

# VALUING ADMINISTRATIVE DEMOCRACY

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*Public engagement has long sat at the heart of administrative law’s democratic aspirations. For proponents, opportunities for individuals to participate in agency decision-making help reconcile the administrative state with democratic ideals. Yet a tide of skepticism is swelling. The ascendant “abundance movement” argues that overemphasizing participatory procedures slows government action while delivering incommensurate benefits. Others—including most Supreme Court justices—cast presidential control as the sole credible means of securing agencies’ perceived legitimacy and accountability. Although proponents and critics alike rely on assumptions about the value that the public places on participatory mechanisms, little evidence exists about how people actually view these mechanisms and how they consider tradeoffs, including those involving procedurally caused delays.*

*This Article supplies that evidence. It presents results from experiments in which over 5,800 participants read agency policy vignettes that varied in their use of participatory tools. Some experiments also varied in the reported length of the rulemaking process—a key cost of procedure that critics emphasize. Participants then assessed the agency’s accountability, legitimacy, fairness, and related qualities.*

*Across experiments, a consistent pattern emerges: people value agencies that invite and ensure robust participation. The largest shifts in attitudes occur when agencies move beyond basic notice-and-comment to offer structured deliberation or targeted outreach to underrepresented groups. The public’s appetite for meaningful voice is also remarkably durable; even when participatory mechanisms lengthen rulemaking by years, support for those tools remains strong. These findings indicate that the public values not only administrative efficiency but also a government that listens widely, thoughtfully, and carefully.*

*The policy implications are pragmatic: to strengthen agencies’ perceived connection to democratic values, officials should preserve notice-and-comment as a floor, improve representational balance, and deploy “thicker” engagement opportunities, especially early-stage deliberation among key stakeholders. They should also consider ways to eliminate the most extreme delays while also resisting the urge to streamline participatory procedure across the board. Administrative democracy’s future will hinge less on slogans for or against “procedure” and “participation” than on careful, evidence-based design choices that deliver opportunities for voice when the public is willing to wait for them.*

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INTRODUCTION .....	3
I. ADMINISTRATIVE DEMOCRACY AND ITS CRITICS.....	6
A. Participatory Mechanisms .....	7
1. <i>Notice-and-Comment</i> .....	8
2. <i>Balanced Notice-and-Comment</i> .....	10
3. <i>Public Advocate Involvement</i> .....	11
4. <i>Deliberation Among Stakeholders</i> .....	12
5. <i>Deliberation Among Representative “Mini-Publics”</i> .....	13
B. Dividing Lines.....	14
1. <i>The Abundance Critique</i> .....	14
2. <i>The Presidentialist Alternative</i> .....	17
3. <i>Defenses</i> .....	19
C. Existing Evidence.....	20
1. <i>Legitimacy Experiments: Proof of Concept</i> .....	21
2. <i>The American Administrative Blindspot</i> .....	23
3. <i>The Cost Blind Spot</i> .....	24
II. ANALYSIS.....	24
A. Study 1 .....	25
1. <i>Research Design</i> .....	25
2. <i>Results</i> .....	30
B. Study 2 .....	34
3. <i>Research Design</i> .....	35
2. <i>Results</i> .....	39
III. IMPLICATIONS AND PRESCRIPTIONS.....	44
A. Responding to Critics .....	45
B. Unpacking Administrative Democracy’s Bipartisan Appeal.....	50
C. Strengthening Channels for Participation.....	51
D. Examining a Wider Range of Mechanisms .....	52
CONCLUSION .....	54
APPENDIX .....	55

## INTRODUCTION

Modern American administrative law is, in many ways, the law of democratic engagement in government decision-making.<sup>1</sup> Scholars extol the virtues of public participation in agency decision-making and urge greater democratization of the process.<sup>2</sup> Recent presidential administrations devoted significant attention to increasing opportunities for public engagement.<sup>3</sup> The widespread embrace of these measures reflects a belief that opportunities for public involvement help legitimize agency action in the eyes of the public.<sup>4</sup>

In a break with this tradition, the Trump administration has turned decisively against public participation norms. In April 2025, the White House released an executive order that—despite its seemingly workaday subject matter (showerhead water pressure)<sup>5</sup>—staked out a revolutionary claim: “[n]otice and comment is unnecessary because [the President is] ordering the repeal.”<sup>6</sup> Later that same day, the White House released a presidential memorandum directing agencies to repeal “unlawful regulations”—and, in doing so, “dispense with notice-and-comment rulemaking,” which it deemed “unnecessary.”<sup>7</sup> While agencies have not abandoned public participation (perhaps because they have

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<sup>1</sup> See Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U.L. REV. 793, 817-26 (2021) (describing the tools that agencies use to bring in public input during the rule development process); Reeve Bull, *Making the Administrative State “Safe for Democracy”: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 619 (2013) (“At the same time that agencies have taken a greater role in governmental policymaking, everyday citizens have become substantially more capable of informing the process.”).

<sup>2</sup> See, e.g., Nikhil Menezes & David E. Pozen, *Looking for the Public in Public Law*, 92 U. CHI. L. REV. 971 (2025) (looking to recent literature on deliberative democracy and “mini-publics” for a reform agenda for public law, including administrative law); Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1 (2023) (critiquing the lack of representation in notice-and-comment rulemaking and arguing for reforms to ensure balanced participation); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017) (urging greater incorporation of public participation in administrative decision-making); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) (arguing that the administrative process fits well with a “civic republican” vision that emphasizes “citizen participation in government and deliberative decision making”).

<sup>3</sup> See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (discussing e-rulemaking initiatives in several recent administrations designed to increase participation); Cynthia R. Farina, Mary Newhart, & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 126-29 (2012) (recounting efforts to use information communications technologies to enhance public participation from the Clinton to Obama administration); Steven J. Balla & Sarah Hay, *New Goals, Old Tools: Broadening Public Participation in the Regulatory Process in the Biden Administration*, REG. STUDS. CTR. (Nov. 28, 2023), [https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-11/commentary\\_public\\_engagement\\_over\\_time\\_final.pdf](https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-11/commentary_public_engagement_over_time_final.pdf) (discussing Biden-era efforts to “expand public participation” in a way that connects explicitly with “notions of equity”).

<sup>4</sup> See, e.g., Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1318-19 (2016) (noting that “participation may be especially valuable in the administrative state, which has long battled perceived illegitimacy”).

<sup>5</sup> Exec. Order 14,264, *Maintaining Acceptable Water Pressure in Showerheads*, 90 Fed. Reg. 15,619 (Apr. 15, 2025), <https://www.govinfo.gov/content/pkg/FR-2025-04-15/pdf/2025-06459.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> Presidential Memorandum, *Directing the Repeal of Unlawful Regulations*, THE WHITE HOUSE (Apr. 9, 2025), <https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/>.

no legal basis for doing so),<sup>8</sup> there is no question that the Trump administration is interested in reforms that would streamline agency decision-making at the expense of opportunities for public input.

These efforts to erode participatory mechanisms come at a time of growing elite frustration with what we call “administrative democracy.”<sup>9</sup> A prominent scholar decries a “procedure fetish” in administrative law and urges agencies to abandon the supposed costly fiction that participatory mechanisms bear on citizens’ perceptions of administrative legitimacy.<sup>10</sup> More broadly, an emerging political coalition committed to regulatory reform in service of a “politics of abundance” targets public engagement mechanisms as a driver of government failure.<sup>11</sup> Alongside these developments, a series of recent Supreme Court decisions has expanded the President’s power over agencies.<sup>12</sup> The Court justifies this power shift in part by claiming that presidential control is the principal—if not the only—source of legitimacy and democratic accountability for the administrative state, a claim that sidesteps the possibility that direct public participation may advance those very aims, and perhaps more effectively.<sup>13</sup> Taken together, these developments—the Trump administration’s exertion of greater control over agencies, a growing political coalition skeptical of administrative procedures that stand in the way of abundance goals, and the judicial project of tethering agencies to the President to serve goals that administrative lawyers historically looked to participatory mechanisms to advance—indicate that administrative law’s focus on democratic engagement is on the retreat.

This turn away from administrative democracy is unfolding within elite circles—among political officials, judges, and scholars. Whether these developments align with the public’s views is

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<sup>8</sup> See Emma Gardner & Sam Hess, *EPA Appears to Sidestep White House Push to Skip Notice and Comment*, INSIDE EPA (Nov. 20, 2025), <https://insideepa.com/daily-news/epa-appears-sidestep-white-house-push-skip-notice-and-comment> (noting that EPA, at least, has largely provided for public participation despite efforts by the White House to encourage agencies to forgo public participation opportunities, and quoting scholars noting the legal problems with skipping required comment periods).

<sup>9</sup> By this, we mean the incorporation of participatory procedures into the task of administrative governance. This term may strike some as an oxymoron, insofar as bureaucracy is usually counterposed with democracy, but as detailed *infra* Part I, there have in fact been many efforts to suffuse administrative decision-making with democratic processes. These efforts are simply the administrative manifestation of a broader movement in representative democracies around the globe to “complement” representative processes, like elections, with direct methods of “participatory inclusion.” See Samuel Bagg, *Democratic Disenchantment*, BOSTON REV. (Aug. 19, 2024), <https://www.bostonreview.net/articles/democratic-disenchantment/> (“This ideal is arguably the most practically significant contribution of twentieth-century political theory. It has inspired countless reforms and experiments across the globe, under a wide variety of headings—ranging from ‘negotiated rulemaking’ and ‘collaborative governance’ to ‘participatory budgeting,’ ‘deliberative mini-publics,’ and ‘citizens’ assemblies.’ By now, the paradigm is so dominant that the very idea of ‘democratic innovation’ is often understood as synonymous with direct, deliberative participation by ordinary people in processes of collective decision-making.”).

<sup>10</sup> See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019). In a similar vein, Richard Pildes observes increasing recognition of “the tradeoffs that can arise between the important democratic process values of participation and the capacity to deliver public goods effectively.” See Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. L. F. 185, 210 (2024).

<sup>11</sup> See *infra* notes 94-98 and accompanying text.

<sup>12</sup> See *infra* notes 99-108 and accompanying text.

<sup>13</sup> See *id.*

largely unknown. To what extent do ordinary people value opportunities to participate in administrative governance? Would the loss of such opportunities alter how they evaluate agency action? And are they willing to dispense with participatory opportunities in the name of administrative efficacy and executive dispatch?

If it exists, evidence that people do not value, or are at least willing to curtail, participatory mechanisms would undermine a key rationale for providing opportunities for “administrative democracy”—that it contributes to the sociological legitimacy of government.<sup>14</sup> If, on the other hand, there is evidence that people *do* value opportunities to participate in agency decisionmaking, then efforts to streamline or eliminate those opportunities might generate backlash or self-defeating losses of legitimacy.

Policymakers and scholars are flying blind, however, as they try to understand which of these characterizations of public preferences is more accurate. Although members of the public are among the intended beneficiaries of administrative law’s participatory mechanisms, little evidence exists concerning the public’s views on these mechanisms.<sup>15</sup> This Article fills that lacuna. By doing so, we hope to discipline the increasingly salient debate between administrative democracy’s advocates, who claim that participatory mechanisms advance important values, and its critics, who argue either that these measures interfere with the provision of governmental services that the public demands or that presidential control more effectively furthers these values.

To investigate these issues, we employ an experimental design.<sup>16</sup> Our study—involving 5,805 participants—is the first to directly test whether ordinary people value a broad range of public participation mechanisms in U.S. administrative law, as well as to test how they cognitively process the time costs those mechanisms impose.<sup>17</sup> In Study 1, we randomly vary participants’ exposure to participatory mechanisms and compare their responses with those of a no-participation control

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<sup>14</sup> See Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919, 923 (2024) (linking scholars’ interest in legitimacy of administrative decision making to “Max Weber’s concept of sociological legitimacy: the public’s belief that power is exercised in a manner that is justified, leading people to accept even those outcomes with which they disagree”); see also *id.* at 927-33 (fleshing out the definition of sociological legitimacy and contrasting it with competing notions of legitimacy that are more grounded in moral reasoning and legality). One can understand sociological legitimacy as an empirically verifiable concept of legitimacy—it exists to the extent that relevant publics in fact accept decisions as legitimate. The concept is therefore sometimes referred to as “descriptive legitimacy.” See *id.* at 923 & n. 17 (using this alternate term).

<sup>15</sup> See *infra* Part I.C (collecting the available evidence and highlighting the limits of our knowledge on this question).

<sup>16</sup> In so doing, this Article is situated alongside a growing body of recent work on “experimental jurisprudence.” See Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 746 n.72, 747 n.75 (2022) (collecting citations). For an application to administrative law, see Kevin Tobia, Daniel E. Walters, & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153 (2024) (using experimental methods to assess whether the major questions doctrine can be justified, as an approximation of how ordinary people understand the limits of delegation).

<sup>17</sup> Two studies have examined how the use of notice-and-comment affects perceptions of legitimacy. See Feinstein, *supra* note 14; Alexander I. Ruder & Neal Woods, *Procedural Fairness and the Legitimacy of Agency Rulemaking*, 30 J. PUB. ADMIN. RES. & THEORY 400, 411-12 (2020). These studies, however, do not assess mechanisms beyond notice-and-comment, analyze values beyond legitimacy, or examine how people trade off costs of participation against the legitimacy benefits of participation.

group.<sup>18</sup> In Study 2, we use a conjoint experiment to assess the factors that drive participants to pick between randomly generated sets of process “profiles” that vary both procedural features *and* time costs.<sup>19</sup> Taken together, these studies offer an unprecedented window into how the public thinks, or is likely to think, about the massive changes to administrative law that are being undertaken or contemplated.

To preview our results, both studies reveal that people value most participatory mechanisms, especially tools that promote a balanced set of commenters in notice-and-comment, foster deliberation among diverse stakeholders or a randomly selected group of citizens, and incorporate an agency-appointed “public advocate” into the policymaking process. The weakest effects were observed for conventional notice-and-comment rulemaking, which is far less ambitious than the other interventions we tested. Study 2 further demonstrates that people are remarkably willing to tolerate additional delay, up to a point, in exchange for meaningful participatory mechanisms. For the most favored mechanisms, people’s preference for these tools over faster but more procedurally sparse decision-making endures well past the median duration of contemporary rulemakings. These findings call into question claims that the public would prefer, or even accept, streamlined procedures designed to expedite agency action at the expense of opportunities to participate.

The Article proceeds as follows. Part I surveys the extant literature on administrative democracy and procedural reform, explains how experimental methods can illuminate public preferences regarding administrative procedures, and motivates our focus on particular participatory mechanisms. Part II details our research methodology and reports the results. Part III considers implications of these results. It begins by emphasizing that participatory mechanisms potentially play an important legitimizing function—one that may be jeopardized by an overly swift embrace of procedural parsimony that may reflect elite views more than lay preferences. It then explores potential explanations for the bipartisan appeal of participatory mechanisms, urges institutional designers to consider new mechanisms that increase representation and deliberation, and calls on scholars to expand experimental research into how ordinary people perceive administrative structures and procedures.

## I. ADMINISTRATIVE DEMOCRACY AND ITS CRITICS

Commitment to procedures that enable public participation in agency decision-making has historically been a central theme in administrative law.<sup>20</sup> In the canonical administrative-law case *Sierra Club v. Costle*, the D.C. Circuit asserted that “[a]gency decisions made after adequate consideration of

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<sup>18</sup> See *infra* Part II.A.

<sup>19</sup> See *infra* Part II.B.

<sup>20</sup> See Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 360 (1972); see also Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174-75 (1997) (“[C]ourts, Congress, and scholars have elevated participation to a sacrosanct status.”).

all affected interests would have, in microcosm, legitimacy based on the same principle as legislation.”<sup>21</sup> Nearly every modern president has emphasized the importance of public participation.<sup>22</sup> Its supporters are widespread in legal academia.<sup>23</sup> Yet, as the introduction suggests, the view that participation should play a prominent role in administration is now in retreat.

Our goal in this Part is to take stock of the growing debates about participatory mechanisms. First, in Part I.A, we summarize the principal ways that public participation can be, and often has been, institutionalized in the American administrative state. Next, Part I.B explores the contours of the emerging divide between proponents and detractors of participatory mechanisms. This subpart suggests that this divide is driven in part by empirical disagreements about the extent to which the public actually values opportunities for participation and about how people balance participatory mechanisms against the competing value of efficient decision-making. Finally, Part I.C argues that this debate can be advanced via experimental studies.

## A. Participatory Mechanisms

Modern administrative law practice involves extensive and varied opportunities for public involvement in agency decision-making.<sup>24</sup> Innovative new ideas for engaging the public are

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<sup>21</sup> 657 F.2d 298, 400 (D.C. Cir. 1981); *see also* *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978) (connecting the legitimacy of agency rulemaking to procedures that, *inter alia*, promote “participatory democracy” within agencies).

<sup>22</sup> *See supra* note 3 and accompanying text.

<sup>23</sup> *See, e.g.*, Chris Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647, 707 (2024) (advocating for bolstering “the direct relationships between agencies and citizens through democratizing administrative policymaking”); Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 3000, 3007 (2023) (asserting that “agencies have more diverse, frequent, and interactive relationships with the publics and situations they regulate than elections could provide”); PETER M. SHANE, *DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY* 171 (2022) (asserting that “the democratic pedigree of the modern federal administrative establishment is at least as strong as that of Congress itself”); Sant’Ambrogio & Staszewski, *supra* note 1, at 796 (arguing that engagement with the public “enhances the democratic legitimacy and accountability of federal agencies and the regulations they promulgate”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 (1975) (“Agency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation.”); *see also supra* note 2 (advancing arguments for newer and more inclusive forms of administrative democracy).

<sup>24</sup> For examples of methods by which agencies make policy, *see, e.g.*, Chris Brummer, Yesha Yadav, and David Zaring, *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297 (2024); Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 497 (2021) (discussing rulemaking and adjudication); Yehonatan Givati, *Game Theory and the Structure of Administrative Law*, 81 U. CHI. L. REV. 481, 481 (2014) (licensing and advanced rulings); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007) (guidance documents). For a sense of the menu of participatory mechanisms concerning just one of these methods, *see* Michael Sant’Ambrogio and Glen Staszewski, *Public Engagement with Agency Rulemaking*, ACUS, Nov. 19, 2018, at 174-75 (discussing sixteen different potential participatory mechanisms in rulemaking).

proliferating, especially as new technologies increase opportunities for direct participation.<sup>25</sup> Spanning the waterfront would be impractical.<sup>26</sup>

Accordingly, we focus on participatory mechanisms in one context: rulemaking under the Administrative Procedure Act of 1946 (APA).<sup>27</sup> We examine five mechanisms: (1) the conventional notice-and-comment procedure that serves as a default under the APA; (2) a version of notice-and-comment in which the agency ensures balance among participants on relevant dimensions; (3) a version of notice-and-comment involving an agency official tasked with advocating for the general public; (4) a process that involves early deliberation among stakeholder groups, à la negotiated rulemakings; and (5) a process involving early deliberation among a randomly selected or representative group of ordinary people. These mechanisms are eclectic, differing in their frequency of use,<sup>28</sup> the democratic assumptions on which they rest,<sup>29</sup> and other features. This section introduces these mechanisms.

### 1. Notice-and-Comment

Notice-and-comment rulemaking is a workhorse of agency decision-making.<sup>30</sup> Pursuant to the APA, an agency seeking to promulgate a legislative rule must, in most circumstances, complete three interactions with the public before doing so.<sup>31</sup> First, the agency must publish a “[g]eneral notice of proposed rule making.”<sup>32</sup> Second, it must “give interested persons an opportunity to participate in the

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<sup>25</sup> See Luigi Bobbio, *Designing Effective Public Participation*, 38 POL’Y & SOC’Y 41 (2019) (providing an overview of recent innovations); Sant’Ambrogio & Staszewski, *supra* note 1 (noting that many of these innovations could be, and in some cases already are being, deployed by agencies).

<sup>26</sup> That the concept of “public participation” is somewhat ambiguous and open to multiple interpretations further complicates efforts to define the set of participatory mechanisms. See Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WISC. L. REV. 297, 317 (2010) (finding that, although that phrase appears more than 200 times in the U.S. Code, it “does not appear as part of [any] formal definitions section”); see also Bobbio, *supra* note 25, at 41 (“Participation is a loose concept . . .”).

<sup>27</sup> 5 U.S.C. § 553; see also Exec. Order 12,866, *Regulatory Planning and Review* (Sept. 30, 1993) (directing agencies to “provide the public with meaningful participation in the regulatory process”).

<sup>28</sup> Compare *infra* Part I.A.1 (describing the notice-and-comment procedure’s centrality to rulemaking); with *infra* Part I.A.5 (noting that, while “mini-publics” are increasingly common in other polities, their use in federal administrative agencies remains limited).

<sup>29</sup> For instance, the mechanisms involving notice-and-comment connect to “aggregative” democratic theories, which assume participants’ preferences are fixed and exogenous, whereas mechanisms involving group discussion connect to deliberative or civic-republican theories of democracy, all of which consider the very act of critical engagement as valuable. See Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 20-31 (2022).

<sup>30</sup> See Rossi & Stack, *supra* note 2, at 2 (referring to notice-and-comment rulemaking as “[t]he dominant form of federal lawmaking today”).

<sup>31</sup> 5 U.S.C. § 553.

<sup>32</sup> *Id.* at § 553(b).



rule making.”<sup>33</sup> Third, the agency must “consider . . . the relevant matter presented” from members of the public.<sup>34</sup> The Supreme Court interprets this third mandate as including a requirement that agencies “respond to significant comments received during the period for public comment.”<sup>35</sup>

Notice-and-comment receives praise from many corners.<sup>36</sup> Kenneth Culp Davis called it one of the “greatest inventions of modern government.”<sup>37</sup> Judicial decisions throughout the 1960s and 1970s further enhanced its democratic bona fides by requiring agencies to respond to significant comments before finalizing a rule.<sup>38</sup> A diverse set of scholars contends that the process buttresses key values in administration, including legitimacy, accountability, and fairness.<sup>39</sup> Even Justice Clarence Thomas—who is often deeply critical of the administrative state<sup>40</sup>—recognizes that notice-and-comment “at least attempts to provide a ‘surrogate political process’ that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process.”<sup>41</sup>

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<sup>33</sup> *Id.* at § 553(c).

<sup>34</sup> *Id.*

<sup>35</sup> *See* *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); *see also* *Ohio v. EPA*, 603 U.S. 279, 294 (2024) (citing the EPA’s failure to “offer[] . . . [a] reasoned response” to a comment submitted during the notice-and-comment process as a factor in granting a motion to stay enforcement of the rule); *Portland Cement Ass’n v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

<sup>36</sup> *See, e.g.*, Shoba Sivaprasad Wadhia and Christopher J. Walker, *Assessing Visions of Democracy in Regulatory Policymaking*, 21 *GEO. J.L. & PUB. POL’Y* 389, 411 (2023) (arguing that “the default regulatory mode should be notice-and-comment rulemaking”); Seifter, *supra* note 4, at 1308 (referring to the procedure as “the most well-known and heralded form of administrative participation”).

<sup>37</sup> Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 *SAN DIEGO L. REV.* 315, 324 (2005) (quoting *ADMIN. L. TREATISE* § 6.15, at 283 (1<sup>st</sup> ed. Supplement)).

<sup>38</sup> *See* Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 *CORNELL L. REV.* 69, 76-77 (2022) (noting that courts and agencies, at the urging of scholars, democratized notice-and-comment rulemaking through the 1960s and 1970s in response to trends that were not yet taking place when the APA was originally passed); Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 *ADMIN. L. REV.* 1139 (2001).

<sup>39</sup> *See, e.g.*, Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 *UCLA L. REV.* 1188, 1244 (2012) (stating that the mechanism “provides opportunities for public participation and obligations for decisionmakers to consider a range of different perspectives, which improve the legitimacy of the administrative process.”); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 *MINN. L. REV.* 1, 20 (2012) (“Public participation . . . is a crucial way to ensure that agency decisions are legitimate, accountable, and just.”); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 *GEO. WASH. L. REV.* 1343, 1343 (2011) (“An agency’s public proposal of a rule and acceptance of public comment prior to issuing the final rule can help us view the agency decision as democratic and thus essentially self-legitimizing.”); Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 *U. PA. L. REV.* 923, 972 (2008) (“Both democratic and technocratic ideals in administrative law suggest that notice and comment is a desirable form of agency action.”).

<sup>40</sup> *See, e.g.*, *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring) (decrying “a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure”).

<sup>41</sup> *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 58 n.13 (2020) (Thomas, J., concurring).

Importantly, however, the segment of the public that engages in the process is highly unrepresentative of the general public.<sup>42</sup> When agencies simply throw open their doors and welcome all comers, often the result is that wealthy and well-organized people and groups dominate the process.<sup>43</sup> The remaining four mechanisms aim to mitigate this participatory imbalance.

## 2. *Balanced Notice-and-Comment*

“The flaw in the pluralist heaven,” E.E. Schattschneider proclaimed, “is that the heavenly chorus sings with a strong upper-class accent.”<sup>44</sup> In other words, and as applied to the administrative context, open-ended invitations to participate are unlikely to yield participation that represents the full diversity of the public’s views. To address this imbalance, various structures and procedures aim to amplify the voices of underrepresented individuals and groups. The approximately 1,000 advisory committees across the executive branch must be “fairly balanced in terms of the view represented.”<sup>45</sup> Agencies are statutorily required to consider the effects of their proposed rules on small businesses,<sup>46</sup> which are considered, rightly or wrongly, to be underpowered.<sup>47</sup> And some seats on multimember commissions are reserved for supposedly underpowered interests, such as the “community-bank seat” on the Federal Reserve Board of Governors.<sup>48</sup> Add it all up and, according to Anya Bernstein and Glen Staszewski, “[n]o other part of our government is required to consider as many views and interests as agencies.”<sup>49</sup>

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<sup>42</sup> See Rossi and Stack, *supra* note 2, at 3 (“Empirical studies consistently reveal that actual participation by the public in agency rulemaking is deeply unrepresentative, across a range of different substantive regulatory contexts and types of issues.”).

<sup>43</sup> See Menezes & Pozen, *supra* note 2, at 1005 (stating that the “practical result of this formality neutrality [in the notice-and-comment process] has often been regressive”); Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 45-46 (2019) (summarizing studies finding higher rates of participation by directly affected interests, often business interests); THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 86-87 (1969) (arguing that participatory mechanisms “cut out that part of the mass that is not specifically organized around values strongly salient to the goals of the program”).

<sup>44</sup> E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY 35 (1960). This basic insight is also associated with public choice literature—in particular, Mancur Olson’s classic *The Logic of Collective Action*, which argued that motivation to participate varies in the population, and that this leads to systemic disparities in political power. MANCUR OLSON, JR. THE LOGIC OF COLLECTIVE ACTION (1971).

<sup>45</sup> 5 U.S.C. app. § 5(b)(2); see also Brian D. Feinstein and Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139 (2020) (providing an overview of the approximately 1,000 advisory committees across the executive branch).

<sup>46</sup> Regulatory Flexibility Act of 1980, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121.

<sup>47</sup> See Brian D. Feinstein, *Small Business Favoritism*, Working Paper, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5375532](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5375532).

<sup>48</sup> See Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 3, 82 (2022).

<sup>49</sup> Anya Bernstein and Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1780 (2023).

Scholars have called for similar identity-conscious measures in notice-and-comment rulemaking to help redress inequalities in participation. Blake Emerson and Jon Michaels propose that no important regulations be “proposed without meaningful consultation with those for whom the laws and regulations are designed to protect.”<sup>50</sup> Bijal Shah urges agencies to engage “proxy representati[ves] to ensure attention to underserved interests.”<sup>51</sup> For Chris Havasy, ensuring that all people whom the agency action may affect—which is not necessarily a representative cross-section of the public—have an opportunity to participate is vital.<sup>52</sup> Finally, one of us proposes that agencies conduct outreach to marginalized stakeholders who can offer dissenting voices in the notice-and-comment process, which can help foster healthy conflict within agencies.<sup>53</sup>

These prescriptions align with the Biden administration’s charge to agencies: that “[o]pportunities for public participation shall be designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities.”<sup>54</sup> Although President Trump later rescinded the executive order containing that directive, it retains currency among progressives and thus may be revisited in a future Democratic administration.<sup>55</sup>

### 3. *Public Advocate Involvement*

The use of public advocates—agency officials tasked with representing the public in agency proceedings<sup>56</sup>—is another participatory device that warrants attention. Public advocates have long been a staple of state-level public utility rate regulation in the form of ratepayer or consumer advocates.<sup>57</sup> In the federal government, ombuds and consumer-advocate offices play a similar role.<sup>58</sup> Although the typical public advocate is situated within the agency whose decision-making is supposed to be affected, other public advocates are standalone agencies or subagencies charged with influencing decision-making across institutional boundaries. For instance, officials at the Small Business Administration and Bureau of Indian Affairs play similar roles, representing a relatively large subset

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<sup>50</sup> Blake Emerson & Jon. D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 133 (2021).

<sup>51</sup> Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1063, 1683-84 (2024); *see also* Rossi and Stack, *supra* note 2. Rossi and Stack also urge agencies, early in the rulemaking process, to announce which stakeholders they expect to participate and then hold agencies accountable for those stakeholders’ actual engagement in the process. *See id.*

<sup>52</sup> *See* Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 757 (2023)

<sup>53</sup> *See* Walters, *supra* note 29.

<sup>54</sup> Exec. Order 14,094, *Modernizing Regulatory Review* (Apr. 6, 2023).

<sup>55</sup> *See, e.g.*, Federico Holm and James Goodwin, *Beyond Notice-and-Comment: Bridging the Participation Gap for an Equity-Focused Regulatory System*, 10 ADMIN. L. REV. 67 (2025).

<sup>56</sup> *See* Rossi & Stack, *supra* note 2, at 37.

<sup>57</sup> *See* Adam R. Fremeth, Guy L. F. Holburn, & Pablo T. Spiller, *The Impact of Consumer Advocates on Regulatory Policy in the Electric Utility Sector*, 161 PUB. CHOICE 157 (2014).

<sup>58</sup> *See* Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 65 (2014).

of the general public—small business owners and Native Americans, respectively—in *other* agencies’ rulemakings.<sup>59</sup> The Investor Advocate at the SEC and Taxpayer Advocate at the IRS also represent a broad swath of the public, albeit typically outside of the rulemaking context.<sup>60</sup> Further expanding this model could advance legitimacy, responsiveness, and other values.<sup>61</sup>

#### 4. *Deliberation Among Stakeholders*

Participation in rulemaking can also occur outside the notice-and-comment period. Negotiated rulemaking, for example, expands participatory opportunities to include the period before a proposed regulation is published.<sup>62</sup> The Negotiated Rulemaking Act of 1990 establishes the sequence.<sup>63</sup> The agency first convenes a committee of representative stakeholders.<sup>64</sup> For a commercial air travel regulation, for example, that might include airline executives, union leaders, air-safety advocates, and others, alongside agency staff.<sup>65</sup> The committee then meets to negotiate the text of a proposed rule. If its members reach consensus, in most cases the agency will adopt that consensus position as its proposed rule. The next step is the usual notice-and-comment process.

Following an initial surge of enthusiasm in the 1990s, the use of negotiated rulemaking has declined.<sup>66</sup> Still, many scholars see promise in the approach. Jody Freeman and Laura Langbein argue that participation in processes like negotiated rulemakings enhances participants’ perceptions of legitimacy, regardless of whether the substantive outcome ultimately favors them.<sup>67</sup> Chris Havasy likewise identifies several advantages of negotiated rulemaking over conventional notice-and-comment.<sup>68</sup> In notice-and-comment, the agency passively receives whatever comments interested

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<sup>59</sup> See Rossi & Stack, *supra* note 2, at 38.

<sup>60</sup> See 15 U.S.C. § 78pp(b)(1)(A)–(C) (Investor Advocate); 26 U.S.C. § 7803(c)(2)(A)–(c)(3) (Taxpayer Advocate). Further, public advocates are more commonly found in state-level and non-U.S. agency proceedings. See Rossi and Stack, *supra* note 2, at 37, 46.

<sup>61</sup> See Rossi & Stack, *supra* note 2, at 37–39; Feinstein, *Identity-Conscious*, *supra* note 48, at 29–32; Schlanger, *supra* note 58.

<sup>62</sup> There are other mechanisms for participating in the pre-proposal stage, although none quite as formal and deliberative as the negotiated rulemaking. For instance, agencies sometimes issue advanced notices of proposed rulemaking (ANPRMs) that are essentially notice-and-comment proceedings on whether to initiate notice-and-comment rulemaking. Most of the time, however, agencies do none of this and simply generate their proposal informally through in-house work, perhaps in collaboration with exceptionally interested parties (usually regulated entities). See Keith Naughton, Celeste Schmid, Susan Webb Yackee, & Xueyong Zhan, *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL’Y ANALYSIS & MGMT. 258 (2009).

<sup>63</sup> 5 U.S.C. §§ 561–570.

<sup>64</sup> Id. § 563(a).

<sup>65</sup> See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1257 (1997) (listing broadly similar examples).

<sup>66</sup> See Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 988 (2008).

<sup>67</sup> Jody Freeman and Laura Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 67 (2001).

<sup>68</sup> See Havasy, *supra* note 52, at 823.

parties choose to submit; in a negotiated rulemaking, by contrast, the agency identifies and actively engages affected parties—a step that may involve mitigating social or economic inequalities to promote equal voice.<sup>69</sup> Further, whereas notice-and-comment is open to all who are *interested* in weighing in, negotiated rulemakings prioritize those who actually would be *affected* by the prospective regulation,<sup>70</sup> although determining who should be part of the negotiation is tricky.<sup>71</sup> Finally, at least in theory, negotiations offer an opportunity for deliberative decision-making and, through reciprocal reason-giving, the possibility of genuine consensus.<sup>72</sup>

### 5. *Deliberation Among Representative “Mini-Publics”*

So-called “mini-publics” are proliferating worldwide.<sup>73</sup> Although they have made only modest inroads into the American administrative state to date,<sup>74</sup> that may soon change. Advocates argue that mini-publics could be readily adapted to U.S. administrative practice and may remedy several shortcomings of existing forms of public engagement.<sup>75</sup>

The defining features of mini-publics are that agencies convene randomly selected groups of citizens to engage in a facilitated deliberation, typically culminating in a recommendation to the decisionmaker.<sup>76</sup> The deliberative aspect of mini-publics is not unique—negotiated rulemaking also

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Critics note that negotiated rulemaking’s method of assembling “stakeholders” may leave out the general public’s interest—a critical contrast with mini-publics, discussed *infra* Part I.A.5.

<sup>72</sup> Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 18 (1982) (arguing that negotiated rulemaking’s focus on consensus among stakeholders promotes legitimacy and reduces adversarialism); *but see* Coglianese, *supra* note 65 (showing that, despite promises of reduced conflict, negotiated rules tend to be challenged in court at the same rate as non-negotiated rules).

<sup>73</sup> See SIMONE CHAMBERS, CONTEMPORARY DEMOCRATIC THEORY 202 (2024) (“The deliberative mini-public (DMP) is . . . probably the institution that is getting the most attention and use.”); Julien Vrydagh and Didier Caluwaerts, *How Do Mini-publics Affect Public Policy? Disentangling the Influences of a Mini-public on Public Policy Using the Sequential Impact Matrix Framework*, 59 REP. 117, 118 (2023) (“In recent years, mini-publics have enjoyed an increasing popularity among academics, practitioners, and policy-makers.”); *id.* at 119-24 (providing examples from the international context Sharon Jacobs, *The Challenges of Participatory Administration*, 58 UC DAVIS L. REV. 323, 365 n.209 (2024) (collecting examples from U.S. states).

<sup>74</sup> See Sant’Ambrogio & Staszewski, *supra* note 1, at 821 (discussing mini-publics as a subset of what they call “enhanced deliberative methods”).

<sup>75</sup> See, e.g., David Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1458 (2013) (proposing that “large panels of randomly selected citizens decide policy questions presented to them by government officials”); Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 465 (1992) (proposing that “citizen panels . . . perform some of the administrative tasks now handled by administrative agencies”); *id.* at 508, 512 (including rulemaking as one of these tasks, with a focus on deliberation). See also Menezes & Pozen, *supra* note 2, at 1020 n.226 (collecting citations proposing these bodies).

<sup>76</sup> CHAMBERS, *supra* note 73, at 202 (“Although there is a lot of variety in design features and uses across and within democratic systems, two features are defining elements of all DMPs. The first is a random selection of participants, and the second is facilitated deliberation.”).

emphasizes structured discussion—but the random selection of participants is distinctive.<sup>77</sup> The premise of this “lottocratic” approach is to eliminate participation bias by assembling a group whose composition, in expectation, mirrors the broader affected public.<sup>78</sup> Advocates point to this representativeness as a way to bolster agencies’ legitimacy and democratic responsiveness.<sup>79</sup> Some participatory democrats, however, criticize mini-publics precisely because they are presented as a stand-in for the general public, arguing that their use may displace opportunities for more direct, widespread participation.<sup>80</sup>

## B. Dividing Lines

Given the longstanding tradition of public participation in notice-and-comment rulemaking, one might assume that administrative democracy rests on solid ground. Yet its footing is increasingly uncertain. As discussed *supra*, the Trump administration curtailed the use of notice-and-comment rulemaking—casting doubt on the continued viability of participatory mechanisms.<sup>81</sup> At the same time, critics from across the political spectrum push for procedural streamlining.<sup>82</sup> Meanwhile, the Supreme Court’s embrace of a theory positing that presidential control alone delivers legitimacy and accountability to agencies leaves little room for participatory mechanisms to also serve those functions.

In this section, we examine the arguments marshaled by both critics and champions of public participation. We show that much of the debate turns on empirically testable claims about whether participatory mechanisms meaningfully shape public attitudes towards agency decisions.

### 1. *The Abundance Critique*

A growing chorus challenges agencies’ procedural commitments on the grounds that they sap administrative capacity. The “ossification” literature first crystallized this concern several decades ago, arguing that agencies struggle to fulfill their missions when encumbered by extensive procedural obligations, including public participation requirements.<sup>83</sup> Reflecting on the participatory reforms of

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<sup>77</sup> See David M. Farrell & Peter Stone, *Sortition and Mini-Publics: A Different Kind of Representation*, in OXFORD HANDBOOK OF POLITICAL REPRESENTATION IN LIBERAL DEMOCRACIES (Rorschneider & Thomassen, eds., 2020).

<sup>78</sup> CHRISTINA LAFONT, *DEMOCRACY WITHOUT SHORTCUTS: A PARTICIPATORY CONCEPTION OF DELIBERATIVE DEMOCRACY* (2019).

<sup>79</sup> See Menezes & Pozen, *supra* note 2, at 984 1017-26 (summarizing these arguments).

<sup>80</sup> LAFONT, *supra* note 78.

<sup>81</sup> See *supra* notes 5-7 and accompanying text.

<sup>82</sup> See *infra* Part I.B.2.

<sup>83</sup> See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991); but see Jason Webb Yackee and Susan Webb Yackee, *Administrative Procedures and Bureaucratic*

the 1960s and 1970s, Richard Stewart warns of the “resource and delay costs that could result if broadened participation rights were effectively exercised.”<sup>84</sup> These concerns have, at times, driven agencies to shift away from rulemaking toward less formal policymaking tools.<sup>85</sup>

A related critique focuses on the potential for well-resourced interests to capture participatory processes.<sup>86</sup> As Wendy Wagner and others observe, expansive participatory opportunities can produce sprawling dockets that effectively drown out lay voices and enable “informational capture.”<sup>87</sup> Other scholars similarly caution that participatory mechanisms must be carefully designed to ensure balanced input without overwhelming agencies’ ability to function.<sup>88</sup>

Nicholas Bagley presses these criticisms further. He argues that administrative law is marked by a preternatural “procedure fetish”—a reflexive confidence in procedural form as a means of legitimizing agency decision-making and guarding against interest-group capture.<sup>89</sup> Bagley contends that the very problem that these participatory mechanisms aim to solve—a “democratic deficit” said to undermine legal and sociological legitimacy—is a chimera.<sup>90</sup> In particular, he questions whether the public attaches much meaning to procedure at all, noting that “claims about [sociological] legitimacy tacitly ascribe the lawyerly anxiety about procedural irregularity to the broader public—a public that, as it happens, is mercifully unaware of picayune debates over administrative procedure.”<sup>91</sup> In pursuing a resolution to a perceived democratic deficit that may not meaningfully exist, Bagley argues, we have lost sight of the aggregate costs of participation-enhancing measures—costs that can make it harder for agencies to carry out their statutory missions.

Bagley acknowledges that participation-enhancing procedures can yield benefits. For him, selecting the best procedural framework is an “optimization problem,” involving “balanc[ing]

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*Performance: Is Federal Rulemaking “Ossified”?*, 2 J. PUB. ADMIN. RES. & THEORY 261 (2010) (providing empirical evidence that cuts against the ossification thesis)

<sup>84</sup> Stewart, *supra* note 23, at 1774.

<sup>85</sup> See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165-166 (2000).

<sup>86</sup> See David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 85 (2005) (summarizing empirical research on the subject as “demonstrat[ing] that participation [in rulemakings] is minimal, of low quality, and dominated by powerful interests”).

<sup>87</sup> See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1351-62 (2010).

<sup>88</sup> See, e.g., Jacobs, *supra* note 73, at 381-404 (proposing congressional reforms and intra-agency public advocate-style offices instead of direct public involvement); Rossi, *supra* note 20, at 211-41 (proposing a balanced approach).

<sup>89</sup> Bagley, *supra* note 10, at 349; see also Pildes, *supra* note 10, at 213 (claiming that legal education emphasizes the benefits of “process and participation” while largely ignoring the attendant efficiency costs). To be clear, Bagley’s concerns extend beyond public participation and include other procedural constraints on agency action, such as ordinary remand without regard to the harmlessness of the error. Bagley, *supra* note 10, at 356.

<sup>90</sup> *Id.* at 377.

<sup>91</sup> *Id.* at 381.

competing goals of efficiency, the protection of legal rights, and public accountability.”<sup>92</sup> Attempts to address that problem are stymied both by disagreement “on what the right balance should be” and an absence of “good evidence about how most administrative procedures affect that balance.”<sup>93</sup>

Bagley’s critique dovetails with the emerging “abundance movement,” a prominent and increasingly influential strand of contemporary political discourse.<sup>94</sup> The movement contends that today’s central policy challenge is insufficient production of key public goods that the public demands, such as affordable housing, clean electric power, high-speed rail, and mRNA vaccines.<sup>95</sup> Equally important as this substantive claim is abundance proponents’ procedural diagnosis of how production shortfalls arise. According to abundance theorists, the core problem mirrors the one Bagley identifies: the ample opportunities for public influence that government affords are exploited by powerful, determined interests to drive up the costs of producing both regulations and goods.<sup>96</sup> The abundance movement’s prescriptive conclusion is that increased production requires accepting fewer formal opportunities for public engagement in government decision-making.

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<sup>92</sup> *Id.* at 352. See also Jacobs, *supra* note 73, at 370-81 (highlighting tensions between expanded public participation and other core values, namely, efficient administration, expertise, and non-arbitrary decision); Pildes, *supra* note 10, at 213 (“Participation and good process have their roles, of course, but ... that value must be weighed against the necessity of delivering important public goods.”); Rossi, *supra* note 20, at 193-94 (discussing tensions between participation and democracy); Stewart, *supra* note 23, at 1708-09 (arguing that “the political tug and pull arising from participation might well threaten the impartiality and rationality of the decisional process”).

<sup>93</sup> *Id.*

<sup>94</sup> The movement’s manifestos are EZRA KLEIN & DEREK THOMPSON, *ABUNDANCE* (2025), and MARC. J. DUNKELMAN, *WHY NOTHING WORKS: WHO KILLED PROGRESS—AND HOW TO BRING IT BACK* (2025). These books have spawned myriad commentaries in just a few short months since publication, some sympathetic but many critical as well. For a sample, see Hannah Story Brown, *An Abundance of Credulity*, AM. PROSPECT (Mar. 26, 2025), <https://prospect.org/culture/books/2025-03-26-abundance-of-credulity-klein-thompson-dunkelman-review/>; Sandeep Vaheesan, *The Real Path to Abundance*, BOSTON REV. (May 22, 2025), <https://www.bostonreview.net/articles/the-real-path-to-abundance/>; Zephyr Teachout, *An Abundance of Ambiguity*, WASH. MONTHLY (Mar. 23, 2025), <https://washingtonmonthly.com/2025/03/23/an-abundance-of-ambiguity/>; Ruy Teixeira, *‘Abundance’ Is a Winning Message. But Can Democrats Embrace It?*, THE FREE PRESS (Mar. 23, 2025), <https://www.thefp.com/p/can-democrats-embrace-abundance>. These ideas are very much in the *zeitgeist*, and are even beginning to influence policy decisions. Eric Biber, *Abundance and the Seven County Case*, LEGALPLANET (June 5, 2025), <https://legal-planet.org/2025/06/05/abundance-and-the-seven-counties-case/> (discussing the apparent reliance on abundance movement thinking in the Supreme Court’s significant curtailment of NEPA review).

<sup>95</sup> KLEIN & THOMPSON, *supra* note 94, at 20.

<sup>96</sup> *Id.* at 82 (“Affluent, stable societies have more negotiations. And that means people’s concerns can be voiced, their needs can be met, their ideas can be integrated, their insights can be shared. It also means that it becomes difficult to get much of anything done.”); Robert Saldin & Steven Teles, *The Rise of the Abundance Faction*, NISKANEN CTR. (June 4, 2024), <https://www.niskanencenter.org/the-rise-of-the-abundance-faction/> (“From the creation of compliance divisions inside of firms to the expansion of standing to sue to rules on public participation in government decision-making, the state that we created a half-century ago had the effect of displacing or slowing down the parts of organizations — public and private — focused on the delivery of goods and services.”); Brink Lindsey, *State Capacity: What It Is, How We Lost It, and How to Get It Back*, NISKANEN CTR. (Nov. 2021), <https://www.niskanencenter.org/wp-content/uploads/2021/11/brinkpaper.pdf> (arguing that the left needs to reconsider the “decentralized, legalistic model of governance that has guided progressive-led state expansion since the 1960s, reducing the veto power that activist groups exercise in the courts, and shifting the focus of policy-design from ensuring that power is subject to progressive checks to ensuring that power can actually be exercised effectively”).



Critics of the abundance movement charge that its aim is to “jettison [public participation] altogether.”<sup>97</sup> A more accurate characterization, however, is that the movement identifies a procedural optimization problem but does not purport to solve it.<sup>98</sup> Addressing that problem would require far more empirical evidence about the public’s expectations regarding opportunities to influence government decision-making, as well as how the public evaluates tradeoffs, such as the delays that democratic procedures can impose.

## 2. *The Presidentialist Alternative*

At the same time that the abundance movement calls into question the balance of benefits and costs that participatory mechanisms deliver, the Supreme Court equates democratic administration with presidential control.<sup>99</sup> For the Court, executive-branch officials “acquire[] [their] legitimacy and accountability to the public through a clear and effective chain of command down from the President, on whom all the people vote.”<sup>100</sup> That view has become a recurring theme in the Roberts Court’s ongoing project of reducing agencies’ independence.<sup>101</sup> Indeed, eight current justices have authored or joined opinions advancing variants of this claim.<sup>102</sup>

To be sure, the Court eschews direct comparisons between participatory mechanisms and presidential control. Still, the claim that presidential control is *the* means of bolstering the administrative state’s accountability and legitimacy carries an unmistakable implication: institutional designers seeking to fortify administrative democracy—and avoid judicial scrutiny—should tether

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<sup>97</sup> Vaheesan, *supra* note 94 (“[I]nstead of making the case for strengthening and broadening democratic participation in land use policy, they imply we should simply jettison it altogether. They do not call for these things explicitly. But their simplistic morality tales invite these conclusions, and the authors do nothing to guard against them. This vision is undemocratic in both form and function.”).

<sup>98</sup> See, e.g., J.B. Ruhl & James Salzman, *The Greens’ Dilemma: Building Tomorrow’s Climate Infrastructure Today*, 73 EMORY L.J. 1, 60 (2023) (noting that the clean energy transition requires us to “reassess the trade-off” that exists between speed and public participation).

<sup>99</sup> See Emily R. Chertoff & Jessica Bulman-Pozen, *The Administrative State’s Second Face*, 100 N.Y.U. L. REV. 727, 767 (2025) (“In recent years, the Supreme Court has reduced its account of democratic administration to presidentialism.”).

<sup>100</sup> *United States v. Arthrex*, 594 U.S. 1, 11 (2021) (internal quotation omitted).

<sup>101</sup> See, e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 232 (2020) (“[The Court possesses a] duty to ensure that the Executive Branch is overseen by a President accountable to the people”); *Kisor v. Wilkie*, 588 U.S. 558, 571–72 (2019) (“[A]gencies ... have political accountability, because they are subject to the supervision of the President, who in turn answers to the public.”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010) (“[Without] the authority to remove those who assist him in carrying out his duties ... the President could not be held fully accountable.”). See also Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371 (2022) (canvassing judicial opinions claiming that White House control makes agencies accountable to the people).

<sup>102</sup> These eight jurists are Chief Justice John Roberts and Justices Samuel Alito, Amy Coney Barrett, Neil Gorsuch, Elena Kagan, Brett Kavanaugh, Sonia Sotomayor, and Clarence Thomas. See, e.g., *Arthrex*, 594 U.S. at 27 (Roberts, C.J., joined in relevant part by Barrett, Alito, and Kavanaugh, JJ.); *Seila Law*, 591 U.S. at 231–32 (Roberts, C.J., joined in relevant part by Thomas, Alito, Gorsuch, and Kavanaugh, JJ.); *Kisor*, 588 U.S. at 571–72 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.). Only Justice Ketanji Brown Jackson has not done so.

agencies to the White House rather than expand opportunities for direct public engagement in agency decision-making.

Although boosters of presidentialism span the ideological spectrum,<sup>103</sup> they are especially prominent within the conservative legal movement. For then-Judge (now Justice) Brett Kavanaugh, these independent agencies are “in considerable tension with our nation’s longstanding belief in accountability.”<sup>104</sup> Steven Calabresi similarly argues the President’s “unique claim to legitimacy” warrants presidential control over the administrative state.<sup>105</sup> Kavanaugh’s and Calabresi’s claims leave no room for the possibility that alternative institutional designs—such as public participation in agency decision-making—could also advance these values. Justice Clarence Thomas goes even further, asserting that, without presidential control, agencies have “no accountability to . . . the people.”<sup>106</sup> On this view, presidential control is the exclusive path to popular accountability, foreclosing participatory mechanisms as viable alternatives.

Ordinary people are the purported beneficiaries of a White House-directed administrative state. After all, proponents of presidential control over agencies assert that the President is the key link in a chain connecting agencies to the people; agencies are accountable to the President, who in turn is accountable to voters.<sup>107</sup> Empirical evidence, however, reveals that the public—again, the theory’s avowed beneficiaries—do not appear to endorse it. In a set of survey experiments, one of us found that people presented with an agency vignette in which the President controls appointments, removals, and regulatory review concerning the agency are no more likely to perceive that agency as

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<sup>103</sup> See generally Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 53 (2006) (noting that “legal scholars . . . give[] [the presidential administration model] more credence for enhancing agency legitimacy than previous theories”). From the left, then-Professor (now Justice) Elena Kagan, argues that the presidency “most possesses the legitimacy that . . . administration requires.” Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341 (2001). Lawrence Lessig and Cass Sunstein believe that a “strongly unitary executive” promotes accountability.” Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2-3 (1994). It is possible that the left will increasingly embrace presidential power in the future. See Gregory Elinson, *Presidentialism Reconsidered: Liberals’ Turn Away from Presidential Power and Its Consequences*, (Aug. 11, 2025), unpublished manuscript on file with author, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5366495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5366495) (arguing that progressives and liberals should embrace presidentialism more aggressively).

<sup>104</sup> Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1474 (2009).

<sup>105</sup> Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1995). See also Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1762 (2023) (considering presidential control to be the sole institutional design feature preventing Congress from “transform[ing] the executive branch into a perpetual and unaccountable bureaucratic machine”); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 116 (2007) (“[A]dministrative legitimacy lies in tracing administrative authority to the mandate of democratically elected institutions.”).

<sup>106</sup> *Seila Law*, 591 U.S. at 240 (Thomas, J., concurring in part and dissenting in part).

<sup>107</sup> See 1 ANNALS OF CONG. 499 (1789) (James Madison) (endorsing a “great principle of unity and responsibility in the Executive department,” through which “the chain of dependence [will] be preserved” with an executive-branch officials “depend[ing], as they ought, on the President, and the President on the community”).

accountable to people like them than are participants presented with an agency that is independent of the White House in these respects.<sup>108</sup>

### 3. *Defenses*

Champions of participatory mechanisms face dual challenges from the abundance movement and presidentialism. In response, they offer three principal justifications for meaningful public participation.<sup>109</sup> *First*, some emphasize an epistemic justification. On this view, public participation enhances governance quality by helping agencies overcome the “knowledge problem” inherent in complex regulatory tasks.<sup>110</sup> Agency decision-making often involves irreducibly technical subject matter,<sup>111</sup> and a key problem agencies face is collecting relevant technical information and identifying shortcomings with proposed actions. Public participation mechanisms can assist by crowdsourcing technical insights and exposing limitations that might otherwise go undetected.<sup>112</sup>

*Second*, proponents argue that public participation serves as a source of legitimacy amid political conflict. These arguments trace back to mid-twentieth-century pluralist accounts of administration, which posited that interest-group influence in agency decision-making fosters responsiveness to public concerns.<sup>113</sup> Beginning in the 1980s, advocates of civic republicanism and deliberative democracy pressed for dialogic forums, such as negotiated rulemaking, capable of forging consensus or, at the very least, reducing disagreement, rather than merely aggregating preferences.<sup>114</sup> More recent scholarship spotlights irreducible disagreements and power imbalances as limitations to the interest-group and deliberative theories, and thus calls for more intentional efforts to elevate marginalized

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<sup>108</sup> Brian D. Feinstein, *Presidential Administration and the Accountability Illusion*, 74 DUKE L.J. 1791 (2025).

<sup>109</sup> See Archon Fung, *Putting the Public Back Into Governance: The Challenges of Citizen Participation and Its Future*, 75 PUB. ADMIN. REV. 513 (2015) (identifying problem solving, legitimation, and social justice as the three key values advanced by participation). In sorting arguments in favor of participatory mechanisms into three categories, we do not mean to imply a lack of overlap in these three justifications. Indeed, all of this work to bring the public in is in some sense ultimately motivated by a perennial urge to ensure that public law is in some sense “authored” by the people who have to live by the rules that the administrative state sets. See Menezes & Pozen, *supra* note 2.

<sup>110</sup> Yoon-Ho Alex Lee, *Beyond APA Section 553: Hayek’s Two Problems and Rulemaking Innovations*, 91 GEO. WASH. L. REV. 1215 (2023).

<sup>111</sup> Mendelson, *supra* note 39, at 1347-48 (noting that agency action involves both technical questions calling for agency expertise and “questions that can only be understood as value-laden”).

<sup>112</sup> Beth Simone Noveck, *Crowdlaw: Collective Intelligence and Lawmaking*, 40 ANALYSE & KRITIK 359, 363-64 (2018). Some decisions made by agencies also implicate value judgments or carry distributive implications that cannot be answered by expert decision-making alone, and even then, agencies might gain valuable perspective as they navigate the political implications of their decision-making. See Mendelson, *supra* note 39.

<sup>113</sup> See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 441-43 (2003) (classifying this argument as part of the “interest representation model”). As one of us has written, interest-group pluralists advocated procedures that would facilitate “interest-group participation, [which] would serve as a ‘surrogate for the political process,’ thereby imparting democratic legitimacy on the administrative state.” Walters, *supra* note 53, at 21 (quoting Stewart, *supra*).

<sup>114</sup> See, e.g., Seidenfeld, *supra* note 2.

constituencies within agency processes or to obstruct elite capture.<sup>115</sup> Finally, an agency’s very act of considering participants’ views and offering reasoned explanations for why it accepted or rejected them can serve a legitimizing function.<sup>116</sup>

*Third*, a set of contemporary theorists advances the following normative claim: public participation in agency decision-making is essential to democratic equality and social justice.<sup>117</sup> For some in this camp, public participation is not merely instrumental; it is central to the very purpose of the administrative state, which provides the institutional infrastructure for a more inclusive and fully realized “new democracy.”<sup>118</sup> Blake Emerson, for example, argues that the architects of the modern administrative state sought to build bonds between the public and agencies, which are quite literally the agents of the public and stewards of their interests.<sup>119</sup> Unlike the epistemic and legitimation justifications, which treat participatory mechanisms as a means to valuable ends, this account frames participation as a matter of justice or democratic equality—ends in themselves.

In short, there are several reasons why policymakers, scholars, and, indeed, ordinary people might value public participation enough to demand that administrative agencies provide opportunities for it. However, these reasons are theoretically commensurable with the existence of other values, such as avoiding inefficient government decision-making, that are increasingly at the center of the critique of participation. As with the critique of participation, we stand to gain much by gathering actual evidence of ordinary people’s preferences.

### C. Existing Evidence

To recap, at least part of the widening divide turns on competing hypotheses about the importance of these mechanisms for fostering conditions of sociological legitimacy. The core questions, then, are empirical. Here, we review the existing evidence related to these questions. Ultimately, we find a critical gap and a need for additional evidence in the American administrative context. This conclusion paves the way to our original study in Part II.

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<sup>115</sup> Feinstein, *supra* note 48; Walters, *supra* note 53; Samuel Bagg, *Sortition as Anti-Corruption: Popular Oversight against Elite Capture*, 68 AM. J. POL. SCI. 93 (2024).

<sup>116</sup> See JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 168 (2018); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1255 (2009).

<sup>117</sup> Jodi Short collects many of these works and discusses their differences in *The Moral Turn in Administrative Law*, (Jul. 29, 2025), unpublished manuscript on file with author, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4909394](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4909394).

<sup>118</sup> WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 16 (2022) (arguing that the founders of the modern American state sought to modernize democracy through bureaucracy).

<sup>119</sup> BLAKE EMERSON, THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 2 (2019) (arguing that the tension between democracy and bureaucracy can be resolved through institutional arrangements that “mediate the dialogue between public law and public opinion”). Similar accounts have been offered in recent years under the rubric of “trusteeship” or “relational fairness.” See, e.g., Katharine Jackson, *The Public Trust: Administrative Legitimacy and Democratic Lawmaking*, 56 CONN. L. REV. 1 (2023); Havasy, *supra* note 52.

### 1. *Legitimacy Experiments: Proof of Concept*

Recent years have witnessed a surge of interest in innovative forms of public engagement around the world,<sup>120</sup> accompanied, particularly in Europe, by a corresponding growth in empirical research evaluating how such mechanisms shape perceptions of legitimacy.<sup>121</sup> Most of these studies rely on experimental surveys: respondents view vignettes describing a decision-making process that either includes (treatment) or omits (control) participatory mechanisms and then answer questions designed to elicit their judgments about the legitimacy of the resulting decision.<sup>122</sup> Many of these experiments draw on an established experimental literature on procedural legitimacy, which focused largely on criminal procedure and emphasized how certain procedural features enhance perceived fairness.<sup>123</sup> Adapting that framework to a broader set of administrative and policy contexts, the new literature employs an open-ended conception of legitimacy that goes beyond fairness and also considers correlates of legitimacy such as trust, accountability, and representativeness.<sup>124</sup>

On the whole, this burgeoning literature finds that participatory mechanisms generally produce measurable increases in perceived legitimacy compared to processes lacking such opportunities. For instance, Micha Germann reports that Irish respondents presented with a vignette involving the adoption of a universal basic income and randomly shown different versions of a mini-

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<sup>120</sup> See GRAHAM SMITH, *DEMOCRATIC INNOVATIONS: DESIGNING INSTITUTIONS FOR CITIZEN PARTICIPATION* (2009); STEPHEN ELSTUB & OLIVER ESCOBAR, *HANDBOOK OF DEMOCRATIC INNOVATION AND GOVERNANCE* (2019); SIMONE CHAMBERS, *CONTEMPORARY DEMOCRATIC THEORY* ch. 11 (2023); Luca Bartocci, Giuseppe Grossi, Sara Giovanna Mauro, & Carol Ebdon, *The Journey of Participatory Budgeting: A Systematic Literature Review and Future Research Directions*, 89 INT'L REV. ADMIN. SCI. 757 (2023).

<sup>121</sup> See, e.g., Hannah Werner & Sofie Marien, *Process vs. Outcome? How to Evaluate the Effects of Participatory Processes on Legitimacy Perceptions*, 52 BRIT. J. POL. SCI. 429 (2022); Lars Brummel & Lisanne de Blok, *Do Political and Social Accountability Arrangements Increase Citizens' Legitimacy Perceptions? A Vignette Experiment in the Netherlands*, 26 PUB. MGMT. REV. 3365 (2024); Ran Hirschl & Alexander Hudson, *A Fair Process Matters: The Relationship between Public Participation and Constitutional Legitimacy*, 49 L. & SOC. INQUIRY 2074 (2024); Micha Germann, *Mini-Publics, (Lack of) Representativeness, and Legitimacy Beliefs*, 55 BRIT. J. POL. SCI. 1 (2025); Ine Goovaerts, Jenny de Fine Licht, & Sofie Marien, *When Deliberative Mini-Publics' Outcomes and Political Decisions Clash: Examining How Responsive Communication Influences Legitimacy Perceptions*, 64 EUR. J. POL. RES. 767 (2025); Jenny de Fine Licht, Daniel Naurin, Peter Esaiasson, & Mikael Gilljam, *When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship*, 27 GOVERNANCE 111 (2024); Alex Jingwei He & Liang Ma, *Citizen Participation, Perceived Public Service Performance, and Trust in Government: Evidence from Health Policy Reforms in Hong Kong*, 44 PUB. PERFORMANCE & MGMT. REV. 471 (2021); Micha Germann, Sofie Marien, & Lala Muradova, *Scaling Up? Unpacking the Effect of Deliberative Mini-Publics on Legitimacy Perceptions*, 72 POL. STUDS. 677 (2022).

<sup>122</sup> There is also some qualitative research in this tradition. See, e.g., Ank Michels & Laurens de Graaf, *Examining Citizen Participation: Local Participatory Policy Making and Democracy*, 36 LOCAL GOV. STUDS. 477 (2010).

<sup>123</sup> See, e.g., Brummel & de Blok, *supra* note 121, at 3369 (discussing the “procedural fairness literature” associated with work by Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375 (2006); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Peter Esaiasson, Mikael Persson, Mikael Gilljam, & Torun Lindholm, *Reconsidering the Role of Procedures for Decision Acceptance*, 49 BRIT. J. POL. SCI. 291 (2016); Werner & Marien, *supra* note 121, at 430.

<sup>124</sup> See Tessa Haesevoets, Arne Roets, Kristof Steyvers, Bram Verschuere, & Bram Wauters, *Towards a Multifaceted Measure of Perceived Legitimacy of Participatory Governance*, 37 GOVERNANCE 711 (2024).

public procedure were substantially more likely to view the ultimate decision as fair and acceptable.<sup>125</sup> Specifically in the regulatory context, Jan Beyers and Sarah Arras find that opportunities to participate in environmental regulatory decisions in Belgium positively affect acceptance of both the process itself and the resulting decisions.<sup>126</sup> At the same time, many studies draw attention to contextual factors that might attenuate the effect on legitimacy. Several show that perceived legitimacy may depend on the substantive outcome of the decision-making process.<sup>127</sup> Others suggest that perceived legitimacy diminishes when governments depart from recommendations generated through deliberative public fora.<sup>128</sup> Additional research shows that perceptions of legitimacy are contingent on the representational balance of participatory mechanisms.<sup>129</sup> One study finds that procedural costs—namely, time demands placed on mini-public participants—can reduce public support for their use.<sup>130</sup>

Taken together, this literature suggests that, despite important caveats regarding the design of specific mechanisms, the effects of participatory mechanisms on sociological legitimacy are neither speculative nor trivial. People hold discernible preferences about decision-making procedures, even when those procedures do not directly involve them. Further, and consistent with theory, they tend to view outcomes as more acceptable when decisionmakers provide avenues for public input. Although these experiments cannot directly address whether actual participatory mechanisms affect people's views on government outside of these experimental settings, they do provide important evidence of the micro-level mechanisms that could, in the aggregate, affect such macro-level indices of sociological legitimacy.<sup>131</sup> We do not have to simply guess at whether participatory mechanisms enhance legitimacy—we can measure it.

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<sup>125</sup> Germann, *supra* note 121, at 6. Specifically, they were up to 60 percent of a standard deviation more likely to reach this conclusion. *Id.*

<sup>126</sup> Jan Beyers & Sarah Arras, *Stakeholder Consultations and the Legitimacy of Regulation Decision-Making: A Survey Experiment in Belgium*, 15 REGUL. & GOV. 877 (2021).

<sup>127</sup> See Jean-Benoit Pilet, Damien Bol, Davide Vittori, & Emilien Paulis, *Public Support for Deliberative Citizens' Assemblies Selected through Sortition*, 62 EUR. J. POL. RES. 873 (2023); *but see* Brummel & de Blok, *supra* note 121 (finding that legitimacy was positively impacted both for expected losers and winners); Werner & Marien, *supra* note 121 (finding that unfavorable outcomes did not change the effect).

<sup>128</sup> See, e.g., Lisa van Dijk & Jonas Lefevre, *Can the Use of Minipublics Backfire? Examining How Policy Adoption Shapes the Effect of Minipublics on Political Support Among the General Public*, 62 EUR. J. POL. RES. 135 (2023); Goovaerts, et al., *supra* note 120 (finding that legitimacy falls when government disregards recommendations of mini-publics, but that this can be offset to some degree by reasoning).

<sup>129</sup> Germann, *supra* note 121; Beyers & Arras, *supra* note 126.

<sup>130</sup> Henrik Serup Christensen, *How Citizens Evaluate Participatory Processes: A Conjoint Study*, 12 EUR. POL. SCI. REV. 239 (2020).

<sup>131</sup> The main barrier to the micro-level mechanisms of legitimation translating to macro-level impacts on sociological legitimacy would be the degree to which ordinary citizens are aware of the participatory opportunities that provided for by law. See Maija Jaske, *Participatory Innovations and Maxi-Publics: The Influence of Participation Possibilities on Perceived Legitimacy at the Local Level in Finland*, 58 EUR. J. POL. RES. 603 (2019) (drawing attention to citizens' awareness of participatory opportunities as a critical factor in the success of public participation driving legitimacy beliefs). This is a very real, if solvable, problem in the American administrative law context. See Gabriel Scheffler & Daniel E. Walters, *The Submerged Administrative State*, 2024 WISC. L. REV. 789 (2024) (arguing that agencies are difficult for the public to observe, and that

## 2. *The American Administrative Blindspot*

While the literature above suggests that public participation can bolster sociological legitimacy, its findings do not readily translate to the U.S. administrative context. Most studies draw on samples from outside the United States<sup>132</sup>—indeed, nearly exclusively from Western and Northern Europe—raising concerns about generalizability. Moreover, few focus on administrative agencies. Many examine local decision-making, which may not resemble decisions made by large national bureaucracies. These contextual differences raise questions regarding external validity and underscore the need for replication within the American administrative state before drawing broader conclusions.

Some scholars have begun applying experimental methodology to the study of American administrative decision-making. Alexander Ruder and Neal Woods use a survey experiment to study the effect of transparency and standard notice-and-comment procedures on perceptions of legitimacy for food-and-drug regulations, and they find “little support for the widespread contention in the administrative rulemaking literature that fair procedures impart unconditional legitimacy to agency rulemaking actions,” but also that affirmatively forgoing such process *can* negatively affect perceptions of legitimacy.<sup>133</sup> Jed Stiglitz shows that reason-giving, particularly when coupled with the prospect of judicial review, leads otherwise non-impacted participants to higher satisfaction in decisions, greater perceived fairness, and greater belief in the honesty of the decisionmaker.<sup>134</sup> One of us reports that the use of notice-and-comment modestly increases people’s perceptions of the agency’s legitimacy, although not to the same extent as treatments indicating that the agency relied on subject-matter experts.<sup>135</sup>

Despite these important first steps, existing research does not answer many of the questions animating the current debate over public participation. The extant literature only examines a small subset of the procedural mechanisms that do—or could—structure administrative decision-making. American agencies have recently engaged in significant experimentation with new participatory forms.<sup>136</sup> The experimental literature, however, has only begun to explore this terrain. Until experimental research is extended to a wider range of mechanisms, we cannot confidently assess how participation shapes legitimacy in the American administrative context.

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this may be part of why the benefits of regulation do not set off positive policy feedback loops that boost the perceived legitimacy of government).

<sup>132</sup> See *infra* Part I.C.1; but see Kristinn Mar & John Gastil, *Do Voters Trust Deliberative Minipublics? Examining the Origins and Impact of Legitimacy Perceptions for the Citizens’ Initiative Review*, 45 POL. BEHAVIOR 975 (2023) (finding that mini-publics in three U.S. states were largely viewed as untrustworthy).

<sup>133</sup> Ruder & Woods, *supra* note 17, at 411-12.

<sup>134</sup> EDWARD H. STIGLITZ, *THE REASONING STATE* 218 (2022).

<sup>135</sup> Feinstein, *supra* note 17. Notably, The increase in perceived legitimacy here is not as large as the increase for treatments

<sup>136</sup> Sant’Ambrogio & Staszewski, *supra* note 1; Rossi & Stack, *supra* note 2.

### 3. *The Cost Blind Spot*

As noted above, the emerging critique of participatory procedures concedes that participation may generate sociological legitimacy, yet argues that any such gains must be weighed against the costs these mechanisms impose. This concern is especially salient because costly procedures may impair government efficacy—potentially diminishing the very sociological legitimacy that participation is thought to enhance. These critiques are theoretically plausible, but to our knowledge, have not been tested in experimental studies. The closest approximation is a conjoint experiment conducted on Finnish participants that examined how the personal burdens of participation—i.e., the costs of participation *on the participant*—affected participants’ preferences among procedural outcomes.<sup>137</sup> The study found that more demanding processes—for example, extended deliberation—reduced favorability.<sup>138</sup> As we read the abundance critique, however, the principal concern is not participant burden but time delays and other costs that participatory mechanisms may introduce into agency decision-making. Notably, these costs borne by the agency—and, arguably, ultimately by society—have never been examined as a relevant factor. The result is a substantial gap in our understanding of this theoretically important objection.

## II. ANALYSIS

This Part presents the Article’s core experiments. The first set of experiments exposes participants to an agency policymaking vignette, in which the participatory mechanisms employed by the agency vary across participants; participants then evaluate the agency concerning eight values. As reported below, most mechanisms generate positive and statistically significant increases in these evaluations.

The second set of experiments introduces time costs. Using conjoint designs, participants compare two policymaking vignettes that differ in terms of both participatory mechanisms and the time required for rule completion. Participants then select their preferred vignette. These studies show that participants generally favor opportunities to participate even when these opportunities extend the policymaking process by years—though, notably, their tolerance for delay is not unlimited.

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<sup>137</sup> See Christensen, *supra* note 130.

<sup>138</sup> *Id.* (noting that respondents “rebuffed processes involving more than five meetings”).



## A. Study 1

### 1. *Research Design*

Participants in this study read a vignette describing a proposed policy the Federal Aviation Administration (FAA) is considering. Under current FAA regulations, commercial airline pilots must retire by age 65.<sup>139</sup> The vignette explains that the agency is considering whether to raise the mandatory retirement age to 75. After reviewing brief arguments for and against the change,<sup>140</sup> participants are told that “the FAA decided to follow a certain process” in evaluating the proposal. The details of this process—which vary across participants—constitute the study’s treatment and control conditions, to which participants are randomly assigned.<sup>141</sup>

Randomization is central to the design. By randomly assigning large numbers of participants to each condition, we minimize the risk of omitted-variable bias. In expectation, the treatment and control groups should be equivalent with respect to demographic characteristics, attitudes toward government, and other potentially relevant factors.<sup>142</sup>

A first set of treatment conditions concerns the extent to which outside actors helped formulate the policy proposal. Some participants learn that a group consisting of airline executives, pilots’ union leaders, and other stakeholders helped formulate the proposal. Others are told that a panel of “ordinary people from all walks of life” helped craft the proposal. Specifically, these conditions read:

#### *Deliberation Condition:*

First, the FAA gathers a group of airline executives, pilots’ union leaders, air-safety advocates, and passengers. Guided by an agency mediator, this group then reviews the evidence for and against changing the retirement age and discusses various options.

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<sup>139</sup> 14 C.F.R. § 121.383.

<sup>140</sup> Specifically, they read that “allowing older pilots to keep flying would help address an ongoing pilot shortage and thus allow airlines to operate more flights at lower cost,” versus that allowing these pilots, “who are more likely to have medical issues while flying, would put passengers at risk.”

<sup>141</sup> Importantly, participants are not informed of the partisan affiliation of the FAA administrator or the White House’s role in the decision. Doing so would risk priming participants to think about the decision in terms of partisanship. Of course, participants still may make inferences concerning the role of the President and his appointees in this FAA decision. With a large number of participants, evenly divided between Trump and Harris supporters, randomly assigned to each treatment or control condition, however, any differences participants have concerning these inferences will likely wash out in expectation.

<sup>142</sup> This benefit of random assignment notwithstanding, as a validity check we also run regression models that include a full battery of demographic control variables. The resulting estimates are nearly identical to those reported *infra* in terms of direction and statistical significance.

If the group members can agree on a proposal, the FAA adopts their proposal as its final decision. If they cannot agree, then the FAA makes the final decision itself.

*Mini-Publics Condition:*

First, the FAA gathers a group of ordinary people from all walks of life. Guided by an agency mediator, this group then reviews the evidence for and against changing the retirement age and discusses various options. The group then votes on these options.

The FAA considers the group members' views—particularly if there is a majority or consensus view—when considering options. Only then does it publish its final decision.

A second set of conditions describes how the FAA solicits input: whether it passively receives comments through the conventional notice-and-comment (“N&C”) process; actively seeks a balanced and diverse range of public input; and/or involves an agency official designated to represent the public’s interest. The text of these conditions appears below.

*Notice & Comment (N&C) Cond.:*

After the proposal is written, the FAA invites any interested people or groups to comment on it.

*Balanced N&C Condition:*

After the proposal is written, the FAA invites any interested people or groups to comment on it. It identifies groups that likely have an interest but may not respond to its announcement. The FAA specifically reaches out to leaders and members of those groups to encourage them to submit comments. It does not proceed until it has received comments from a balanced, varied set of members of the public and outside groups.

*Public Advocate Condition:*

The “public advocate”—an FAA official whose job it is to represent the general public’s interest—submits a separate comment on the proposal.

In practice, some of these participatory mechanisms may operate as complements rather than substitutes. Most notably, notice-and-comment does not preclude additional engagement methods, such as stakeholder deliberations, input from a representative citizens’ panel, or contributions from an in-house public advocate. Moreover, because notice-and-comment is statutorily required for most

legislative rules,<sup>143</sup> proposed procedural innovations would ordinarily supplement—not replace—it. Accordingly, we include the following conditions that pair notice-and-comment with these additional participatory mechanisms.

*Deliberation + N&C Condition:*

First, the FAA gathers a group of airline executives, pilots’ union leaders, air-safety advocates, and passengers. Guided by an agency mediator, this group then reviews the evidence for and against changing the retirement age and discusses various options. If the group members can agree on a proposal, the FAA publishes their proposal and invites any interested people or groups to comment on it.

Next, it thinks carefully about the comments it receives and responds in writing to significant comments. Only then does it publish its final decision.

*Mini-Publics + N&C Condition:*

First, the FAA gathers a group of ordinary people from all walks of life. Guided by an agency mediator, this group then reviews the evidence for and against changing the retirement age and discusses various options. The group then votes on these options. The FAA uses the option that received a majority of votes as the basis for a written proposal.

Then, the FAA publishes the proposal and invites any interested people or groups to comment on it. Next, it thinks carefully about the comments it receives and responds in writing to significant comments. Only then does it publish its final decision.

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<sup>143</sup> 5 U.S.C. § 553(b) (requiring notice of proposed rulemakings); id. at 553(c) (“[T]he agency shall give interested persons an opportunity to participate in the rule making” through submission of material, and must “consider[] . . . the relevant matter presented”).

*Public Advocate + N&C Condition:*

First, the FAA publishes a proposal and invites any interested people or groups to comment on it. Then, the “public advocate”—an FAA official whose job it is to represent the general public’s interest—submits a separate comment on the proposal.

Next, the FAA thinks carefully about the comments it receives and responds in writing to significant comments. Only then does it publish its final decision.

Finally, some participants are randomly assigned to view the following control condition, which conveys that the FAA decides on a policy *sua sponte*.<sup>144</sup>

*Control Condition:*

First, the FAA writes the details of the policy change. The next step is for the FAA to publish its decision.

After reading their vignette, participants answer eight questions, presented in random order and designed to elicit their views of the FAA and its decision-making process. We refer to these questions as *attitudinal measures*. For each measure, participants are tasked with selecting a response along a seven-point ordinal scale, with a plain-text description accompanying each point.<sup>145</sup> Table 1 presents these attitudinal measures.

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<sup>144</sup> By design, the control condition does not describe the FAA’s internal decision-making process. Participants may bring their own assumptions when imagining what this process might look like. Others may rely on their perceptions of the FAA’s reputation or other factors. Readers who are unsatisfied with this stripped-down control condition can consider the *N&C Condition* as an alternative control condition. Notice-and-comment is the default procedure for legislative rulemakings, see 5 U.S.C. § 553, most of the other treatment conditions that we test are layered on top of the *N&C Condition*. Differences in mean affect scores for participants that view the *N&C Condition* versus one of the other treatment conditions are reported *infra* note 158 and accompanying text.

<sup>145</sup> For example, response options for the *Accountability* measure are: “1- very unaccountable,” “2- somewhat unaccountable,” “3- slightly unaccountable,” “4- neither unaccountable nor accountable,” “5- slightly accountable,” “6- somewhat accountable,” and “7- very accountable.” See Stefanie Stantcheva, *How to Run Surveys: A Guide to Creating Your Own Identifying Variation and Revealing the Invisible*, at 21, NAT’L BUREAU OF ECON. RSCH., Working Paper No. 30527, 2023 (explaining how using a bipolar ordinal scale prevents priming participants toward a particular end of the scale, thereby reducing the risk of acquiescence bias). Some conceptual overlap exists among several of these attitudinal measures. In their landmark study on perceived legitimacy and support for local police, Jason Sunshine and Tom Tyler operationalize legitimacy by aggregating responses to measures concerning shared values, trustworthiness, shared values, and the appropriateness of noncompliance, among other subjects. Jason Sunshine and Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOCIETY REV. 513, 539-40 (2003); see also *id.* at 535, 542 (including a question on procedural fairness, which the authors find is an “antecedent of legitimacy”). Nevertheless, we report results for each item separately, as each captures a sufficiently distinct concept.

Table 1: Attitudinal Measures

Topic	Text	Options
Accountable	<i>In your view, how accountable is the FAA to people like you?</i>	1- very unaccountable ... 7- very accountable
Legitimate	<i>In your opinion, how legitimate is the FAA's decision-making process?</i>	1- very illegitimate ... 7- very legitimate
Shares Values	<i>How confident are you that the FAA shares your values and will take them into account when making this decision?</i>	1- very uncertain ... 7- very certain
Renders Sound Decision	<i>How certain are you that the FAA will make a sound decision here?</i>	1- very uncertain ... 7- very certain
Responsive	<i>In your opinion, how responsive is the FAA to people like you?</i>	1- very unresponsive ... 7- very responsive
Fair Process	<i>In your view, how fair are the procedures that the FAA uses to make this decision?</i>	1- very unfair ... 7- very fair
Duty to Obey	<i>Imagine that you learn that an airline disagrees with the FAA's eventual decision on the legally required age for pilots to retire. Therefore, the airline decides not to comply with this requirement. How would this information change your opinion of the airline?</i>	1- much more negative ... 7- much more positive
Trustworthy	<i>In your opinion, how trustworthy is the FAA in making this decision?</i>	1- very untrustworthy ... 7- very trustworthy

A total of 4,050 participants completed the study.<sup>146</sup> Participants were recruited through Prolific, an online platform that connects researchers with subjects. Each participant was paid \$1 for a study that took approximately five minutes on average to complete.

<sup>146</sup> A power analysis indicates that recruiting approximately 350 participants for each of the nine conditions will provide adequate statistical power to detect a modest effect size (Cohen's  $d = 0.16$ , 80 percent power,  $\alpha = 0.10$ , one-tailed difference of means test). See generally Franz Faul, Edgar Erdfelder, Albert-Georg Lang & Alex Buchner, *G\*Power 3: A Flexible Statistical Power Analysis Program for the Social, Behavioral, and Biomedical Sciences*, 39 BEHAV. RSCH. METHODS 175 (2007) (introducing G\*Power). We increased this figure to 450 participants per condition, or 4,050 total, to account for the inevitability that some participants will fail the attention check.

This attention check—or, more precisely, comprehension check—presents a paragraph of text followed by a question. Within the paragraph is a direction to ignore the question and instead check a specified response option. See Tobias Gummer, Joss Rossmann & Henning Silber, *Using Instructed Response Items as Attention Checks in Web Surveys: Properties and Implementation*, 50 SOCIO. METHODS & RSCH. 238, 239 (2021). Here, the attention check read:

By design, the sample is evenly split between Trump and Harris voters in the 2024 presidential election.<sup>147</sup> As is common with online experiments, individuals with above-average income and education levels are overrepresented.<sup>148</sup> College graduates, women, and non-Hispanic whites also are overrepresented.<sup>149</sup>

## 2. Results

For a first-cut look at the results, we take the mean of participants' responses for each of the eight attitudinal measures to create an overall *affect score*.<sup>150</sup> These scores are arranged on a 1-7 Likert scale, ranging from least to most positive response. Table 2 reports the mean scores for participants viewing each condition. As the table shows, mean affect scores are higher for all treatment conditions compared to the control condition.<sup>151</sup>

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Research shows that people's state of mind affects their views about government decisions. Accordingly, we are interested in understanding your state of mind. Specifically, we want to determine whether you take the time to read directions. Please ignore the question below and instead select "all of the above" as your answer. Yes, that's right: ignore the question and just check "all of the above."

Which of the following best describes how you are currently feeling? (a) Content, (b) Alert, (c) Distracted, (d) All of the above

The results reported *infra* do not materially change if participants who failed this check are included.

<sup>147</sup> Self-reported partisan identification is split nearly evenly: 41.6 percent Democrats and 40.1 percent Republicans.

<sup>148</sup> College graduates comprise 66.3 percent of the sample. Concerning annual household income, 12.4 percent report less than \$30,000, 38.5 percent fall between \$30,000 and \$75,000, and 49.1 percent report incomes above \$75,000. For the commonness of this overrepresentation, see, e.g., Feinstein, *supra* note 17, at 961; Stiglitz, *supra* note 134, at 196-97; Nicholas A. Valentino, Carly Wayne & Marzia Ocen, *Mobilizing Sexism: The Interaction of Emotion and Gender Attitudes in the 2016 US Presidential Election*, 82 PUB. OP. Q. 799, 813 (2018).

<sup>149</sup> The sample is 69.0 percent non-Hispanic white and 54.8 percent female. Regarding age, the sample more closely mirrors U.S. demographics; here, the median participant is 42 years old.

<sup>150</sup> See *supra* Table 1 (describing these eight measures). Scores for *Reaction to Noncompliance* are reversed before these scores use as an input for affect scores. The mean affect score across all conditions is 4.77 ( $SE = 1.25$ ,  $n = 4,005$ ). We found that the eight measured items had a Cronbach's *alpha* value of .85, which lends credibility to using the aggregative *affect score* as a simplified measure of the underlying concept of acceptance of the agency action. See Using and Interpreting Cronbach's Alpha, UNIV. OF VA. LIBRARY, <https://library.virginia.edu/data/articles/using-and-interpreting-cronbachs-alpha> (explaining Cronbach's *alpha* and acceptable thresholds for determining that survey items are reliably measuring an underlying concept).

<sup>151</sup> That the means are clustered slightly above the midpoint of a seven-point scale is typical in experimental studies concerning public perceptions of U.S. administrative agencies. See Feinstein, *supra* note 17, at 965; Stiglitz, *supra* note 134, at 196 (reporting similar dynamics for five-point scales concerning satisfaction, fairness, and honesty). Comparative experimental studies of the legitimacy of government decisions also exhibit similar clustering, usually slightly above the midpoint. See Brummel & de Blok, *supra* note 121, at 3378; Goovaerts, et al., *supra* note 121, at 776; Licht, et al., *supra* note 121, at 125; Germann, et al., *supra* note 121, at 688. Other works cited in note 121 do not report summary statistics.

Table 2: Affect Scores by Condition

Condition	Mean (Std. Dev.)	Obs.
Control	4.42 (1.33)	448
Deliberation	4.88 (1.22)	446
Mini-Publics	4.76 (1.30)	449
Notice & Comment (N&C)	4.57 (1.26)	456
Balanced N&C	4.88 (1.22)	441
Public Advocate	4.75 (1.24)	427
Deliberation + N&C	5.05 (1.19)	446
Mini-Publics + N&C	4.82 (1.21)	443
Public Advocate + N&C	4.78 (1.22)	449

Figure 1 reports the difference in mean affect score for participants who view each mechanism, in turn, versus participants who view the control condition. Phrased another way, this figure shows how much higher or lower, on average, participants who view a vignette with each participatory mechanism rank the agency versus participants who view a vignette in which the agency decides on a policy without outside participation. For each mechanism, the figure reports the difference in mean affect score for all participants (estimated differences denoted by circles), Trump voters (denoted by squares), and Harris voters (triangles).

Figure 1: Estimated Effects of Participatory Mechanisms on Affect Scores

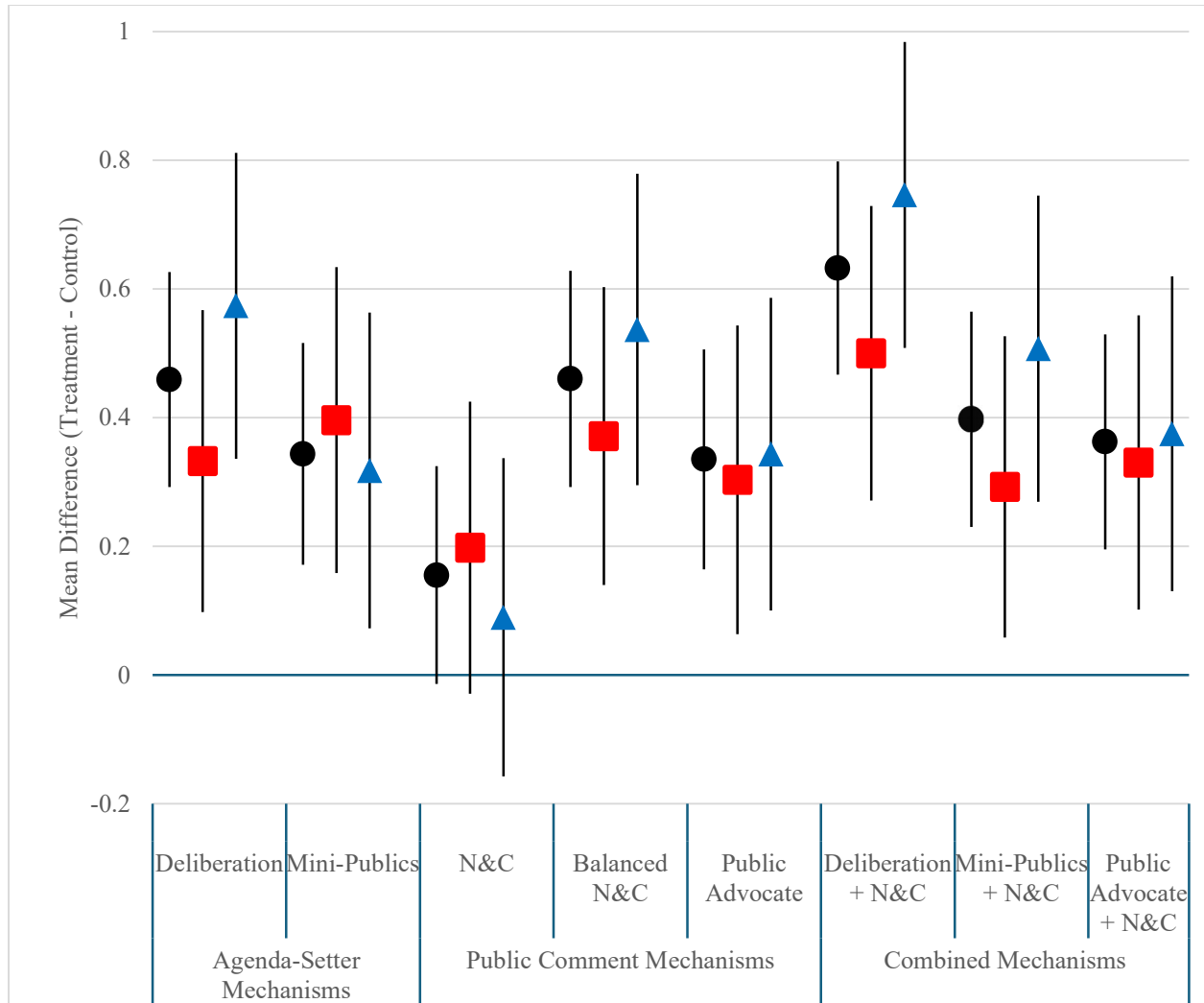


Figure identifies the difference in mean affect scores, on a seven-point scale, for participants who view each of the listed treatment conditions versus those that view the control condition. Circles denote estimated differences in means for all participants; squares denote estimated differences for Trump voters; and triangles denote estimated differences for Harris voters. Lines emanating from means show 95% confidence intervals. Differences in means were calculated via two-tailed Welch's t-tests.

As the figure shows, all the participatory mechanisms yield higher affect scores than the control condition. For all but one of these mechanisms, these differences in means are statistically significant at  $p < 0.001$ . For all participants who view the *Notice & Comment (N&C)* condition, that



difference is significant at  $p < 0.10$ .<sup>152</sup> Notably, these results hold for both Trump voters (denoted by squares in the figure) and Harris voters (triangles).<sup>153</sup>

As Figure 1 shows, *Deliberation* + *N&C* is the clear winner among these mechanisms.<sup>154</sup> Participants assigned to this treatment report a 0.63-point higher affect score compared to those assigned to the control condition.<sup>155</sup> That effect size is slightly more than one-half of one standard deviation in affect scores—a substantial increase. *Balanced N&C* and *Deliberation* are tied for the second most impactful procedural mechanism.<sup>156</sup> The lowest-scoring treatment condition is *N&C*—which nonetheless receives a 0.16-point higher mean affect score than the control condition.<sup>157</sup>

We also compare affect scores for participants who view the *N&C* condition versus those who view another treatment condition. These other treatment conditions are all associated with higher mean affect scores than simple notice-and-comment.<sup>158</sup>

The results reported in Figure 1 hold, in nearly all cases, when each component of the affect scores is examined separately. The Appendix reports the estimated effects of each participatory mechanism on participants' views concerning the agency's accountability, legitimacy, responsiveness, decisional soundness, trustworthiness, shared values, procedural fairness, and reaction to

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<sup>152</sup> The marginally statistically significant results for simple notice-and-comment rulemaking accord with previous research that, using similar methodology, found statistically marginal effects of introducing public participation. See Feinstein, *supra* note 17, at 972. That previous research operationalized public participation as simple notice-and-comment rulemaking. See *id.* at 954-55.

<sup>153</sup> As Figure 1 shows, the results for Trump voters, Harris voters, and all voters are directionally consistent and statistically significant at the same levels. Notably, the differences in mean affect scores for *Deliberation* + *N&C* versus the control condition are slightly higher for Harris voters (0.75 points) than Trump voters (0.50 points)—a 0.25-point “Harris-Trump gap.” For the other treatment conditions, smaller Harris-Trump gaps—or, for two conditions, Trump-Harris gaps—exist. These relatively small gaps notwithstanding, the main takeaway from this analysis is that the results reported above around broadly consistent for Democratic and Republican voters.

In addition, multivariate regression models that include a battery of demographic variables also support these findings. Specifically, these models control for measures for race, gender, age, education level, and income level. Because participants are randomly assigned into a treatment or control condition, controlling for these demographic variables in a regression framework should not be necessary. Nonetheless, these models provide a check on our results. The Appendix reports the results of this supplemental analysis.

<sup>154</sup> This statement pertains to the point estimates, setting aside the overlapping confidence intervals.

<sup>155</sup>  $SE = 0.08$ ,  $t = 7.49$ .

<sup>156</sup> *Balanced N&C* and *Deliberation* are followed by *Mini-Publics* + *N&C*, *Public Advocate* + *N&C*, *Mini-Publics*, and *Public Advocate*. *Balanced N&C* difference in means ( $b$ ) = 0.46,  $SE = 0.09$ ,  $t = 5.38$ ; *Deliberation*:  $b = 0.46$ ,  $SE = 0.09$ ,  $t = 5.39$ ; *Mini-Publics* + *N&C*:  $b = 0.40$ ,  $SE = 0.09$ ,  $t = 4.66$ ; *Public Advocate* + *N&C*:  $b = 0.36$ ,  $SE = 0.09$ ,  $t = 4.26$ ; *Mini-Publics*:  $b = 0.34$ ,  $SE = 0.09$ ,  $t = 3.91$ ; *Public Advocate*:  $b = 0.34$ ,  $SE = 0.09$ ,  $t = 3.85$ ; *N&C*:  $b = 0.15$ ,  $SE = 0.09$ ,  $t = 1.80$ .

<sup>157</sup> Note, however, that the difference in means for *N&C* versus the control condition falls short of  $p < 0.05$ , a conventionally accepted level for statistical significance ( $SE = 0.09$ ,  $t = 1.80$ ,  $p = 0.07$ ).

<sup>158</sup> Difference in means ( $b$ ) between *N&C* and *Mini-Publics* = 0.19,  $SE = 0.09$ ,  $t = 2.21$ ; *Deliberation*:  $b = 0.30$ ,  $SE = 0.08$ ,  $t = 3.69$ ; *Balanced N&C*:  $b = 0.30$ ,  $SE = 0.08$ ,  $t = 3.69$ ; *Public Advocate*:  $b = 0.18$ ,  $SE = 0.08$ ,  $t = 2.13$ ; *Deliberation* + *N&C*:  $b = 0.30$ ,  $SE = 0.08$ ,  $t = 3.69$ ; *Mini-Publics* + *N&C*:  $b = 0.24$ ,  $SE = 0.08$ ,  $t = 2.93$ ; *Public Advocate* + *N&C*:  $b = 0.21$ ,  $SE = 0.08$ ,  $t = 2.52$ . Differences calculated via two-tailed Welch's t-tests.

noncompliance.<sup>159</sup> Participants' responses concerning all eight of these concepts are broadly consistent with their affect scores reported in Figure 1.<sup>160</sup> The Appendix also presents results for regression models that regress each of these eight concepts, in turn, on all treatment conditions. Again, the results are consistent with those in Figure 1.<sup>161</sup>

To summarize, the results indicate that participants assign positive value to participatory mechanisms, particularly mechanisms that entail outreach to and consideration of a balanced, varied set of actors (i.e., the *Deliberation* + *N&C*, *Balanced N&C*, and *Deliberation* conditions). It bears emphasis that respondents are ordinary people who likely had limited ex ante understanding of what kind of process might be afforded in administrative decision-making. Yet, when randomly shown possibilities, these respondents measurably attributed greater legitimacy than their randomly assigned peers attributed to a no-procedure baseline.

## B. Study 2

Study 1 showed that people evaluate an agency more favorably when it employs participatory mechanisms in rulemaking. In practice, however, adding procedural requirements may impose costs as well as confer benefits, and those costs must be considered alongside any gains. The most straightforward potential cost is delay. Indeed, prominent scholars contend that layering procedural requirements “ossifies” the rulemaking process, producing precisely such delays.<sup>162</sup> Study 2 compels participants to confront these potential time costs, examining how people balance the tradeoff between the benefits of greater public involvement and these costs.

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<sup>159</sup> See *supra* Table 1 (listing these eight concepts as the components of the affect scores).

<sup>160</sup> See *infra* Table A1 (reporting these results).

<sup>161</sup> See *infra* Table A2.

<sup>162</sup> See *supra* note 83 and accompanying text.

## 1. Research Design

Study 2 employs choice-based conjoint analysis, a survey-based research method that enables estimation of the value participants assign to each of several treatment conditions presented simultaneously.<sup>163</sup> Conjoint analysis is based on participants' choices between a series of paired vignettes combining different features of interest. Specifically, each individual "profile" in the pairing is composed of randomly assigned "levels" of certain "attributes"—for instance, one attribute might be whether a public advocate was utilized, and another might be the length of time to rule finalization, and within each attribute there could be a variety of values (e.g., "public advocate used," "public advocate not used," "4 months," "9 months," etc.). The construction and presentation of each profile in each choice pair is randomly selected from all possible combinations of attributes and levels.

The participant then selects which of the two profiles they favor (i.e., in the parlance of this method, completing a "task"). Next, the participant undertakes a second task involving a new pair of profiles, with a mix of previously viewed features and new ones. The process typically repeats. From the data collected, we estimate a statistical model that produces a measure—the average marginal component effect (AMCE)—that can be interpreted as the causal effect on preferences of switching from one reference level to another.<sup>164</sup> As applied to our research question, the method enables us to understand the interactive effect of participatory mechanisms and time costs on participants' attitudes toward the agency.

As before, all profiles in this study begin with an explanation that the FAA is considering raising the mandatory retirement age for commercial pilots. Each profile then includes randomly selected levels of several attributes. First, the profile will include one of three levels of an agenda-setting attribute:

*In-House Condition:*

To write a first draft of its proposal, the FAA relies on the views of its own personnel.

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<sup>163</sup> See Jens Hainmueller, Daniel J. Hopkins, and Teppei Yamamoto, *Causal Inference in Conjoint Analysis: Understanding Multidimensional Choices via Stated Preference Experiments*, 22 POL. ANALYSIS 1, 2 (2013) (providing an overview of conjoint analysis). The method is commonly deployed by marketing researchers to determine public preferences about the design of products. See generally Felix Eggers, Henrik Sattler, Thorsten Teichert, and Franziska Völckner, *Choice-Based Conjoint Analysis*, in HANDBOOK OF MARKET RESEARCH 1 (2018) (providing an overview). For examples of social scientists using the method to study public attitudes, see, e.g., Jens Hainmueller & Daniel J. Hopkins, *The Hidden American Immigration Consensus: A Conjoint Analysis of Attitudes toward Immigrants*, 59 AM. J. POL. SCI. 529 (2015); Thomas J. Leeper, Sara B. Hobolt, & James Tilley, *Measuring Subgroup Preferences in Conjoint Experiments*, 28 POL. ANALYSIS 207 (2020).

<sup>164</sup> Kirk Bansak, Jens Hainmueller, Daniel J. Hopkins, & Teppei Yamamoto, *Using Conjoint Experiments to Analyze Election Outcomes: The Essential Role of Average Marginal Component Effect*, 31 POL. ANALYSIS 500, 503-04 (2023). More specifically, AMCE tells the researcher whether and to what extent switching from one level of an attribute to another would affect the probability that that profile would be chosen versus a randomly selected profile. *Id.* It is also possible to assess the effect of an interaction of attribute levels on AMCE, which provides a way of assessing how the participant thinks about tradeoffs between attributes. See Hainmueller, et al., *supra* note, at 12-13.

*Deliberation Condition:*

To write a first draft of its proposal, the FAA gathers a group of airline executives, pilots' union leaders, air-safety advocates, and passengers. Guided by an agency mediator, this group then reviews the evidence for and against changing the retirement age and discusses various options. If the group members agree, the FAA adopts their view as the FAA's initial proposal.

*Mini-Publics Condition:*

To write a first draft of its proposal, the FAA gathers a group of ordinary people from all walks of life. Guided by an agency mediator, this group then reviews the evidence for and against changing the retirement age and discusses various options. The group then votes on these options. The FAA uses the option that received the most votes as the basis for a written proposal.

Next, each profile includes, by random assignment, one of three levels of a comment process attribute.

*No N&C Condition:*

The FAA does not accept comments on the proposal from outside people or groups.

*N&C Condition:*

After the proposal is written, the FAA invites any interested people or groups to comment on it.

*Balanced N&C Condition:*

After the proposal is written, the FAA invites any interested people or groups to comment on it. It identifies groups that likely have an interest but may not respond to its announcement. The FAA specifically reaches out to leaders and members of those groups to encourage them to submit comments. It does not proceed until it has received comments from a balanced, varied set of members of the public and outside groups.

Each profile also randomly incorporates one of two levels of a public-advocate attribute.

<i>No Public Advocate Condition:</i>	Some agencies have a “public advocate,” who is an agency official whose job it is to represent the general public’s interest. The FAA does not have a public advocate.
<i>Public Advocate Condition:</i>	The “public advocate”—an FAA official whose job it is to represent the general public’s interest—submits a separate comment on the proposal.

Finally, each profile randomly incorporates one of seven levels of a timeframe attribute. For example, some participants read:

Following this process means that the FAA will take an additional 4 months (1/3 of a year) to make its decision, compared to if the FAA did not follow this process and instead made its decision based on the information it has now.

That four-month delay corresponds to the fastest 1 percent of FAA rulemakings in recent years.<sup>165</sup> Other participants learn that the rule took an additional nine months (the 5th percentile for FAA rulemaking duration), 12 months (10th percentile), 18 months (25th percentile), 25 months (50th percentile), 51 months (75th percentile), or 102 months (90th percentile).<sup>166</sup>

Given these attributes and levels, there are 126 different possible combinations of features that could be included in each profile. As noted above, each participant views and must make a choice concerning six separate pairs of profiles. Table 3 provides an example of a pair of vignettes with different combinations of conditions. The italicized text in the table—visible only in the Article, not to participants—identifies which conditions are included.

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<sup>165</sup> Figures calculated from Rachel Potter, *Replication Data for: Slow-Rolling, Fast-Tracking and the Pace of Bureaucratic Decisions in Rulemaking*, <https://doi.org/10.7910/DVN/1O8LCD>, Harvard Dataverse, V1. For each of 5,827 FAA proposed rules, Professor Potter reports the total time that the proposed rule was under consideration and the total time that the proposed rule was under review at the White House Office of Information and Regulatory Affairs (OIRA). To estimate the amount of time that the proposed rule was under consideration at the agency (before heading to OIRA), we subtract the latter figure from the former figure.

<sup>166</sup> Participants also see the corresponding number of years, e.g., for the final condition, “102 months (8 and 1/2 years).”

Table 3: Sample Task for Conjoint Analysis

Select the option that you would prefer:			
<i>Option A</i>		<i>Option B</i>	
<i>In-House Condition</i>	To write a first draft of its proposal, the FAA relies on the views of its own personnel.	<i>Mini-Publics Condition</i>	To write a first draft of its proposal, the FAA gathers a group of ordinary people from all walks of life. Guided by an agency mediator, this group then reviews the evidence for and against changing the retirement age and discusses various options. The group then votes on these options. The FAA uses the option that received the most votes as the basis for a written proposal.
<i>N&amp;C Condition</i>	After the proposal is written, the FAA invites any interested people or groups to comment on it.	<i>N&amp;C Condition</i>	After the proposal is written, the FAA invites any interested people or groups to comment on it.
<i>No Public Advocate Condition</i>	Some agencies have a “public advocate,” who is an agency official whose job it is to represent the general public’s interest. The FAA does not have a public advocate.	<i>Public Advocate Condition</i>	The “public advocate”—an FAA official whose job it is to represent the general public’s interest—submits a separate comment on the proposal.
<i>Time: 5th pct.</i>	Following this process means that the FAA will take an additional 9 months (3/4 of a year) to make its decision, compared to if the FAA did not follow this process and instead made its decision based on the information it has now.	<i>Time: 75th pct.</i>	Following this process means that the FAA will take an additional 51 months (4 and 1/4 years) to make its decision, compared to if the FAA did not follow this process and instead made its decision based on the information it has now.

A power analysis indicates that an experiment with 900 participants—each completing six tasks—is sufficient to detect a modest effect size.<sup>167</sup> Because we also aim to assess whether supporters

<sup>167</sup> We use an online tool developed by Alberto Stefanelli and Martin Lukac to arrive at this figure. See Alberto Stefanelli and Martin Lukac, *Conjoint Experiments: Power Analysis Tool*, <https://mblukac.shinyapps.io/conjoints-power-shiny/>. Stefanelli and Lukac develop this tool by conduct a literature review of conjoint experiments to induce general principles regarding the number of observations needed to observe whether an effect of a given size is present. See Alberto Stefanelli

and opponents of the incumbent president respond differently to participatory mechanisms, we conduct separate analyses for Trump and Harris voters. We therefore double the sample to 1,800 participants, evenly divided by 2024 vote choice. With each participant completing six tasks, the study contains a total of 21,600 choices between vignettes with different features.

## 2. Results

We begin with descriptive statistics. In conjoint experiments, raw preferences across attributes and levels can be estimated as marginal means, which approximate the percentage of participants who would favor a particular feature in an average profile.<sup>168</sup> Table 4 reports the estimated preference for each level of each attribute.

Table 4: Marginal Means

Attribute	Level	Est. % Supporting
Proposal	In House	40.3%
	Mini-Publics	48.0%
	Deliberation	61.5%
Public Advocate	No	46.9%
	Yes	53.1%
Public Comment	None	38.6%
	Simple N&C	51.5%
	Balanced N&C	59.9%
Time to Implementation	1 <sup>st</sup> Percentile	56.8%
	5 <sup>th</sup> Percentile	55.9%
	10 <sup>th</sup> Percentile	56.0%
	25 <sup>th</sup> Percentile	55.0%
	50 <sup>th</sup> Percentile	49.6%
	75 <sup>th</sup> Percentile	40.7%
	90 <sup>th</sup> Percentile	35.3%

Table 4 shows that deliberation is the most favored feature among those tested, with an estimated 61.5 percent of participants preferring it. The next most popular is balanced notice-and-

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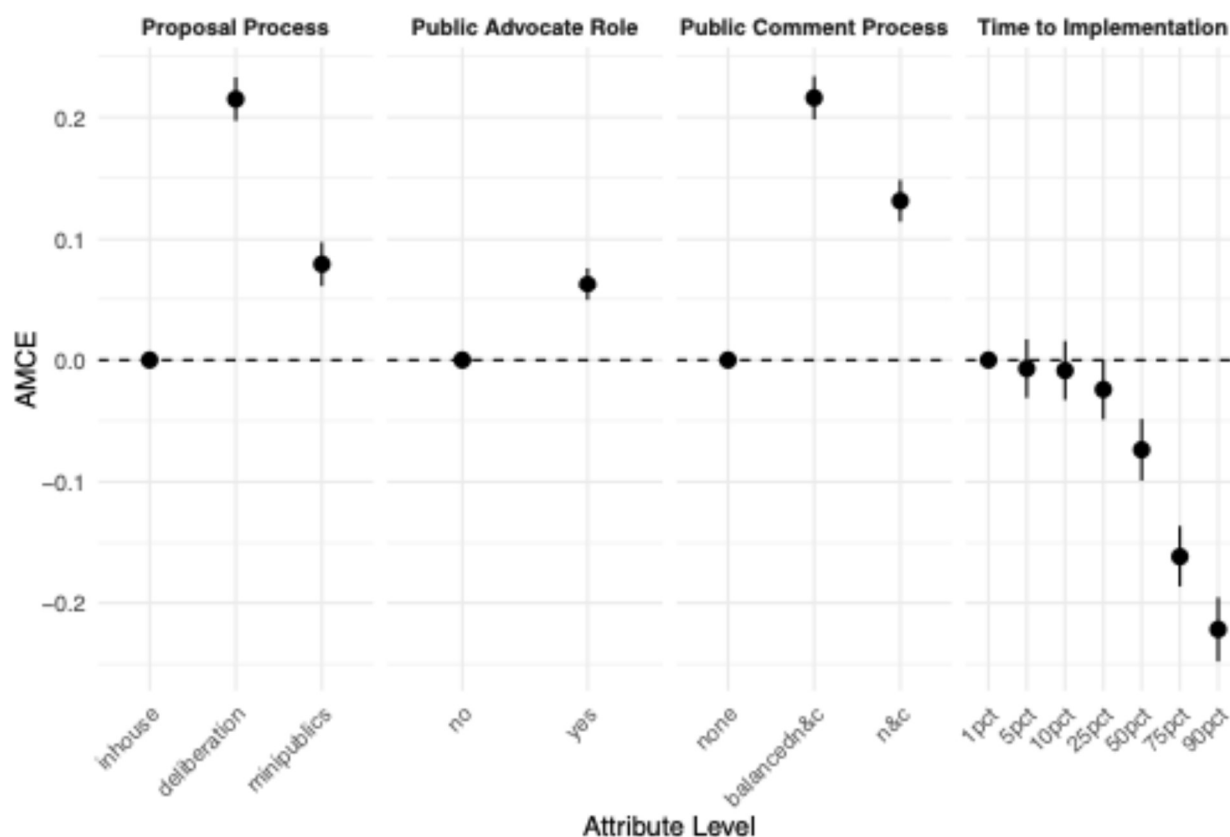
and Martin Lukac, *Subjects, Trials, and Levels: Statistical Power in Conjoint Experiments*, Nov. 2020, <https://doi.org/10.31235/osf.io/spkcy>. The tool reports that an experiment that involves 800 participants completing six tasks each; has three variable levels for the attribute with the highest number of levels; and uncovers a (hypothetical) effect size of 0.05 has predicted statistical power of 98%. Further, an experiment with these attributes has close to zero probability that the coefficient estimates are incorrectly signed (Type S error) and an exaggeration ratio (the ratio by which these estimates may overestimate the true population parameters, or Type M error) of 1.08.

<sup>168</sup> See *Marginal Means*, <https://thomasleeper.com/cregg/reference/mm.html> (explaining that this measure “represent[s] the mean outcome across all appearances of a particular conjoint feature level, averaging across all other features”).

comment rulemaking (59.9 percent). Public advocates (53.1 percent) and simple notice-and-comment rulemaking (51.5 percent) were also viewed favorably. Regarding time-to-implementation, most participants favor timeframes at least up to the 25<sup>th</sup> percentile (18 months), and we cannot statistically rule out the possibility that a majority would support a timeframe of up to the 50<sup>th</sup> percentile (25 months). As in Study 1, analyses stratified by 2024 presidential vote choice reveal little difference in preferences between Trump and Harris voters.

Next, we turn to causal effects. As discussed above, the principal quantities of interest are the AMCEs for each level of each attribute, which represent the causal effect of adopting that level relative to a designated baseline.<sup>169</sup> Figure 2 presents the results.

Figure 2: Average Marginal Component Effects (AMCEs), All Participants



<sup>169</sup> Here, we set the baseline reference value for the proposal process attribute at in-house preparation—in other words, we compare the effect of moving from in-house preparation to deliberative preparation, and in-house preparation to preparation using mini-publics. We similarly set the baseline reference value for the public advocate attribute as not having a public advocate; the baseline reference value for public comment process at none; and the baseline reference value of the time to implementation attribute at the 1<sup>st</sup> percentile (i.e., four months).



As Figure 2 illustrates, shifting from a non-participatory process to more robust participatory mechanisms yields positive and statistically significant effects. Profiles featuring a deliberative process are more likely to be preferred than those relying solely on in-house preparation. The use of mini-publics also produces a positive, though smaller, effect. The inclusion of a public advocate also increases the likelihood that a profile will be selected. The presence of notice-and-comment rulemaking increases profile selection, especially when it includes a balanced set of perspectives.<sup>170</sup> As in Study 1, the overall pattern persists when the model is estimated separately for Harris and Trump voters, although preferences for more robust public participation mechanisms may be stronger among Harris voters than among Trump voters.

The analysis of time costs yields another important finding. Figure 2 shows a statistically significant *negative* effect on profile selection once time-to-implementation levels reach the 50<sup>th</sup> percentile (25 months). Although shorter delays do not reach statistical significance, the estimated effects are negative and grow monotonically as timeframes lengthen beyond the four-month baseline. In short, participants view time costs as a meaningful detriment, and these costs begin to materially influence choices somewhere between eighteen and twenty-five months of added delay.<sup>171</sup>

Finally, we examine how participatory mechanisms and time costs interact—a key question given the inherent tradeoffs between participation and speed. Figure 3 reports these interactive effects for the full sample and for each voter subgroup. All estimates are relative to a baseline in which the proposal is generated entirely in-house and the timeline is at the 1<sup>st</sup> percentile (four months).

One way to interpret the estimates is to ask: at what point does delay erode the benefits of a participatory mechanism to the extent that participants become indifferent between that mechanism and the parsimonious-but-fast baseline? For mini-publics, that point is roughly the 50<sup>th</sup> percentile (25 months). For deliberation, however, the effect persists until delays reach between the 75<sup>th</sup> and 90<sup>th</sup> percentiles (51 to 102 months).<sup>172</sup> Thus, although time costs exert substantial downward pressure, support for deliberative mechanisms nonetheless remains strong even in the face of long delays.<sup>173</sup>

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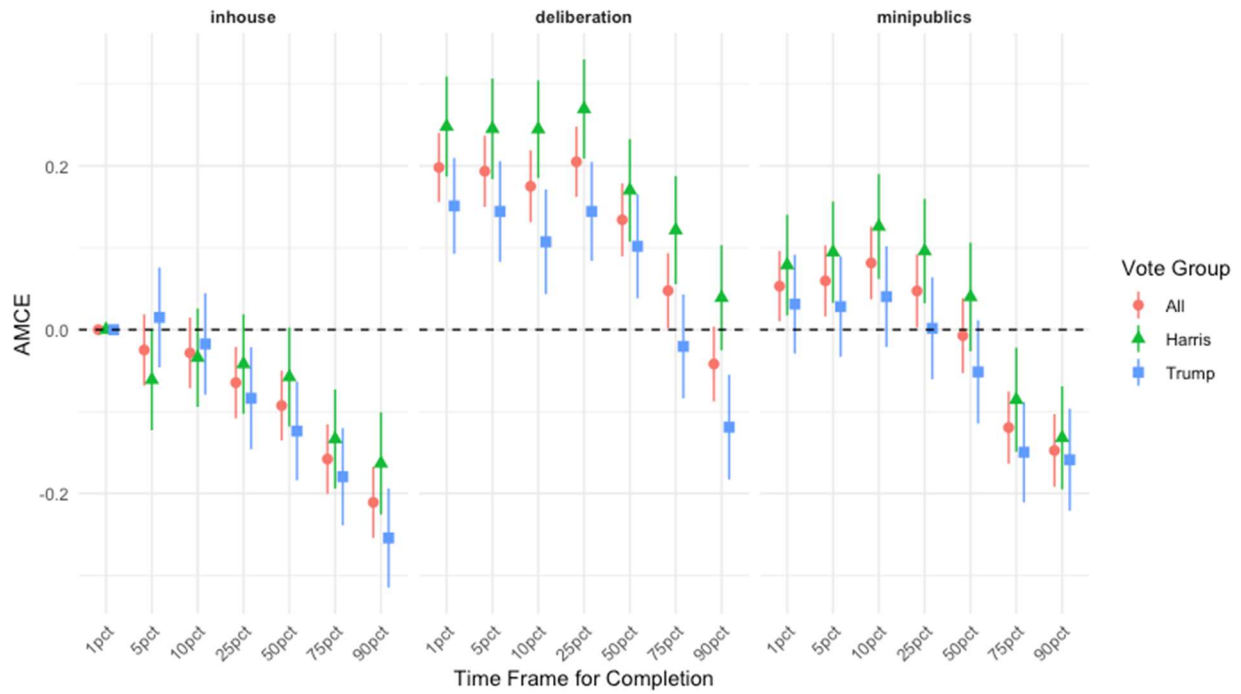
<sup>170</sup> Together, these results reinforce the findings from Study 1. On the one hand, because the conjoint experiment only asks participants to choose which profiles they prefer in randomly selected pairs, we do not glean as much information about *why* the public values public participation. On the other hand, leaving the choice about what motivates participants in the evaluation of public participation mechanisms unspecified, we observe that there may be value attributed to public participation that is independent of the attitudinal measures collected in Study 1. For instance, simple notice-and-comment rulemaking was generally not significant in Study 1, except regarding responsiveness, but it is statistically significant here. One possible interpretation is that responsiveness may be especially important to participants as they weigh different procedural mechanisms.

<sup>171</sup> Once again, these patterns are nearly identical for Harris and Trump voters.

<sup>172</sup> These statements interpret the coefficient estimates, denoted as circles in Figure 3, and ignore the degree of uncertainty around these estimates, i.e., the 95 percent confidence intervals marked as lines emanating from these estimates.

<sup>173</sup> As before, these results hold for both Harris and Trump voters.

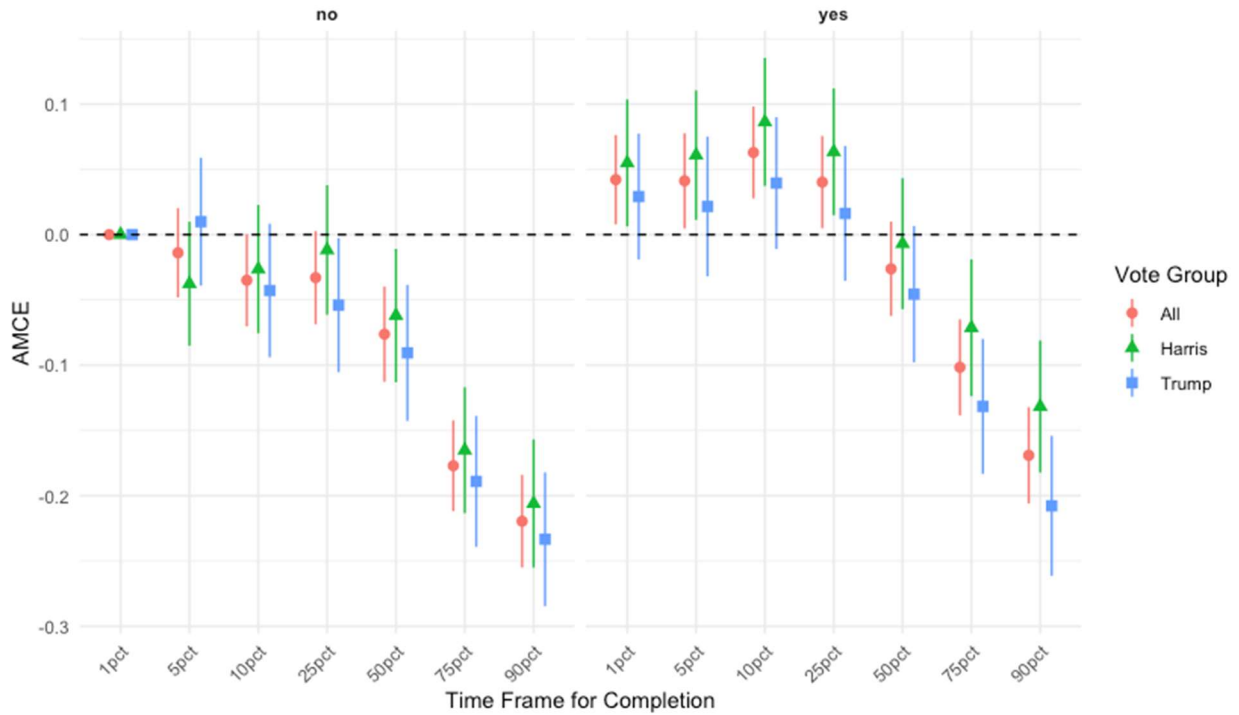
Figure 3: AMCEs by Proposal Process and Time Frame



Next, Figure 4 examines the interaction between the public advocate attribute and time costs. The positive effect of including a public advocate dissipates once the time to implementation reaches the 50<sup>th</sup> percentile (25 months). Put differently, participants prefer having a public advocate over none when the attendant delay is short—four months—but that preference weakens as delays grow.<sup>174</sup>

<sup>174</sup> Again, 2024 presidential vote choice does not appear to influence how participants evaluate these tradeoffs.

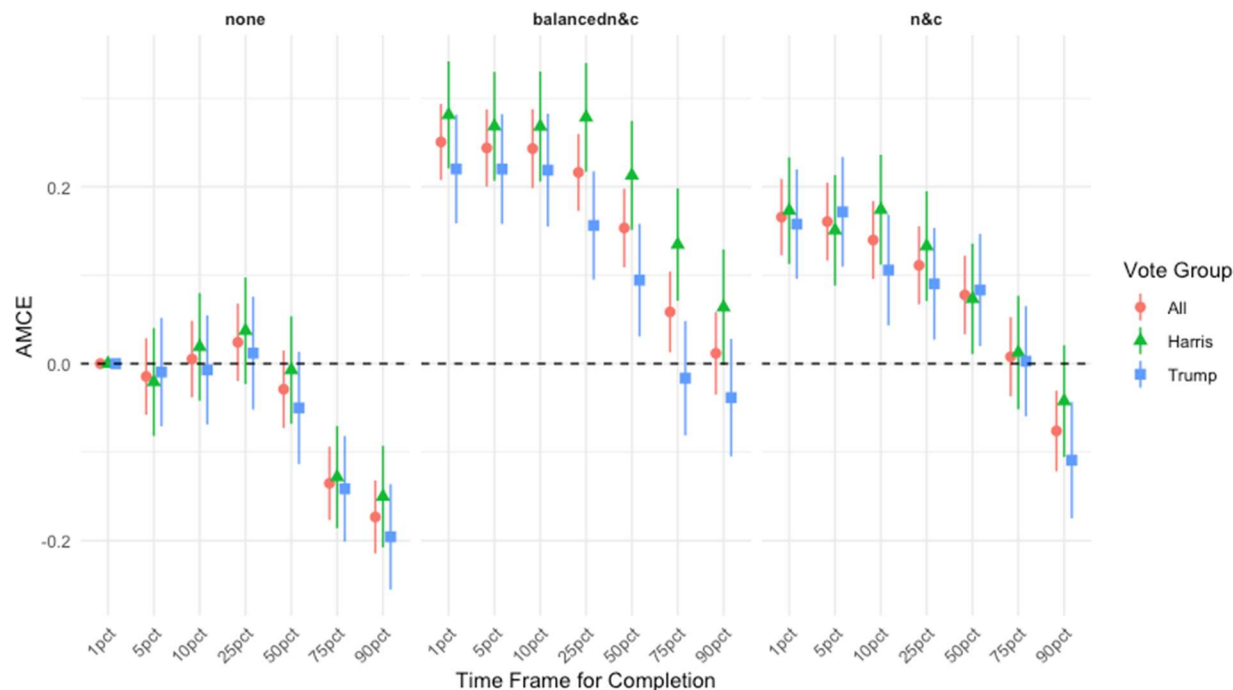
Figure 4: AMCEs by Public Advocate Presence and Time Frame



Finally, Figure 5 presents the results of an interaction between public comment method and time costs. These results show that participants' preferences for notice-and-comment are more resilient in the face of increasing delays than the other participatory mechanisms. For simple notice-and-comment processes, participants prefer that mechanism to the no-comment baseline (with a four-month timeline) up to the 75<sup>th</sup> percentile (51 months). For balanced notice-and-comment processes, this preference persists even to the 90<sup>th</sup> percentile (102 months). In short, while time costs moderate preferences for notice-and-comment processes, participants are generally unwilling to forgo opportunities for public feedback even when doing so would yield substantial time savings.<sup>175</sup>

<sup>175</sup> As with the other interaction plots, we see that who the participant voted for generally has no bearing on the results, although we do perhaps see some marginal difference between Harris voters and Trump voters in terms of how quickly time delay concerns reduced preferences for balanced notice-and-comment rulemaking (Harris voters seemingly always prefer it, whereas Trump voters become indifferent to it at the 75<sup>th</sup> percentile (fifty-one months)).

Figure 5: AMCEs by Public Comment Process and Time Frame



### III. IMPLICATIONS AND PRESCRIPTIONS

The headline from the experimental surveys presented in Part II is that people value participatory mechanisms—particularly those that bring in diverse voices and ensure robust engagement with representative views—and appear willing to tolerate substantial, though not unlimited, delays in exchange.<sup>176</sup> With rare exception, participants consider agencies that employ such mechanisms as more accountable, legitimate, responsive, and trustworthy.<sup>177</sup> They are also more likely to believe that the agency’s values align with their own and that its decision is sound.<sup>178</sup> Finally, the use of participatory mechanisms heightens people’s perceived duty to obey; noncompliance is viewed more negatively when the rule was developed with meaningful public input.<sup>179</sup>

<sup>176</sup> See *supra* Part II.A.

<sup>177</sup> For a breakout of the results on these individual measures, see *infra* Appendix.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Our evidence on this front connects to studies that employ field experiments and other methods to assess whether opportunities for *regulated firms* to participate in agency decision making increase compliance. See, e.g., Edmund Malesky & Markus Talesky, *Participation, Government Legitimacy, and Regulatory Compliance in Emerging Economies: A Firm-Level Field Experiment in Vietnam*, 113 AM. POL. SCI. REV. 530 (2019). It is also related to studies showing that participation in legal decisionmaking motivates personal compliance with those decisions. See, e.g., Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCH. PUB. POL’Y & LAW 78 (2013). As far as we can tell, no study has asked about ordinary peoples’ perceptions of whether non-compliance is less

These effects are present for a wide variety of participatory mechanisms. They are weakest for the basic notice-and-comment process, which tends to yield effect sizes that are smaller and occasionally fall short of conventional thresholds for statistical significance.<sup>180</sup> The effects are stronger when agencies take steps to ensure that a balanced array of voices is heard. The strongest effects arise from agency-guided deliberation among key stakeholders and from “balanced” notice-and-comment, in which the agency actively seeks out underrepresented individuals and groups that may have an interest in the proposal.<sup>181</sup>

Of course, deeper forms of engagement take time and thus can delay policy implementation. Study 2 shows that people favor participatory mechanisms even when their use extends rulemaking timelines—but only to a point. For example, people favor the use of mini-publics over developing policies entirely in-house until around the point at which the former causes roughly a twenty-one-month delay. For deliberative mechanisms, tolerance for delay is even greater.<sup>182</sup>

This Part draws out several implications of these findings. It begins by showing how the findings challenge both the abundance movement’s critique of administrative procedures and, more subtly, the claim that presidential control offers a superior path to legitimacy and accountability. It then highlights a striking result: in an era when Republican and Democratic voters seem to agree on little, they both favor agency decisions that utilize participatory mechanisms. Given these findings, policymakers should strengthen tools that facilitate public engagement in agency decision-making. The Part concludes by urging scholars to extend this research to a broader set of participatory forms.

#### A. Responding to Critiques of Participatory Democracy

These results unsettle key assumptions underlying two major challenges to participatory mechanisms. *First*, the abundance movement contends that an excessive focus on procedures unduly stifles worthy government action.<sup>183</sup> Procedural design, on this view, involves navigating tradeoffs among efficiency, rule-of-law values, public accountability, and other aims<sup>184</sup>—but American public law often strikes that balance poorly.<sup>185</sup> Policymakers with what critics call a “procedure fetish” are said to overweight proceduralist values at the expense of efficient government.<sup>186</sup> Accordingly, these

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excusable in a process where the public has an opportunity to participate, but it stands to reason that moral views of compliance obligations would be stronger if the process is perceived as more legitimate.

<sup>180</sup> See *supra* note 152 and accompanying text; but see *supra* Table 4 & Figure 2 (finding large differences between a no-comment process baseline and simple notice-and-comment processes).

<sup>181</sup> See *supra* Part II.A.2, II.B.2. Recall that, for the guided deliberation mechanisms, if the stakeholders involved in the deliberation agree, the agency uses their views as the basis for a proposed rule to undergo the notice-and-comment process. See *id.*

<sup>182</sup> See *supra* Part II.B.1.

<sup>183</sup> See *supra* Part I.B.1.

<sup>184</sup> See Ruhl & Salzman, *supra* note 98, at 60 (noting that the clean energy transition requires us to “reassess the trade-off” that exists between speed and public participation).

<sup>185</sup> See Bagley, *supra* note 10, at 352.

<sup>186</sup> *Id.* at 349.

critics call for greater optimization of procedure—retaining public participation procedures where they are perceived as necessary, but discarding them when their effect on the efficacy of government decision-making begins to detract from public expectations.<sup>187</sup>

Determining whether administrative law has, in fact, struck the “right” balance requires empirical evidence on whether ordinary people—the constituency that many participatory mechanisms purport to serve—actually value these procedures. This Article provides such evidence. Study 1 shows that participatory procedures are associated with heightened perceptions of agency accountability, legitimacy, responsiveness, trustworthiness, soundness of judgment, and value alignment.<sup>188</sup> Participants not only support the existing notice-and-comment regime; they express stronger approval for mechanisms that move beyond it. Study 2 shows that participants continue to support these mechanisms even when they introduce significant delays (up to a point).<sup>189</sup> In short, participants recognize the tradeoff between participation and efficiency emphasized by abundance theorists, but seem more willing to accept that tradeoff than abundance scholars appear to be.

These findings do not resolve the optimization problem that abundance theorists identify. Nonetheless, the results should shift our priors. Professor Bagley attributes the administrative state’s supposed overemphasis to the central role of lawyers in administration.<sup>190</sup> Lawyers, he argues, place extraordinary weight on procedural regularity and—owing to what he terms their “lawyerly anxiety”—tacitly attribute those concerns to the public, which may or may not actually share these concerns.<sup>191</sup> This Article suggests otherwise. Participatory mechanisms are valued not only by process-minded Washington lawyers but also by a broad cross-section of Americans.

Importantly, our findings do not suggest that people value participatory mechanisms because they personally wanted to participate in this particular FAA rulemaking (or any other). Given generally low levels of political knowledge and engagement,<sup>192</sup> that interpretation seems implausible. A more likely implication is that people feel positively when they know that interested citizens have opportunities to participate. That sentiment may reflect a form of second-order self-interest: individuals want these mechanisms available for others now so that they themselves could use them in the future if an agency action becomes salient to them. Alternatively, they may believe that other people deserve an opportunity to participate when they are affected, even if the individual respondent has no reason to anticipate ever using these mechanisms. Our study does not reveal which is a more

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<sup>187</sup> See *supra* notes 92-93 and accompanying text.

<sup>188</sup> See *supra* Part II.A.

<sup>189</sup> See *supra* Part II.B.

<sup>190</sup> See Bagley, *supra* note 10, at 380-81.

<sup>191</sup> *Id.* at 381.

<sup>192</sup> See Coglianese, *supra* note 3, at 964 (reporting “a modest, if not trivial” level of public engagement in regulatory agencies); see also MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 52-104 (1996) (reporting low levels of political knowledge among survey respondents).

plausible interpretation—it simply shows that ordinary people attribute value to administrative democracy as an abstract principle of institutional design.

Regardless of why respondents favor participatory mechanisms in administrative decision making, the fact that they express these preferences—even when primed with information about increased time costs<sup>193</sup>—poses a challenge for the abundance movement. If what matters is what ordinary people want out of their government, as the abundance critique emphasizes, it is difficult to dismiss the evidence we present: people consistently want meaningful opportunities for public participation in administrative decision-making. It is certainly reasonable that people would be able to reason abstractly about the kind of participatory system that should exist, and our data provide a window into how people do that.

*Second*, many jurists and scholars maintain that greater—or even exclusive—presidential control over agencies is necessary to remedy the administrative state’s alleged deficit of accountability and legitimacy.<sup>194</sup> Most prominently, the Supreme Court describes presidential control as the exclusive means by which “the exercise of executive power remains accountable to the people.”<sup>195</sup>

The results in this Article cast doubt on that claim. Of the eight participatory mechanisms studied, five produce statistically significant increases in assessments of the legitimacy of the decision-making process.<sup>196</sup> A partially overlapping set of five mechanisms increases the extent to which participants consider the agency accountable “to people like [them].”<sup>197</sup> These findings suggest that greater presidential control—if it comes at the expense of opportunities for public participation—may displace important institutional sources of legitimacy and accountability.<sup>198</sup>

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<sup>193</sup> See *supra* Part II.B.

<sup>194</sup> See *supra* Part I.B.2.

<sup>195</sup> *Arthrex*, 594 U.S. at 27; see also *supra* notes 101 & 102 and accompanying text (providing additional quotations from Supreme Court opinions supporting this proposition).

<sup>196</sup> See *infra* Appendix Figure A1. For the other three mechanisms—*Mini-Publics* + *N&C*, *Mini-Publics*, and *N&C*, the effect-size estimates are positive but do not achieve conventionally accepted levels of statistical significance.

<sup>197</sup> See *infra* Appendix Figure A1. As with the legitimacy measure, the estimated effects concerning the accountability measure are positive and statistically significant for five out of the eight studied mechanisms. The three other mechanisms are *Balanced N&C*, *N&C*, and *Public Advocate*. Once again, the effect-size estimates are positive but fall short of conventionally accepted levels of statistical significance.

<sup>198</sup> Much the same could be said of the Supreme Court’s efforts to curtail agencies’ ability to interpret law on the grounds that agency decision-making is democratically illegitimate compared to statutory lawmaking by Congress. See Anya Bernstein, Glen Staszewski, & Wendy E. Wagner, *Sidelining the Public*, at 4 (unpublished manuscript on file with authors) (“[T]he current Supreme Court is steadfastly undermining agencies’ authority, expanding private parties’ power to challenge regulations, expanding judges’ authority to reject agencies’ interpretations of statutes they implement, and demanding increasingly herculean levels of forethought from both agencies and statutes. Much of this has been justified through a rhetoric of empowering Congress.”). As with presidential administration, efforts to empower Congress at the expense of agencies may not be costless, insofar as they likewise forfeit the legitimizing qualities of public participation in agency procedures.

It is important to underscore that this Article does not claim to provide a definitive response to critics of participatory mechanisms. As with most empirical research, our studies contain meaningful limitations. Taken together, these limitations suggest that our conclusions are best understood as shifting the conversation around the abundance movement and presidential control—not as supplying the final word.

One limitation is that, because this Article does not directly compare the studied participatory mechanisms with specific tools of presidential control, we cannot draw conclusions about which approach better effectuates these values. Nonetheless, the consistent directional pattern—across both Trump and Harris voters—suggests that these mechanisms promote perceived legitimacy and accountability, and thus undercuts claims that enhanced presidential control is the *exclusive* means of advancing those values.<sup>199</sup> It could be that some degree of presidential control can comfortably coexist with meaningful public participation, and that combining them only augments perceived legitimacy and accountability. But when presidential control is held out as sufficient on its own to provide democratic accountability—as it is in the recent Trump administration actions curtailing public participation<sup>200</sup>—our results counsel skepticism.

Another limitation is that the effects we identify may not seamlessly translate into the kind of diffuse, aggregate support that government officials might hope to cultivate. After all, sociological legitimacy, perceived trust, and related concepts are shaped by many factors.<sup>201</sup> Further, although experimental studies are well-suited to isolating the causal effects of discrete interventions, they cannot tell us whether the effect sizes are large enough to influence aggregate sociological legitimacy or, if so, whether any such influence would endure. This limitation notwithstanding, however, our studies reveal a strong micro-level mechanism through which investment in participatory procedures generates benefits.

A final potential limitation concerns external validity. Given low levels of general political knowledge among Americans,<sup>202</sup> we assume that most people are unaware of the specific procedures

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<sup>199</sup> Other recent research conducted by one of us finds that the public evinces no support for arguments that presidential control enhances agencies' perceived legitimacy or accountability. See Feinstein, *supra* note 108. When one considers this Article's finding of bipartisan support for participatory measures alongside this lack of support for presidential-control mechanisms in these other studies, the intellectual foundation for presidential control is further eroded. These findings are not surprising: presidential elections have many limitations that the sanguine presidentialist accounts tend to gloss over. See CHARLES R. BEITZ, *FOR THE PEOPLE? DEMOCRATIC REPRESENTATION IN AMERICA* (Henry Brady, ed. 2024).

<sup>200</sup> See *supra* notes 5-8 and accompanying text.

<sup>201</sup> See MARC J. HETHERINGTON, *WHY TRUST MATTERS: DECLINING POLITICAL TRUST AND THE DEMISE OF AMERICAN LIBERALISM* (2005); Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. REV. POL. SCI. 475 (2000) (analyzing the micro- and macro-level foundations of political trust and the voluminous literature addressing different aspects of these determinants).

<sup>202</sup> See DELLI CARPINI & KEETER, *supra* note 192, at 52-104 (reporting low levels of political knowledge among survey respondents).



that agencies use to structure decisions like the one described in these studies.<sup>203</sup> That we inform participants of the mechanisms the FAA uses and then ask their views on that agency is a situation unlikely to be seen in the wild. A critic might argue that these studies “prime” respondents to think about participatory mechanisms and that, once primed, respondents express support for those mechanisms.

Our response is twofold. First, we note that Study 2 varies both the participatory mechanisms and the rulemaking timeframes that respondents observe. If our discussion of participatory mechanisms primes respondents to consider a previously unconsidered procedural benefit, then our description of the regulatory timeframes ranging from four to 102 months similarly primes them to consider a previously unconsidered procedural cost. In effect, the vignettes encourage respondents to consider both positive and negative aspects of participatory mechanisms. That respondents report preferences for more robust participatory mechanisms despite the perceived time costs (for which they also were primed) suggests that they are making direct tradeoffs and give greater weight, up to a point, to the opportunity to participate than they do to marginal improvements in efficiency of government action.

Second, the priming that inevitably occurs in a survey experiment resembles the priming that occurs in the real world when a government action becomes personally salient. Affected individuals—who may indeed have been “mercifully unaware”<sup>204</sup> of the available participatory mechanisms—may find themselves seeking that very information and valuing the opportunity for voice quite differently after they encounter a potential government action that would directly affect them. Likewise with a survey experiment: one can understand respondents’ preferences as “primed” reflections of what they would expect were they to ever have to engage in the process personally. The fact that we observe these preferences far upstream of any such real-world action, where the interests are likely to be weak, suggests a real challenge for abundance politics, because it implies that real-world priming would have the same effect, if not even a stronger one.

Abundance theorists might reply that most people will never actually be affected by government action in ways that activate these latent preferences. Most of us are not commercial pilots approaching retirement age, after all. It is not clear, however, why this response does not simply elide the reality that government action often creates both winners and losers. That the resulting losers are likely primed to value voice does not undercut their preferences—it underscores them. Thus, while the average person is not likely to know or care much about FAA retirement rules or administrative procedures *ex ante*, their recognition in our studies of potential process legitimacy concerns that could arise when the government takes actions negatively affecting some people’s interests is worth taking seriously as a signal of potential political backlash from actual efforts to streamline procedure. A national plebiscite on procedural reform that did *not* prime people to observe a lack of participatory opportunities might well succeed by abstracting away all salience of participatory opportunities, but it

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<sup>203</sup> See Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 1023 (2018) (inferring from indirect evidence that “most voters know very little about most agency activity”).

<sup>204</sup> Bagley, *supra* note 10, at 381.

would not escape the fact that losers in the decision-making process would eventually find that they had lost their voice.

## B. Unpacking Administrative Democracy’s Bipartisan Appeal

The finding that participatory opportunities appeal to both Trump and Harris voters is striking.<sup>205</sup> Americans have polarized along party lines over the past several decades.<sup>206</sup> To an increasing extent, Republicans and Democrats disagree not only on politics, but also on cultural attachments, brand preferences, and even senses of humor.<sup>207</sup> That they would coalesce around the value of participatory mechanisms in agency rulemakings is surprising at first blush.

What might explain this convergence? We offer three possibilities. *First*, participants may not have perceived presidential involvement in the agency’s decision at all. The vignettes did not mention the President or political appointees, and respondents may simply have considered the prospect. In that case, partisan considerations would have little reason to shape responses—participation may be a concept that resonates across party lines. Although this explanation suggests that partisan differences might surface in more politically charged rulemakings—where presidential preferences are salient—it bears emphasis that most rulemaking is not highly politicized. Much of it, like our FAA vignette, concerns technically complex questions that do not map neatly onto partisan divides. We might therefore expect the cross-partisan participatory “legitimacy boost” observed here to operate in many routine agency contexts.

*Second*, participants may have indeed assumed that President Trump (the sitting President at the time the surveys were administered) or his appointees were involved, but their enthusiasm for participatory mechanisms outweighed their support for, or opposition to, his involvement. On this account, respondents recognize the importance of public participation in agency decision-making, and that recognition dominates whatever partisan impulses they may have. In an era of polarization and frequent partisan turnover of the presidency, participants may be able to reason abstractly about the desirability of procedures that endure across election cycles, giving them a voice in government regardless of whether their party controls the White House.

*Third*, supporters of both political parties may be subject to countervailing pressures that essentially cancel out. Some people may infer that greater public participation reduces the President’s

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<sup>205</sup> See *supra* Part II.A.2, II.B.2 (reporting that the results for both sets of voters are positive and statistically significant at the same levels as in the principal analysis). Naturally, the differences in means between treatment and control are not *identical* for Trump and Harris voters. Nonetheless, they are similar enough that the basic conclusions from the principal analysis hold for both subgroups. See *id.* (describing the magnitude of the “Harris-Trump” gap for various participatory mechanisms).

<sup>206</sup> See Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra, and Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 132 (2019) (reporting trends in affective polarization).

<sup>207</sup> See Brian D. Feinstein, William R. Heaston, and Guilherme Siqueira de Carvalho, *In-Group Favoritism as Legal Strategy*, 60 AM. BUS. L. J. 5, 56-57 (2023) (summarizing these differences).

relative influence—a negative outcome for President Trump’s supporters and a positive one for his opponents. Others may infer that greater public participation reduces civil servants’ relative influence, which—given that most civil servants tend to lean left<sup>208</sup>—would tend to shift policy rightward in expectation. That shift would generally please conservatives and displease liberals. If subsets of each party’s supporters hold these opposing beliefs, the cross-cutting pressures effectively cancel each other out, yielding aggregate opinions that appear similar across party lines.

Whatever the explanation, the convergence between Trump and Harris voters is notable in today’s fractured political landscape and merits further study. It may be that, even when Americans diverge sharply on substance, they retain the capacity to agree on process—and that the administrative state holds underappreciated potential as a forum for structured, broadly legitimate political contestation.<sup>209</sup>

### C. Strengthening Channels for Participation

Given the consistent support for participatory mechanisms across these studies, the primary prescription is straightforward: policymakers should explore expanding the use of participatory mechanisms in agency policymaking—particularly deliberative panels and measures to ensure diverse perspectives are represented—so long as such investments do not impose excessive delays.<sup>210</sup>

Perhaps the most important takeaway is that policymakers should consider these mechanisms not only as a matter of principle, but because doing so may serve their own institutional interests. Appointees in administrative agencies, under ordinary circumstances, must remain attentive to the need to preserve public confidence in their institutions. Consider trust in government: in a recent poll, only 22 percent of Americans reported that they “trust the government to do what is right” either “just about always” or “most of the time.”<sup>211</sup> Because most of the participatory mechanisms we study

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<sup>208</sup> Brian D. Feinstein and Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731, 756 (2022) (reporting a left-centered distribution of civil servants’ ideal point estimates based on a measure derived from campaign donations).

<sup>209</sup> *Cf.* Walters, *supra* note 53.

<sup>210</sup> One useful framing of the task that policymakers face is in terms of a budget—policymakers can invest in greater participation, but, depending on *how* they choose to instantiate public participation, they might have different levels of time-delay leeway. An important takeaway, which this framing highlights, is that the budget is not capped—better forms of public participation may be worth implementing despite an increased time-delay cost that would perhaps doom lesser forms of participation.

<sup>211</sup> Pew Research Center, *Public Trust in Government: 1958-2024*, June 24, 2024, <https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/>.

are associated with increased perceptions of trustworthiness,<sup>212</sup> strengthening these mechanisms may enhance public trust and, in turn, make it easier for appointees to advance their policy goals.<sup>213</sup>

Even officials seeking to “deconstruct” the administrative state should consider the value of participatory mechanisms.<sup>214</sup> The procedural requirements for rescinding regulations are identical to those for issuing new ones.<sup>215</sup> Thus, to the extent such officials care about popular legitimacy, a perceived duty to obey among the public, or any of the other concepts examined in this Article, they too should facilitate some degree of public participation.

#### D. Examining a Wider Range of Mechanisms

The mechanisms studied in this Article are important, but they represent only a subset of the tools—both existing and proposed—for facilitating public engagement in agency decision-making. These measures range from utilizing ex ante listening sessions and ideologically balanced advisory committees to establishing “living” rulemaking dockets that allow the public to propose modifications to existing rules.<sup>216</sup> Technological innovation may further expand these possibilities.<sup>217</sup> Future research should therefore broaden the scope of studied mechanisms to include both existing procedures and those that emerging technologies make possible.

Scholars should also extend their inquiry beyond federal agencies to state and local institutions. Such work would be especially useful in evaluating the abundance movement’s call to streamline

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<sup>212</sup> See *infra* Figure A1 (reporting that the *Deliberation* + N&C, *Deliberation*, *Balanced N&C*, *Mini-Publics* + N&C, and *Public Advocate* + N&C conditions have a positive and statistically significant effect on agency trustworthiness).

<sup>213</sup> See Koen Migchelbrink & Steven Van de Walle, *When Will Public Officials Listen? A Vignette Experiment on the Effects of Input Legitimacy on Public Officials’ Willingness to Use Public Participation*, 80 PUB. ADMIN. 271 (2019) (explaining that administrators value meaningful public input in part because of the legitimacy dividend that it delivers).

<sup>214</sup> See Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State,”* WASH. POST. (Feb. 23, 2017), [https://www.washingtonpost.com/politics/topwh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8-da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/topwh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8-da-f9ea-11e6-bf01-d47f8cf9b643_story.html) (quoting Steve Bannon, then serving as senior counselor to President Trump, as seeking the “deconstruction of the administrative state”); see also Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 9-17 (2017) (describing these political efforts).

<sup>215</sup> See 5 U.S.C. § 551(5) (defining “rule making” as “agency process for formulating, amending, or repealing a rule”); *id.* at § 553 (requiring the notice-and-comment procedure for most rulemakings); see also *Motor Vehicle Manufacturers Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (stating that “rescission or modification” of a rule promulgated under § 553 is subject to the same arbitrary-or-capricious standard as applied to the original rule).

<sup>216</sup> See Sant-Ambrogio and Staszewski, *Public Engagement*, *supra* note 1 (describing these and other examples of participatory mechanisms).

<sup>217</sup> See, e.g., Stephen M. Johnson, *Rulemaking 3.0: Incorporating AI and ChatGPT into Notice and Comment Rulemaking*, 88 MO. L. REV. 1021 (2024); but see Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S: J.L. & POL’Y FOR THE INFO. SOC’Y 33 (2005) (noting shortcomings of earlier efforts to utilize a technological advance, the advent of the internet, to enhance participation). In addition, given the Biden administration’s focus on expanding these mechanisms, it is reasonable to expect that additional expansion of participatory mechanisms, perhaps drawing on emerging technologies like AI, will be on the horizon during the next Democratic administration to adopt a similar posture. See Office of

procedures in the name of efficient governance.<sup>218</sup> Because much of the abundance critique focuses on construction projects, particularly for housing, transportation, and green-energy projects,<sup>219</sup> experiments that discuss these projects and describe participatory interventions in local-level permitting and zoning processes would be particularly valuable. Going further, our findings highlight a tension at the heart of the abundance critique that additional research could illuminate. The abundance movement identifies procedural excess as impeding beneficial government action.<sup>220</sup> Yet, in a democracy, some degree of public support for government action is both politically necessary and normatively desirable. Although abundance scholars rightly emphasize the often-neglected costs of procedure,<sup>221</sup> they largely overlook the possibility that using participatory procedures can build public support for agency decisions. For instance, Professor Bagley characterizes procedural design as an “optimization problem” that balances efficiency, rights protection, and accountability.”<sup>222</sup> Our results suggest that tailoring procedures to bolster public support for the agency’s ultimate decision should also figure into the calculation.

As this Article shows, participatory mechanisms can help build popular support for government action—yet, as abundance theorists warn, excessive procedure can hinder that same action. Striking the right balance requires navigating between these competing concerns. Additional research on how the public evaluates agencies’ procedural choices is therefore important to charting a path forward.

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Information and Regulatory Affairs, *With the People, For the People: Strengthening Public Participation in the Regulatory Process*, Aug. 2024, at 6 (“The Biden-Harris has made public participation in rulemaking a priority.”).

<sup>218</sup> See, e.g., Bagley, *supra* note 10, at 352.

<sup>219</sup> See, e.g., KLEIN AND THOMPSON, *supra* note 94, at 21-100.

<sup>220</sup> See *supra* Part I.B.2 (summarizing this argument).

<sup>221</sup> See, e.g., Bagley, *supra* note 10, at 357.

<sup>222</sup> See *id.* at 352.

## CONCLUSION

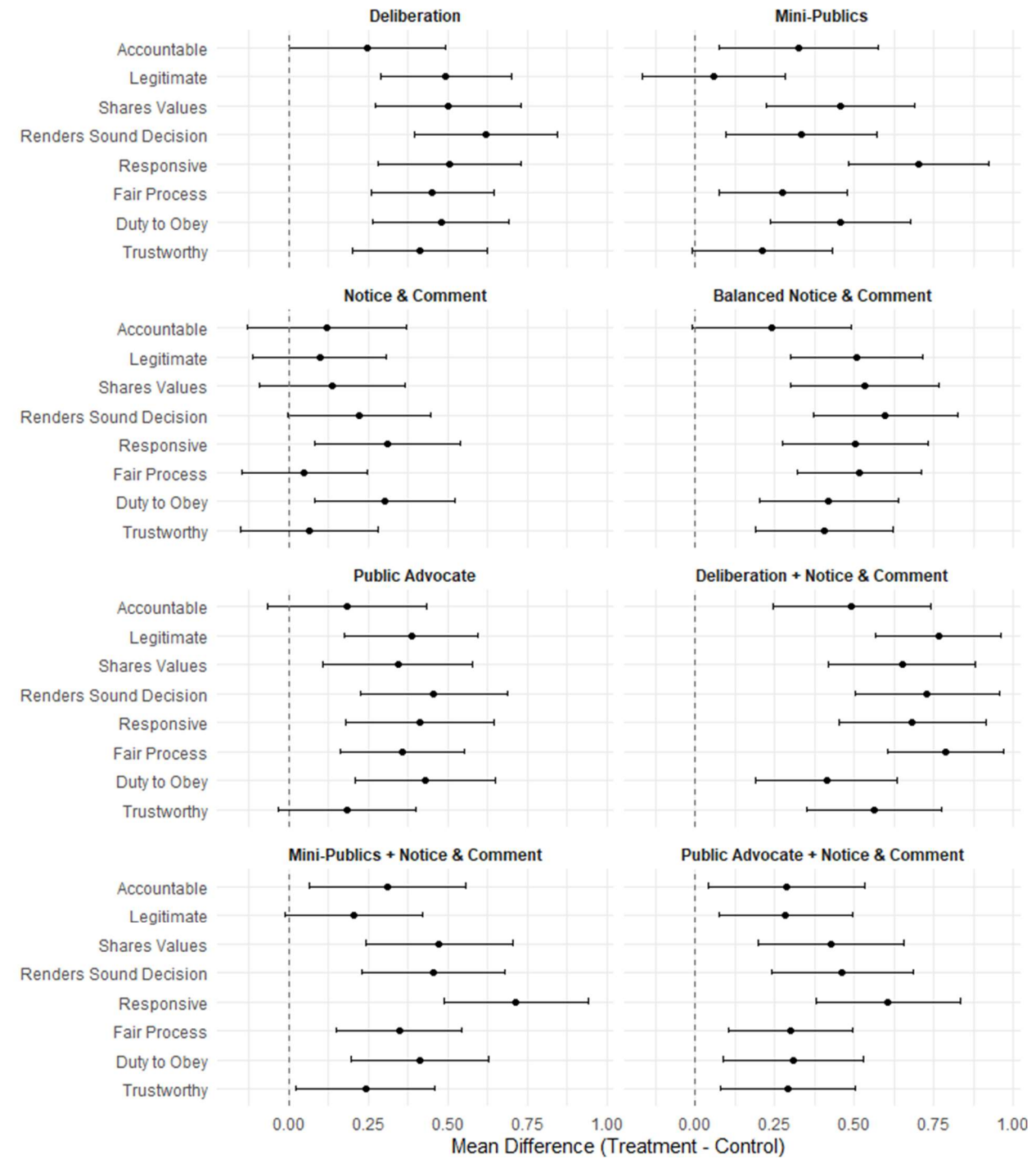
This Article brings clarity to a long-running—and increasingly heated—debate in administrative law and institutional design. Across two sets of experiments, we find consistent evidence that ordinary Americans value agencies’ efforts to open their doors to the public—not only through the familiar notice-and-comment process, but even more through mechanisms that promote balance, inclusiveness, and deliberation. These forms of engagement reliably enhance perceptions of an agency’s accountability, legitimacy, fairness, trustworthiness, and related attitudes. Further, the public’s appetite for voice is remarkably resilient; even when participatory mechanisms lengthen rulemaking timelines by years, support for these mechanisms persists, though not without limits. These results suggest that people care not only about administrative efficiency, but also about having a government that listens broadly and seriously.

These findings counsel a shift in perspective. The familiar debate over whether agencies employ “too little” or “too much” process obscures a more pressing insight: the *kind* of participation matters. Our results suggest that administrative democracy flourishes when agencies treat notice-and-comment as a floor rather than a ceiling, and when they invest in participatory mechanisms that are representative and deliberative. When deployed thoughtfully, such mechanisms reframe delay not as dead weight, but as an investment in strengthening democratic values.

## APPENDIX

This Appendix presents additional analyses that supplement the principal findings from Study 1. *First*, we examine each of the eight attitudinal measures underlying the affect scores discussed in the main text separately. (Recall that, to generate these scores, we aggregated participants' responses to all eight attitudinal measures and took an equally weighted average.) Figure A1 reports the difference in mean score between participants exposed to each participatory mechanism and those assigned to the control condition.

Figure A1: Estimated Effects of Procedural Mechanisms



Circles denote the differences in mean scores, on a 1-7 scale, for each listed attitudinal measure (e.g., Accountable, Legitimate, etc.) for participants who view each listed treatment condition (e.g., Deliberation, Mini-Publics, etc.) versus for participants who view the control condition. Bars show 95% confidence intervals.



The figure confirms that respondents generally view participatory mechanisms favorably. They respond positively to early-stage mechanisms involving deliberative bodies—whether comprised of key stakeholders (the *Deliberation* condition) or ordinary people (*Mini-Publics*). For both mechanisms, point estimates for all eight attitudinal measures are positive, and nearly all reach conventional levels of statistical significance.<sup>223</sup>

Layering these early-stage mechanisms onto notice-and-comment produces even stronger responses. For both the *Deliberation* + N&C condition and the *Mini-Publics* + N&C condition, point estimates and confidence intervals shift further in the positive direction relative to, respectively, the *Deliberation* and *Mini-Publics* conditions alone. Participants thus appear to prefer these innovations as supplements to—not substitutes for—the existing notice-and-comment process.

Among the tested mechanisms, N&C on its own is the least impactful. As Figure A1 shows, its estimated effects are smaller and often not statistically significant. Even so, participants may still view notice-and-comment more favorably than its absence: differences in mean scores for the N&C condition versus the control condition are positive and statistically significant for *responsive* and *duty to obey* measures. In other words, notice-and-comment is associated with both an enhanced sense that the agency is responsive to “people like you” and a belief that actors who flout the agency’s decision should be viewed negatively.

*Second*, we estimate regression models that include covariates for all treatment conditions, allowing for direct comparisons of effect sizes. Table A2 reports these results. In Panel (a), Model 1 regresses affect scores on participants’ assigned condition (omitting the control condition). Models 2–9 repeat this analysis for the remaining attitudinal measures (e.g., *accountable*, *legitimate*, etc.). The models in Panel (b) add demographic controls. Although random assignment of large numbers of participants makes confounders unlikely, we report these models for readers interested in the robustness of the findings.

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<sup>223</sup> The estimates for all attitudinal measures are statistically significant at the  $p < 0.05$  level for the *Deliberation* condition. For the *Mini-Publics* condition, the difference in means for *trustworthy* is significant only at  $p < 0.10$  ( $b = 0.21$ ,  $SE = 0.11$ ), and the difference in means for *legitimate* indicates that we cannot reject the null hypothesis that this condition does not raise or lower participants’ sense that the agency’s decisional process is legitimate versus the control condition of no participatory mechanisms ( $b = .06$ ,  $SE = 0.11$ ).

Table A2: Regression Analysis of Participant Scores on Treatment Conditions

*(a) No Demographic Covariates*

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
<i>Attitudinal Measure:</i>	<i>Affect</i>	<i>Accountable</i>	<i>Legitimate</i>	<i>Shares Values</i>	<i>Renders Sound Decision</i>	<i>Responsive</i>	<i>Fair Process</i>	<i>Duty to Obey</i>	<i>Trustworthy</i>
Deliberation	0.602 *** (0.115)	0.610 *** (0.114)	0.529 *** (0.119)	0.482 *** (0.117)	0.627 *** (0.119)	0.516 *** (0.115)	0.577 *** (0.115)	0.508 *** (0.117)	0.448 *** (0.115)
Mini-Publics	0.505 *** (0.123)	0.506 *** (0.123)	0.098 (0.129)	0.463 *** (0.122)	0.392 ** (0.131)	0.716 *** (0.114)	0.379 ** (0.121)	0.494 *** (0.122)	0.270 * (0.121)
N&C	0.197 † (0.116)	0.194 † (0.117)	0.047 (0.119)	0.124 (0.117)	0.195 † (0.117)	0.332 ** (0.117)	0.078 (0.114)	0.316 * (0.123)	0.074 (0.116)
Balanced N&C	0.614 *** (0.119)	0.615 *** (0.119)	0.580 *** (0.125)	0.535 *** (0.122)	0.613 *** (0.122)	0.514 *** (0.118)	0.670 *** (0.120)	0.446 *** (0.118)	0.474 *** (0.120)
Public Advocate	0.439 *** (0.120)	0.440 *** (0.120)	0.401 ** (0.123)	0.340 ** (0.124)	0.467 *** (0.124)	0.428 *** (0.119)	0.452 *** (0.118)	0.447 *** (0.122)	0.186 (0.117)
Deliberation + N&C	0.863 *** (0.121)	0.869 *** (0.121)	0.865 *** (0.121)	0.666 *** (0.123)	0.771 *** (0.126)	0.729 *** (0.122)	0.988 *** (0.118)	0.448 *** (0.123)	0.652 *** (0.122)
Mini-Publics + N&C	0.514 *** (0.118)	0.516 *** (0.118)	0.250 * (0.126)	0.463 *** (0.120)	0.451 *** (0.120)	0.739 *** (0.120)	0.466 *** (0.121)	0.421 *** (0.118)	0.285 * (0.118)
Public Advocate + N&C	0.475 *** (0.116)	0.471 *** (0.116)	0.266 * (0.119)	0.407 ** (0.119)	0.438 *** (0.118)	0.627 *** (0.117)	0.378 ** (0.117)	0.328 ** (0.122)	0.294 * (0.115)
Demographic Covariates?	N	N	N	N	N	N	N	N	N
<i>Observations</i>	4,005	4,032	4,031	4,035	4,028	4,035	4,035	4,038	4,036
$\chi^2$	70.9	21.0	91.3	47.4	58.8	64.5	101.0	26.4	45.3

Coefficient estimates and robust standard errors (in parentheses) were obtained via ordered logit models. Ordered dependent variable participants' entry for the listed outcome variable, on a 1-7 scale. Coefficient estimates for cuts 1-6 not reported. Omitted condition: control condition.

(b) *With Demographic Covariates*

	(10)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)
<i>Attitudinal Measure:</i>	<i>Affect</i>	<i>Accountable</i>	<i>Legitimate</i>	<i>Shares Values</i>	<i>Renders Sound Decision</i>	<i>Responsive</i>	<i>Fair Process</i>	<i>Duty to Obey</i>	<i>Trustworthy</i>
Deliberation	0.618 *** (0.115)	0.230 * (0.116)	0.544 *** (0.120)	0.486 *** (0.118)	0.625 *** (0.120)	0.520 *** (0.116)	0.581 *** (0.115)	0.515 *** (0.118)	0.461 *** (0.116)
Mini-Publics	0.515 *** (0.123)	0.348 ** (0.121)	0.087 (0.130)	0.477 *** (0.122)	0.393 ** (0.132)	0.722 *** (0.115)	0.372 ** (0.122)	0.483 *** (0.123)	0.274 * (0.122)
N&C	0.205 † (0.117)	0.131 (0.119)	0.053 (0.119)	0.139 (0.118)	0.198 † (0.117)	0.335 ** (0.117)	0.086 (0.115)	0.319 * (0.123)	0.069 (0.116)
Balanced N&C	0.598 *** (0.118)	0.218 † (0.119)	0.564 *** (0.125)	0.527 *** (0.122)	0.596 *** (0.122)	0.504 *** (0.117)	0.654 *** (0.120)	0.422 *** (0.118)	0.455 *** (0.121)
Public Advocate	0.456 *** (0.121)	0.204 † (0.121)	0.408 ** (0.124)	0.354 ** (0.125)	0.479 *** (0.125)	0.452 *** (0.119)	0.460 *** (0.119)	0.440 *** (0.123)	0.197 † (0.118)
Deliberation + N&C	0.876 *** (0.121)	0.510 *** (0.121)	0.871 *** (0.122)	0.679 *** (0.123)	0.778 *** (0.125)	0.737 *** (0.122)	0.996 *** (0.118)	0.450 *** (0.123)	0.664 *** (0.122)
Mini-Publics + N&C	0.525 *** (0.118)	0.293 * (0.118)	0.241 † (0.128)	0.477 *** (0.119)	0.458 *** (0.121)	0.758 *** (0.120)	0.463 *** (0.122)	0.414 *** (0.119)	0.281 * (0.118)
Public Advocate + N&C	0.476 *** (0.116)	0.285 * (0.117)	0.252 * (0.120)	0.413 *** (0.118)	0.434 *** (0.118)	0.630 *** (0.116)	0.370 ** (0.117)	0.317 * (0.123)	0.291 * (0.115)
Demographic Covariates?	Y	Y	Y	Y	Y	Y	Y	Y	Y
<i>Observations</i>	3,993	4,019	4,018	4,022	4,016	4,022	4,021	4,025	4,023
$\chi^2$	129.4	73.3	141.5	101.0	100.0	128.0	147.5	55.8	91.2

Coefficient estimates and robust standard errors (in parentheses) were obtained via ordered logit models. Ordered dependent variable participants' entry for the listed outcome variable, on a 1-7 scale. Coefficient estimates for cuts 1-6 not reported. Omitted conditions: control condition, non-female (includes male, non-binary, and other / prefer not to answer), non-African American, non-Hispanic, income < \$30,000, educational attainment: some high school.

The results in Table A2 reinforce the principal findings. Coefficient estimates for all attitudinal measures point in the expected direction, and nearly all reach conventional levels of statistical significance. For most attitudinal measures, *Deliberation* + *N&C* produces the largest effects,<sup>224</sup> with *Balanced N&C*, *Deliberation*, and *Mini-Publics* + *N&C* also performing well. *N&C* alone is the least favored mechanism; its coefficient estimates are generally the smallest and reach statistical significance at  $p < 0.10$  in nine out of the eighteen models.

<sup>224</sup> There are two exceptions. (1) For the *Duty to Obey* measure, *Deliberation* and *Mini-Publics* produce higher scores than *Deliberation* + *N&C*. (2) For the *Responsive* measure, where *Mini-Publics* + *N&C* generates the strongest effect. This result is intuitive. The *Responsive* measure asks about the FAA's responsiveness "to people like you" and *Mini-Publics* emphasizes the involvement of ordinary people. By contrast, *Deliberation* involves access for stakeholders—who are unlikely to be "people like" the typical participants, making that participatory mechanism less relevant for a question concerning the agency's "responsive[ness] . . . to people like you."

Finally, in Table A3, we report the demographic breakdown of our participants in Study 1 and Study 2.

Table A3: Demographics

	Study 1		Study 2	
	Mean (SD)	Min/Max	Mean (SD)	Min/Max
Age	44.13 (17.83)	18/88	42.25 (13.63)	18/82
Female	0.55 (0.50)	0/1	0.58 (0.49)	0/1
Black	0.14 (0.34)	0/1	0.11 (0.32)	0/1
Hispanic/Latino	0.06 (0.24)	0/1	0.07 (0.25)	0/1