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Grasping for Energy Democracy

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GRASPING FOR ENERGY DEMOCRACY

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Until recently, energy law has attracted relatively little citizen participation. Instead, Americans have preferred to leave matters of energy governance to expert bureaucrats. But the imperative to respond to climate change presents energy regulators with difficult choices over what our future energy sources should be, and how quickly we should transition to them—choices that are outside traditional regulatory expertise. For example, there are currently robust nationwide debates over what role new nuclear power plants and hydraulically fractured natural gas should play in our energy mix, and over how to maintain affordable energy for all while rewarding those who choose to put solar panels on their roofs. These questions are far less technical and more value laden than most of the questions energy bureaucrats faced in the past. Consequently, these issues have provoked a growing call for the "democratization" of energy law, so that the field might better inject Americans' preferences and goals into decisions over energy policy.

But exactly how the democratization of energy law might proceed remains unclear. Indeed, the concept of "energy democracy" has taken on significantly different—and frequently conflicting—meanings in debates over energy law reform. This Article argues that the lack of clarity over the meaning of energy democracy presents a troubling hurdle to the burgeoning project of democratizing energy law, as different conceptions of the term demand divergent legal reforms. To make this case, it first identifies three distinct conceptions of energy democracy in discussions of energy law reform: consumer choice, local control, and access to process. It then explains how each of these visions counsels for a different set of regulatory reforms, which instantiate distinct processes for channeling citizen preferences about the future of our energy system. As regulators choose among these visions, it is imperative that they understand the stakes of embracing any particular conception of "energy democracy." This Article advances that endeavor by tying the rhetoric of energy democracy to concrete proposals for reform, and evaluating what each portends for the "democratization" of energy law. It concludes with a note of caution about too swiftly embracing "consumer choice" or "local control," since each risks narrowing modes of participation in ways that may diminish from a robust conversation about the grid-wide changes needed in U.S. energy supply.

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Introduction

Americans have long treated energy law as predominantly an exercise in expert technological management, requiring limited citizen participation.[1] We all want light upon the flick of a switch, and we revile the notion of waiting in line to fill our gas tanks, but rarely have we been interested in peering behind the curtain of energy regulation.[2] It doesn't help that energy regulators implement their mandates to ensure reliability and maintain "just

1. *See* Richard F. Hirsh, Power Loss: The Origins of Deregulation and Restructuring in the American Electric Utility System 1–2, 9 (1999) (describing the twentieth-century "consensus" between regulated utilities and public utility commissions).

2. *See* Michael J. Graetz, The End of Energy: The Unmaking of America's Environment, Security, and Independence 1 (2011); *see also* Am. Acad. of Arts & Scis., Beyond Technology: Strengthening Energy Policy Through Social Science 8 (2011), https://www.amacad.org/pdfs/alternativeenergy.pdf [https://perma.cc/M6AJ-Z7X4] ("One of the great triumphs of modern society is that we've hidden the infrastructure. Nobody really understands where electricity, gas, or water come from.").

and reasonable rates" primarily through complex adjudicatory proceedings,[3] which discourage broad participation.[4]

Yet climate change obliterates the idea that energy law can continue to be—if it ever was—a value-neutral exercise best left to utilities and their regulatory oversight bodies. To effectively respond to climate change, the U.S. energy system requires a radical transformation—often called "decarbonization"—from predominantly fossil-fuel-fired energy to almost exclusively carbon-free energy sources.[5] In the face of this challenging task and the many policy conundrums it raises, few Americans express continued desire to punt energy policy to bureaucratic experts.[6]

Instead, "[p]eople are starting to recognize that the world of energy involves fundamental ethical questions."[7] This growing recognition is evident in recent protest movements—and violent reprisals—over new oil and gas pipelines,[8] in strangely cross-partisan state battles over solar energy policy,[9] and in hard-fought state ballot initiatives considering whether to adopt carbon taxes.[10] Despite such visible outcries from the public on energy policy, much of our decisionmaking on energy policy in the United States occurs

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3. *See infra* Section I.B.

4. *See infra* note 72 and accompanying text.

5. *See infra* Section I.C.

6. *See* Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 Emory L.J. 695, 697–98 (2016) (describing the many political battles that energy raises).

7. *See* Benjamin K. Sovacool & Michael H. Dworkin, Global Energy Justice: Problems, Principles, and Practices 1 (2014).

8. *See* Gregor Aisch & K.K. Rebecca Lai, *The Conflicts Along 1,172 Miles of the Dakota Access Pipeline*, N.Y. Times (Nov. 23, 2016) (updated Mar. 20, 2017), http://www.nytimes.com/interactive/2016/11/23/us/dakota-access-pipeline-protest-map.html (on file with the *Michigan Law Review*); Juliet Eilperin, *The Keystone XL Pipeline and Its Politics, Explained*, Wash. Post (Feb. 4, 2014), https://www.washingtonpost.com/news/the-fix/wp/2013/04/03/the-keystone-xl-pipeline-and-its-politics-explained/?utm_term=.3cb0d32cdfca [https://perma.cc/7CLX-QQM4].

9. *See* Shelley Welton, *Clean Electrification*, 88 U. Colo. L. Rev. 571, 592–94 (2017) (documenting the proliferation of state debates over solar policy); Stephen Lacey, *Why More Tea Partyers Are Rallying Behind Solar*, Greentech Media (Feb. 5, 2015), https://www.greentechmedia.com/articles/read/why-more-conservatives-and-libertarians-are-getting-behind-solar [https://perma.cc/Q57J-C8QU]; Taylor Link, *Florida Voters Reject Misleading Referendum that Sought to Tax Solar Energy*, Salon (Nov. 9 2016, 9:00 PM), http://www.salon.com/2016/11/09/florida-voters-reject-misleading-referendum-that-sought-to-tax-solar-energy/ [https://perma.cc/GYY3-JUQG]; John Schwartz, *Measure in Florida that Claims to Back Solar Power May Discourage It*, N.Y. Times (Oct. 27, 2016), http://www.nytimes.com/2016/10/28/science/florida-solar-power-referendum.html (on file with the *Michigan Law Review*); Tell Util. Solar Won't Be Killed, http://dontkillsolar.com/tusk/ [https://perma.cc/QMC8-JKE3] (Republicans for solar website).

10. *See* Chelsea Harvey, *The Battle over Washington State's Proposed Carbon Tax Has Gotten Even Weirder*, Wash. Post (Nov. 8, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/07/the-bizarre-political-fight-over-washington-states-ballot-measure-to-tax-carbon/?utm_term=.7acdfaaf4900 [https://perma.cc/7EAS-JEXA]; Lewis Kamb, *Washington Voters Reject Initiative to Impose Carbon Tax on Fossil Fuels*, Seattle Times (Nov. 8, 2016, 9:00 PM), http://www.seattletimes.com/seattle-news/politics/carbon-emissions-tax-initiative-732/ (on file with the *Michigan Law Review*).

within complex layers of bureaucracy.[11] Today's energy bureaucrats must determine what the fate of aging nuclear power and coal plants should be;[12] how much renewable energy to incentivize, and who should pay for it;[13] how to protect low-income consumers from rising energy prices; [14] whether to approve new transmission lines, pipelines, nuclear power plants, off-shore wind farms, and underground carbon-sequestration chambers;[15] how much to rely on natural gas, often hydraulically fractured, to meet electricity needs;[16] and where to site whatever new infrastructure they approve.[17] In our current energy governance regime, the public plays a limited role in making these decisions.[18]

To better inject societal values and public opinions into these decision-making processes, there is a widening call among activists, scholars, and regulators for the "democratization" of energy law and policy.[19] This call

11. *See infra* Section I.B.

12. *See, e.g.*, Tom Knox, *Ohio Regulators Approve Income Guarantees for AEP and FirstEnergy*, Columbus Bus. First (Mar. 31, 2016), http://www.bizjournals.com/columbus/news/2016/03/31/ohio-regulators-approve-income-guarantees-for-aep.html [https://perma.cc/YQM6-8WZX] (explaining Ohio energy regulators' effort to subsidize certain coal and nuclear plants); Jesse McKinley, *Lawsuit Seeks to Halt New York Subsidies for Upstate Nuclear Plants*, N.Y. Times (Oct. 19, 2016), http://www.nytimes.com/2016/10/20/nyregion/lawsuit-seeks-to-halt-new-york-subsidies-for-upstate-nuclear-plants.html?_r=0 (on file with the *Michigan Law Review*) (explaining New York lawsuit challenging the Public Service Commission's decision to subsidize certain nuclear plants in the state).

13. *See* Welton, *supra* note 9, at 592–94; *see also* Troy A. Rule, *Solar Energy, Utilities, and Fairness*, 6 San Diego J. Climate & Energy L. 115, 117–19 (2015).

14. *See, e.g.*, State of N.Y. Pub. Serv. Comm'n, *Order Adopting Low Income Program Modifications and Directing Utility Filings*, N.Y. St. Dep't Pub. Serv. 1–2 (2016), http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-m-0565&submit=search£y+Case+Number [https://perma.cc/AC74-694F].

15. *See* Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. Rev. 1079, 1101–02 (2013) (explaining process of states granting infrastructure developers "certificates of need").

16. *See Rating the States on Their Risk of Natural Gas Overreliance*, Union Concerned Scientists, http://www.ucsusa.org/clean-energy/rating-the-states-on-their-risk-of-natural-gas-overreliance#.WFwqmFcdOf1 [https://perma.cc/8ZMA-P8SP] (arguing that many U.S. state commissions may be putting their consumers at risk by overrelying on natural gas).

17. *See* Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 Vand. L. Rev. 1801, 1804 (2012) (explaining challenges of siting new transmission lines, given the power that state commissions wield).

18. *See infra* Section I.B.

19. This call proceeds under several different names, as explored in the competing conceptions laid out below. I consider many reformers calling for "consumer empowerment," "consumer participation," "local control," and "energy justice" to be making similar demands to those who explicitly label their aim as one of "energy democracy." *See, e.g.*, John Farrell, Inst. for Local Self-Reliance, Beyond Utility 2.0 to Energy Democracy (2014), https://ilsr.org/report-energy-democracy/ [https://perma.cc/U4HU-GM2X]; Kristin Ralff-Douglas & Marzia Zafar, Policy & Planning Div., Cal. Pub. Utils. Comm'n, Customers as Grid Participants: A Fundamentally New Role for Customers 3 (2013), http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Organization/Divisions/Policy_and_Planning/PPDCustomerRoleMay15th.pdf [https://perma.cc/EW2B-EXY4]; Al Weinrub & Anthony Giancatarino, Toward a Climate Justice Energy Platform: Democratizing Our Energy Future (2015), http://www.localcleanenergy.org/files/Climate

emerges from a realization that the choices and challenges now facing energy regulators raise difficult questions of values and tradeoffs that make public participation more important and worthwhile.[20] But exactly how the "democratization" of energy might proceed remains unclear. Indeed, the concept of "energy democracy" has taken on significantly different—and frequently conflicting—meanings to different actors within debates over energy law reform.

This Article argues that the lack of clarity over what "energy democracy" entails presents a troubling hurdle to the project of democratizing the field, as different conceptions of the term counsel for divergent legal reforms. The Article identifies three distinct conceptions of "energy democracy" that have emerged in discussions of energy law reform:

> 1. *Consumer Choice*: Energy governance regimes should be redesigned to give consumers more choices in their energy purchasing decisions, including more control over their level of energy demand and the opportunity to generate, store, and sell their own electricity.
> 2. *Local Control*: Energy decisionmaking should be decentralized by local communities claiming ownership of energy resources and control over energy decisionmaking.
> 3. *Access to Process*: Energy regulators should embrace procedural reforms that enable more citizens to participate in governmental decisionmaking processes about energy policy across all levels of government.[21]

Unsurprisingly, these three emerging visions of what "democracy" might look like in energy law track long-standing, competing conceptions within democratic theory.[22] Within energy law, however, the three strands of democratic reforms parsed above often get collapsed into a single

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%20Justice%20Energy%20Platform.pdf [https://perma.cc/RP3E-EALS]; Joseph P. Tomain, *The Democratization of Energy*, 48 VAND. J. TRANSNAT'L L. 1125 (2015); *Energy Democracy*, CTR. FOR SOC. INCLUSION, http://centerforsocialinclusion.org/our-work/our-programs/energy-democracy/ [https://perma.cc/E8MS-GPFG]; *Energy Democracy, #BlackLivesMatter, and the NAACP Advocacy Agenda*, NAACP (May 29, 2015), http://www.naacp.org/latest/energy-democracy-blacklivesmatter-and-the-naacp-advocacy-agenda/ [https://perma.cc/738P-M2SC] (remarks given by Jacqueline Patterson, director of Environmental and Climate Justice). *But see* Nico Stehr, *Exceptional Circumstances: Does Climate Change Trump Democracy?*, ISSUES SCI. & TECH., Winter 2016, at 30 (critiquing the movement of some scholars toward oblique endorsement of greater authoritarianism as an answer to climate change).

20. *See* Roger E. Kasperson & Bonnie J. Ram, *The Public Acceptance of New Energy Technologies*, DÆDALUS, Winter 2013, at 90, 91 (arguing that the energy transition is at heart a "social" question).

21. One might alternatively refer to this third conception as "advocacy democracy," which Russell Dalton et al. suggest exists where "citizens or public groups directly interact with government and even directly participate in the deliberation process, even if the actual decisions remain in the hands of government elites." *See* Russell J. Dalton et al., *Democratic Publics and Democratic Institutions*, *in* DEMOCRACY TRANSFORMED?: EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED INDUSTRIAL DEMOCRACIES 250, 254 (Bruce E. Cain et al. eds., 2003).

22. *See* ROBERT A. DAHL, ON DEMOCRACY 3 (2d ed. 2015) (observing that the definition of "democracy" remains contested after twenty-five centuries of debate); Dalton et al., *supra* note 21, at 256; David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1703 (2005) (tracing competing conceptions of democratic theory in the twentieth century).

celebratory mode. Take, for example, this statement from the Alliance for a Green Economy, a not-for-profit group commenting on New York's current efforts to reform its regulatory framework for electricity:

> [These reforms present] an opportunity to fight for ENERGY DEMOCRACY, so that residents and communities can be full participants in a clean energy future, from owning renewable energy projects, controlling how we distribute energy, or gaining the power to make decisions about how energy investments are made in our neighborhoods.[23]

With this one statement, the Alliance encapsulates all three conceptions of energy democracy: residents achieving "full participation" by "owning renewable energy projects" (*consumer choice*); communities owning energy projects and "controlling how we distribute energy" (*local control*); and residents and communities "gaining the power to make decisions" about energy investments (*access to process*).[24]

Is it a problem to have this pluralist vision of energy democracy? Not entirely. At times, these visions can coexist or complement each other. Nevertheless, the theories behind these visions and the changes in energy governance that they require are different enough that regulators may have a difficult time squaring simultaneous pursuit of all three. Consider the first two conceptions: (1) consumer choice and (2) local control. They both focus on *decentralization* as democratization, but they suggest decentralizing in strikingly different ways. The consumer-choice conception underpins the movement in several states to create "distribution markets" where consumers can sell energy directly into the grid.[25] These reforms would lead to near-complete marketization of electricity decisionmaking, with aggregated individual consumer choices, motivated by pricing signals, driving systemic change.

In contrast, the local-control conception counsels for devolution of electricity systems to municipal ownership or legal control. In this way, localities would gain more say in setting priorities for their electricity systems, be they economic development or environmental goals.[26] Where desired, localities might also focus on locally siting new energy generation, to keep jobs and resources within the community.[27]

Finally, the access-to-process conception introduces a third, distinct reform agenda. This conception focuses not on downsizing, but instead on reshaping energy law's governing institutions to make them more responsive

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23. *What's REV Why Does It Matter?*, ALLIANCE FOR GREEN ECON. http://alliancefora greeneconomy.org/content/reclaiming-energy-vision [https://perma.cc/KH6S-PENA].

24. *Id.* Gaining decisionmaking power might also come about through increased local control, but need not. *See infra* Parts III–IV.

25. *See infra* Sections II.A–II.B.

26. *Infra* Part III.

27. *See* N.Y. STATE ENERGY DEMOCRACY ALL., FORMATION, ORGANIZATION, AND MOVING OUR AGENDA: A REPORT FROM OUR FIRST 18 MONTHS 9 (2016), http://energydemocracy ny.org/wp-content/uploads/2015/12/EDA_Phase_1_report_final.pdf [https://perma.cc/Y5TU-QKK2] (espousing this vision).

to citizen concerns and preferences. In this way, process-based reforms strive to include more voices in energy decisionmaking processes in a collective, rather than atomized-consumer, capacity. This aim gives the access-to-process vision a *political* focus similar to local control, which consumer choice lacks. But although local control might be accompanied by process-based reforms, devolution would be neither necessary nor sufficient.[28] Localism is not a panacea for participation, and it presents distinct challenges as a locus for attempting to change the larger, interconnected electricity grid.[29] Alternatively, process-based reforms might include enhancing public participation in governance processes at the state and regional scales, where most energy decisionmaking currently takes place.[30]

As this Article's exploration of these alternative pathways makes apparent, these divergent legal regimes—all based on some version of "energy democracy"—have significantly different implications for the shape of energy governance. And as political theorists and scholars of procedure have long documented, process and substance are intimately linked.[31] For this reason, the ways in which we democratize energy policymaking processes will be inextricably tied to the outcomes these processes produce in terms of long-lasting energy infrastructure[32] and political character.[33]

Therein lies the danger of the current use of "energy democracy" as a guiding principle for energy law reform. To talk as though we all agree on this goal risks cutting out important front-end deliberations over its definition—deliberations that are crucial to guide major regulatory reforms now taking place.[34] Scholars are just beginning to grapple with the emergence of these competing democratic paradigms within energy law. Most pointedly, Joseph Tomain's 2015 essay *The Democratization of Energy* catalogues and

28. *Infra* Part IV.

29. *See infra* Section V.B.

30. *See infra* Section I.B.

31. Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 26–27 (1997). *See generally* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo. L.J. 887 (1999) (comparing congressional rulemaking to judicial rulemaking and noting the effects of each on substantive rights); Lawrence B. Solum, *Procedural Justice*, 78 S. Cal. L. Rev. 181 (2004) (noting how procedure and the enforcement and authority of legal norms are intertwined).

32. *See* Gregory C. Unruh, *Understanding Carbon Lock-In*, 28 Energy Pol'y 817, 817 (2000) (explaining how energy infrastructure "locks in" certain modes of production).

33. On the links between process and participation within bureaucracy, see Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 Admin. L. Rev. 411, 470 (2005), which observes that "[t]he public's perception of its stake in regulatory policy depends rather largely on the process through which people are queried." On energy, climate change, and the shaping of ourselves, see Dale Jamieson, Reason in a Dark Time: Why the Struggle Against Climate Change Failed—and What It Means for Our Future 182 (2014). *See also* Jedediah Purdy, After Nature: A Politics for the Anthropocene 265–67 (2015).

34. *See, e.g.*, *infra* Section II.A (describing several states' reform initiatives).

celebrates the ways in which energy and environmental politics are decentralizing decisionmaking and giving consumers "greater input into their energy choices."[35] Sharon Jacobs's 2017 article *The Energy Prosumer* begins an exploration of the challenges that a consumer-choice vision might pose to traditional regulatory processes.[36] Numerous other scholars are writing around the concept of energy democracy without labeling it as such: those embracing localism as a climate change strategy;[37] those considering the evolving mandate and powers of public utility commissions;[38] those exploring the relationship between federal energy markets and state policy objectives;[39] and those focused on the opportunities and challenges posed by new, small-scale energy technologies.[40] All of these scholars wrestle with the interrelationship of governance processes and governance outcomes in energy law.

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35. Tomain, *supra* note 19, at 1125.

36. Sharon B. Jacobs, *The Energy Prosumer*, 43 ECOLOGY L.Q. 519 (2017).

37. *See* Uma Outka, *Cities and the Low-Carbon Grid*, 46 ENVTL. L. 105 (2016); Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669 (2010); Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267 (2017) (reserving the question of whether localism is really democratic for future work—that is, for this Article).

38. *See generally* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 814 (2016) (discussing the local restructuring of energy markets that were in response to Congress's failure to enact a national approach to decarbonization); William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614 (2014) (exploring the past concepts of public utility to better handle with the modern challenge of decarbonization); Jonas J. Monast & Sarah K. Adair, *A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals*, 38 COLUM. J. ENVTL. L. 1, 3–4 (2013) (noting the mandates of public utility commissions and public service commissions); Inara Scott, *"Dancing Backward in High Heels": Examining and Addressing the Disparate Regulatory Treatment of Energy Efficiency and Renewable Resources*, 43 ENVTL. L. 255 (2013) (discussing the development of renewable resources within utilities); Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commissions to Meet Twenty-First Century Climate Challenges*, 38 HARV. ENVTL. L. REV. 371 (2014) [hereinafter Scott, *Old Dog*] (examining the history of public history commissions to better understand how they will respond to climate change).

39. *See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016); Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016); Joel B. Eisen, *Dual Electricity Federalism Is Dead, but How Dead, and What Replaces It?*, 8 GEO. WASH. J. ENERGY & ENVTL. L. 3 (2017) [hereinafter Eisen, *Dual Electricity*]; Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1786 (2016); Emily Hammond & David B. Spence, *The Regulatory Contract in the Marketplace*, 69 VAND. L. REV. 141, 143 (2016); Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885 (2015); Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399 (2016).

40. *See, e.g.*, Joel B. Eisen, *An Open Access Distribution Tariff: Removing Barriers to Innovation on the Smart Grid*, 61 UCLA L. REV. 1712 (2014); Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877 (2011); Welton, *supra* note 9; David B. Spence, *Paradoxes of "Decarbonization"* (Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. 565, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802231 [https://perma.cc/CJB2-T29L].

Despite this robust scholarship on reforming energy governance, no one has yet probed the democratic implications of these debates. Perhaps that is in part because the move toward more democracy within bureaucracy is not universally celebrated. Indeed, it is a delicate time for "democracy" in the United States.[41] Many suggest our democracy is substantially broken, particularly after the rancorous 2016 presidential election, which exposed deep fissures among the American people.[42] And within the bureaucratic realm, scholars have frequently noted the ways in which "democratization" of government can hamper its effectiveness, efficiency, transparency, and responsiveness.[43]

These criticisms have bite in the energy sphere, where there is considerable tension over how to strike the appropriate balance between technocratic expertise and democratic impulses.[44] Climate change presents a particularly thorny problem for the field in this regard, given that we are all plagued by well-documented cognitive biases that particularly disadvantage us in solving long-term, collective action problems.[45] Nevertheless, given the relative dearth of participatory mechanisms to date in energy law—and the pressing

41. *Cf.* PURDY, *supra* note 33, at 256 (observing that "now is an awkward time to argue" that democracy must be the "fulcrum" of environmental politics); Sklansky, *supra* note 22, at 1706–07 (gathering views of "thoughtful people" that democracy "has become simply a term of 'vague endorsement'—a 'hurrah word'" (footnote omitted)).

42. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014) (finding that average Americans have little influence on political outcomes); Glen Browder, *American Democracy No Longer Works as It Has in the Past*, HUFFINGTON POST (Jan. 12, 2013, 11:00 AM), http://www.huffingtonpost.com/glen-browder/american-democracy-no-lon_b_2156650.html [https://perma.cc/2ABQ-6DAQ]; Roslyn Fuller, *Why Is American Democracy So Broken, and Can It Be Fixed?*, NATION (June 9, 2016), https://www.thenation.com/article/why-is-american-democracy-so-broken-and-can-it-be-fixed/ [https://perma.cc/YY8U-D6ML]; Brendan James, *Princeton Study: U.S. No Longer an Actual Democracy*, TALKING POINTS MEMO (Apr. 18, 2014, 10:43 AM), http://talkingpointsmemo.com/livewire/princeton-experts-say-us-no-longer-democracy [https://perma.cc/ZYC7-UK4A].

43. *See* Margaret Canovan, *Taking Politics to the People: Populism as the Ideology of Democracy*, *in* DEMOCRACIES AND THE POPULIST CHALLENGE 25, 28 (Yves Mény & Yves Surel eds., 2002) (arguing that adding popular channels of influence causes processes to become "so bafflingly tangled and opaque that the vast majority of its supposed participants can form no clear picture to help them make sense of it"); Dalton et al., *supra* note 21, at 269–73 (noting this tension). *But see* Cuéllar, *supra* note 33, at 416 (collecting and critiquing scholars who reason along these lines).

44. *See* Frank Fischer, *Technological Deliberation in a Democratic Society: The Case for Participatory Inquiry*, 26 SCI. & PUB. POL'Y 294, 294 (1999) ("Far too little systematic attention has been devoted to the ability of citizens to participate meaningfully in an age dominated by complex technologies and expert decisions."); Susan Rose-Ackerman, *Citizens and Technocrats: An Essay on Trust, Public Participation, and Government Legitimacy*, *in* COMPARATIVE ADMINISTRATIVE LAW 251, 260–65 (Susan Rose-Ackerman et al. eds., 2d ed. 2017).

45. *See* Robert Gifford, *The Dragons of Inaction: Psychological Barriers That Limit Climate Change Mitigation and Adaptation*, 66 AM. PSYCHOLOGIST 290, 290 (2011) (arguing that when it comes to climate change, individuals are impeded from acting by seven "psychological barriers, or 'dragons of inaction'"); Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299, 300 (arguing that human cognitive limitations related to climate change create a "social trap"). Overcoming precisely this type of trap is one of the central ideas

new questions confronting the field regarding the future shape of our energy systems—some opening up of the field is worthwhile.[46] But one does not have to agree with this sentiment to care about the changes roiling energy law. Like it or not, the call for some sort of "energy democracy" is broadening, and regulators are grappling with how to channel this sentiment into on-the-ground regulatory reforms. To aid in these endeavors, this Article splits open the rhetorical trope of "energy democracy" to shift the debate to one of underlying values rather than consensus-building phrases.

This Article's primary aim is to provide clarification, rather than to prescribe a solution. Only after we have laid bare the possibilities and contradictions contained in a concept so broad as "energy democracy" can we move forward in determining how to achieve it. But this Article's crystallization of divergent concepts unearths some tentative normative conclusions. In particular, its analysis suggests reasons to remain wary of efforts to steer energy democracy toward consumer choice or local control, which present narrow modes of participation for addressing the systemic changes needed in energy law.[47]

This Article proceeds in five Parts. Part I describes the regulatory landscape in which calls for energy democracy are burgeoning, and the impetus behind the recent multivalent push in this direction. Parts II through IV describe in more detail the three dominant, competing visions for expanding energy democracy previewed in this introduction: consumer choice, local control, and access to process. Part V considers the ways in which these visions diverge, concluding that reformers should be cautious in their haste to abandon, rather than improve, existing channels for injecting democratic preferences into energy bureaucracy.

I. The Regulatory Landscape and the Impetus for Change

A. *Some Terminological Clarifications*

Before plunging into the intricacies of energy bureaucracy, two matters of semantic housekeeping are in order. First, I want to address the use of the term "democracy" to describe the various movements afoot in the reform of energy governance. As I have characterized them, calls for energy "democracy" are a long way from a Schumpeterian emphasis on voting as the central act of democratic participants.[48] Instead, the push for "energy

behind representative democracy, which may be more capable of expressing "'public' preferences . . . rather than the products of narrow self-interest." *See* Peter L. Strauss, *Review Essay: Sunstein, Statutes, and the Common Law—Reconciling Markets, the Communal Impulse, and the Mammoth State*, 89 Mich. L. Rev. 907, 924 (1991) (book review).

46. *See infra* Section I.C. I leave for future work the question of precisely what the advisable stopping point is for "democratizing" energy law. I tackle the questions in this order because the answer to "how much democracy" turns on what "democracy" within energy law comes to mean.

47. *See infra* Part V.

48. *Cf.* Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 269 (3d ed. 1950) ("[T]he democratic method is that institutional arrangement for arriving at political

democracy" focuses on methods of citizen-state interaction that go beyond enhancing representative democracy, for at least two reasons.

First, there is severe distrust of the fairness and effectiveness of our representative democratic system in the United States, given well-known campaign-finance biases, rampant partisanship, and (not unrelatedly) a gridlocked Congress.[49] This distrust has caused scholars and activists across fields to seek additional "channels for articulating and aggregating" citizens' values, goals, and preferences. [50] For this reason, democratic theorists have observed over the past several decades a shift toward "'sub-politicization,' whereby politics is emerging in places other than the formal political arena . . . because citizens no longer think that traditional forms of political participation are adequate."[51] Exactly this kind of subpoliticization is now at work in energy governance, as the field faces expanded calls for citizen participation in the consumer and bureaucratic realms.[52]

Second, there may be particular cause for subpolitical action in the energy field. Energy policy confounds electoral politics, particularly in the United States—for example, the recent presidential election featured almost

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decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."); LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 284 n.32 (1999) (characterizing Schumpeter's form as "as spare a notion of democracy as one could posit without draining the term of meaning").

49. *See, e.g.*, Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48 (1985) (suggesting that it is noncontroversial "to suggest that Madison's understanding of the role of the representative has only been imperfectly realized"). Kenneth Arrow's "Impossibility Theorem," illustrating that "democratic collective decision-making processes cannot be both fair and rational," added intellectual heft to these concerns. Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2124 (1990).

50. Tom Christensen & Per Lægreid, *New Public Management: Puzzles of Democracy and the Influence of Citizens*, 10 J. POL. PHIL. 267, 267 (2002); Russell J. Dalton et al., *New Forms of Democracy? Reform and Transformation of Democratic Institutions*, *in* DEMOCRACY TRANSFORMED?, *supra* note 21, at 1, 2 ("[T]he public's preferred mode of democratic decision-making is moving toward new forms of more direct involvement in the political process.").

51. Roberta Sassatelli, *Virtue, Responsibility and Consumer Choice: Framing Critical Consumerism*, *in* CONSUMING CULTURES, GLOBAL PERSPECTIVES: HISTORICAL TRAJECTORIES, TRANSNATIONAL EXCHANGES 219, 223 (John Brewer & Frank Trentmann eds., 2006); *see* Dalton et al., *supra* note 21, at 1 (tracing a "growing willingness" to look beyond representative democracy to "sustain the legitimacy and effectiveness of current mechanisms of self-government"); *see also* K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1332 (2016) (arguing for the creation of "alternative vehicles for voice and participation at the national or local level").

52. The movement toward "local control" often involves public referenda and city council decisionmaking in ways that extend beyond the realm of the "subpolitical." Even there, however, the predominant question is whether to continue to allow a state commission to oversee private utilities, or instead to replace this model with a locally owned utility, whose board answers to the city council. This central question remains a subpolitical one that implicates form and function of bureaucracy. *See* Welton, *supra* note 37, at 285–93 (arguing that the question of municipal ownership versus commission control of electric utilities can be viewed as a decision about whether to "contract out" this government function).

no discussion of climate change and energy policy,[53] despite the fact that the candidates held diametrically opposed positions.[54] To be sure, representative democracy still matters in energy law, at least at the state level—twenty-four U.S. states passed a total of at least fifty-one bills related to transforming energy in the last year.[55] But rarely do politicians pass legislation making the "hard" decisions over which many in the energy field disagree.[56] They often leave to energy bureaucrats decisions over how to achieve the (often-divergent) goals of abundant, affordable, and clean energy.[57] Options on the table for meeting the energy sector's expanding aims also diverge considerably—they include constructing more rooftop solar arrays, large-scale wind farms,

53. John Schwartz & Tatiana Schlossberg, *For Clinton and Trump, There's Little Debating a Climate Change Divide*, N.Y. TIMES (Oct. 17, 2016), http://www.nytimes.com/2016/10/18/science/hillary-cinton-donald-trump-global-warming.html (on file with the *Michigan Law Review*). This silence is not limited to the most recent election cycle. *See* Osofsky & Peel, *supra* note 6, at 707 ("During 2011 and 2012, climate change and clean energy had become so politically unpalatable that the terms were barely uttered by the President.").

54. *See* Rebecca Harrington, *Where Hillary Clinton and Donald Trump Stand on Climate Change*, BUS. INSIDER (Oct. 5, 2016, 5:39 PM), http://www.businessinsider.com/clinton-trump-environment-policies-plans-climate-change-platforms-2016-9 [https://perma.cc/SV5M-EBVR] (comparing the Clinton and Trump platforms on climate change).

55. *See* POWERSUITE, http://powersuite.aee.net/welcome [https://perma.cc/4N6R-RAKE] (results obtained by searching for bills categorized as relating to utility ownership, electricity generation, grid modernization, net metering, distributed generation, and renewable energy signed in all states between August 1, 2016, and August 1, 2017).

56. For example, in 2006, California passed a sweeping bill to address climate change, which it strengthened in 2016. California Global Warming Solutions Act of 2006, ch. 488, 2006 Cal. Stat. 3419 (codified at CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West 2016)). At eight pages, A.B. 32 is a remarkably short bill and delegates almost all decisionmaking as to how to achieve the state's aims to the California Air Resources Board. Assemb. B. 32, §§ 38560–38566. To be fair, California's legislature has refined the objectives set out in A.B. 32 many times in the years since, in ways that are often far more prescriptive. *See, e.g.*, Assemb. B. 2514, 2010–2011 Reg. Sess. (Cal. 2010) (requiring the Public Utilities Commission to consider establishing targets for utilities to procure energy storage). But these refinements themselves came from political engagement at the level of bureaucracy, as debates emerged at the California Air Resources Board over how best to implement A.B. 32's broad mandate. *See* Assemb. B. 398, 2017–2018 Reg. Sess. (Cal. 2017) (renewing and modifying California's existing cap-and-trade program through 2031, and adopting several design changes intended to appease critics of the current system). For details on how the new bill responds to critiques of the Air Resource Board's initial cap-and-trade program, see Eric Biber, *Thoughts on AB 398*, LEGAL PLANET (July 14, 2017), https://legal-planet.org/2017/07/14/thoughts-on-AB-398 [https://perma.cc/CP2G-VTQK], and Cara Horowitz, *California Extends Its Cap-and-Trade Program Through 2030*, LEGAL PLANET (July 17, 2017), https://legal-planet.org/2017/07/17/california-extends-its-cap-and-trade-program-through-2030/ [https://perma.cc/HC4U-YBCU].

57. *See* Assemb. B. 32. For example, rather than pursue legislation as a way to reform energy governance, New York State has elected to dramatically overhaul its electricity regulation through proceedings at the state Public Service Commission, which is enacting these sweeping reforms under its long-standing authority to ensure "just and reasonable" rates. *See* N.Y. PUB. SERV. LAW § 65 (McKinney 2011); *see also* State of N.Y. Public Serv. Comm'n, *Order Adopting a Ratemaking and Utility Revenue Model Policy Framework*, N.Y. STATE DEP'T PUB. SERV. 3, 7–8 (May 19, 2016), http://documents.dps.ny.gov/Public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-M-0101&submit=search [https://perma.cc/Z65P-7RFH] [hereinafter N.Y. May 2016 Order].

or nuclear power plants;[58] turning down thermostats and donning sweaters; displacing coal with hydraulically fractured natural gas; ignoring the problem in favor of the expediency of short-term growth; or (relatedly and belatedly) shooting massive quantities of sulfur dioxide into the stratosphere to try to jury-rig a climate that's been given up as lost.[59] Because so much of this decisionmaking occurs within bureaucracy, citizens and interest groups wishing to express opinions on these options often have to participate at the subpolitical level.

For this reason, this Article focuses on how citizens and consumers are participating in energy decisionmaking in ways that extend beyond the classic modes of voting or seeking to influence legislators. And I refer to the broad movement toward this more expansive participation as "energy democracy," even though the term proves inapt at times for reasons explored herein. Sometimes this same movement flies under other reform banners, including those of consumer empowerment, consumer participation, local energy, and energy justice.[60] I am particularly interested in the ways in which reformers in these various strands employ the rhetoric of "democracy" in characterizing their aims, and I illustrate in the coming Parts how all these calls for reform attempt to justify themselves on democratic grounds.

The second point of semantic clarification concerns what I mean by "energy." The laws and governance of energy are broad and complex enough that any single article can scarcely cover the potential democratization of them all. Energy law writ large includes the laws governing extraction of raw energy resources; energy imports and exports; environmental review; energy transport infrastructure, including oil and gas pipelines as well as rail and truck transport; electricity generation, transmission, and distribution; planes, trains, and automobiles, and their accompanying infrastructure; the disposal of energy waste such as spent nuclear fuel and coal ash; and research, development, and deployment of new energy sources.[61]

Consistent with existing discussions of energy democracy, I focus in this Article specifically on electricity law and electricity governance—that is, the bodies and laws that govern how the United States generates, transmits, and distributes enough electricity to power the homes and businesses of its 324 million residents. Much of the conversation around energy democracy focuses here because "America does not run on gas, oil, or coal any more than

58. Interestingly, the Nuclear Regulatory Commission has long viewed public participation as a "vital ingredient" in its licensing procedures, precisely because of the many value-related tradeoffs that nuclear energy entails. *See* Cuéllar, *supra* note 33, at 452 (quoting N. States Power Co., 1 N.R.C. 1, 2 (1975)).

59. *See* David Keith, A Case for Climate Engineering 4 (2013).

60. See *infra* Parts II and III for examples of how these terms interweave with "energy democracy."

61. *See, e.g.*, Lincoln L. Davies et al., Energy Law and Policy, at ix-xi (2015).

we may one day run on wind, solar, or tidal power. America runs on electricity."[62] Moreover, as Section I.C explains, multiple forces are converging to make electricity regulators fundamentally reexamine their aims and methods, opening up room for injecting some version of democracy into the field. But to understand the impetus for change requires a primer on the field as it stands.

B. *An Overview of Existing Energy Institutions*

There is an obvious reason that "democracy"[63] has been relatively slow in coming to the field of energy law: the United States has a byzantine bureaucratic structure for governing electric energy. It involves federal, regional, state, and local oversight of for-profit, not-for-profit, and cooperatively owned ventures that manage the production, generation, transmission, transportation, and distribution of electricity.[64] Such dense, bureaucratic layering does not lend itself easily to democratic interventions.

The Federal Power Act of 1935 divides jurisdiction over electricity between federal and state governments, with federal regulators placed in charge of "wholesale" electricity sales—that is, sales for resale, or large-scale purchases made between generators and utilities—and interstate transmission (large lines that carry electricity over long distances).[65] The Act reserves for states authority over "retail" sales—that is, final sales from utilities to consumers—and the distribution system (the smaller lines that deliver electricity to homes and businesses).[66]

Both the federal government and all state governments have set up commissions to ensure that sales terms and prices under their jurisdiction are "just and reasonable."[67] At the federal level, the relevant commission is the Federal Energy Regulatory Commission (FERC). At the state level, it is the state Public Utility Commission (PUC).[68] Traditionally, these commissions ensured just and reasonable rates by granting monopoly service territories to individual utilities, and then holding periodic "rate cases" to examine, utility

62. Gretchen Bakke, The Grid: The Fraying Wires Between Americans and Our Energy Future, at xi (2016). Bakke's quote underplays the extent to which the American transportation sector remains heavily dependent on oil, but one gets the idea.

63. From here forward, when I use the term "democracy," I mean democracy as defined above as the "subpoliticization" of the field of energy governance. *See supra* note 51.

64. See Boyd & Carlson, *supra* note 38, at 820–40, for a more detailed exposition of electricity law's structure.

65. 16 U.S.C. § 824(a) (2012).

66. *Id.* § 824(b).

67. *Id.* § 824d(a) (conferring this authority on the Federal Energy Regulatory Commission); Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 603 (1944) (explaining that energy regulators' primary task—"the fixing of 'just and reasonable' rates"—requires case-by-case "balancing of the investor and the consumer interests"); *see also, e.g.*, N.Y. Pub. Serv. Law § 65 (McKinney 2011) (conferring similar authority on state-level regulators); S.C. Code Ann. § 58-27-810 (2015) (same).

68. *See* Boyd & Carlson, *supra* note 38, at 813.

by utility, costs and charges.[69] Most state commissions still do precisely this: utilities come before the commission every few years for a rate case, in which the commission determines what infrastructure the utility needs to build, how much of a return on its investment the utility should earn to keep it financially healthy, and what the utility's operating expenses are likely to be.[70] The commission then translates this calculation into the per-kilowatt-hour rates that we all see on our electricity bills.[71] Commissions typically allow outsiders with a clear interest in the rate case to participate as "intervenors," but rate cases remain by and large technical, expert affairs.[72]

At the federal level, significant changes in electricity regulation have taken place over the last twenty-five years. Following a general regulatory trend toward allowing markets rather than regulators to determine prices,[73] FERC undertook a fundamental restructuring of its electricity regulations during the 1990s. Instead of requiring utilities to file their rates, FERC now allows wholesale rates to be determined by wholesale markets, where generators bid in their electricity for sale and market administrators accept the lowest bids available to satisfy the electricity needs of purchasing utilities.[74] These markets—and the transmission assets of participating utilities—are now managed by not-for-profit "regional transmission organizations" (RTOs) or "independent system operators" (ISOs). [75] These regional entities

69. *Id.* at 827.

70. *See id.* at 836–39 (explaining that thirty-two states work either under a traditional or "hybrid" model of regulation, where the state retains "the traditional [utility] franchise at the retail level").

71. *See* Regulatory Assistance Project, Electricity Regulation in the US: A Guide 31–58 (2011), http://raponline.org/wp-content/uploads/2016/05/rap-lazar-electricity regulationintheus-guide-2011-03.pdf [https://perma.cc/ASC6-XPXR].

72. Because of proceedings' technical complexity, intervention requires significant time and resource investments. *See* William T. Gormley, Jr., The Politics of Public Utility Regulation 34 (1983); Charlie Harak et al., Nat'l Consumer Law Ctr., A Consumer's Guide to Intervening in State Public Utility Proceedings, at vii–xiii (2004), http://www.nclc.org/images/pdf/energy_utility_telecom/additional_resources/consumers_guide.pdf [https://perma.cc/RJE8-ZBFD]; Regulatory Assistance Project, *supra* note 71, at 29–30.

73. *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998) (exploring the causes of the nation's changed approach to industry regulation, including the reduced role of agencies and the new goals of promoting competition and maximizing consumer choice).

74. *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385) (requiring utilities to allow other utilities to access their transmission lines at non-discriminatory rates); *see, e.g.*, Regional Transmission Organizations, 65 Fed. Reg. 810, 810 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35) (authorizing and setting criteria for the establishment of regional electricity markets).

75. Utilities opt into these regional markets, and upon doing so, they agree to grant the system operator operational control of their transmission, although the utilities retain ownership. *See* Ill. Commerce Comm'n v. Fed. Energy Regulatory Comm'n, 721 F.3d 764, 769 (7th Cir. 2013).

range in size from single state to fifteen state,[76] and now serve about two-thirds of U.S. electricity customers.[77]

Not all states have opted to let their utilities participate in these regional markets. Particularly in the southeast and most of the west, states have chosen to forgo these markets and retain full control over electricity generation, transmission, and distribution (which all continue to be owned by a few "vertically integrated" utilities in the state).[78] In contrast, most states that have permitted their utilities to join RTOs or ISOs have also required divestment of generation assets by their utilities, such that only transmission and distribution remain regulated monopolies.[79] In many of these states, these regulated utilities continue to provide all services to end-use customers within their monopoly service territory.[80] But a handful of states have decided to build markets "all the way down,"[81] such that end-use consumers can now shop among "retail suppliers" of electricity.[82]

Here's what's important about this regulatory scheme for purposes of energy democracy: it's complicated, multilayered, and immensely technical. It has but a few formal, underutilized avenues for injecting citizen input regarding policy preferences.[83] A citizen interested in influencing policy choices regarding her home's electricity supply might need to participate in processes at her local city council, her state PUC, her regional RTO, and FERC—and she would have to discern which concerns about the system fell under the purview of each entity. Nevertheless, these complexities of the system evoked only occasional complaint during most of the twentieth century, when the United States was dominated by large, centralized electricity infrastructure.[84] The major utility corporations that owned the bulk of this infrastructure delivered acceptably cheap, reliable power to American homes and businesses, keeping the public quiescent and regulatory puzzles to a

76. *About Us*, MISO, https://www.misoenergy.org/AboutUS/Pages/AboutUs.aspx [https://perma/cc/K3LC-9EPS].

77. Michael H. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 544 (2007); *see also Ill. Commerce Comm'n*, 721 F.3d at 769 (noting that RTOs control "more than half" of the nation's electrical grid).

78. *See* Boyd & Carlson, *supra* note 38, at 836 ("Twenty U.S. states continue to regulate electricity under a traditional cost-of-service model . . . .").

79. *Id.* at 837–38.

80. *Id.*

81. *Cf.* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 11 (2010) (coining the phrase "federalism-all-the-way-down" to describe the ways in which federalism extends beyond the state level).

82. Boyd & Carlson, *supra* note 38, at 837.

83. See *infra* Part IV for more on existing avenues of participation.

84. *See* HIRSH, *supra* note 1, at 53–55.

minimum. Accordingly, one of the major questions that must be asked about energy democracy is, *why now*?[85]

C. *The Push for Energy Democracy*

It is impossible to assert one cause, or set of causes, behind the present push for energy democracy. The drivers are complex and multifaceted. In this Section, however, I claim that three developments have lent momentum to the discussion of energy law's democratization: climate change, market changes, and technological developments.

Perhaps the most significant driver of the current calls for energy democracy is climate change. There is, of course, substantial debate in the United States about whether and how quickly to respond to climate change. But there is growing appreciation—both domestically and internationally—that legally mandated decarbonization is likely necessary to stave off catastrophic harm to humanity in the coming centuries.[86] Many subnational governments, including several states and localities within the United States,

85. To be sure, there have been moments during the history of electricity when concerns other than abundant, cheap power have filtered into the field—most notably, during the debate over municipalization of electricity services around the turn of the twentieth century, the movement to bring electricity to rural residents in the 1930s, the push for need-based electricity pricing during the energy crises of the 1970s, and the ongoing debate over the risks and benefits of nuclear power. *See* Steven Mark Cohn, Too Cheap to Meter: An Economic and Philosophical Analysis of the Nuclear Dream (1997); Graetz, *supra* note 2, at 61–78 (on resistance to nuclear); Hirsh, *supra* note 1 (broad history of utility regulation in the twentieth century); David E. Lilienthal, TVA: Democracy on the March 19–20 (20th anniversary ed. 1953) (on rural electrification); David E. Nye, Electrifying America: Social Meanings of a New Technology, 1880–1940 (1990) (broad history of electricity in the United States); Daniel T. Rodgers, Atlantic Crossings: Social Politics in a Progressive Age 135–36 (1998) (on municipalization movements); Richard Rudolph & Scott Ridley, Power Struggle: The Hundred-Year War over Electricity (1986) (on public power and nuclear energy); Linda Cohen, *Innovation and Atomic Energy: Nuclear Power Regulation, 1966–Present*, Law & Contemp. Probs., Winter–Spring 1979, at 67, 67–68 (tracing the impacts of public participation on nuclear licensing procedures during the 1970s); Outka, *supra* note 37; Welton, *supra* note 37. I do not discuss these movements further here, in part because of space constraints, and in part because although these debates focused on widening the lens of energy law, none of them directly called for the democratization of the field. Thus, the present movement is more focused on democracy *as such* than any movements in the past were.

86. The most recent international climate change agreement, the Paris Accord, sets a goal of maintaining warming to less than "1.5° C above pre-industrial levels." Paris Agreement, para 17, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf [https://perma.cc/A4SB-ZJ3P]; *see also* James H. Williams et al., Pathways to Deep Decarbonization in the United States, at xiv (2014), http://deepdecarbonization.org/wp-content/uploads/2015/11/US_Deep_Decarbonization_Technical_Report.pdf [https://perma/cc/2KQF-FJKT] (outlining the steps the United States would need to take to meet its portion of the effort to reach this goal, including almost complete decarbonization of the electricity sector, at the same time its size doubled); The White House, United States Mid-Century Strategy for Deep Decarbonization (2016), https://unfccc.int/files/focus/long-term_strategies/application/pdf/mid_century_strategy_report-final_red.pdf [https://perma.cc/TNJ8-39MA] (providing the Obama Administration plan for cutting emissions 80% by 2050).

have already committed to levels of emissions reductions that will require radical transformation of the electricity sector.[87]

Much of the present call for "energy democracy" stems from recognition of the scale of the changes and choices at hand for the sector. Technocratic expertise provides limited grounds for making these choices. The question of how to transform energy is one of values: although we have many technologies at hand to help in this transition—from nuclear energy, to large-scale renewables, small-scale distributed energy, energy storage, and carbon capture and sequestration—none of them is without expense, risks, or complications. Which expenses and risks to bear, and which to avoid, is far from a technocratically determinable choice.[88]

That said, the existence of climate change does not inexorably point toward the need for democratization of energy law. Indeed, those committed to climate change have much to risk in pushing for the democratization of energy: given Americans' disparate views about the existence and exigency of climate change, it is not clear that democratization of the field will lead to greater action.[89]

However, there are a few reasons to believe that it might. First, Americans agree on "clean energy" much more than they do on climate per se: "More than 80 percent, including wide majorities of Democrats, Republicans and independents, favor expansion of the solar and wind industries."[90] Second, psychological research has demonstrated that Americans' "belief" in climate change shifts in response to the array of strategies available to combat the problem. Most notably, those inclined to deny the existence of the problem are more likely to accept it when armed with the knowledge that geoengineering—that is, the intentional technological manipulation of the climate system—presents a potentially viable solution.[91] Similarly, deliberation appears to enhance the taste of Americans for clean energy and energy

87. As of November 2017, 188 subnational jurisdictions, representing over 1 billion people, have signed an "Under 2 MOU [Memorandum of Understanding]" jointly committing to reduce their emissions 80% to 95% below 1990 levels by 2050. *The Memorandum of Understanding (MOU) on Subnational Global Climate Leadership*, UNDER2, http://under2mou.org/the-mou/ [https://perma.cc/8BK2-Q47D]. U.S. signatories include California, Connecticut, Massachusetts, Minnesota, New Hampshire, New York, Oregon, Rhode Island, Vermont, and the cities of Los Angeles, New York, Oakland, Portland, Sacramento, San Francisco, Seattle, and Austin. *Under2 Coalition*, UNDER2, http://under2mou.org/coalition/ [https://perma.cc/NP82-G6BM]

88. Moreover, little is currently known about public preferences on these matters. *See* Kaspersen & Ram, *supra* note 20, at 90.

89. Connie Roser-Renouf et al., *Global Warming's Six Americas and the Election, 2016*, YALE PROGRAM ON CLIMATE CHANGE COMM. (July 12, 2016), http://climatecommunication.yale.edu/publications/six-americas-2016-election/ [https://perma.cc/6ZKK-PLUM].

90. Tatiana Schlossberg, *Poll Finds Deep Split on Climate Change. Party Allegiance Is a Big Factor.*, N.Y. TIMES (Oct. 4, 2016), http://www.nytimes.com/2016/10/05/science/climate-change-poll-pew.html?_r=0 (on file with the *Michigan Law Review*).

91. *See* Dan M. Kahan et al., *Geoengineering and Climate Change Polarization: Testing a Two-Channel Model of Science Communication*, 658 ANNALS AM. ACAD. POL. & SOC. SCI. 192, 206 (2015).

conservation: strikingly, in one (now-dated) Texas deliberative poll, the number of people prepared to pay "at least $1 more a month for more environmentally friendly renewable energy resources" increased from 55% to 88% after a weekend of deliberation, and the proportion of participants "giving first priority to energy conservation" rose 31%.[92] These surveys and studies suggest that there might be more room for agreement within discussions of energy policy than there is when these concerns are channeled into the partisanship of representative democracy.[93]

Even if energy democracy's proponents are optimistic about the possibilities for democratization advancing climate action, climate change cannot fully explain the present push. After all, the problem has been with us for at least three decades now.[94] The major changes to energy law that have happened over the same time frame are another driver of "energy democracy."[95] In particular, FERC's creation of wholesale electricity markets in much of the country empowered new participants, often peddling new technologies, on both the buyer and seller sides. Small-scale generators know they have an outlet for the electricity they produce. [96] Small-scale electricity retailers, including municipally owned utilities and cooperatives, know they

92. James S. Fishkin et al., *Deliberate Polling and Public Consultation*, 53 PARLIAMENTARY AFF. 657, 662–63 (2000) (reporting these changes in attitudes "[a]fter participation in a weekend discussion," during which participants were given "information about the costs and benefits of both environmental protection and cheap energy"). There are limited more recent results available for deliberative polling on energy preferences. One 2011 study of Idahoans' energy preferences conducted a daylong deliberative poll in which participants were given a briefing document and an hour-long review of the briefing document, and then asked to participate in small group discussions and a panel asking questions of experts. That study found limited shift in overall attitudes on energy, although the greatest shifts in attitude occurred regarding fossil fuels and nuclear energy (for which support declined). *See* Troy E. Hall et al., *Evaluating the Short- and Long-Term Effects of a Modified Deliberative Poll on Idahoans' Attitudes and Civic Engagement Related to Energy Options*, 7 J. PUB. DELIBERATION 1, 9–11 (2011). A 2007 deliberative poll of Vermonters' energy preferences using similar methods found increased support for renewables and energy efficiency, and decreased support for oil after the deliberative poll. *See* ROBERT C. LUSKIN, CTR. FOR DELIBERATIVE OP. RESEARCH, REPORT ON THE DELIBERATIVE POLL ON 'VERMONT'S ENERGY FUTURE', 18–19 (2007), http://web.mit.edu/cron/Backup/project/urban-sustainability/Old%20files%20from%20summer%202009/Ingrid/Urban%20Sustainability%20Initiative.Data/Urban%20Sustainability%20Initiative.Data/PDF/Vermont_DP_Report_Final_doc.zip-0147664645/Vermont_DP_Report_Final_doc.zip.pdf [https://perma.cc/U4KQ-UCTF].

93. Hari M. Osofsky and Jacqueline Peel make this argument at length in Osofsky & Peel, *supra* note 6. On climate and partisanship's link, see Dan M. Kahan, *Climate-Science Communication and the* Measurement Problem, 36 ADVANCES POL. PSYCHOL. 1, 11 (2015).

94. United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107.

95. *See supra* Section I.B.

96. Congress facilitated these changes by passing the Public Utilities Regulatory Policies Act of 1978 (PURPA), which required utilities to purchase the output of small nontraditional generators at the "avoided cost" of the utility generating the power itself. *See* Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 16 U.S.C. §§ 2601–2645 (2012)); 18 C.F.R. pt. 292 (outlining the avoided cost rules); *see also* HIRSH, *supra* note 1, at 81–131 (describing the impact of PURPA).

no longer have to rely on contracts with major utilities to procure electricity for their consumers.[97]

These discrete market penetrations have led to a larger conceptual shift in the field of electricity. Supply and demand once occupied neat sides of an electricity diagram, with large companies producing and transmitting electricity to be parceled out and delivered to those who demanded it. Now, every consumer can herself be an energy supplier as well, by putting solar panels on her roof, or bidding her ability to *cut* demand at a certain time, by a certain amount, into the wholesale electricity market.[98] This consumer-supplier breakdown threatens many of the basic tenets of electricity grid design and regulatory structure, by transforming the previously passive "ratepayer" into an active "participant" in the system.[99]

One final factor behind the current push for energy democracy is the rapid proliferation of clean energy technologies over the past several years. Of course, this growth is closely related to the rise of concern about climate change, as much of it would have been impossible without policies put in place to promote renewable energy on climate change grounds.[100] Nevertheless, many technologies have made more rapid progress than experts predicted they would,[101] such that renewables now form the predominant new source of U.S. electricity generation.[102]

97. *See* Suedeen G. Kelly, *Municipalization of Electricity: The Allure of Lower Rates for Bright Lights in Big Cities*, 37 NAT. RESOURCES J. 43, 43–45 (1997).

98. Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 763 (2016) (describing the rise of "demand response," whereby consumers sell their ability *not* to consume power into the grid).

99. *See* Jacobs, *supra* note 36, at 520–21; Welton, *supra* note 9, at 611–13 (describing the basic framework established in the early twentieth century that governed the provision of electricity from public utilities to consumers).

100. "More than half of all growth in renewable electricity (RE) generation (60%) and capacity (57%) since 2000 is associated with state [renewable procurement] requirements." GALEN BARBOSE, LAWRENCE BERKELEY NAT'L LAB., U.S. RENEWABLES PORTFOLIO STANDARDS: 2016 ANNUAL STATUS REPORT 2 (2016), https://emp.lbl.gov/sites/all/files/lbnl-1005057.pdf [https://perma.cc/A4Z2-5VEG]; *Promoting Clean, Renewable Energy: Investments in Wind and Solar*, WHITE HOUSE, https://www.whitehouse.gov/recovery/innovations/clean-renewable-energy [https://perma.cc/466N-79NX] (asserting that the American Reinvestment and Recovery Act is responsible for a sizeable portion of wind energy's growth).

101. Chris Tomlinson, *Renewable Energy Growing Faster than Expected: Worries that Wind and Solar Power Would Destabilize Power Grids Unproven*, HOUS. CHRON. (Oct. 27, 2016), http://www.houstonchronicle.com/business/outside-the-boardroom/article/Renewable-energy-growing-quick-than-expected-10415616.php [https://perma.cc/GJS5-4ZMV].

102. Renewable energy accounted for a record-breaking 69% of all power capacity installed in the United States in 2015. Zachary Shahan, *Renewables = 69% of New US Electricity Capacity in 2015*, CLEAN TECHNICA (Feb. 15, 2016), https://cleantechnica.com/2016/02/15/renewables-69-of-new-us-electricity-capacity-in-2015/ [https://perma.cc/L8K2-8TQS].

Until this recent growth, utilities and regulators seemed to assume that consumer-side technologies (often referred to as "distributed energy resources")[103] would have a limited impact on the overall grid and utility business models.[104] Now, distributed technologies' dominance has left utilities and regulators reeling. A summer 2016 white paper published by the trade association representing public utility commissioners observed that these technologies are "turning the traditional model upside down."[105] Similarly, utilities themselves have suggested that emerging technologies pose an existential threat to their traditional business model.[106]

These three forces—climate change imperatives, market changes, and technological progress—explain much of the call for more democratic control of the electricity grid. The old, technocratic, closed-door regulatory model is ill-suited for present conditions and no longer proves satisfactory to anyone involved, including regulators, regulated utilities, and the class formerly known as "consumers." The evolving regulatory and technical landscape has empowered a host of new potential participants in the electricity grid—including you, me, and every other electricity consumer in the nation—exponentially expanding the number of players with an economic stake in the future shape of the system. And the imperative to respond to climate change, and its resultant backlash, raises challenging questions about the shape we want our future electricity grid to take.

Many of these questions—perhaps most, depending on how the politics play out—are likely to be answered in the regulatory, rather than legislative, arena. Regulators in many states have little more than their broad "just and reasonable" mandates to guide them. In states with more specific legislative goals, regulators often receive a mandate to cut carbon "*X* amount by *Y*

103. DNV GL, A Review of Distributed Energy Resources 1 (2014), http://www.nyiso.com/public/webdocs/media_room/publications_presentations/Other_Reports/Other_Reports/A_Review_of_Distributed_Energy_Resources_September_2014.pdf [https://perma.cc/ZSC9-UVRW].

104. *See* Edison Elec. Inst., Future of Retail Rate Design (Eric Ackerman & Paul De Martini eds., 2012), http://www.eei.org/issuesandpolicy/stateregulation/Documents/Future%20of%20Retail%20Rate%20Design%20v4%20021713%20eta%20-%20pjd2.pdf [https://perma.cc/69CN-F557].

105. Staff Subcomm. on Rate Design, Nat'l Ass'n. of Regulatory Util. Comm'rs, NARUC Manual on Distributed Energy Resources Compensation 15 (drft. 2016), http://pubs.naruc.org/pub/88954963-0F01-F4D9-FBA3-AC9346B18FB2 [https://perma.cc/78P4-UZDC].

106. *See* Edison Elec. Inst., *supra* note 104, at 2 (arguing that "rates need to change" in order to avoid an "unsustainable path" for the utility industry).

date,"[107] or to achieve a certain percentage of electricity supply from renewable energy.[108] But within these parameters, there are broad choices to be made among policy designs and energy-supply options, and questions of how to balance the ever-present worries of affordability and reliability within an expanding set of goals. These exigent, value-laden choices that agencies must make put them in a place of having to seek their own democratic grounding—rather than being able to fall back on the proximate democratic legitimacy of elected legislators.[109]

Before we get anywhere near answers to how these choices will be resolved, we must attend to the preliminary matter of the democratic architecture that regulators might build in which to allow these debates to unfold. Even if one accepts that energy law needs more democracy, significant questions remain: How will we shape the governance context in which these debates play out? What structures should we adopt for injecting more voices into electricity decisionmaking? The potential mechanisms of energy democracy—consumer choice, local control, and access to process—are, in turn, the focus of the following three Parts.

II. Energy Democracy as Consumer Choice

The first line of energy governance reform that often employs democratic tropes is that of *consumer choice*. In this Part, I explain the vision behind the consumer-choice version of energy democracy, explore the concrete reforms necessary to bring this vision into being, and analyze the democratic implications of these reforms. The following Parts apply this same analytical framework to the two other visions for energy democracy discussed in the introduction—local control and access to process.

A. *Articulating the Vision: Consumer Participation and Empowerment*

Regulatory staff in California have a vision for the electricity grid's future. In a 2015 staff white paper, they describe the future grid as "smarter,

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107. *See, e.g.*, California Global Warming Solutions Act of 2006, ch. 488, 2006 Cal. Stat. 3419 (codified at Cal. Health & Safety Code §§ 38500–38599 (West 2016)) (requiring regulators to design a scoping plan to reduce the state's emissions to 1990 levels by 2020); Global Warming Solutions Act, ch. 298, 2008 Mass. Acts 1154 (codified at Mass. Gen. Laws. ch. 21N §§ 1–9 (2016)) (requiring the state to reduce emissions 10%–25% of 1990 levels by 2020 and at least 80% by 2050).

108. Twenty-nine states have this type of requirement in place. *See* DSIRE, Renewable Portfolio Standard Policies (2016), http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2014/11/Renewable-Portfolio-Standards.pdf [https://perma.cc/EV8H-A7B8].

109. *See* Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 Geo. Wash. L. Rev. 1343, 1349 (2011) (explaining the democratic legitimacy challenge facing bureaucrats); *cf.* Blake Emerson, *Administrative Answers to "Major Questions": A Progressive Theory of Agency Statutory Interpretation*, 102 Minn. L. Rev. (forthcoming May 2018) (manuscript at 30–35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818786 [https://perma.cc/QTK2-XPD9] (observing that U.S. agencies have strayed far from the Weberian ideals of instrumental rationality, and now make value-laden decisions as a matter of course).

more flexible, more integrated, more market-based, and *more democratic*."[110] What they mean by "more democratic" becomes apparent in the following sentence: "Lines are beginning to be blurred in terms of who is providing services and who is consuming them, especially when consumers start morphing into 'pro-sumers'—customers who consume as well as produce energy."[111] Such grid participation, regulators have concluded, will inject democratic choices into energy governance by creating an energy future where utilities and customers become "partners."[112]

California is far from alone in its aim to create this kind of "participatory" grid.[113] New York is taking the concept further: in 2015, its PUC launched a proceeding dedicated to "Reforming the Energy Vision [REV]," which will "reorient both the electric industry and ratemaking paradigm toward a consumer-centered approach."[114] Regulators there believe that this emphasis on consumer choice will "enable the development of a resilient, climate-friendly energy system."[115] Several other states are now following suit.[116]

These theories of "customer empowerment" and "grid participation" have become key concepts in what Joseph Tomain recently described as the "democratization of energy."[117] Grid participation can seem a bit abstract, so it may help to describe in more concrete terms what "consumer choice"

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110. Kristin Ralff-Douglas & Marzia Zafar, Policy & Planning Div., Cal. Pub. Util. Comm'n, Electric Utility Business and Regulatory Models 3 (2015) (emphasis added), http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Organization/Divisions/Policy_and_Planning/PPD_Work/PPDElectricUtilityBusinessModels.pdf [https://perma.cc/Q9E5-99N9].

111. *Id.*

112. Ralff-Douglas & Zafar, *supra* note 19, at 4; *see also* Ralff-Douglas & Zafar, *supra* note 110, at 4–5.

113. I detail the movement toward a participatory grid more (and examine its relationship to goals of energy justice) in Welton, *supra* note 9.

114. *See* State of N.Y. Pub. Serv. Comm'n, *Order Adopting a Regulatory Policy Framework and Implementation Plan*, N.Y. St. Dep't Pub. Serv. 1–3 (Feb. 26, 2015) [hereinafter N.Y. Feb. 2015 Order], http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-m-0101&submit=search£y+Case+Number [https://perma.cc/8HWR-LGL5].

115. *Id.* at 1.

116. *See, e.g.*, Haw. Pub. Util. Comm'n, Exhibit A: Commission's Inclinations on the Future of Hawaii's Electric Utilities (2014), http://puc.hawaii.gov/wp-content/uploads/2014/04/Commissions-Inclinations.pdf [https://perma.cc/8LGR-Y27S]; Minn. Pub. Utils. Comm'n, Staff Report on Grid Modernization (2016); Gavin Bade, *Ohio's REV: PUCO to Explore Grid Modernization, Utility Reform in PowerForward Initiative*, Utility Dive (Mar. 8, 2017), http://www.utilitydive.com/news/ohios-rev-puco-to-explore-grid-modernization-utility-reform-in-powerforw/437682/ [https://perma.cc/ANY4-9Y44]; Robert Walton, *Maryland's REV: How Utility Regulators Plan to Tackle Business Model, DER Reforms*, Utility Dive (Oct. 10 2016), http://www.utilitydive.com/news/marylands-rev-how-utility-regulators-plan-to-tackle-business-model-der-r/427681/ [https://perma.cc/3RCU-2D4D]; *Investigation by the Department of Public Utilities on Its Own Motion into Modernization of the Electric Grid*, Mass. Dep't Pub. Util. (June 12, 2014), http://web1.env.state.ma.us/DPU/FileRoomAPI/api/Attachments/Get/?path=12-76%2fOrder_1276B.pdf [https://perma.cc/U2Q9-KQRY].

117. Tomain, *supra* note 19, at 1138–39.

looks like. The overarching precept is that policies will be put in place that give customers "the ability to not only generate their own carbon-free electricity, but also manage and control how their energy is used in a way that is interactive and accessible."[118] In practice, the ideal grid participant might generate some of her power via rooftop solar panels and monitor her electricity usage through a smart meter. She would own smart appliances—such as a dishwasher, thermostat, and washer and dryer—that respond to real-time electricity prices by automatically starting and stopping based on grid-wide power demand. And she would earn money from plugging in her electric vehicle to act as grid storage when not in use.[119] Choosing to participate in this fashion allows her to use power when it is cheapest, and to sell power back to the grid when it is most expensive. Conveniently, this version of democracy simultaneously saves her money and gives her the satisfaction of helping to alleviate climate change.

B. *From Vision to Concrete Reforms: Making the Grid Participatory*

To reach this consumer-choice ideal will require three simultaneous lines of reform. The first is rationalization of energy pricing, so that its full cost to society becomes apparent from the actual price consumers pay.[120] The second is regulatory-regime reform, to change the role that utilities play in the provisioning of electricity. And the final element is consumer engagement.

Let me describe these further in turn. The first important feature of consumer-choice energy democracy is that it does not rely on consumer beneficence alone. Instead, consumer-choice models give consumers financial incentives to purchase—or reduce purchases—of the kinds of energy that policies are designed to promote or disfavor.

There are two components to rationalizing energy pricing. The first is simple cost alignment among energy markets. Right now, most electricity consumers pay a flat fee per kilowatt-hour for electricity, irrespective of the time it is consumed. But electricity's wholesale cost—the cost to generate and supply power—varies considerably by time of day and time of year.[121]

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118. Devi Glick, *Ten Things More Important than the Clean Power Plan in Limiting Carbon Emissions in the U.S.*, RMI Outlet (Feb. 11, 2016), http://blox.rmi.org/blog_2016_02_11_10_things_more_important_than_the_clean_power_plan [https://perma.cc/P68V-5EAV].

119. *See* Int'l Energy Agency, Residential Prosumers—Drivers and Policy Options (Re-Prosumers), at 5–6 (2014), http://iea-retd.org/wp-content/uploads/2014/06/RE-PROSUMERS_IEA-RETD_2014.pdf [https://perma.cc/BP4Z-HWRC]; All. to Save Energy, Power Generation & Smart Grid 5 (2013), http://www.ase.org/sites/ase.org/files/ee_commission_power_generation_report.pdf [https://perma.cc/88ZB-BNDS]; *see also* Ralff-Douglas & Zafar, *supra* note 19, at 7 (describing the "smart customer" or "home energy manager").

120. *See* A.C. Pigou, Wealth and Welfare 164 (1912).

121. *See* Severin Borenstein et al., *Dynamic Pricing, Advanced Metering, and Demand Response in Electricity Markets* 5 (Ctr. for the Study of Energy Mkts., Working Paper No. 105, 2002), https://escholarship.org/uc/item/11w8d6m4 [https://perma.cc/X8KY-4Q7N] ("In most markets, the wholesale price changes every half-hour or hour.").

Thus, one element of enabling consumers to make better energy choices is showing them the true costs of their consumption decisions with respect to time—that is, having consumers pay "dynamic" prices for their electricity, which vary alongside wholesale prices.[122] Then, the consumer's choice becomes either to adjust time of consumption and maintain low-cost electricity, or to continue ignorant consumption and pay more.

The second component to rationalizing energy pricing is Pigouvian tax reform. Economist Arthur Pigou famously advocated in the early twentieth century that the best way to handle societal ills like pollution is to reflect their cost to society within prices.[123] To accomplish this aim with respect to energy requires better reflecting evolving societal values within the price of various energy sources. Accordingly, under this model, different jurisdictions—with different energy system goals—might price electricity differently.[124] We already have seen some such variations emerge: nine northeastern states as well as California impose a carbon price, via cap-and-trade regimes, on their electricity sectors.[125] Other states emphasize the importance of developing renewable energy by requiring their utilities to procure a certain percentage of their electricity from renewable sources.[126] A suite of additional incentive and tax policies at the state and federal levels also attempt to better align energy pricing with societal goals.[127]

In addition to pricing reforms, a consumer-choice energy democracy requires significant change in the structure of state public utility regulation. Currently, PUCs set per-kilowatt-hour prices for electricity based on a calculation of utility operating expenses, coupled with a "rate of return" provided for utilities' capital investments into grid infrastructure.[128] This regulatory structure creates a risk that utilities will persuade regulators to set rates that result in the overbuilding of generation and transmission.[129] And it gives utilities a distinct *disincentive* to integrate customer offerings to the

122. "Dynamic pricing" could take several different forms, including real-time pricing, time-of-use rates, or critical peak pricing. On these design details, see *id.* at 5–7.

123. *See* Pigou, *supra* note 120, at 164; *see also* William J. Baumol, *On Taxation and the Control of Externalities*, 62 Am. Econ. Rev. 307 (1972).

124. Which, of course, goes to show that setting Pigouvian taxes is itself an exercise in values and political judgment. *See* Douglas A. Kysar, Regulating from Nowhere: Environmental Law and the Search for Objectivity 100–06 (2010); Purdy, *supra* note 33, at 263.

125. *See* Cal. Code Regs. tit. 17, § 95801 (2016) (establishing a greenhouse gas cap-and-trade program for California); Regional Greenhouse Gas Initiative, http://www.rggi.org/ [https://perma.cc/Y5GT-XCCQ] (explaining the carbon dioxide cap-and-trade program covering nine northeastern states).

126. *See* DSIRE, *supra* note 108.

127. *See generally* DSIRE, http://www.dsireusa.org [https://perma.cc/JMT6-ARST] (collecting and cataloguing state incentives for renewables and energy efficiency).

128. *See* 1 Alfred E. Kahn, The Economics of Regulation: Principles and Institutions 35–36 (1970).

129. *See* Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 Am. Econ. Rev. 1052 (1962) (predicting that utilities will do just this).

grid, which cut down on the need for utility infrastructure investment and utility-supplied electricity.[130]

For these reasons, those states focused on creating "consumer choice" are also reconsidering the role of the utility—and the structure of utility regulation—in the future electricity grid. New York has moved the furthest in this direction: its REV proceeding is turning the state's utilities into "distributed system platform" (DSP) providers."[131] As DSPs, New York utilities are responsible for encouraging and aggregating as many demand-side (read: consumer) resources as possible, before purchasing any electricity from the wholesale market.[132] Compensation going forward will be at least partially dependent on the utility's success in attracting such resources.[133] California has taken an even more market-driven approach, which carves out less of a role for traditional utilities. Under the California Independent System Operator's (CAISO's) "Distributed Energy Resource Provider" proposal, independent companies may bid aggregated quantities of distributed energy resources[134] directly into CAISO's wholesale electricity markets.[135]

Finally, the third component of consumer choice is consumer engagement. As California regulators have observed, "If the customer is to make the transformation into an energy manager, he/she will require a significant amount of education, advice and other personalized resources that will help to facilitate and hopefully automate many of the energy management actions."[136] Practically speaking, consumer engagement could be carried out

130. *See generally* Michael P. Vandenbergh & Jim Rossi, *Good for You, Bad for Us: The Financial Disincentive for Net Demand Reduction*, 65 VAND. L. REV. 1527 (2012). Some states have attempted to counter this incentive by "decoupling" revenues and sales in their rate design. *See* REGULATORY ASSISTANCE PROJECT, REVENUE REGULATION AND DECOUPLING: A GUIDE TO THEORY AND APPLICATION 2 (2011), http://www.raponline.org/document/download/id/861 [https://perma.cc/N7MG-9L6S].

131. *See* N.Y. Feb. 2015 Order, *supra* note 114, at 12.

132. *Id.*

133. *See* N.Y. May 2016 Order, *supra* note 57.

134. Distributed energy resources are defined as "resources on the customer side or the distribution grid side of the electric system, such as rooftop solar, energy storage, plug-in electric vehicles, and demand response." CAL. INDEP. SYS. OPERATOR CORP., EXPANDED METERING AND TELEMETRY OPTIONS PHASE 2: DISTRIBUTED ENERGY RESOURCE PROVIDER (DERP), at 4 (2015), http://www.caiso.com/Documents/DraftFinalProposal_ExpandedMetering_TelemetryOptionsPhase2_DistributedEnergyResourceProvider.pdf [https://perma.cc/73Q8-2GUJ].

135. CAL. INDEP. SYS. OPERATOR CORP., ENERGY STORAGE AND DISTRIBUTED ENERGY RESOURCES (ESDER) STAKEHOLDER INITIATIVE (2015), https://www.caiso.com/Documents/RevisedDraftFinalProposal-EnergyStorageDistributedEnergyResources.pdf [https://perma.cc/CM9F-SYHH] (revised draft final proposal); Letter from William H. Weaver, Counsel, Cal. Indep. Sys. Operator Corp., Roger E. Collanton, Gen. Counsel, Cal. Indep. Sys. Operator Corp., and Sydney L. Mannheim, Assistant Gen. Counsel, Cal. Indep. Sys. Operator Corp., to Kimberly D. Bose, Sec'y, Fed. Energy Regulatory Comm'n (May 18, 2016), http://www.caiso.com/Documents/May18_2016_TariffAmendment_ImplementEnergyStorageEnhancements_ER16-1735.pdf [https://perma.cc/VX6X-VJFP] (requesting a waiver of notice period).

136. RALFF-DOUGLAS & ZAFAR, *supra* note 19, at 21.

either by utilities or by third-party partners,[137] and programs might vary depending on the type of consumer targeted for engagement. Likely types of engagement would include outreach to explain changes in pricing and billing, customized consultations on possibilities for grid participation, and the marketing of available products and incentives that accompany them.[138] Ultimately, however, the goal would be to automate as much consumer participation in the grid as possible, with third-party companies rather than motivated individuals coordinating grid offerings and maximizing energy and dollar savings.[139]

C. *Assessing the Vision: How Democratic Can Consumerism Get?*

In this final Section, I assess the possibilities and pitfalls of a consumer-choice version of energy democracy, brought to its fullest instantiation. I conclude that although consumer choice presents exciting possibilities for assisting in *infrastructure* change, it rests on an exceedingly thin conception of democracy.

Those who frame consumer choice as democratic often want to cram it within the category of "critical consumerism," which asks consumers to ground their purchasing decisions in more than just the satisfaction of personal wants, by instead making purchasing a political act.[140] Quintessential examples include environmental labeling schemes, which allow environmentally minded consumers to pay a premium for dolphin-free tuna or sustainably harvested wood.[141] In doing so, consumers engage in democratic expression by sending a message that they have preferences beyond mere end products—they care about *how* a product was made.[142]

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137. *See, e.g.*, RALFF-DOUGLAS & ZAFAR, *supra* note 110, at 14–21.

138. A necessary prerequisite to much of this engagement would be the development of good policies surrounding consumer access to data. *See generally* Alexandra B. Klass & Elizabeth J. Wilson, *Remaking Energy: The Critical Role of Energy Consumption Data*, 104 CALIF. L. REV. 1095 (2016).

139. Stephanie M. Stern, *Smart-Grid: Technology and the Psychology of Environmental Behavior Change*, 86 CHI.-KENT L. REV. 139, 140 (2011) (describing a future in which imploring behavior change is abandoned "in favor of sophisticated default- and preference-setting and integrated external control of residential electricity"). The theory behind automation comes from the literature on "choice architecture," which submits that "default rules . . . can have an exceedingly large impact on environmental quality." *See* Cass R. Sunstein & Lucia A. Reisch, *Automatically Green: Behavioral Economics and Environmental Protection*, 38 HARV. ENVTL. L. REV. 127, 128 (2014).

140. Sassatelli, *supra* note 51, at 219.

141. *See* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 584–88 (2004) (chronicling consumers' willingness to pay extra for the knowledge that certain processes were used in producing products, even though these processes do not bear on their ultimate performance).

142. *See id.*

The consumer-choice vision of energy democracy fits uneasily within this framework. The model is not premised on asking energy users to voluntarily pay extra for clean energy as a type of democratic statement.[143] Instead, states discussing grid participation at mass scale intend to make participation economically desirable by instigating the pricing reforms discussion above.[144] Consumers' rational responses to pricing signals can then drive "participation," severing reliance on altruism or other political impulses as drivers of consumers' actions. The link between democratic desires and right action is further attenuated by the fact that "participation" in the grid is likely to be largely automated, driven by company control rooms or intelligent technology rather than requiring actual consumer effort.[145]

This automation and price rationalization distinguish energy's consumer-choice vision from other critical consumerism schemes. In light of this difference, one might question whether energy law's vision of "consumer choice" is "democratic" at all, or whether injecting this terminology just works to induce more widespread acceptance of thoroughly neoliberal reforms.[146] If, after all, one is induced to act by the logic of the market, is there any democratic process at work?

If there is, such process is of limited expressive value. Enhancing consumer choice within energy law will likely help to break the monopoly hold that investor-owned utilities currently have on electricity provisioning. With consumers able to choose among a number of ways of receiving and producing power, or lowering their consumption, utilities will have a more difficult time using rate-of-return regulation to inflate their profits.[147] Any attempts to overcharge consumers for, say, utility-scale renewables delivered through the transmission grid, might be met by consumer exit in the form of installation of solar panels and rooftop storage.[148] In this way, consumer choice

143. This type of voluntary "green energy" program has existed for a long time, with limited uptake. *See* Sunstein & Reisch, *supra* note 139, at 134–45.

144. Of course, establishing these pricing reforms itself requires regulatory action—which is likely to implicate a number of key political decisions about how much to compensate consumers for taking various participatory actions. But to participate in these reform efforts, consumers must engage in more classic "access to process"–style participation. *See infra* Part IV.

145. *See, e.g.*, Ahmad Faruqui, *The Ethics of Dynamic Pricing*, ELECTRICITY J., July 2010, at 13, 23; Welton, *supra* note 9, at 589.

146. Historian Lizabeth Cohen traces the rhetoric of consumer choice back to defenses of American democracy during the Cold War era. The "consumer choice" as democracy rhetoric makes more sense juxtaposed to the representation of Soviet communism as the conspicuous lack of consumptive opportunities. *See* LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 126 (2003).

147. *See* Averch & Johnson, *supra* note 129, at 1057–58 (predicting that utilities will do just this).

148. To frame this in the enduring theory of Albert Hirschman, consumer choice increases the "exit" options available within the energy sector. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970).

will serve a checking function on monopoly utilities in the classic deregulatory conception of consumers acting as regulators by "making their own choices in the free marketplace."[149]

To be sure, consumers that change their energy consumption patterns may also be expressing their political beliefs, in addition to benefitting their pocketbooks. Such mixed political-economic motivations are likely in the case of clean energy because making clean energy options economically appealing does not guarantee, by any means, that consumers will implement them.[150] Decisions to install solar panels, new appliances, or a new thermostat, or to purchase an electric car and have the necessary charging infrastructure installed are far from cost and effort free. Because of the effort required, and the relatively low budgetary impact of electricity bills on much of the population,[151] acts of "consumer choice" around electricity may often be politically motivated, even if they could be justified by economics alone.[152] But parsing such mixed motivations proves difficult.[153]

At the same time, there are significant problems with the kind of market-based democracy that consumer choice embraces, which have been widely observed outside of the energy law context.[154] First, it treats people

149. *See* COHEN, *supra* note 146, at 393 (quoting Virginia Knauer, consumer adviser to Presidents Nixon, Ford, and Reagan); Robin Hambleton, *Consumerism, Decentralization and Local Democracy*, 66 PUB. ADMIN. 125, 129 (1988) (observing that "[m]arkets give their participants a certain kind of freedom" of choice and partners (quoting David Miller & Saul Estrin, *Market Socialism: A Policy for Socialists*, *in* MARKET SOCIALISM: WHOSE CHOICE? 3, 4 (Ian Forbes ed., 1986))); Troy Rule, *Unnatural Monopolies: Why Utilities Don't Belong in Rooftop Solar Markets*, 52 IDAHO L. REV. 401, 401 (2016) (explaining how solar challenges the traditional utility model).

150. *See* Elisha R. Frederiks et al., *Household Energy Use: Applying Behavioural Economics to Understand Consumer Decision-Making and Behaviour*, 41 RENEWABLE & SUSTAINABLE ENERGY REVIEWS 1385, 1385–86 (2015) (noting that "so-called 'green' knowledge and values . . . do not readily translate into pro-environmental choices when buying goods or using services that impact the environment," even in the presence of "strong material incentives").

151. In 2008, for example, the average U.S. household spent 7.4% of their budget on energy. DIV. OF ENERGY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., LOW INCOME HOME ENERGY ASSISTANCE PROGRAM (LIHEAP) HOME ENERGY NOTEBOOK FOR FISCAL YEAR 2008, at 3 (2010). However, those families facing the worst "energy poverty" sometimes face bills upwards of 20% of their income—making electricity pricing extremely salient. Diana Hernández & Stephen Bird, *Energy Burden and the Need for Integrated Low-Income Housing and Energy Policy*, POVERTY & PUBLIC POL'Y, Nov. 2010 at 5, 7.

152. On this point, Amartya Sen observes that often people act at least in part on the basis of "commitments" to values that do not enhance personal welfare. And because people aren't separately economically rational *or* democratically expressive at different moments of life, the same action may often embody both tendencies. Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 326–29 (1977).

153. Sen observes that some of the most difficult commitments to measure are those where "a person's choice happens to coincide with the maximization of his anticipated personal welfare, but that is not the *reason* for his choice." *Id.* at 326–27; *see also* Sassatelli, *supra* note 51, at 238.

154. *See generally* BENJAMIN R. BARBER, CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE (2007); MARK SAGOFF, THE ECONOMY

specifically as consumers and asks them to make decisions in a consumption-centered framework. Such a market-based system acts predominantly upon preexisting preferences; there is little deliberative process that might help consumers not only fulfill but also *shape* their wants via conversation and public norms.[155] This lack of obvious deliberative processes, coupled with the "ordinariness" of consumption, causes some critics to question whether decisions made in the consumptive context can be "easily translated as 'means' of political participation."[156]

Scholars of behavioral economics have also given us reason to question whether consumers make "good" choices, even in terms of enhancing their own welfare. Contrary to the supposition of most economic modeling, we are all susceptible to a range of cognitive biases that hinder us, in our purchasing decisions, from making what we would identify as first-best choices when we give them careful consideration.[157] These inherent human flaws present a danger in putting too much decisionmaking authority into the cognitively flawed hands of consumers.[158]

Even if we could choose well, there is yet another challenge when it comes to energy's consumer-choice vision: perhaps individuals do not *want* more choices when it comes to energy. It is not at all clear that Americans wish to up the approximately eight minutes a year they currently spend thinking about their utility bill.[159] This potentiality—that enhanced choice

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OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (1988); MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012).

155. For more on this tension, see discussion *infra* Section V.B.

156. Sassatelli, *supra* note 51, at 225; *see also* Pildes & Anderson, *supra* note 49, at 2142 (arguing that social institutions are critical in "structuring individuals' preferences" in ways that "individuals actually experience and affirm"); *infra* Section IV.C. Although, the market can provide its own competitive form of pressure among community members: solar panel ownership tends to cluster, suggesting a peer pressure effect to installation. *See* Marcello Graziano & Kenneth Gillingham, *Spatial Patterns of Solar Photovoltaic System Adoption: The Influence of Neighbors and the Built Environment*, 15 J. ECON. GEOGRAPHY 815, 816–17 (2015); *see also* Brad Plumer, *Solar Power Is Contagious. These Maps Show How It Spreads.*, Vox (May 4, 2016, 12:00 PM), http://www.vox.com/2016/5/4/11590396/solar-power-contagious-maps [https://perma.cc/E3DV-M4PX].

157. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1475–76 (1998) (explaining the challenge of building laws that maximize social welfare once it is understood that "people's revealed preferences" are a shaky ground on which to measure welfare, because we all display "bounded rationality, bounded willpower, and bounded self-interest" (emphasis omitted)); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

158. Of course, as Alan Schwartz has pointed out, it is difficult for regulators to know how to design regulations to ensure rationality as well. *See* Alan Schwartz, *Regulating for Rationality*, 67 STAN. L. REV. 1373, 1373 (2015).

159. Katherine Tweed, *Customers Spend 8 Minutes per Year Interacting Online with Their Utility*, GREENTECH MEDIA (Oct. 27, 2016), https://www.greentechmedia.com/articles/read/customers-spend-8-minutes-a-year-interacting-online-with-their-utility [https://perma.cc/N9DM-GZSR].

may not enhance welfare[160]—should fundamentally call into question the claim that consumer choice adds any *democratic* benefits, given that these benefits are contingent on the preferability of expanded individual choice.[161]

One final tension presented by the consumer-choice model comes from the potential inequalities embedded in the nature of "participation" within this vision. The consumer-choice vision is premised upon individuals' ability to adjust energy consumption and production patterns, by using new cars, new appliances, new thermostats, a new electricity meter, new solar panels, and new storage systems, to name only the technologies now in existence. Given the technology-heavy nature of the vision, there may well turn out to be a class dimension to people's ability to participate in the grid.[162] This stratification seriously troubles the central democratic underpinnings of consumer choice, premised as they are on the "apparently equal nature of voluntary contract."[163] With economic disparities as they are now in the United States, a democratic regime founded on economic engagement is likely to stray dramatically from the principle of "one person, one vote."[164]

In sum, the consumer-choice version of energy democracy offers a powerful tool for testing the application of economic principles to individual electricity decisionmaking. But because of its strong focus on rationalizing prices, the consumer-choice model presents limited opportunities for people to engage with the electric system outside of their role as rational consumer—thus narrowing its democratic potential as a means to express preferences beyond least-cost electricity.

III. Energy Democracy as Local Control

Skepticism about the ability of "consumer choice" to create real democratic possibilities lies at the heart of a second vision of energy democracy: local control. The following Part assesses this second vision, first articulating its animating principles and then exploring the appeal and drawbacks of pursuing reforms in line with this vision of energy democracy.

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160. *See* Sheena S. Iyengar & Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. Personality & Soc. Psychol. 995, 1003 (2000) (finding that too much choice can result in "frustration" and "dissatisfaction").

161. *Id.* at 997 (suggesting that limited preferences for more choice "challenge a fundamental assumption underlying classic psychological theories of human motivation and economic theories of rational choice").

162. *See* Welton, *supra* note 9, at 594 n.92 (collecting evidence that solar panel usage is highly stratified by class).

163. Rahman, *supra* note 51, at 1334.

164. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 476 (1968); Reynolds v. Sims, 377 U.S. 533, 558, 569 (1964) (quoting Grey v. Sanders, 372 U.S. 368, 371 (1963)); *see also* Michael Mintrom, *Market Organizations and Deliberative Democracy: Choice and Voice in Public Service Delivery*, 35 Admin. & Soc'y 52, 55 (2003) ("[T]o the extent that wealth derived from market activity can be transformed into political power, markets can seriously encroach on the notion of political equality that is 'the moral foundation of democracy'" (quoting Dahl, *supra* note 22, at 178)).

A. *Articulating the Vision: Power to the People*

In late 2015, the recently formed "Energy Democracy Project"—a coalition of like-minded nongovernmental organizations—published a concept paper, *Toward a Climate Justice Energy Platform: Democratizing Our Energy Future.* That paper envisions a future energy system comprised of "democratically controlled," "decentralized," "community-based renewable energy."[165] Such animating principles similarly motivate communities proceeding down the route of local control. For example, Boulder, Colorado—a city currently in the midst of a battle to municipalize its electricity system by taking over from the incumbent private utility[166]—explains its decision to do so in this way: "For Boulder, it's an opportunity to create our own electric utility—one that runs on cleaner energy, is cheaper, supports innovation, and serves the public."[167]

This example notwithstanding, localism is not inherently tied to pursuit of climate change goals. To the contrary, most efforts at local energy control over the last several decades have been aimed specifically at cost reductions.[168] And existing publicly owned utilities—both municipally owned, and the more rural public utility districts and rural electric cooperatives—run the gamut in terms of their commitment to clean energy. Some public utility districts and cooperatives are now prioritizing decarbonization.[169] In contrast, the only state in the country with an entirely publicly owned electricity grid—Nebraska—continues to get three-fifths of its electricity from

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165. Weinrub & Giancatarino, *supra* note 19, at 4, 8; *see also* Sean Sweeney, Resist, Reclaim, Restructure: Unions and the Struggle for Energy Democracy, at ii (2012), http://unionsforenergydemocracy.org/wp-content/uploads/2013/12/Resist-Reclaim-Restructure.pdf [https://perma.cc/WM3J-CE56] ("An energy transition can only occur if there is a decisive shift in power towards workers, communities and the public—*energy democracy*.").

166. Alex Burness, *Boulder Releases New Municipalization Cost Analysis*, Daily Camera (Nov. 7, 2016, 3:54 PM), http://www.dailycamera.com/news/boulder/ci_30548298/boulder-released-new-municipalization-cost-analysis [https://perma.cc/A5DN-JNM3] (reporting that although the city and its utility are in settlement negotiations to end the municipalization bid, Boulder continues to move forward in its planning regarding its ongoing municipalization efforts).

167. *Municipalization: An Update*, City Boulder Colo., https://bouldercolorado.gov/energy-future/municipalization-an-update [https://perma.cc/X5N8-EEXM]; *see also* Claire Provost & Matt Kennard, *Hamburg at Forefront of Global Drive to Reverse Privatisation of City Services*, Guardian (Nov. 12, 2014, 4:25 AM), http://www.theguardian.com/cities/2014/nov/12/hamburg-global-reverse-privatisation-city-services [https://perma.cc/2ENL-6BV8] (explaining Hamburg, Germany's motivation for municipalizing in similar terms).

168. *See, e.g.*, Kelly, *supra* note 97, at 43; Shelley Ross Saxer, *Eminent Domain, Municipalization, and the Dormant Commerce Clause*, 38 U.C. Davis L. Rev. 1505, 1508 (2005).

169. *See* Peter Maloney, *Iowa Electric Co-Op Looks to Buy RECs to Go '100% Carbon-Free'*, Utility Dive (Apr. 29, 2016), http://www.utilitydive.com/news/iowa-electric-co-op-looks-to-buy-recs-to-go-100-carbon-free/418328/ [https://perma.cc/Y5QS-8HMB]; Kristen Wright, *Rural Electric Cooperatives Find Renewable Energy Super Star in Solar*, Elec. Light & Power (Feb. 17, 2015), http://www.elp.com/articles/print/volume-93/issue-1/sections/renewables-sustainability/rural-electric-cooperatives-find-renewable-energy-super-star-in-solar.html [https://perma.cc/QM5C-VBBX].

coal,[170] despite the existence of significant wind energy potential in the state.[171]

What these local efforts seem to have in common, though, is a desire for more direct control over decisions regarding energy supply.[172] Calls for localism demand that control be *devolved* from higher levels of government, and that control be more directly *public*, via either direct public ownership or other forms of directly controlling utility decisionmaking.[173] Energy is thus democratized by "putting 'people back in charge.'"[174] Often, calls for local governance have a particular vision of the types of people to be empowered—for example, the Clean Energy Justice Project sees local energy as a way to empower "working people, low-income communities, and communities of color."[175]

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170. Nicholas Bergin, *Coal Still Nebraska's Top Electric Fuel Despite National Trend Toward Natural Gas*, Lincoln J. Star (Mar. 26, 2016), http://journalstar.com/news/local/coal-still-nebraska-s-top-electric-fuel-despite-national-trend/article_790f17ef-d68f-501b-b243-d740aeb70f4f.html [https://perma.cc/KEW9-PTZM]; *Chapter One—Nebraska*, Sw. Museum Engineering Comm. & Computation, http://www.smecc.org/chapter_one-_nebraska.htm [https://perma.cc/4B5R-T8ZS] (detailing Nebraska's history of public ownership). Three-fifths is nearly double the national average. *See Frequently Asked Questions*, U.S. Energy Info. Admin., https://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3 [https://perma.cc/B9KZ-GXY3].

171. *Nebraska: State Profile and Energy Estimates*, U.S. Energy Info. Admin., http://www.eia.gov/state/?sid=NE [https://perma.cc/5U96-8HN4] ("[M]ore than 90% of Nebraska has suitable conditions for commercial-scale wind-powered electricity generation.").

172. *See, e.g.*, Thomas M. Hanna, *Community-Owned Energy: How Nebraska Became the Only State to Bring Everyone Power from a Public Grid*, Yes! Mag. (Jan. 30, 2015), http://www.yesmagazine.org/commonomics/nebraskas-community-owned-energy [https://perma.cc/6CR4-6NE5] ("Local control and the possibility for democratic participation are defining features of Nebraska's publicly owned electricity system. . . . Should they so wish, every Nebraskan has the opportunity to become involved in the decisionmaking of their local electricity provider."); *Topics*, Am. Pub. Power Ass'n, http://www.publicpower.org/Topics/Landing.cfm?ItemNumber=38510 [https://perma.cc/E9SC-7XH9] ("Every citizen is a utility owner, with a direct say in policies that affect rates and service.").

173. *See, e.g.*, *What Is the Energy Democracy Project?*, Energy Democracy Project 1, http://www.localcleanenergy.org/files/WhatIsThe-EnergyDemocracyProject.pdf [https://perma.cc/TM8J-SBKP] ("By energy democracy we mean bringing energy resources under public or community ownership and/or control."); *Resist, Reclaim, Restructure: A Call for Transition and Energy Democracy*, Sys. Change Not Climate Change, http://systemchangenotclimatechange.org/energy-democracy [https://perma.cc/LQ6E-YZXR] ("A truism relevant to our cause: you cannot control what you do not own."). For more detail on recent and ongoing movements by U.S. cities to reclaim control or ownership of their electricity grids, see generally Outka, *supra* note 37, and Welton, *supra* note 37.

174. *Lisa Nandy's Vision of Energy Democracy Isn't Idealism—It's Already Starting to Happen*, Global Justice Now (Sept. 29, 2015), http://www.globaljustice.org.uk/blog/2015/sep/29/lisa-nandy%E2%80%99s-vision-energy-democracy-isn%E2%80%99t-idealism-%E2%80%93-it%E2%80%99s-already-starting-happen [https://perma.cc/CH7L-V3XM] (quoting speech by British Labour Party representative).

175. *See* Weinrub & Giancatarino, *supra* note 19, at 5.

The "localism" vision of energy democracy at times extends beyond local control to emphasize locally sourced energy.[176] This angle of localism is distinct from the emphasis on ownership or control, as locally owned utilities frequently purchase all of their power from outside sources.[177] Under this vision of localism, communities might tap their own solar resources or erect local wind farms, rather than continue to draw all their power from the larger regional grid.[178]

Finally, some calls for localism as a means of achieving energy democracy also have a process focus, including as elements of localism "transparency, accountability, and participation."[179] Similarly, others see energy localism as a way of "building community."[180] This element of localism, however, is the least strategized—a challenge I will return to below.

B. *From Vision to Concrete Reforms: Rescaling Energy*

As a practical matter, localizing energy decisionmaking in the United States requires either creating a municipal utility, or voting as a community to take over energy supply through a mechanism known as "community choice aggregation" (CCA).[181] Municipalization is a tall task in practice.[182] To fully reclaim ownership requires a city to go through costly, complex municipalization proceedings. These proceedings, allowed by law in most states,[183] typically first require a successful referendum vote in an interested

176. *See, e.g.*, *id.* at 12 ("[C]ommunity-based energy is not referring simply to locating energy development in a local community, but also the control and ownership of such development by the community."); *see also* Daniel Chavez, *The Meaning, Relevance and Scope of Energy Democracy*, Transnat'l Inst. (Oct. 9, 2015), https://www.tni.org/en/article/the-meaning-relevance-and-scope-of-energy-democracy [https://perma.cc/CWY8-DQAP].

177. *See* David Schap, Municipal Ownership in the Electric Utility Industry: A Centennial View 97 (1986).

178. *See* Farrell, *supra* note 19, at 15; *Energy Democracy*, Ctr. for Soc. Inclusion, http://www.centerforsocialinclusion.org/ideas/energy-democracy/ [https://perma.cc/TJD9-7AFH] ("Imagine a community of farmers in the heartland harnessing the wind for clean, reliable power or an urban neighborhood generating solar energy in a public space that feeds the energy needs of a whole neighborhood. . . . We call this Energy Democracy . . . .").

179. Weinrub & Giancatarino, *supra* note 19, at 16; *see also, e.g.*, *Mission*, N.Y. St. Energy Democracy Alliance, http://energydemocracyny.org/mission [https://perma.cc/5ZHB-D3RW] (including "widespread and meaningful participation" alongside localism in their platform for reform).

180. Tomain, *supra* note 19, at 1134 (quoting Sarah Krakoff, *Planetarian Identity Formation and the Relocalization of Environmental Law*, 64 Fla. L. Rev. 87, 90 (2012)).

181. *See infra* notes 185–189 and accompanying text.

182. Herman K. Trabish, *IOU, Co-op or Muni? Experts Debate the Creation of Public Utilities*, Utility Dive (Sept. 16, 2015), http://www.utilitydive.com/news/iou-co-op-or-muni-experts-debate-the-creation-of-public-utilities/405511/ [https://perma.cc/8R6C-PQ9Q] ("Of the more than 900 cooperatives and 2,200 municipal electric systems in the U.S., few have been formed in recent decades and 'rarely through an acquisition approach. . . . The economics of forming a new utility are very challenging.'").

183. Abby Briggerman et al., Am. Pub. Power Ass'n, Survey of State Municipalization Laws (2012), https://www-static.bouldercolorado.gov/docs/Survey_of_Municipalization

city or town. The city then negotiates with its incumbent private utility to repurchase necessary grid assets. If an agreement cannot be reached (as is frequently the case), many states provide that the city can exercise eminent domain to reclaim the assets at a court-established fair market value.[184]

In seven states, communities desiring local control can opt for the less complex and expensive option of CCA.[185] In CCA, a community—again following a successful referendum—takes over decisionmaking regarding energy supplies from the incumbent utility but leaves the utility in charge of managing billing and the "poles and wires."[186] CCA thus gives a community control over its most valued aspect of energy decisionmaking—what type of energy it wants flowing in, and from where—while removing some of the most burdensome aspects of municipalization.[187]

What does it mean to give a community "control"? This question is important for assessing the democratic aspect of local control. At the least, a move to municipalization or CCA entails a referendum vote, which presents a chance not only for a community to endorse local ownership, but also to impose particular conditions upon it. For example, Boulder's municipalization referendum required that, in order to municipalize, the public system had to determine it could incorporate more clean energy than the private utility was doing, while maintaining comparable rates.[188] Beyond that, municipalization or CCA also places decisionmaking over electricity supply in the hands of locally elected officials, typically the city council.[189]

Laws-_Duncan_and_Allen__FINAL___00027359_-1-201504271104.pdf [https://perma.cc/3UZ7-B2WF].

184. *See* Saxer, *supra* note 168, at 1514 ("Courts exercise their authority with great deference to the legislature, resulting in extensive legislative power to condemn private property for a variety of purposes.").

185. CCA is explicitly authorized in California, Illinois, Massachusetts, New Jersey, Ohio, New York and Rhode Island. *See* CAL. PUB. UTIL. CODE § 366.2 (West 2016); 20 ILL. COMP. STAT. ANN. 3855/1-92 (West 2016); MASS. GEN. LAWS ANN. ch. 164, § 134 (West 2016); N.J. STAT. ANN. § 48:3-92 (West 2016); OHIO REV. CODE ANN. § 4928.20 (West 2016); 39 R.I. GEN. LAWS ANN. § 39-3-1.2 (West 2016). New York's Public Service Commission recently authorized a pilot program for CCA. *See* State of N.Y. Pub. Serv. Comm'n, *Order Granting Petition in Part*, N.Y. STATE DEP'T PUB. SERV. (Feb. 26, 2015), http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-M-0564&submit=search£y+Case+Number [https://perma.cc/UJS6-THHR].

186. *See, e.g.*, Joshua Emerson Smith, *'Community Choice' Could Provide Cheaper, Greener Electricity for San Diego, Report Says*, SAN DIEGO UNION-TRIB. (July 12, 2017, 4:05 PM), http://www.sandiegouniontribune.com/news/environment/sd-me-san-diego-caa-20170712-story.html (on file with the *Michigan Law Review*).

187. However, I discuss some potential drawbacks to the lessened control provided by CCA in Welton, *supra* note 37, at 283.

188. *See Certificate of Ballot Language*, CITY BOULDER COLO. 4 (Nov. 5, 2013), https://www-static.bouldercolorado.gov/docs/2013_ballot_certification-1-201309061656.pdf [https://perma.cc/5VNK-TS26] (ballot question 2E).

189. In some places, the city council directly controls the public utility; in others, it does so through a governing board. WALTER BAER ET AL., GOVERNANCE IN A CHANGING MARKET: THE LOS ANGELES DEPARTMENT OF WATER AND POWER, at xii (2001).

Finally, some communities have taken steps to include citizens more directly in local energy. For example, Boulder's stated reasons for municipalizing include to "increase citizen participation in democratic decision-making regarding the use of their electricity."[190] Thus, as part of its efforts, the city has hosted a series of hearings and community working groups.[191] These additional linkages to the populace, though, are largely ad hoc rather than legally mandated.

Fully-fledged cooperatives and municipally owned utilities have democratic participation in decisionmaking as a long-standing core principle, frequently enshrined in voting rules.[192] But to have these rules in place does little to answer the question of whether citizen-owners actively engage in significant decisions made by publicly owned utilities.[193] Some publicly owned utilities report conducting special outreach efforts—including through social media and focus groups—to gauge the desires of their members.[194] The managers of others suggest that they can track such desires just through conversations on the streets.[195]

Irrespective of participation rates, local control alone accomplishes only one component of the full localist vision of energy democracy. Although it gives a city control over where its power comes from—including the ability to make contracts that specifically purchase or avoid particular energy sources—most municipally owned utilities and CCAs continue to buy the

190. Verified Application of the City of Boulder, Colorado at 9, *In re* Application of City of Boulder, Colorado for Approval of the Proposed Transfer of Assets, No. 15A-0589E (Pub. Util. Comm'n of Colo. July 7, 2015) [hereinafter *City of Boulder*], https://bouldercolorado.gov/links/fetch/25751 [https://perma.cc/R3BQ-7YMJ].

191. *See id.* at 32.

192. *See, e.g.*, *Understanding the Seven Cooperative Principles*, Am.'s Electric Cooperatives (Dec. 1, 2016), https://www.electric.coop/seven-cooperative-principles%E2%80%8B/ [https://perma.cc/M8LF-5LWC].

193. Some express skepticism as to how "democratic" the modern cooperative really is. *See* John Farrell, *Why Aren't Rural Electric Cooperatives Champions of Local Clean Power?*, Inst. for Local Self-Reliance (Aug. 18, 2014), https://ilsr.org/rural-electric-cooperatives-champions-local-clean-power/ [https://perma.cc/YNJ4-S9FC] (suggesting that board candidates are often filtered through "nominating committees" and run unopposed, and that there is a big gap between cooperative members' surveyed preferences regarding renewable energy and cooperative action).

194. *See, e.g.*, Shari Wormwood, *North Star Electric Cares About What Matters to Younger Member Owners*, Minn. Rural Electric Ass'n (Dec. 16, 2016), http://www.mrea.coop/news/322646/North-Star-Electric-cares-about-what-matters-to-younger-member-owners.htm [https://perma.cc/EJ5L-E2W5].

195. *See, e.g.*, *Cooperative Principle Number Two: Democratic Member Control*, Tex. Co-op Power (Sam Houston Elec. Cooperative, Livingston, Tex.), Oct. 2010, at 19, 19, https://www.samhouston.net/documents-coop/tcp_2010_oct.pdf [https://perma.cc/WZP7-H3WC] ("Like any successful organization, this decision-making process does not operate in the dark. . . . [W]e educate our members during face-to-face conversations, whether at our annual meeting or other events, or even just a conversation in the local supermarket.").

vast majority of their electricity from large-scale, privately owned generators.[196] It takes additional steps to accomplish the second component of a localist vision: locally owned, small-scale generation.

Often, municipalities and CCAs are permitted to own some of their own generation.[197] Deciding to do so can be an expensive proposition for a municipality, as compared to the price at which electricity can be purchased from wholesale markets, but may make sense if the utility seeks to accomplish a broader range of community objectives in its energy decisionmaking.[198] And municipal utilities can—and frequently do, with great success—run their own energy-efficiency and demand-response programs, which focus on cutting energy demand.[199]

There are other steps to accomplish community ownership that can be taken even without municipalization or CCA. Most notably, "community solar" programs have been taking off across the country: as of last count, at least fourteen states and the District of Columbia permitted community solar ownership.[200] In this model, instead of putting solar on their individual homes, community members can purchase shares of the output of larger, community-sited solar panel systems.[201] Larger systems have the advantage of economies of scale[202] and allow those who cannot install their own systems—for technical, financial, or other reasons[203]—to participate in solar generation.[204] Although the community-ownership model has predominantly been applied to solar and wind, one can imagine its extension into microgrid or storage solutions.[205]

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196. *See* Am. Pub. Power Ass'n, 2015–2016 Annual Directory & Statistical Report 28 (2016), http://fusion4freedom.us/pdfs/USElectricUtilityIndustryStatistics.pdf [https://perma.cc/BH9C-MQAD] (showing that publicly owned utilities generate 9.9% of U.S. power).

197. *See* Welton, *supra* note 37, at 312; *Stats and Facts*, Am. Pub. Power Ass'n, https://www.publicpower.org/public-power/stats-and-facts [https://perma.cc/7A3G-QSFX] (showing that two-thirds of the power supplied by publicly owned utilities comes from their own generation or from jointly owned public generation).

198. Welton, *supra* note 37, at 304–05.

199. *Id.* at 304, 332–33.

200. Joseph Goodman & Kevin Brehm, *5 Reasons Community-Scale Solar Is a Multi-GW Market Opportunity*, RMI Outlet (Mar. 17, 2016), https://www.rmi.org/news/blog_2016_03_17_5_reasons_community_scale_solar_is_a_multi_gw_market_opportunity/ [https://perma.cc/FU3T-PGBK].

201. *See id.*

202. Hannah J. Wiseman & Sara C. Bronin, *Community-Scale Renewable Energy*, 4 San Diego J. Climate & Energy L. 165, 166 (2012–2013).

203. Over two-thirds of American residences are not solar appropriate. *See* Samantha Booth, *Here Comes the Sun: How Securities Regulations Cast a Shadow on the Growth of Community Solar in the United States*, 61 UCLA L. Rev. 760, 767 (2014).

204. The ownership of these systems is a complex question—sometimes, ownership resides with the community members purchasing shares; more often, it resides with a third party, who undertakes installation and maintenance and essentially sells to community members a right to a portion of the output of the panels. *See* Wiseman & Bronin, *supra* note 202, at 168 & nn.8–9.

205. *See id.* at 167 (suggesting community arrangements are best suited to wind and solar).

C. *Assessing the Vision: Decentralization and Participation*

Localism has long appealed to Americans in general and environmentalists in particular. Since the 1970s, a significant contingent of those committed to a more sustainable world has viewed "small" as "beautiful."[206] And a great many theorists of democracy have posited that the most successful way to enhance democracy in this country would be a return to the local scale.[207]

Local ownership or control of energy resources has particular appeal when compared to the dominant paradigm of investor-owned utilities. As I have argued elsewhere, moving ownership—or in the CCA model, operative control—into public hands, and thereby creating a tighter link between elected officials and utility practices, may increase the flexibility and responsiveness of utility management to the widening set of concerns facing the electricity sector.[208]

In this way, energy localism can be easily linked to classic theories of democratic experimentalism.[209] Of course, opening the door to local experiments creates the possibility for significant divergence regarding public goals for the electricity sector.[210] Communities desiring faster action on climate change might test the workability of solutions that could then be used at higher levels of government. In contrast, devolution in more recalcitrant locales might lead to *less* action on climate change, in favor of other goals. Although cities cannot fall below state or federal floors in terms of environmental regulations,[211] sometimes municipal utilities and cooperatives are not subject to the same stringency or suite of state regulations as privately owned utilities.[212]

Substantive aims aside, it is less clear whether local control can deliver on its allure of deliberate, collective decisionmaking. To be sure, the mere

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206. E.F. Schumacher, Small Is Beautiful: Economics as if People Mattered (Harper Perennial reprt ed. 2010) (1973); *see also* Amory B. Lovins & L. Hunter Lovins, Brittle Power: Energy Strategy for National Security 1 (Brick House Publishing Co. 2001) (1982).

207. *See* Robert A. Dahl, *The City in the Future of Democracy*, 61 Am. Pol. Sci. Rev. 953, 954 (1967); Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1152 (1980) (arguing for "new forms of city power").

208. *See* Welton, *supra* note 37, at 332–38 (exploring how public ownership has allowed the publicly owned utility in Austin, Texas to excel in responding to climate change).

209. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 287–88 (1998) (proposing a system of "directly deliberative polyarchy" where local experiments are institutionalized via "learning by monitoring"); Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1748 (2005) (celebrating the ability of local majorities to dissent by dictating outcomes in their locality that differ from the national sentiment).

210. *Cf.* Michael A. Livermore, *The Perils of Experimentation*, 126 Yale L.J. 636, 645–53 (2017) (arguing that decentralization and experimentation have under-explored downsides, as well as upsides, in that they can generate welfare-decreasing information).

211. *See* Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. Rev. 1283, 1293–98 (2013) (charting the use of "floors" in environmental law).

212. *See* Regulatory Assistance Project, *supra* note 71, at 23.

fact of public ownership at least enhances the responsiveness of the utility to representative governance.[213] And the requirement of a referendum to establish local control offers a modicum of a democratic sanction to public ownership.[214] But whether or not citizens will pay increased attention, and enhance their participation, in these local elections and local governance decisions is an empirical question without obvious answers.

The idea that localism is more democratic has long been a linchpin of democratic theorists favoring devolution.[215] Classically, a major component of this argument was that whereas traveling to "Washington, London, or Tokyo to interact directly with national government officials" proves difficult for most citizens, a trip to the "city hall or other local agencies" is considerably more doable.[216] Of course, in the age of the internet, when "e-rulemaking" and online commenting are prevalent, this argument loses some force.[217] Nevertheless, there are other potential benefits: local decisionmaking, it is argued, builds community and enhances the possibility of true deliberation.[218] It also contributes to political education, establishing in its citizens the habits and practices of being part of democratic traditions. [219] Those in favor of localism as energy democracy advance similar sorts of claims.[220]

The literature on energy localism pays considerably less attention to the mechanisms necessary to create this kind of democratic space and democratic engine.[221] If successful in promoting widespread participation and significant deliberation, one could imagine that energy localism might

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213. *See* Welton, *supra* note 37, at 318–20.

214. *Cf.* Dalton et al., *supra* note 21, at 252–53 (suggesting that referendum usage's increase in the United States is a symptom of citizens' craving for more democratic outlets, beyond traditional representative democracy).

215. *Cf.* Dahl, *supra* note 22, at 105–09 (calculating the ability of citizens to directly participate in government based on size mathematically).

216. Dalton et al., *supra* note 21, at 255.

217. *See generally* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 Emory L.J. 433 (2004).

218. Hannah Arendt, Between Past and Future 148 (Penguin Books 1993) (1961) (arguing that freedom means "the company of other men [and] a common public space to meet them—a politically organized world, in other words, into which each of the free men could insert himself by word and deed"); Dahl, *supra* note 207, at 957, 964.

219. Carole Pateman, Participation and Democratic Theory 42 (1970) (arguing that "for maximum participation by all the people . . . democracy must take place" beyond "representative institutions at [the] national level" in order to create capable citizens); Kathryn Abrams, *Law's Republicanism*, 97 Yale L.J. 1591, 1605 (1988) ("Localities share histories and traditions that may be more vivid or tangible to their citizens than those of the state or nation; it may therefore be easier for citizens to grasp common norms at an applicable level of specificity."); Hambleton, *supra* note 149, at 136–37 (collecting sources making this argument).

220. *See* Tomain, *supra* note 19, at 1140 ("Citizen participation in energy and climate actions can take place more easily as regulation moves from the federal to the local level.").

221. *See* Abrams, *supra* note 219, at 1605–06 ("If we want to foster a self-conscious politics of collective substantive choice, we must consider the *kinds* of local institutions that will contribute to its development." (emphasis added)).

engender substantial democratic benefits, both within the field and as part of a larger effort to revitalize local communities. Yet there is considerably more work to be done before energy localism can boast this kind of success, given the limited participation in the governance of most publicly owned utilities.[222]

Plenty of theorists are more broadly skeptical about the tight link claimed between localism and democracy. Some question whether localism actually promotes greater participation than national-level political debates.[223] Others worry that it functions as an effective smokescreen for dismantling the role of government in American life.[224] And a third group questions whether enabling greater participation in local politics might actually *decrease* democratic accountability. This concern arises from the observation that it is often those with the strongest—but generally nonrepresentative—preferences that tend to take advantage of local opportunities to participate.[225]

Without successful expansion of local participation, efforts at energy localism risk becoming small-scale experiments driven by local policy elites. Such projects may be worthy in and of themselves,[226] but they are far cries from "increas[ing] citizen participation in democratic decision-making regarding the use of their electricity" (to take Boulder's articulated goal).[227] Empirical work examining how cities proceeding with public ownership or control have assayed to widen participation, and how successful they have been, would be a helpful step in understanding how great the democratic potential of local energy is.[228]

There is also a broader efficacy concern with some of the more politically inspired aims of local control or local resource siting. Often, local control and local resources are touted as a way for a community to control the kinds of energy it runs on, typically in the service of promoting clean energy. But this rationalization suffers from a substantial flaw stemming from the scale of the electricity grid. Adding a local solar farm to the grid might

222. *See supra* note 193.

223. *See* Jeffrey M. Berry, *The Rise of Citizen Groups*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 367, 369 (Theda Skocpol & Morris P. Fiorina eds., 1999).

224. *See* Theda Skocpol, *Unravelling from Above*, AM. PROSPECT, Mar.–Apr. 1996, at 20.

225. *See* Morris P. Fiorina, *Extreme Voices: A Dark Side of Civic Engagement*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY, *supra* note 223, at 395, 397–403, 416 ("[T]he kinds of demands on time and energy required to participate politically are sufficiently severe that those willing to pay the costs come disproportionately from the ranks of those with intensely held extreme views.").

226. I have elsewhere defended cities' movement toward utility ownership as a potentially superior bureaucratic model under conditions of change and uncertainty, as compared to public utility commissions. *See generally* Welton, *supra* note 37.

227. *See City of Boulder*, *supra* note 190.

228. *See* Hambleton, *supra* note 149, at 126–30, 138 (suggesting that the political left may be too optimistic about the possibilities that exist for reinvigorating democracy in this way).

increase the amount of solar energy generally available, but it does not ensure that the coal-fired power that the solar displaces will necessarily be retired.[229] Instead, those decisions will continue to be driven by state- and federal-level policies and mandates, in ways that could undo certain localist impulses. To put this more starkly and concretely: if a state does not change its energy laws in response to changing local preferences, local clean energy supply in one community may simply free up more cheap coal for the community next door to use.[230]

Of course, there might be aims to local ownership and local resource siting other than specifying a certain resource mix. "Community solar" arrangements, for example, appeal largely on egalitarian grounds. The NAACP supports community solar because it "allow[s] us *all* to own a piece of the nation's emerging clean energy infrastructure expansion."[231] If this is community solar's aim, however, it is little more than a new spin on "consumer choice," since it gives the ability to participate in clean energy *as a consumer* to a wider range of individuals. I certainly do not denigrate it on those grounds—if consumer choice is to dominate the policy landscape, I have argued that regulators should move in precisely this direction.[232] But I would hesitate to defend it as a vast improvement in energy *democracy*. Instead, community solar stands largely as an embodiment of potential synchronicities between consumer choice and localism.[233]

Localism could go further in experimenting with alternative modes or aims of property ownership. Already, some localities are "crowdfunding" the installation of solar panels on schools and churches.[234] Perhaps such models could be creatively expanded—for example, a municipally owned utility or electric cooperative might institute programs whereby those residents who volunteer their labor or vacant land for construction of community-scale renewable resources earn an ownership share.[235] Or a community could price ownership shares in community-scale renewable generation based on ability to pay, thus creating a sliding price scale that would enable wider community participation. All to say, local ownership of small-scale resources might allow for successful importation of additional goals into electricity generation, beyond the traditional metric of affordability and the newer metric of carbon intensity.[236] Whether such possibilities flourish in places pursuing local control remains to be seen.

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229. *See, e.g.*, Weinrub & Giancatarino, *supra* note 19, at 4–5.

230. See *infra* Section V.B for elaboration of this point.

231. *Energy Democracy*, *supra* note 19.

232. *See generally* Welton, *supra* note 9.

233. *See* Tomain, *supra* note 19, at 1138.

234. *See, e.g.*, *How It Works*, People's Solar, https://www.thepeoplessolar.com/how-it-works/ [https://perma.cc/HL3L-A2R6] (a crowdfunding platform for solar in schools).

235. *Cf.* H.S. Person, *The Rural Electrification Administration in Perspective*, 24 Agric. Hist. 70, 70–71 (1950) (emphasizing that the New Deal push to electrify America had a joint electrification and employment agenda).

236. One example of a CCA embracing multiple aims to local resource ownership is Marin Clean Energy, which has touted its CCA-owned, 10.5 megawatt, 49-acre solar farm, as

The broader point is this: although localization *could* engage a wider range of Americans in substantive, collective decisionmaking around their energy future, it will not ineluctably do so. Instead, local control could simply provide a useful, small-scale playground in which to experiment with consumer-choice strategies. Boulder seems to embrace this possibility: if municipalization proceeds, the city plans to create Boulder's next-generation grid as a way to "remain relevant in a democratized system."[237] This next-generation system will establish a performance model that rewards the local utility "for achieving an efficient, low-carbon, and flexible electricity system."[238] Although the city remains far from announcing specific policy reforms, city planners have also cited approvingly one report that calls for moving toward "Energy Democracy."[239] Energy democracy, in this conception, looks a lot like plain old consumer choice: it emphasizes the role that consumers-turned-producers and energy managers can play in building a cleaner grid, and how local control can create better incentives for empowering consumers.[240]

This marriage of consumer choice and localism offers risks and rewards: local control may indeed allow for rapid implementation of a full-throated version of consumer choice. But in serving as this type of demonstration project, a locality may forsake any promise to utilize its intimate scale to produce a deliberatively constructed, intentional, and community-wide approach to energy supply and consumption.[241] Ultimately, whether localism returns decisionmaking power to the people in the more collective vein that its proponents espouse depends on whether and how leaders of particular local energy movements instantiate democratic processes as they gain local decisionmaking power.

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responsible for bringing 341 local jobs in addition to renewably powering over 3,000 homes per year. *Local Renewables*, MCE Clean Energy, http://mcecleanenergy.org/local-projects/ [https://perma.cc/X4SY-WNQ6].

237. Memorandum from Jane S. Brautigam, City Manager, City of Boulder, et al., to Members of City Council, 4 (Jan. 27, 2015) (on file with the *Michigan Law Review*) (regarding the Xcel-Minneapolis Franchise).

238. Farrell, *supra* note 19, at 2; *see also* Memorandum from Jane S. Brautigam, *supra* note 237, at 3–5.

239. Memorandum from Jane S. Brautigam, *supra* note 237, at 4 (citing Farrell, *supra* note 19, at 3–5).

240. *See* Farrell, *supra* note 19, at 39 ("[E]nergy democracy mostly overlaps with New York's Utility 2.0 debate, except for the former's more explicitly political perspective.").

241. *Cf.* Krakoff, *supra* note 180, at 90 (embracing local action for its ability to "nurture[ ] the attitudes, behaviors, and patterns of living that might be most adaptive to the resource challenges and scarcities of a climate-changed world"); Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 Duke L.J. 857, 925 (2013) (suggesting that "municipal efforts to address greenhouse-gas emissions . . . although palpably ineffective in one way—they will not directly contribute much to reducing global emissions—may nonetheless turn out to be effective in somewhat the way Sierra Club excursions were: as essays in new ways of experiencing climate change as mattering").

In Part V, I return to discuss some of the challenges of localism previewed here, with special attention to the limits of local governance reform in transforming the larger electricity grid. First, however, there remains one more vision of energy democracy to explore in greater detail: access to process.

IV. Energy Democracy as Access to Process

Calls for localism as the pathway to energy democracy presume to wrest power from our current institutions of electricity governance, which operate predominantly at the state and regional scale.[242] But localizing the scale of governance processes and resource bases provides only one answer to the question of how to improve citizens' access to these processes.[243] Instead, regulators might focus on improving access to the processes that now exist within energy governance at the state, regional, and federal scales. This Part examines how existing regulatory institutions might be reformed to enable more democratic participation in the increasingly value-laden decisions these long-standing institutions are now being forced to make.

A. *Articulating the Vision: The Hard, Dirty Work of Bureaucracy*

Across subject areas, scholars and regulators have been devoting increased attention in the last several decades to more effectively engaging a wider range of citizens in governmental decisionmaking processes. Such proposals often fly under the banner of "deliberative democracy"[244] and, within administrative law, "administrative democracy" or "new governance."[245] At their best, these theories might draw agencies, regulated entities,

242. *See supra* Section I.B.

243. *Cf.* Jerry Frug, *Administrative Democracy*, 40 U. Toronto L.J. 559, 561 (1990) ("Instead of discussing the transformation of the administrative state, proponents of democracy have largely focused on eliminating it.").

244. James S. Fishkin, *The Televised Deliberative Poll: An Experiment in Democracy*, 546 Annals Am. Acad. Pol. & Soc. Sci. 132, 140 (1996); *see also* Benjamin R. Barber, Strong Democracy: Participatory Politics for a New Age 117–19, 174–78 (1984) (proposing a theory of "strong democracy" that is a "distinctively modern form of participatory democracy"); Dorf & Sabel, *supra* note 209, at 283 (proposing a new model of "institutionalized democratic deliberation"); Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493, 1526–28 (1988).

245. On administrative democracy, see generally David Arkush, *Democracy and Administrative Legitimacy*, 47 Wake Forest L. Rev. 611 (2012), and Cuéllar, *supra* note 33. On new governance, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 342, 344 (2004); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997) [hereinafter Freeman, *Collaborative Governance*]; and Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543 (2000). Administrative democracy and new governance overlap, but are not identical: whereas administrative democracy focuses on better incorporating citizens' input into bureaucratic processes, new governance aims more to transform these processes into a "problem-solving exercise in which parties share responsibility for all stages . . . in which solutions are provisional, and in which the state plays an active, if varied, role." Freeman, *Collaborative Governance*, *supra*, at 6.

and interested parties into deliberative dialogue about the problems they face, thus creatively expanding potential solution sets and creating a regime that is "genuinely participatory, adaptive, and problem oriented."[246]

Electricity governance proves in many ways a promising arena for these theories. In their design, RTOs and ISOs attempt to achieve many of the scholarly criteria for collaborative, deliberative institutions. They are quasi-public (requiring FERC approval of operating practices), quasi-private (with utilities able to exit at will), and a middle ground of state and federal authority, with their regional emphasis.[247] Moreover, they have developed their own "stakeholder processes" that attempt to be more flexible and iterative, and to provide early input into procedures and plans.[248] In their ideal form, such processes might allow for a multiplicity of voices, including but not limited to affected states and utilities, to have input into future electric system design.[249]

States, too, are considering how to democratize their regulatory processes as they tackle major reforms. As discussed in more detail below, states are innovating in the realm of process in ways that are unprecedented in the history of public utility regulation. The access-to-process vision can thus be summed up as a concerted attempt to respond to calls for energy democracy not by shifting modes or levels of governance, or by moving to markets to draw on consumer preferences for change, but by focusing on strengthening existing governance institutions and their processes. Perhaps extant processes, with their admitted current imperfections, may be the best places in which to achieve significant change.

B. *From Vision to Concrete Reforms: Cracking Open Energy Institutions*

If the clamor for energy democracy is to be satisfied through reforming existing avenues of governance, these processes have a long way to go. I myself have participated in what I can only describe as a stultifying and unproductive mass of conference calls aimed at carrying out one RTO's stakeholder processes on a single topic. My experience appears representative: current stakeholder participants in these processes report them to be time-consuming, overly technical, and weighted toward RTO members' interests.[250]

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246. Freeman, *Collaborative Governance*, *supra* note 245, at 66.

247. *See* Dworkin & Goldwasser, *supra* note 77, at 546 n.11, 548–49, 555.

248. *See* Shelley Welton, *Non-Transmission Alternatives*, 39 HARV. ENVTL. L. REV. 457, 480 (2015) (noting FERC's recent emphasis on RTOs and ISOs designing robust stakeholder processes).

249. *Cf.* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 957–58 (2014) (articulating this ideal but suggesting that states are given undue primacy in the current administrative model).

250. *See* EJ Wilson, Presentation at the Harvard Environmental Law Program's Power Shift Network Webinar (Mar. 2016), https://cdnapisec.kaltura.com/html5/html5lib/v2.43/mwEmbedFrame.php/p/1511881/uiconf_id/27047321/entry_id/1_b8n8sq7i?wid=_1511881&iframeembed=true&playerId=Ddata-6b6504ae-4307-442d-87a6-ea28baded323&entry_id=1_b8n8sq7i (on file with the *Michigan Law Review*) (discussing case studies and interviews on RTO

Cognizant of these challenges, many scholars and policymakers are working on proposals for reform. Most notably, FERC issued a major order in 2011 regarding RTO practices that emphasized enhancing stakeholder processes.[251] The commission also required that RTOs consider state policies when planning for the future of the transmission grid, in an effort to align regional grid planning with the ambitious renewable energy goals many states have adopted.[252]

Recently, RTOs have begun examining more robust ways to incorporate citizen preferences into energy market design. For example, ISO-New England recently launched a stakeholder process called "IMAPP"—"Integrating Markets and Public Policy."[253] In this proceeding, the RTO is considering stakeholder proposals for ways to recognize and account for public policy initiatives *within* the RTO's market structure. So, for example, the ISO might construct a "forward clean energy market" in which it runs a procurement process to purchase commitments to supply clean energy, in order to help states efficiently meet their renewable energy targets.[254] Or, the ISO might incorporate a carbon adder into the price of electricity, which reflects the price of carbon as established by state laws within the region.[255] FERC has appeared open to fostering a dialogue among states, market participants, environmental groups, and market operators on this topic—in May 2017, it hosted a two-day conference to hear from these stakeholders.[256]

These conversations remain in their early days, and even if an ISO were convinced, it is unclear whether FERC would deem such initiatives legally

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governance). Dworkin and Goldwasser suggest that transmission owners maintain undue influence because they can wield the threat to withdraw from the RTO. Dworkin & Goldwasser, *supra* note 77, at 571.

251. *See* Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842, 49,869 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35) [hereinafter Transmission Planning]; Welton, *supra* note 248, at 457, 462 & n.27 (explaining the order's reliance on stakeholders).

252. Transmission Planning, *supra* note 251, at 49,876.

253. *See Integrating Markets and Public Policy*, New Eng. Power Pool, http://nepool.com/IMAPP.php [http://perma.cc/24X3-FL7H].

254. *See* Timothy J. Brennan, Nat'l Grid, A Forward Clean Energy Market for New England?, at 6 (2016), http://nepool.com/uploads/IMAPP_Presentation_National_Grid.pdf [https://perma.cc/2BLS-W76U].

255. *See* Robert Stoddard & Jerry Elmer, Conservation Law Found., A Competitive Markets Design to Achieve New England's Energy Decarbonization Goals 7 (2016), http://nepool.com/uploads/IMAPP_20160914_Presentation_FCM-C.pdf [https://perma.cc/MNK7-GLFW] (proposal by the Conservation Law Foundation to include a "Carbon Integrated Forward Capacity Market" in ISO-New England); *see also* Exelon, Update on Carbon Price Proposal (2016), http://nepool.com/uploads/IMAPP_20161110_Exelon_Carbon_Price_Proposal_Update.pdf [https://perma.cc/4PL9-TMSZ] (Exelon carbon price proposal for ISO-New England).

256. *See Conferences*, Fed. Energy Regulatory Comm'n, https://www.ferc.gov/EventCalendar/EventDetails.aspx?ID=8663&CalType=%20&CalendarID=116&Date=05/01/2017&View=Listview [https://perma.cc/7Y36-FRNC].

acceptable.[257] If RTOs and ISOs were to shift in this direction, their reforms would have some synergies with the "consumer choice" vision. As in consumer choice, one focus would be on getting prices *right*, from a societal-goal perspective, and then letting the market unfold as it will. Nevertheless, what makes the IMAPP and similar processes different from the consumer-choice vision is the starting point: whereas states contemplating a consumer-choice future are considering relinquishing more control *to* the market, RTOs and ISOs are considering up-front market designs that are more responsive to democratic concerns, as filtered through state policies. Whether states and other stakeholders should want these markets to filter in their preferences is a complex question beyond the scope of this Article—for present purposes, it is most interesting to note the emergence of a robust, deliberative set of conversations on the topic.

At the same time, much clean energy policy remains centered at the state level. States, too, are well aware of the need to engage stakeholders and the public more successfully as they embark on unprecedented levels of reform.[258] The most pronounced movement in this direction is a shift away from the predominant use of "rate cases"—adjudications focused on the revenue needs of a particular utility—as a place to set state policy.[259] Instead, many commissions are now initiating, of their own accord, rulemaking proceedings that allow for a wider lens onto policy questions of social import.[260] In some places, these wider proceedings have been accompanied by the use

257. FERC must approve changes to regional tariffs under its obligation to ensure just and reasonable rates. *See* 16 U.S.C. § 824d(a)–(c) (2012). The Supreme Court has been active in developing these types of efforts recently. *See, e.g.*, Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016); *see also* Ari Peskoe, *Easing Jurisdictional Tensions by Integrating Public Policy in Wholesale Electricity Markets*, 38 ENERGY L.J. 1 (2017) (exploring the legality of such reforms).

258. *See, e.g.*, Robert Walton, *Gov. Brown, Lawmakers Strike Deal for Sweeping Reforms at California PUC*, UTILITY DIVE (June 29, 2016), http://www.utilitydive.com/news/gov-brown-lawmakers-strike-deal-for-sweeping-reforms-at-california-puc/421762/ [https://perma.cc/3RCU-2D4D] (announcing of a series of reforms to make it "easier for the public and watchdog groups to participate in CPUC proceedings").

259. Most PUCs have rulemaking authority, in addition to adjudicatory authority. *See, e.g.*, *Administrative Rules*, OR. PUB. UTIL. COMM'N, http://www.puc.state.or.us/Pages/admin_rules/index.aspx [https://perma.cc/EG8J-EFU3] (explaining the difference between the Oregon PUC's rulemaking and ratemaking procedures).

260. *See, e.g.*, N.Y. Feb. 2015 Order, *supra* note 114; *see also* Herman K. Trabish, *Confidence in Collaboration: Rhode Island Targets a Common Perspective on DER Values*, UTILITY DIVE (Sept. 6, 2016), http://www.utilitydive.com/news/confidence-in-collaboration-rhode-island-targets-a-common-perspective-on-d/425700/ [https://perma.cc/2QPX-ABR6]; *Docket Tracker*, IOWA UTILS. BD. (Jan. 7, 2014), https://iub.iowa.gov/docket-tracker [https://perma.cc/XQV3-CMFF?type=image] (describing the docket on Distributed Generation as "initiating an inquiry into the subject of distributed generation to consider the policy and technical issues associated with its potential widespread use, including consumer protection, interconnection, and safety," and inviting comments on "broad general questions").

of more collaboratives, in which the classic adversarial structure of proceedings is replaced by a more dialogic model, intended to spark creativity toward new solutions and compromises.[261] A wide range of civil society and not-for-profit organizations have expressed their support for further movement in this direction, calling for increased use of transparent, collaborative processes in place of rate cases.[262] Collaboratives might prove particularly useful in structuring fruitful citizen input, by soliciting widespread participation on the issues that matter most to people and involve the least technical expertise.[263]

If more collaborative, commission-initiated proceedings are to become the way of the future, they will need to be accompanied by one other simple but contentious reform: state governments will have to give PUCs the resources necessary for conducting such proceedings. Commissioners may well hesitate to implement these more capacious processes due to resource constraints.[264] And many of the states that have been most successful in utilizing these broader processes are also the best resourced, in terms of staff and money. These examples confirm a point that should be intuitive: if we want bureaucracy to do much of the work of democracy, we cannot impoverish our bureaucratic organizations.

C. *Assessing the Vision: Who'd Want to Participate in* That*?*

To be frank, the clamor that exists for "energy democracy" within the activist community rarely includes direct calls for more "access to process"

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261. In this way, these collaboratives resemble the movement toward "negotiated rulemaking" in federal agencies during the 1990s, which has had questionable success. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L.J. 1255, 1261 (1997).

262. *See* Letter from Dan Bakal et al., to Travis Kavulla, President, Nat'l Ass'n of Regulatory Util. Comm'rs 3 (June 23, 2016), http://blogs.edf.org/energyexchange/files/2016/06/Good-Rate-Design-Process-Letter-to-NARUC.pdf [https://perma.cc/Z76J-JJXY].

263. A recent report from the Harvard Environmental Policy Initiatives catalogues several other instances of PUCs using "workshops" and "stakeholder meetings" to advance productive dialogues on policy topics of interest. *See* Ari Peskoe, Harvard Envtl. Policy Initiative, Alternative Dispute Resolution at Public Utility Commissions 14–19 (2017), http://environment.law.harvard.edu/wp-content/uploads/2017/05/Alternative-Dispute-Resolution-at-PUCs-Harvard-Environmental-Policy-Initiative.pdf [https://perma.cc/6DAV-7GFL]; *see also* Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 Admin. L. Rev. 611, 617, 622 (2013) (arguing that democratic enhancements to agency procedures should focus on involving citizens in appropriate ways, on questions where their opinions can be of real use and import). Of course, collaboratives also have anti-democratic tendencies, in that they limit the people invited to the table (much like negotiated rulemaking). *See* Herman K. Trabish, *Reporter's Notebook: How Conflict and Collaboration Shape Utility Policy in the Age of Renewables*, Utility Dive (Sept. 15, 2016), http://www.utilitydive.com/news/reporters-notebook-how-conflict-and- collaboration-shape-utility-policy-in/426332/ [https://perma.cc/8UT3-L3UJ].

264. *See, e.g.*, Letter from Dan Bakal et al., to Travis Kavulla, *supra* note 262 (recommending that commissions "should look for opportunities to engage collaboratively in formal, constructive stakeholder processes that explore new ways of moving forward together, even if it takes a little longer").

of the type outlined above. [265] It seems, in some ways, like a 1960s conceit—one that predates all of the public choice denigration of U.S. political systems,[266] and one that runs counter to Americans' serious distaste for bureaucracy and the general decline in civic participation over the last fifty years.[267] Yet at the same time, the activist community clearly recognizes the benefits of organizing at a scale larger than the local, and of attempting to have more plural voices injected into major policy debates over the future of our energy system. One need look no further than the Keystone Pipeline XL debate that played out over the last five years as evidence of this proposition.[268] Other examples abound: the "Break Free" movement staged what one major newspaper called "the largest ever global civil disobedience against fossil fuels" over the course of two weeks in May 2016,[269] and protests against the Dakota Access Pipeline in North Dakota garnered substantial media and presidential attention in 2016 and early 2017.[270]

Protests—a clear symbol of energy democracy's mounting power—are one important avenue of voicing popular sentiment regarding major energy infrastructure decisions. Such protests may "have in them the seeds of a more democratic politics."[271] Ultimately, however, "unless protests (or their activists) move inside the institutions in some way, the impact on public

265. However, interest in process appears to be growing. *See, e.g.*, N.Y. State Energy Democracy All., *supra* note 27, at 6 (explaining the group's agenda to change PUC participatory processes).

266. Public choice theory borrows from economics' rational actor model to "seek[ ] to understand political outcomes as a function of self-interested individual behaviors." Mashaw, *supra* note 31, at 11 (explaining—though not agreeing with—this viewpoint, and sketching its prevalence and import). For a classic exposition of public choice theory, see James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, *in* The Theory of Public Choice—II 11 (James M. Buchanan & Robert D. Tollison eds., 1984). For a more recent take, see Terry M. Moe, *Power and Political Institutions*, *in* Rethinking Political Institutions: The Art of the State 32 (Ian Shapiro et al. eds., 2006).

267. *Cf.* David Graeber, The Utopia of Rules: On Technology, Stupidity, and the Secret Joys of Bureaucracy 45–53 (2015) (describing bureaucracy horror writing and his own bureaucratic horror story); Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 25–26 (2000).

268. *See* Eilperin, *supra* note 8.

269. *See, e.g.*, Oliver Milman, *'Break Free' Fossil Fuel Protests Deemed 'Largest Ever' Global Disobedience*, Guardian (May 16, 2016, 2:22 PM), http://www.theguardian.com/environment/2016/may/16/break-free-protest- fossil-fuel [https://perma.cc/66MW-MEPK].

270. *See* Eilperin, *supra* note 8; *see also* Memorandum from Jo-Ellen Darcy, Assistant Sec'y of the Army, to Commander, U.S. Army Corps of Eng'rs, https://www.army.mil/e2/c/downloads/459011.pdf [https://perma.cc/LY9L-VUXS] (announcing decision under the Obama Administration to conduct an environmental impact statement on the Lake Oahe crossing of the pipeline); *Presidential Memorandum Regarding Construction of the Dakota Access Pipeline*, White House (Jan. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline [https://perma.cc/5T28-4RZF] (ordering the Army Corps of Engineers to "review and approve in an expedited manner" any easements or other permits necessary for the pipeline's completion).

271. Fischer, *supra* note 44, at 296.

policy is indirect and uncertain."[272] Moreover, the opportunity for deliberation toward a meeting of opposing minds is sacrificed.[273] One critical challenge for the access-to-process vision, then, will be to channel the strong feelings evinced in these protests into conversations within energy law's formalized governance processes.

PUCs may be a particularly productive site in which to achieve this aim. Some critique the "just and reasonable" standard governing PUC decisionmaking as providing almost no substantive boundaries to commission authority.[274] At the same time, this broad mandate offers considerable leeway for injecting new considerations and processes into long-standing legal regimes.[275] A clamor of voices presenting new ideas of what citizens and ratepayers want out of these systems might have considerable power in shaping what just and reasonable energy policy looks like in the future. And the potential payoff of participation increases as more state commissions begin to fundamentally reexamine their legal regimes governing electricity.[276]

One must, however, have faith in the ability of deliberative democracy to infiltrate and influence energy institutions to buy into this vision. Such faith is currently in short supply.[277] For several decades, public choice scholars have propounded the "interest group" representation model of the state, which views all outcomes as bargains that benefit special interests to the detriment of the general welfare.[278] These theories' emphasis on the links between political power and regulatory outcomes casts into doubt the ability of citizens to meaningfully change outcomes based on participation and deliberation. But these theories are not without their forceful critics, who make an important point of comparative institutional competence[279] when it

272. Dalton et al., *supra* note 21, at 251; *see also* David Treuer, *An Indian Protest for Everyone*, N.Y. Times (Nov. 26, 2016), http://www.nytimes.com/2016/11/26/opinion/sunday/an-indian-protest-for-everyone.html (on file with the *Michigan Law Review*) (eloquently making this same point with respect to the Standing Rock Protests over the North Dakota Access pipeline).

273. *See* Amy Gutmann & Dennis Thompson, Democracy and Disagreement 1 (1996) ("[W]hen citizens or their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions.").

274. *See, e.g.*, Elesha Simenov, Note, *Just* Not *Reasonable: What the FERC's Order on Demand Response Reveals About the Current Shortfalls in "Just and Reasonable" Rulemaking*, 31 Temp. J. Sci. Tech. & Envtl. L. 311, 326 (2012) (arguing that the "just and reasonable" standard provides no "defined method for dealing with new and complicated technologies").

275. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1, 7 (2014) (describing how FERC must use a dated statute to cope with new problems); Scott, *Old Dog*, *supra* note 38, at 375.

276. *See supra* notes 114–116.

277. *See* Mashaw, *supra* note 31, at 26–29 (critiquing the way public choice theory risks creating the dread government it imagines); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 Va. L. Rev. 199, 202 (1988) (suggesting that public choice theorists caused "the democratic sphere" to "become[ ] the embodiment of, if not evil, then abject failure").

278. *See* Mashaw, *supra* note 31.

279. *Cf.* Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (1994).

comes to administrative democracy: agencies in fact may be subject to *fewer* of these pathologies than elected officials, making them a comparatively better place in which deliberation might occur.[280] Indeed, precisely because of their "greater expertise and fewer immediate political pressures," agencies may be the *best* place for deliberation to occur.[281]

Even if powerful corporate interests do at times dominate agency processes,[282] there is another reason to push for their reform rather than abandonment: to a large extent, we get the bureaucracy we build. To presume that one should not attempt to reform or intervene in these processes because only industry participates becomes a self-fulfilling prophecy.[283] Only by actively seeking to make RTOs, PUCs, and other government entities more open to a wider range of viewpoints can those outside the process hope to influence the decisions that these agencies control.[284]

The most optimistic studies of democratizing regulatory processes suggest that the lay public is quite interested in commenting on certain regulations, and that their comments "nearly always raise concerns that are relevant to the agency's legal mandate."[285] Particularly as the issues confronting energy law become more value laden, and thus amenable to lay input, energy law might import some of these ideas.

That said, energy regulators confront in spades a challenge that plagues administrative democracy more generally: the "fundamental incongruence between the way that 'insiders' think and talk . . . and the ways that novice

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280. David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 101, 106 (arguing that "agency policymaking is often . . . desired by voters" because it produces the result that voters would have come to "if they had the time and resources to devote to the problem"); *see also* Pildes & Anderson, *supra* note 49, at 2193.

281. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992).

282. *See, e.g.*, Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 82 (2013) (finding that few rules receive comments, and most of these come from regulated entities); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 103–04 (2011) (finding imbalances in interest-group participation "over the entire life cycle" of certain environmental regulations); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 137 (2006). *But see* Cuéllar, *supra* note 33, at 460 (finding that for two of the three regulations he studied, "comments from individual members of the lay public account[ed] for over 70% of comments").

283. *See* MASHAW, *supra* note 31, at 26–27.

284. On this point, Rachel Barkow offers helpful starting suggestions as to how attention to institutional design can better empower less influential groups. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); *see also* Dorothy M. Daley & Tony G. Reames, *Public Participation and Environmental Justice*, *in* FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT'S RESPONSE TO ENVIRONMENTAL JUSTICE 143, 145–46 (David M. Konisky ed., 2015) (arguing that well-done participation can "can increase equity, reduce conflict and gridlock, and lead to improved environmental decision making"); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1627 (1985).

285. Cuéllar, *supra* note 33, at 414.

commenters do."[286] To effectively accommodate democratic demands *within* existing processes, regulators will have to become more adept at accepting "situated knowledge"—that is, knowledge that is "highly contextualized, experiential, [and] often communicated in the form of personal stories."[287]

The challenge of incorporating this kind of knowledge is most acute in RTOs, which operate through opaque, technical, deeply bureaucratic, and meeting-dense processes.[288] It is simply unlikely that a substantial number of individual citizens or small groups might participate in these endeavors, owing to both cognitive and resource constraints.[289] Because of these constraints, interest groups and state representatives—standing as the voice of their members or polities—are the major players in RTO proceedings.[290] And in terms of interest groups' member connection, "almost all are led by resident professional staffs, and funded more by outside donors or commercial side ventures than from membership dues."[291] Thus, if one falls into the camp that believes that national-scale interest groups "are no substitute for more personal forms of political engagement,"[292] then RTOs remain challenging sites for democracy building.[293] At the least, serious thought should be given to the way that groups participating in RTO stakeholder processes establish their positions on the significant democratic questions present in energy governance, in an attempt to gauge which groups best channel public views.[294] Moreover, policymakers might be particularly wary of using RTOs

286. Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1187 (2012); *see also* Mendelson, *supra* note 109, at 1346.

287. Farina et al., *supra* note 286, at 1187.

288. *See* Benjamin A. Stafford & Elizabeth J. Wilson, *Winds of Change in Energy Systems: Policy Implementation, Technology Deployment, and Regional Transmission Organizations*, 21 ENERGY RES. & SOC. SCI. 222, 230-31 (2016) (reporting the results of interviews with RTO stakeholder participants, including comments on the sheer number of meetings and the fact that to participate effectively, "you have to be a combination of an economist and a math wizard").

289. *See* Kay Lehman Schlozman et al., *Civic Participation and the Equality Problem*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY, *supra* note 223, at 427, 431–38 (finding that the "skew" in political participation based on high levels of education or income is "especially pronounced" in the United States); Rahman, *supra* note 51, at 1330.

290. *See* Dworkin & Goldwasser, *supra* note 77, at 571; *see also* Seifter, *supra* note 249, at 963–69 (suggesting that the fact that states are primarily represented at FERC by their national association creates perverse results in the positions taken).

291. Skocpol, *supra* note 224, at 24.

292. PUTNAM, *supra* note 267, at 344.

293. *See* Mintrom, *supra* note 164, at 61; *see also* Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 185 (1977–1978). *But see* Berry, *supra* note 223, at 369 (defending the importance of national interest groups against criticisms that they represent only "thin" democracy).

294. Miriam Seifter has recently argued that agency participation can only be justified on grounds of democratic legitimacy if participants "channel the will of the public majority." Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1324 (2016). I think this argument overstates the challenge, since the theory of constructing a more

as loci of policymaking, instead of state PUCs, if they are less capable of engendering participation.

State PUC decisionmaking processes enjoy somewhat broader participation than these densely technical, often obscure RTO stakeholder-driven processes. Particularly when it comes to major reform or topics that interest the public at large, there does appear to be an appetite to participate at the PUC level. For example, 300-plus stakeholders have weighed in on New York's recent effort at major electricity regulatory reform, including many small community groups.[295] The New York commission's use of numerous public hearings and collaborative processes tracks some of the recommendations that scholars outside the energy law field have made regarding how to broaden administrative "democracy."[296]

One particularly noteworthy example comes from the efforts of the "Energy Democracy Alliance," a group working to inject its vision of energy democracy[297] into New York's regulatory reforms.[298] One of the Alliance's main concerns has been energy affordability in the face of the commission's many consumer-centered reforms.[299] To address these concerns, New York's commission instituted a proceeding to consider the effects of its reform agenda on low-income utility customers.[300] After approximately a year of study and meetings, the commission announced in 2016 a major expansion

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deliberative administrative state is that the process of deliberation itself may improve outcomes without requiring perfect representation. Nevertheless, Seifter adeptly identifies challenges in relying on interest groups as channels for public representation without also knowing whether the group "actually speak[s] for a membership." *Id.* at 1300.

295. *See Matter Master: 14-00581/14-M-0101*, N.Y. St. Dep't Pub. Serv., http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-M-0101&submit=search [https://perma.cc/23HL-HNRR] (showing 310 participants).

296. *See* Fiorina, *supra* note 225, at 414 (arguing that the cure to skewed participation "is even more civic engagement" to dilute the outlier voices); Arkush, *supra* note 245, at 611; David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 Geo. Wash. L. Rev. 1458, 1458 (2013); Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. Rev. 321, 325 (2010); Cuéllar, *supra* note 33, at 469–72; Cynthia R. Farina et al., *Regulation Room: Getting "More, Better" Civic Participation in Complex Government Policymaking*, 7 Transforming Gov't 501, 501 (2013); Fishkin, *supra* note 244, at 134; David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 Fordham L. Rev. 81, 82–83 (2005); Frug, *supra* note 243, at 562; William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 Admin. L. Rev. 171, 171–72 (2009); Mendelson, *supra* note 109, at 1346; Noveck, *supra* note 217, at 437–38; Peter M. Shane, *Empowering the Collaborative Citizen in the Administrative State: A Case Study of the Federal Communications Commission*, 65 U. Miami L. Rev. 483 (2011).

297. For the Alliance's mission, see *About Us*, N.Y. Energy Democracy Alliance, http://energydemocracyny.org/about-us [https://perma.cc/AQR2-455K].

298. *See* N.Y. Feb. 2015 Order, *supra* note 114.

299. *Policy Priorities*, N.Y. Energy Democracy Alliance, http://energydemocracyny.org/policy-priorities [https://perma.cc/Y3BZ-LG9M].

300. *See* State of N.Y. Pub. Serv. Comm'n, *Order Instituting Proceeding*, N.Y. State Dep't Pub. Serv. 1 (Jan. 9, 2015), http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-m-0565&submit=search£y+Case+Number [https://perma.cc/9VXF-G4GW].

of its low-income programs: the new policy targets a total allowable "energy burden" for households of 6% of income[301] and consequently expands spending on low-income programs by *87%*.[302] Both activists and the commission credit these reforms largely to successful citizen participation: during twelve public hearings, over 100 speakers generated 600 pages of testimony attesting to the "difficulties that they have faced paying for service, and the need to improve energy affordability for the poorest New Yorkers."[303] This outcome demonstrates the ability of "situated knowledge" to contribute to significant electricity law reform through well-executed access to process.[304]

One final concern with an access-to-process vision of democracy comes from asking what is lost when access is gained. More specifically, some worry that drawing protest groups and activists within bureaucratic processes deradicalizes their demands and saps the strength of their movements.[305] There is, perhaps, glory in the struggle *against* government that cannot be replicated in a daylong, windowless meeting within the halls of power.[306] Relatedly, too many of these meetings—that is to say, too much participation—might bog down institutions, impeding them from achieving their goals.[307] Striking the right amount of access to process is thus a challenge that rarely will leave all sides satisfied.

The access-to-process vision of energy democracy thus faces all the challenges that have plagued efforts to inject more participation in bureaucracy across other subject areas. But it also is the only vision of energy democracy

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301. "Energy burden" refers to the percentage of household earnings that go toward paying energy bills. *See* State of N.Y. Pub. Serv. Comm'n, *Order Adopting Low Income Program Modifications and Directing Utility Filings*, N.Y. St. Dep't Pub. Serv. 3, 7–8 (2016), http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-m-0565&submit=search£y+Case+Number [https://perma.cc/AC74-694F].

302. *See* State of N.Y. Pub. Serv. Comm'n, *Order Adopting Low Income Program Modifications and Directing Utility Filings*, N.Y. St. Dep't Pub. Serv. 4 (2016), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BC2F31C9-B563-4DD6-B1EA-81A830B77276} [https://perma.cc/AC74-694F].

303. *See id.* at 7; *see also* N.Y. State Energy Democracy All., *supra* note 27, at 8–9.

304. I provide a much more detailed account of this proceeding in Shelley Welton, *Grid Modernization and Energy Poverty*, 18 N.C. J.L. & Tech. 555, 596–606 (2017).

305. *See* Sklansky, *supra* note 22, at 1766 (explaining how participatory democracy can become "a rhetoric of apology" if "the mere *possibility* of participation can be invoked to legitimize decisions as democratic").

306. *See* Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 3 (2004) (arguing that democracy must be much more than participation in institutions); Bernard E. Harcourt, *Supreme Court Review—Foreword: "You Are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers*, 94 J. Crim. L. & Criminology 503, 512 (2004) (exploring "a politics that embraces the marginal, even criminal desire to transgress for the sake of transgression, that thrives on rebellion against hegemonic legal regimes").

307. *See* Michael Schudson, The Rise of the Right to Know: Politics and the Culture of Transparency, 1945–1975, at 4 (2015) (cataloguing the "limits to the value of openness"); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. Rev. 173, 178 (1997).

that specifically aims to facilitate scale-appropriate dialogue about what Americans want out of their electricity supply. In the final Part that follows, I defend this aspiration of the access-to-process vision, and explore more completely the reasons that I believe the two other visions fall short in this regard.

V. Coming to Terms

As has long been the case with questions of participation, power, and democracy generally, there is no perfect answer when it comes to how best to achieve democratization in the realm of energy governance. There are benefits and drawbacks to all three visions of "energy democracy." Yet, although a decisive choice in favor of one vision and its attendant reforms may not be warranted, I argue in this Part that there are reasons to be wary of the movement toward consumer choice and local control as antidotes to mounting frustration with the technocratic nature of centralized energy bureaucracies. Each of these visions presents a risk of diminishing the force and function of the access-to-process vision, without necessarily offering up a better replacement. To make this case, this final Part puts the access-to-process vision into comparison with consumer choice and localism to suggest some shortcomings each of these alternatives to traditional citizen participation has in the energy law context. It also briefly suggests some ways that regulators might work to overcome or dampen these weaknesses.

A. *Consumer Choice and Access to Process*

I find particular cause for concern in the notion that consumer-choice reforms in energy law will quench the growing thirst for democratization. Consumer-choice energy democracy asks people to participate as *consumers* in making choices about their energy supply. This opportunity to cooptimize energy consumption and monetary savings might present a neoliberal fantasy for the gadget obsessed,[308] but it is likely to prove overwhelming and annoying to most of us.[309] Early empirical data suggest that most customers prefer to delegate energy choices to companies and technologies that will optimize and automate them for us.[310] If this trend continues, then energy-supply decisions in the consumer-choice framework will turn largely upon the revenue opportunities presented to these companies.[311] What role, then, is left for everyday energy users to make their preferences known?

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308. The brilliant and caustic William Boyd deserves credit for suggesting this phrase to me.

309. *See* Eisen, *supra* note 40, at 1722–23.

310. Elisabeth Dütschke & Alexandra-Gwyn Paetz, *Dynamic Electricity Pricing—Which Programs Do Consumers Prefer?*, 59 Energy Pol'y 226, 226 (2013) (finding that "smart home technologies including demand automation" proved a "prerequisite" for consumer-side engagement in European field tests of dynamic pricing); Joel B. Eisen, *Smart Regulation and Federalism for the Smart Grid*, 37 Harv. Envtl. L. Rev. 1, 13 (2013).

311. *See* N.Y. May 2016 Order, *supra* note 57, at 40–41.

My worry is this: a full-throated consumer-choice vision is likely to offer limited outlets for expressing considered preferences on energy supply. At the same time, redesigning governance to accomplish this vision may diminish Americans' interest in participating in many of the centralized processes we currently have for collectively making major energy infrastructure decisions. Put differently, consumer-choice versions of energy democracy come specifically at the impoverishment of central mechanisms for planning our energy transition: where consumer choice reigns, regulatory power is transformed from grid-wide planning and priority setting, into a focus on business-model design and oversight. Although processes may still nominally be in place for consumers to express preferences on these new regulatory priorities, the topics and choices on the table are unlikely to attract robust consideration.

New York may stand as a cautionary tale in this regard. As noted earlier, regulators there are transforming the state's utilities into "distributed system platform provider[s]," by which they mean electric grid coordinators, capable of running a market that dispatches customer-sited distributed energy resources in the same way that wholesale electricity markets coordinate large-scale utility offerings. [312] To get utilities on board, regulators have offered them the chance to propose new modes of earning revenues, with earnings tied to the utility's ability to successfully deploy increasing quantities of distributed resources.[313] In simpler terms, here's the arrangement: New York utilities will now be in charge of promoting distributed energy, and they'll make their decisions in this regard based on what will earn them the most revenue under new business models established by the commission.

New York's plan may prove to be a highly effective method for deploying maximum quantities of distributed energy resources.[314] And there has certainly been considerable citizen input into its contours. As noted above, the process of overhauling the state's utility system has provoked outstanding levels of public participation—that is to say, an efflorescence of energy democracy in the access-to-process mode.[315] But postreform, the commission will be relegated to a position of approving or disapproving particular utility models for earning revenue from system dispatch design.[316] Utilities themselves will be elevated to the position of controlling quantities and types of distributed energy supplies and balancing these with wholesale

312. *See* N.Y. Feb. 2015 Order, *supra* note 114, at 31.

313. *See* N.Y. May 2016 Order, *supra* note 57, at 41.

314. It has certainly made this one of its goals. *See* N.Y. Feb. 2015 Order, *supra* note 114, at 3.

315. *See Matter Master: 14-00581/14-M-0101*, *supra* note 295 (noting 310 intervenors in the REV proceeding).

316. *See* N.Y. May 2016 Order, *supra* note 57, at 24–25, 47 (describing the commission's new process for utilities proposing "platform service revenues" and "earning adjustment mechanisms" to be approved by the commission for inclusion in the utility's tariff).

market purchases, so long as they play by the rules set forth for their newly created markets.

Accordingly, New York's commission is in essence accepting diminished control over the future shape of the grid in order to create an efficient energy market that includes robust consumer-choice-style participation.[317] In making these reforms, the commission has transformed its role from active policymaker and grid planner into something more akin to a market monitor, in charge of ensuring that utilities have fair market rules and compensation structures in place.[318] That's an important role, to be sure—the incentives that the commission puts in place will certainly drive utility decisionmaking regarding what type, scale, and quantity of resources to pursue.

But the commission's role will also become more opaque, creating risks to the kind of deliberative democracy it has been so successful in fostering during its recent regulatory reforms. Although the rate incentives that the commission establishes will contain significant value choices within them, these values will be funneled into highly technocratic discussions that mirror the ratemaking procedures of the past. In these conversations, stakeholders without significant technical training may find it difficult to link proposed "earning adjustment mechanisms" to robust debates over the role of the utility in modern society or the best way to protect vulnerable consumers.[319] And because the commission has decided to continue ratemaking's utility-by-utility approach to designing new "earning mechanisms" and "platform service revenues,"[320] it will be even more difficult for stakeholders with limited resources to participate effectively. Thus, it is hard to imagine these proceedings encouraging civic participation in the way that major planning or rulemaking proceedings do. Accordingly, New York risks trading away access to process in enhancing consumer choice.

"So what?" one might ask. If we have more individuals participating in consumer choice than we could ever hope to muster under an access-to-process vision, then we may well have a net democratic gain. Maybe consumer participation is all we can really expect of people desensitized by a century of consumptive turns in democracy, where we have increasingly been asked to "vote" as consumers and where political campaigns have largely drawn from the playbook of advertising.[321]

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317. *See id.* at 16–17, 21–22 ("Rather than specifying or pre-approving all of the actions it believes need to be taken, the Commission will allow markets to bring forward the best options to achieve the broad policy objectives identified by the State.").

318. *See* N.Y. Feb. 2015 Order, *supra* note 114, at 31.

319. *See* N.Y. May 2016 Order, *supra* note 57.

320. *See id.* at 36–37 ("To the extent possible, the financial details of EAMs [earning adjustment mechanisms] should be developed in rate proceedings, because the relative weight of each EAM will vary by utility based on its potential value within the service territory, the capabilities of the utility, and the unique financial situation of each utility.").

321. *See* COHEN, *supra* note 146, at 332 (discussing political campaigns borrowing from advertising); *see also* Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2114 (2005) (concluding that conscientious consumerism may

Yet something will be lost in the expediency of implementing consumer choice. Here's the key limit of this vision: we, as people, may not seek the same things under consumer choice as we would if we engaged in access to process, for two reasons. First, it has long been observed that "the same person may have distinct interests in her role as consumer from those in her role as worker, or as citizen, or as a parent."[322] In exercising my consumer choice, I may view the world and my role within it differently than I do when I, say, vote, or go to a public meeting.[323] Moreover, asking me to approach decisions about energy supply as a consumer, rather than a citizen may in fact *diminish* my willingness to make what I see as socially beneficial, rather than financially sound, decisions. Electricity-sector researchers already have found this trend at work, observing:

> Millennials are frequently motivated by the social aspects of making better choices about energy use, and more broadly about sustainability. Once money is introduced into the equation, the desired behavior is often "crowded out" by the financial incentive and trails off, as they try to internally reconcile their motivations for taking action.[324]

Second, democratic theorists from Rousseau onward have emphasized the particular importance of deliberation in shaping the choices made in a democracy.[325] That is to say, consumer choice not only narrows the band of interests I may consider in making energy decisions, it also takes away the

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prove a more significant endeavor than trying to confront head-on the challenges that sustainability presents to markets). *See generally* COHEN, *supra* note 146 (discussing the various democratic valences of "consumers" over the twentieth century).

322. Pildes & Anderson, *supra* note 49, at 2176; *accord* Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1394 (1981) (arguing that people hold separate economic and public interest preferences, and economists' techniques problematically confound these categories). *But see* Carol M. Rose, *Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name Is Preference*, 87 MICH. L. REV. 1631, 1635–36 (1989) (reviewing MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (1988)) (suggesting Sagoff's "category mistake" is illusory).

323. *See* BARBER, *supra* note 154, at 128; Reich, *supra* note 284, at 1625; Sunstein, *supra* note 49, at 31. This long-held intuition of democratic theorists has been empirically confirmed by behavioral economists, who find that the context in which information is presented to individuals has dramatic impact on their ultimate choices. *See, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 1–4 (Penguin Books 2009) (2008).

324. David Roberts, *Energy-Efficient Homes: Yes, We Want Them. But We Haven't Done the Work.*, Vox (June 22, 2016), https://www.vox.com/2016/6/22/11993840/home-energy-management [https://perma.cc/H6B9-N3DR] (quoting interview with consumer scientist Guy Champniss); *see also* Simon Hedlin & Cass R. Sunstein, *Does Active Choosing Promote Green Energy Use?*, 43 ECOLOGY L.Q. 107, 107 (2016) (finding that "active choosing had larger effects in promoting green energy use than did green energy defaults . . . apparently because of the interaction between people's feelings of guilt and reactance").

325. JÜRGEN HABERMAS, *The Public Sphere*, *in* JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER 231, 231–32 (Steven Seidman ed., 1989) ("[P]ublic opinion, in terms of its very idea, can be formed only if a public that engages in rational discussion exists."); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 90–93 (Maurice Cranston trans., Penguin Books 1968) (1893).

opportunity available in an access-to-process mode of democracy for the process itself to *change my mind*.[326] Thus, if we transfer planning and oversight functions from governing institutions to a marketplace of consumer choice, we diminish the spaces in which citizens and regulators can have productive interactions that in fact work to change substantive outcomes.[327] A loss of deliberative potential may prove particularly worrisome in the electricity governance context, where hard-to-weigh tradeoffs are now inevitable among cost, reliability, and security. Significant risks—whether from climate change, nuclear proliferation, underground storage of various substances, bird deaths, water shortages, increased energy poverty, or geopolitical instability, to name a few—are now unavoidable. The question is which risks we as a society wish to assume, and which we prefer to avoid at all costs. These are precisely the kinds of questions that cannot be easily built into a system of market incentives, but beg democratic answers arrived at through careful consideration of the tradeoffs at hand.

These conclusions about the risks of consumer choice point to some ways in which regulators might seek to ameliorate the vision's democratic weaknesses, even while harnessing its economic strengths. In particular, regulators should think carefully about how to design the regulatory processes of establishing new incentive regulation. These processes should make the value choices inherent in these regulations as obvious and nontechnical as possible. Beginning such proceedings with broad discussion of values and their relationship to policy choices, and then transparently translating these into incentives, would maximize stakeholder input into this more technical mode of commission policymaking. In this way, maybe the models of consumer choice and access to process could be pursued simultaneously without one working to the diminishment of the other.

B. *Local Control and Access to Process*

Quite a different set of risks exists with pursuit of local control as a replacement for more centralized energy decisionmaking. In ideal theory, robust local democratic processes prove a training ground of civic education, giving citizens bite-sized experiences of democracy that ready and excite them for participation at the national scale.[328] One might hope that

326. *See* Pildes & Anderson, *supra* note 49, at 2178 (arguing that true "individual rationality" within a democracy "cannot be realized simply through private reflection on one's personal preferences; it emerges from social and political struggles"); *see also* Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 119, 122 (2002); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 7 (1983) (on the meaning-making functions of collective practices for making decisions).

327. On the power of deliberation to change minds specifically with respect to energy policy, see Fishkin et al., *supra* note 92, at 662–63. *See also* Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 170 (2004) ("[T]here is a growing scholarly literature that connects good environmental results with the strength of a jurisdiction's democratic institutions and the robustness of public debate.").

328. *Cf.* PATEMAN, *supra* note 219, at 42–43.

these same ideals would translate to the marriage of a local-control vision of energy democracy with access to process. If localities were to focus their reforms on ensuring widespread participation in decisions made under local ownership or control, perhaps they could become a democratic training ground for broader participation in energy institutions at the state and federal levels.[329]

But there are kinks in this theory when it comes to the energy system. One significant risk is that participation in energy governance may be a zero-sum game: individuals that participate in local energy decisionmaking may decide to forgo state-level or regional-level participation. This decision might, on its surface, appear logical: to the extent that a locality takes over ownership of its grid and energy supply decisionmaking, it intentionally severs itself from state governing institutions.[330] This disengagement is likely to discourage participation in energy institutions at higher levels, given that local citizens will perceive these to have limited bearing on local resource decisions.[331]

But in fact—ironically and problematically—no disengagement happens at all under local electricity ownership and control. Unless a city physically islands itself from the rest of the electricity grid, or adopts enough storage never to call on resources outside its territory,[332] areas under local control remain very much tied to the surrounding grid.[333] This interconnection creates a potential collision between localism and access-to-process visions, at least for those cities that hope to affect system-wide changes in our energy supply through the power that local control brings.

For example, say a locality moves to local control in order to drastically increase its usage of renewable energy. Perhaps, to demonstrate its ambition, it signs contracts to ensure that 100% of its electricity needs are met by

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329. In contrast, the more that localism embraces a consumer-choice model, the less chance there is of localism functioning in this "training ground" capacity.

330. In other words, the locality "exits" from state-level utility politics and policies. *See* Hirschman, *supra* note 148, at 4, 15–16.

331. *Cf.* Daley & Reames, *supra* note 284, at 147 ("While devolution to subnational governments may provide more opportunity for public participation in state and local institutions, it significantly complicates the ability of federal agencies to maintain well-resourced public participation processes." (citation omitted)).

332. Any "islanding" would be likely to increase everyone's cost of transitioning to renewables. A larger transmission grid, with more inter-regional flows of electricity, is important in affordably integrating large amounts of renewable energy into the grid. *See* Energy & Envtl. Econ., Regional Coordination in the West: Benefits of PacifiCorp and California ISO Integration 2–3 (2015), https://www.caiso.com/Documents/StudyBenefits-PacifiCorp-ISOIntegration.pdf [https://perma.cc/XV9C-F6T7]; Nat. Res. Def. Council, Regional Transmission Organizations: Recommendations for the West 1 (2016), https://www.nrdc.org/sites/default/files/regional-transmission-organizations-west-ib.pdf [https://perma.cc/VYK2-DAG5].

333. *See* Mass. Inst. of Tech., The Future of the Electric Grid 3 (2011), https://energy.mit.edu/wp-content/uploads/2011/12/MITEI-The-Future-of-the-Electric-Grid.pdf [https://perma.cc/NNS8-BPPD] (describing how the U.S. electric power system is comprised of three large grids).

renewable sources.[334] Two consequences follow, based on the current structure of the grid. First, a city may have a false sense that it has created a small-scale demonstration of perfected decarbonization, when in fact nothing of the sort has happened. There are no cities with "100% renewable" pledges that *actually* source all of their electricity from real-time, local renewable generation.[335] Instead, they are able to import electricity from other locations via the expansive U.S. transmission grid.[336] Moreover, the existence of "renewable energy certificates" (RECs) allows these cities to continue to run on fossil fuels as backup power.[337] Renewable energy generators earn RECs—credits created by state law—for each megawatt-hour of renewable energy they generate, which can then be sold separately from the underlying energy produced.[338] Because of RECs, a city can rely on natural gas or coal-fired generation to supply, say, a few megawatt-hours of electricity during a still, sultry evening, and then buy RECs from a local wind farm to "cover" those megawatt-hours, thus maintaining a 100% renewables pledge.[339] There is nothing necessarily deceptive in this practice, but it does mean that cities rely upon their neighbors in meeting these pledges more than the populace may appreciate.[340]

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334. A few cities have done this. *See* City of Greensburg, Kan. & BNIM, Greensburg Sustainable Comprehensive Plan 76 (2008), http://www.greensburgks.org/residents/recovery-planning/sustainable-comprehensive-master-plan/at_download/file [https://perma.cc/7VSW-GCWB]; Philip Radford & Sandy Buchanan, *Cincinnati Dumps Duke Energy*, Huffington Post (Apr. 28, 2012, 4:22 PM), http://www.huffingtonpost.com/philip-radford/cincinnati-clean-energy_b_1457224.html [https://perma.cc/MHP4-GKVT]; Wilson Ring, *100% of Power for Vermont City Now Renewable*, Bos. Globe (Sept. 15, 2014), https://www.bostonglobe.com/metro/2014/09/14/vermont-milestone-green-energy-efforts/fsLHJl4eoqv6QoFNewRYBK/story.html (on file with the *Michigan Law Review*); Erica Robbie, *Aspen Is Third U.S. City to Reach 100% Renewable Energy*, Aspen Times (Sept. 1, 2015), http://www.aspentimes.com/news/17972193-113/aspen-is-third-us-city-to-reach-100 [https://perma.cc/2TQY-X8VQ].

335. David Roberts, *No, City Pledges to Get 100% Renewable Energy Are Not Misleading*, Vox (Aug. 8, 2017, 2:10 PM), https://www.vox.com/energy-and-environment/2017/8/8/16111630/city-pledges-100-renewable-energy [https://perma.cc/2CN8-5WBD]. Although, Burlington "theoretically" could island itself from the grid, given that it owns its local grid and hydroelectric and biomass facilities that could back up its renewable energy. *See* Colin Woodard, *America's First All-Renewable-Energy City*, Politico Mag. (Nov. 2016), http://www.politico.com/magazine/story/2016/11/burlington-what-works-green-energy-214463 [https://perma.cc/2YZD-V2DZ].

336. Roberts, *supra* note 335.

337. *Renewable Energy Certificates (RECs)*, U.S. Envtl. Protection Agency, https://www.epa.gov/greenpower/renewable-energy-certificates-recs [https://perma.cc/3HEQ-TEEM].

338. *Renewable Energy Certificates*, Bottom Line (World Res. Inst., Wash., D.C.), Nov. 2008, at 1, 1–2, http://www.wri.org/sites/default/files/pdf/bottom_line_renewable_energy_certs.pdf [https://perma.cc/9F9Y-NQTD].

339. *See* David Roberts, *RECs, Which Put the "Green" in Green Electricity, Explained*, Vox (Nov. 9, 2015, 1:00 PM), https://www.vox.com/2015/11/9/9696820/renewable-energy-certificates [https://perma.cc/5QVB-9FY5].

340. *See, e.g.*, Michael Bielawski, *Vermont's All-Renewable Claims Based on Uneven RECs Market*, VermontWatchdog.org (Nov. 28, 2016), http://watchdog.org/282645/renewable-energy-credits-created-equal/ [https://perma.cc/H9YM-WRYS] (discussing this challenge in relation to Burlington's claim of "100 percent renewable" energy); *see also* Alex Epstein, *The Truth*

The second consequence of local renewable commitments under current grid conditions is potentially more pernicious. Assume a locality that moves to a 100% renewables pledge replaces its old contracts to purchase coal-fired electricity with contracts to purchase wind farm output. Or even assume that it builds a community-owned solar farm to replace the coal it used to rely upon. Because the electricity grid is interconnected,[341] the coal-fired electricity that used to go to this locality can now be routed to another location with less stringent renewable energy requirements. The fallout is that a city's actions directed toward changing its personal energy mix may have limited impact on the composition of the larger grid.[342]

Note that this same tension does not inhere in all local actions related to climate change. For example, if a city changes zoning, land use, and transportation infrastructure to induce less driving and denser living, these changes will both satisfy local democratic preferences[343] and reduce overall carbon pollution. The same is true of changes to a city's building code to improve the efficiency of its building stock. [344] But importing more renewable energy connects a city to actions outside its physical footprint in a way that these localized changes do not.

Because of this interconnectedness, energy localism may result in a sort of false empowerment, with residents believing they have substantially contributed to solving a problem that in fact cannot be addressed through their actions at the local level. Where this happens, localism proves at best a limited antidote to frustrations with large-scale energy bureaucracy. At worst, a robust local approach to energy democracy risks diminishing the impetus to engage in bureaucratic processes and reforms at the state, regional, and federal level—the levels of governance where citizens might be *more* likely to accomplish their most ambitious aims with respect to energy systems' transformation.[345]

About Apple's '100% Renewable' Energy Usage, Forbes (Jan. 8, 2016, 12:23 PM), http://www.forbes.com/sites/alexepstein/2016/01/08/the-truth-about-apples-100-renewable-energy-usage/#1785ea1c3256 [https://perma.cc/D422-KY63].

341. Mass. Inst. of Tech., *supra* note 333, at 3.

342. Policy wonks often refer to this troubling consequence of local carbon pollution regulation as "leakage." *See* Shelley Welton et al., Ctr. for Climate Change Law, Columbia Law Sch., Regulating Electricity Imports into RGGI: Toward a Legal, Workable Solution 7 (2013), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/RGGI%20paper_Final%20Aug%2021_2013.pdf [https://perma.cc/M3XM-VK7E].

343. At least, such actions might satisfy democratic preferences if the local democracy is robust.

344. *See* Trisolini, *supra* note 37, at 688–89, 697, 707 (arguing that "because local actions predominantly target consumption, the built environment, and waste generation," they create net cuts in carbon pollution).

345. Of course, state-level action runs into similar challenges (as does federal, to a certain extent, when it comes to the global problem of climate change). But states have more tools to control the emissions content of electricity that crosses their borders. California's "first deliverer" policy essentially imposes a carbon imports tax on electricity. Cal. Code Regs. tit. 17, § 95802(a)(175) (2017). For an explanation of how California's "first deliverer" policy works

In offering this critique, I do not wish to tamp out local efforts at energy control and supply altogether. Local control—in certain locales, with democratically responsive local governments and appetites for experimentation—might result in useful tests of new modes of participation and ownership.[346] Localism might also prove particularly useful in promoting certain resources in earlier stages of development, where early investment can help bring down costs and make them more competitive in larger marketplaces.[347] By placing their energies here, localities could provide useful information for broader efforts to accomplish their same goals.[348]

But as an overall principle of energy democracy, touting localism as a solution obscures the fact that we can't run from our interwired nature, at least not for some time to come. Any useful lessons learned from local experimentation will have to be transferred upwards to state and federal efforts at electricity infrastructure transformation, if they are to have the kinds of practical effects their proponents desire. To lessen the possibility that localism functions as a smokescreen rather than a locus of innovation, localities taking over their own energy decisionmaking will thus have to ensure that they—and their residents—remain engaged at levels of governance beyond the city bounds.

Conclusion

> *The possibility of more democratic futures . . . depends on the political tools with which we address the passing of the era of fossil fuel.*[349]

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in practice, see Erin Parlar et al., Ctr. for Climate Change Law, Columbia Law Sch., Legal Issues in Regulating Imports in State and Regional Cap and Trade Program 11 (2012), http://wordpress.ei.columbia.edu/climate-change-law/files/2016/06/Parlar-et-al.-2012-10-Imports-in-StateRegional-Cap-and-Trade.pdf [https://perma.cc/23FD-GPMS]. *See also* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013) (upholding California's low-carbon fuel standard, which regulates the carbon content of imported as well as in-state fuels).

346. *See* Welton, *supra* note 37, at 342–43.

347. *Cf.* Herman K. Trabish, *Why the Installed Price of Distributed Solar Keeps Dropping*, Utility Dive (Sept. 10, 2015), http://www.utilitydive.com/news/why-the-installed-price-of-distributed-solar-keeps-dropping/405187/ [https://perma.cc/MH3R-8SXQ] (suggesting that distributed solar costs plummeted over the last few years largely due to a decrease in "soft costs" as companies learned about how to efficiently and effectively market and install panels).

348. *See* Welton, *supra* note 37, at 341–42 (concluding that "[m]unicipalization and CCA thus offer the most promise as essentially a prod, both to more robust state action on climate change and to higher-level conversations about the possibilities for, and shape of, decarbonization."); *cf.* Yair Listokin, *Learning Through Policy Variation*, 118 Yale L.J. 480, 483, 485 (2008) (explaining that "innovative high-risk policies" are best implemented in contexts where policy can be easily reversed, and that the pursuit of such policies is preferable to a simple utilitarian welfare-maximization model in the case where learning is possible).

349. Timothy Mitchell, Carbon Democracy: Political Power in the Age of Oil 252 (2011).

This Article has suggested that the pressures placed upon energy law to turn in more democratic directions present more contradictions and challenges than first meet the eye. Even if energy law reformers agree on a goal of democratization, there remain significant choices to be made regarding *how* to democratize. This Article has illustrated the critical structural choices to be made regarding how to shape the frameworks in which debates over the future of our energy system will take place. These choices will tap into citizens' and energy consumers' knowledge, preferences, and deliberative capacities in distinctly different manners, and none is without drawbacks in some respects. For these reasons, it is critical that regulators and advocates considering democratization understand the tradeoffs to be made in proceeding down a consumer-choice, local-control, or access-to-process line of reform. A simple vaunting of certain reforms' "democratic" characteristics risks short-circuiting this important analysis.

There remains a risk that all this talk of pathways to energy democracy might seem rather small-fry to readers outside the energy law field, who doubt their personal or society's general inclination to participate in any sort of energy democracy. To thwart any reasoning in this direction, I want to end with a reminder of just how tightly linked energy and democracy may be. In *Carbon Democracy*, one of the most ambitious scholarly attempts to link the two topics, political theorist and historian Timothy Mitchell sweepingly surveys the bonds between society's dominant fuel choice and the character of its democracy.[350] In brief, he argues that the geological characteristics of oil—and the nature of its supply chain—had much to do with the forms of democracy that came to dominate the industrialized world during the twentieth century.[351] Oil extraction was technocratic, dominated by managers and engineers, and its global distribution pathways were flexible.[352] This structure kept workers from gaining the same power they had during the heyday of coal, where the importance of individualized miner knowledge and the inflexibility of supply chains allowed for greater worker influence.[353]

Mitchell's analysis thus emphasizes how fuel choice influences the democratic character of a society. The analysis here focuses on the antecedent democratic question of *how* we choose our fuel—a question that becomes even more important if Mitchell's analysis is correct.[354] As Mitchell has explained it, "[T]he building of solutions to future energy needs is also the

350. *See generally* MITCHELL, *supra* note 349 (discussing in-depth the way in which a nation's energy source is reflective of and influential to its political development).

351. *Id.* at 4, 253.

352. *Id.* at 21–29.

353. *Id.* at 21 ("The flow and concentration of [coal] energy made it possible to connect the demands of miners to those of others, and to give their arguments a technical force that could not easily be ignored.").

354. Some criticize Mitchell's analysis as overly materialist, focusing on the importance of energy infrastructure to the exclusion of social relations, but not in ways that undermine his point for present purposes. *See* Mazen Labban, *Book Review—Timothy Mitchell's 'Carbon Democracy: Political Power in the Age of Oil'*, ANTIPODE (Mar. 19, 2013), https://antipodefounda

building of new forms of collective life."[355] When we decide how to power our society, we are also making decisions about ownership structures, political power, transportation networks, landscapes, and the risks we are willing—and unwilling—to accept as byproducts of a life of modern convenience.[356] At a more quotidian level, we are deciding how our houses should be designed, how we will commute, where we will live, and how we will interact with technology. Because of these inescapable interconnections and dependencies, the pathways we choose for democratizing energy will ultimately help shape our country's character for decades, if not centuries, to come. Let us choose them wisely, with as deep an understanding of their possibilities and pitfalls as we can muster.

tion.org/2013/03/19/book-review-mazen-labban-on-timothy-mitchells-carbon-democracy/ [https://perma.cc/WB3U-GYR6] (suggesting Mitchell problematically ignores "other kinds of linkages . . . [that helped] forg[e] collective political ideology, such as mass circulation newspapers and other periodicals, political parties and organizations, *etc.*").

355. MITCHELL, *supra* note 349, at 238.

356. *See* Clark A. Miller & Jennifer Richter, *Social Planning for Energy Transitions*, 1 CURRENT SUSTAINABLE/RENEWABLE ENERGY REP. 77, 78 (2014) ("[T]he rise of new energy resources (or the end of old ones) can give rise to massive reconfiguration of social, environmental, and technological landscapes . . . .").