOCRACY (Sept. 4, 2017), https://perma.cc/5JN2-4JGG (discussing a mini-public convened in South Australia to address nuclear waste storage).

the most precipitous decline in trust over the last few decades.[233] The partisan rancor, elite capture, and lack of democratic responsiveness that characterize Capitol Hill have motivated some political philosophers to propose sortition-based deliberative bodies that would effectively displace Congress as the primary site of U.S. lawmaking.[234] But far more modest and realistic innovations could be implemented in the near term. Professors Michael Neblo, Kevin Esterling, and David Lazer, for instance, have advocated "a system of online deliberative town halls" designed to foster informed, inclusive, and open-ended deliberation between political representatives and randomly selected constituents on matters of national import.[235] In an experiment involving thirteen members of Congress, these scholars and collaborators found that voters who are disengaged from traditional partisan politics are especially likely to participate in such town halls and that the experience fosters greater trust in government.[236] Real-world examples of legislative mini-publics are thin at the state level as well. However, Professor Hubertus Buchstein has highlighted the success of Washington State's Citizens' Commission on Salaries for Elected Officials, a mixed body of randomly selected citizens and appointed experts that sets the salaries of public officials, as a demonstration of the potential effectiveness of mini-publics in resolving issues that require the widespread perception of institutional neutrality.[237]

---

[233] *See* David R. Jones, *Declining Trust in Congress: Effects of Polarization and Consequences for Democracy*, 13 FORUM 375, 376 (2015) (analyzing the "uniquely dramatic decline in the public's confidence" that Congress has experienced since the early 1970s).

[234] For representative examples, see Alexander A. Guerrero, *The Promise and Peril of Single-Issue Legislatures*, 18 GEO. J.L. & PUB. POL'Y 837, 852 (2020) (proposing "single-issue legislative bodies" chosen by lottery); and Alex Zakaras, *Lot and Democratic Representation: A Modest Proposal*, 17 CONSTELLATIONS 455, 457 (2010) (proposing "citizens' chambers" selected by lot, which would "review legislation approved by the elective chamber, deliberate about its merits, and then vote to approve or veto it").

[235] MICHAEL A. NEBLO, KEVIN M. ESTERLING & DAVID M.J. LAZER, POLITICS *WITH* THE PEOPLE: BUILDING A DIRECTLY REPRESENTATIVE DEMOCRACY 17 (2018). The broader goal of these town halls is to create a virtuous "cycle of deliberation," whereby "citizens communicate their general interests, and legislators debate and craft policies to advance those interests." *Id.* The legislators can "then attempt to persuade their constituents that they have succeeded via deliberative [and electoral] accountability." *Id.*

[236] Michael A. Neblo, Kevin M. Esterling, Ryan P. Kennedy, David M.J. Lazer & Anand E. Sokhey, *Who Wants to Deliberate—And Why?*, 104 AM. POL. SCI. REV. 566, 576 (2010).

[237] *See* Hubertus Buchstein, *Democracy and Lottery: Revisited*, 26 CONSTELLATIONS 361, 373 (2019):

> The commission's activities have been [ ] regarded as successful. The salaries of officials in Washington State do not markedly diverge from those in comparable states of the USA and thus the state continues to attract competent

In a more speculative vein, Lafont has suggested that mini-publics might be most powerfully deployed in situations where majority opinion does not seem to be reflected in existing policy or the platforms of the major political parties.[238] Following this insight, one can imagine entrepreneurial members of Congress convening mini-publics to generate recommendations on matters with demonstrable broad-based public support but minimal institutional uptake by party leadership—say, a digital bill of rights.[239] The goal would be to expand the scope of political contestation and strengthen the force of majority opinion upon lawmakers.

Critics of mini-publics have highlighted the dissonance between the structured deliberations of a small number of randomly selected individuals and the democratic agency of the citizenry at large.[240] Moreover, while mini-publics that make political decisions on their own appear democratically suspect, mini-publics that lack decision-making power risk turning into symbolic bodies summoned by politicians who wish to give the impression of listening to "the people."[241] Others have questioned whether mini-publics can ever cultivate reasoned deliberation free from elite manipulation. For these critics, mini-publics simply cannot escape the logic of the epistemic and capture critiques.[242]

> personal [sic] to politics and the civil service. In addition, ever since the commission was instituted, the issue of pay and perks in Washington State appears to have almost completely vanished from the agenda of populist rabble-rousing.

238 *See* Lafont, *supra* note 201, at 97 ("But perhaps even more significant are cases when the mini-public's recommendations coincide with the majority opinion but *differ* from existing policy. This mismatch should signal to the public the need to scrutinize the political system." (emphasis in original)).

239 *See, e.g.*, Taylor Orth, *U.S. Tech Regulation Receives Overwhelming Public Support and Bipartisan Backing*, YOUGOV (Feb. 2, 2023), https://perma.cc/3NTC-ZMY4 (reporting survey results indicating that "[m]any forms of tech regulation" not reflected in U.S. law "receive support from large majorities of Americans").

240 *See, e.g.*, TUCK, *supra* note 194, at 49–50 ("[T]he turn to sortition has patently been a turn away from electoral democracy *as such*, and by playing down the significance of the vote, it leaves the mass of citizens with no *active* role at all . . . ." (emphasis in original)).

241 For an arguable recent example, consider French President Emmanuel Macron's Citizens Convention for Climate in 2019–2020. The French Parliament ignored or watered down a majority of the Convention's proposals, although approximately 40% of them were ultimately enacted into law. *See* Sonia Phalnikar, *France's Citizen Climate Assembly: A Failed Experiment?*, DEUTSCHE WELLE (Feb. 16, 2021), https://perma.cc/FF4T-2GLG.

242 For an overview of six of the most prominent critiques of mini-publics, including their manipulability and the limited capacities of participants, see Stephen Elstub & Zohreh Khoban, *Citizens' Assemblies: A Critical Perspective*, *in* DE GRUYTER HANDBOOK OF CITIZENS' ASSEMBLIES, *supra* note 180, at 113, 114–21. *See also* ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 206–11 (2d ed. 2016); Jane Mansbridge, Joshua Cohen, Daniela Cammack, Peter Stone, Christopher H. Achen, Ethan J. Leib & Hélène Landemore, *'Representing and Being*

Although these concerns may never be fully dispelled, they can be mitigated. Reckoning with them requires, first and foremost, not treating mini-publics as substitutes for the mechanisms of representative democracy but rather as supplements to existing political processes and institutions that do not sufficiently involve ordinary citizens.[243] For guiding the work of agencies or courts, mini-publics can ensure such citizens have a meaningful chance to have their views taken into consideration. For resolving disputes over discrete issues such as the salaries of state officials or the storage of nuclear waste, mini-publics can enhance the legitimacy of contested outcomes. And for crafting proposals for legislation, mini-publics can generate policies with broad popular support that are not being offered by existing representatives. Across these venues, the potential for elite manipulation can be curbed through random selection of participants and constraints on "top-down framing and agenda setting."[244] To lower the practical stakes and representational burden, all of these strategies can be tried first by state and local actors, in an experimentalist fashion, before being routinized or scaled to the federal level.[245]

Represented in Turn'—A Symposium on Hélène Landemore's Open Democracy, 18 J. DELIBERATIVE DEMOCRACY, no. 1, 2022, at 1, 6–7; Curato & Böker, *supra* note 215, at 174–76. On the challenge of overcoming motivated reasoning in deliberative settings, see generally Samuel Bagg, *Can Deliberation Neutralise Power?*, 17 EUR. J. POL. THEORY 257 (2018).

243 *See, e.g.*, CRISTINA LAFONT, DEMOCRACY WITHOUT SHORTCUTS: A PARTICIPATORY CONCEPTION OF DELIBERATIVE DEMOCRACY 136 (2020) ("Deliberative democrats should endorse the use of minipublics for shaping public opinion, not [for making] political decisions."); *see also supra* note 215 (discussing the "systemic turn" in the deliberative democracy literature). Although we refer to "citizens" in the sentence accompanying this footnote and elsewhere, we do not mean to take any position on whether or when mini-publics should be limited to those who hold a certain citizenship or other legal status. *Cf.* Michael K. MacKenzie, *Representation and Citizens' Assemblies*, *in* DE GRUYTER HANDBOOK OF CITIZENS' ASSEMBLIES, *supra* note 180, at 21, 32 (suggesting that citizens' assemblies have better incentives than elected bodies to represent "unorganized or latent interests or groups, such as noncitizens").

244 Marit Böker & Stephen Elstub, *The Possibility of Critical Mini-Publics: Realpolitik and Normative Cycles in Democratic Theory*, 51 REPRESENTATION 125, 132 (2015); *see also id.* at 132–40 (reviewing design options to enhance mini-publics' "critical capacity" and "emancipatory potential"); Samuel Bagg, *Sortition as Anti-Corruption: Popular Oversight Against Elite Capture*, 68 AM. POL. SCI. REV. 93, 97–102 (2024) (emphasizing the power of random selection as "a distinctive weapon against elite capture" and discussing training, agenda-setting, and information-gathering techniques that can "substantially mitigate the risks of manipulation" in sortition-based reforms).

245 *Cf.* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 840 (2000) (discussing the "democratic legitimacy" conferred by experimentalist institutions' "use of directly deliberative problem-solving techniques").

Beyond the domain of courts, agencies, and legislatures lies the possibility of incorporating mini-publics into the processes of formal constitutional change. This prospect may seem especially pie-in-the-sky, given both the high salience of constitutional change and the multidecade drought in state constitutional conventions.[246] But a system of citizen panels has already been institutionalized in one state, Oregon, to make recommendations on ballot initiatives which may involve constitutional amendment.[247] And Ireland's recent use of citizens' assemblies to facilitate previously blocked constitutional reforms on same-sex marriage and abortion has sparked wide interest here as well as abroad.[248] Inspired in part by Ireland's example, prominent U.S. legal scholars have begun to recommend that various sorts of citizens' assemblies be convened to generate amendment proposals or instructions for delegates to a constitutional convention.[249]

Before the current convention drought took hold, moreover, state constitutional convention organizers had converged on a set of norms that made these bodies distinctive "sites of political equality and popular sovereignty" in their own right.[250] These norms include the special election of delegates who are not professional politicians; conformity with the principle of one-person, one-vote; a published journal of proceedings; and submission of all amendment

---

[246] *See supra* notes 164–69 and accompanying text.

[247] *See supra* note 182 and accompanying text (discussing Oregon's Citizens' Initiative Review); *see also* MacKenzie & Warren, *supra* note 231, at 115 (suggesting that the Oregon example showcases the ability of mini-publics to serve as "trusted information proxies" for the general public). *See generally* Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 HARV. L. REV. 959 (2010) (exploring ways that citizens' assemblies might be used to improve the state ballot initiative process).

[248] *See supra* note 208 and accompanying text.

[249] *See, e.g.*, PURDY, *supra* note 16, at 221–23; JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 231–33 (2023); Lawrence Lessig, *Making a Constitutional Convention Safe for Democracy*, N.Y. REV. BOOKS (Apr. 17, 2023), https://www.nybooks.com/online/2023/04/17/making-a-constitutional-convention-safe-for-democracy-lessig/; *see also* David Van Reybrouck, *We Have One Year to Make Democracy Work in Europe. Or Else the Trumps Take Over*, DE CORRESPONDENT (Nov. 19, 2016), https://perma.cc/Y5Z6-85AZ (urging the use of Irish-style citizens' assemblies to formulate recommendations for making the European Union more democratic). One of us has proposed, more modestly, that when future Congresses send Article V amendments to the states, they should prescribe that ratification be done through special conventions, rather than state legislatures, on the ground that conventions are more representative of the electorate and more legible as instantiations of the public. *See* Pozen & Schmidt, *supra* note 167, at 2392–93; *see also id.* at 2358 (explaining that Congress was pushed to prescribe ratification by convention once before, for the Twenty-First Amendment, by "a lingering feeling . . . that ratification of the Eighteenth Amendment had not accurately reflected public opinion" and that "[c]onventions would allow for a more direct appeal to the people").

[250] Pozen, *Common Law of Constitutional Conventions*, *supra* note 166, at 2228.

proposals to statewide referenda.[251] Reviving state constitutional conventions, with or without associated citizens' assemblies, would provide a powerful demonstration of how mini-publics can author fundamental law in partnership with sympathetic macro-publics—and how the public can become a meaningful protagonist and not just a floating signifier in the story of public law.

CONCLUSION

"In no two ages or places is there the same public. Conditions make the consequences of associated action and the knowledge of them different."[252] Dewey's observation amid the growing societal complexity of the 1920s is even more urgent today. Political polarization, media fragmentation, economic inequality, and related developments have undermined the plausibility of appeals to the public throughout public law, which assume its existence as a stable foundation for public opinion, the public interest, and public participation. If coherent publics can be brought to bear on constitutional interpretation, administrative action, and the separation of powers, they must be located and shown to perform their designated function, not assumed.

The centrality of "the public" to contemporary public law is not merely a matter of rhetorical convenience or conceptual inertia. Rather, it conveys a widely held ambition that our fundamental legal arrangements ought to reflect the ongoing influence of ordinary citizens in their collective capacities. We have suggested that taking this ambition seriously would require new democratic designs that enable deliberative publics to help author, and not just monitor, legal and policy decisions.

In outlining potential strategies for institutionalizing authorial publics in each branch of government, we do not claim to offer a programmatic agenda, much less a practical guide to reform. Nor do we gainsay the fundamental importance of, or the need to bolster, the ordinary mechanisms of representative democracy. We do, however, hope to impress upon all students of public law that the public has indeed become a "phantom"[253] throughout much of the field's discourse, theory, and practice. We can either accept that grim reality or work to bring credible publics to life.

---

[251] *See id.* at 2225–30.

[252] DEWEY, *supra* note 91, at 82.

[253] LIPPMANN, PHANTOM PUBLIC, *supra* note 3, at iii.