

University of Chicago Legal Forum

Volume 2023

Article 8

2024

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Recommended Citation

Pildes, Richard H. (2024) "The Neglected Value of Effective Government," *University of Chicago Legal Forum*: Vol. 2023, Article 8.

Available at: <https://chicagounbound.uchicago.edu/uclf/vol2023/iss1/8>

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The Neglected Value of Effective Government

Richard H. Pildes[†]

ABSTRACT

Democratic systems inevitably seek to reflect and realize a range of values. But democratic and legal theory in recent decades have given too little attention and weight to the value and importance of delivering effective government. Much of democratic theory and legal scholarship on democracy focuses on values such as political equality, fair representation, democratic deliberation, political participation, and individual rights, among other values. But less weight is given to the capacity of government to deliver effectively on the issues citizens care about most urgently.

Yet a defining feature of—and threat to—democracy in recent years is the perceived failure of democratic governments, in the United States and throughout the West, to deliver effectively on the issues their members care most about. This Article aims to bring greater attention to the importance of effective government by illuminating tensions that arise between effective government and other important democratic values.

The Article focuses on tensions (1) between political accountability and effective government; (2) between political equality and effective government; (3) between open government and effective government; (4) between “fair” representation and effective government (including a critique of current proposals for proportional representation); and (5) between process and participation and effective government.

Taken as a whole, the point of these examples is to bring attention to the value and importance of state capacity to deliver effectively. Viewing current arrangements and proposed reforms through the lens of effective government opens up new directions for scholarship on democracy. But the first step is to recognize that the failure to deliver effective government is roiling most democracies today, and that if democracies cannot overcome that challenge, popular frustration, anger, distrust, or worse, will continue to grow.

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I. INTRODUCTION

Democratic systems inevitably seek to reflect and realize a range of values. But democratic and legal theory in recent decades have given too little attention and weight to the value and importance of delivering effective government. Much of democratic theory and legal scholarship on democracy focuses on values such as political equality, fair representation, democratic deliberation, political participation, and individual rights, among other values. Less weight is given to the capacity of government to deliver effectively on the issues citizens care about most urgently.¹ Put another way, much of democratic and legal theory focuses on the inputs to the democratic process rather than the outputs, with insufficient attention to the relationship between the two. Among democratic theorists, John Rawls does recognize that a citizen's "first interest in government" is the passage of "just and effective legislation." Rawlsian theory, however, then focuses only on the first part of that principle, the justness of distributional outcomes, and does little to flesh out the second part, the importance of effective legislation.²

Yet when democratic governments cannot deliver effectively on issues many of their members care most urgently about, that failure can lead at a minimum to distrust, alienation, withdrawal, anger, and resentment. Even worse, it can fuel desires for a strongman figure³ who will supposedly cut through the dysfunction and deliver when democratic governments have failed to do so. Walter Lippmann, writing in the 1920s, asserted: "Men do not long desire self-government for its own sake. They desire it for the sake of the results."⁴ Modern public opinion polling confirms the significant percentage of Americans who

¹ To be sure, there are some works that do integrate democratic theory with detailed attention to making government function more effectively. One work in democratic theory that is similar in perspective to this essay is IAN SHAPIRO & FRANCES ROSENBLUM, *RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF* (2018). For work that might be considered applied democratic theory that focuses on delivering effective government, see Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* 477 (Justin Desautels-Stein & Christopher Tomlins ed. 2017). For a significant set of essays that explore possible relationships between constitutionalism and effective government, see *CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT?* (Vicki Jackson & Yasmin Dawood ed. 2022), to which I also contributed. The introduction, written by the editors, provides an overview of why effectiveness is important for constitutional government in democracies.

² JOHN RAWLS, *A THEORY OF JUSTICE*, 199–200 (1971).

³ This can certainly be a woman, as several prominent past and current examples attest.

⁴ WALTER LIPPMANN, *PUBLIC OPINION*, 312 (1922). More recently, David Runciman similarly asserts the appeal of modern democracy essentially rests on two elements: (1) democracy offers dignity and respect to citizens, whose views must be taken seriously and (2) it promises to deliver long-term benefits to those citizens. DAVID RUNCIMAN, *HOW DEMOCRACY ENDS*, 169–71 (2018).

currently would sacrifice democracy for governments that deliver greater prosperity.⁵

Most importantly, this challenge is now among the most acute that democracies across the West face in our era. A defining feature of democracy in recent years is the perceived failure of democratic governments to deliver effectively on the issues their members care most about.

I have been writing about the decline of effective government, focused initially on the United States, since 2014.⁶ Since then, it has become clear that many of the long-established democracies across the West are also perceived by many of their own citizens to be failing to provide effective governance.⁷ This Article aims to bring greater attention to this value in our thinking about the structure of democracy and the tradeoffs among various democratic values—at both the macro-level of democratic institutional design and the more mundane level of routine matters such as government administration. This Article does so by identifying and highlighting tensions that arise between effective government and other important democratic values. By reorganizing and synthesizing under the general framework of effective governance several discrete subject areas that I and other scholars have engaged, my aim is to spur greater attention among legal scholars and democratic theorists to the central role the delivery of effective government should play in assessing democratic institutions and proposed political reforms.

II. THE DECLINE IN EFFECTIVE GOVERNMENT

Perhaps no need exists to establish, in a social-scientific way, a decline in the effectiveness of American government. There is no sin-

⁵ As one study notes, “When violations of democracy are indisputably clear, many citizens find ways to not perceive undemocratic behavior as undemocratic if they agree with it politically. This might provide one explanation for why democratically elected leaders in today’s democracies are so often able to get away with violations of democracy without facing electoral backlash.” Suthan Krishnarajan, *Rationalizing Democracy: The Perceptual Bias and (Un)Democratic Behavior*, AM. POL. SCI. REV. 1–23 (Aug. 25, 2022). See also Domenico Montanaro, *Poll: Dangers for Both Parties on the Economy, Crime and Transgender Rights*, NPR (Mar. 29, 2023), <https://www.npr.org/2023/03/29/1166486046/poll-economy-inflation-transgender-rights-republicans-democrats-biden> [<https://perma.cc/9K8P-36RG>] (finding 31% of polled voters ranking the economy as the most important issue facing the country, followed by 20% of polled voters ranking preserving democracy as the highest ranking issue); see Mike Cummings, *Study: Americans Prize Party Loyalty Over Democratic Principles*, YALE NEWS (Aug. 11, 2020), <https://news.yale.edu/2020/08/11/study-americans-prize-party-loyalty-over-democratic-principles> [<https://perma.cc/4K3U-RBYE>] (showing that only 3.5% of U.S. voters would cast ballots against their preferred candidates as punishment for undemocratic behavior).

⁶ Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government Feature*, 124 YALE L.J. 804 (2014) [hereinafter *Romanticizing*].

⁷ Richard H. Pildes, *Political Fragmentation in Democracies of the West*, 37 B.Y.U. J. PUB. LAW 209 (2023).

gle metric for measuring the effectiveness of government, in part because many different dimensions exist along which that question can be asked. But generally speaking, is government successfully addressing the issues citizens view as most urgent? Do citizens generally believe the country is on the right track or the wrong track? Are citizens accepting of the major political parties and political leaders or are they dissatisfied enough to turn to minor and insurgent parties or to seek outsiders to govern? Is government providing sufficient public goods, such as infrastructure, to enable the health, safety, welfare and economic prosperity of citizens?

Nonetheless, various metrics have been invoked to confirm this point. The number of “important” bills Congress enacts, for example, has declined significantly in recent years. So, too, has the overall number of bills: in the 1970s, Congress enacted 800 laws in every two-year term; today, that number is 300–350. In the late 1990s, the Senate cast around 350 votes on legislation; in 2019, that number fell to 108. As a sign of the inability of Congress to update earlier statutes and programs, the number of enacted bills that change, revise, or restructure such statutes has gone down dramatically. The most creative metric, perhaps, compares public polling on the issues citizens care most intensely about and the extent to which Congress legislates on those issues. Not surprisingly, that percentage has dropped significantly. Even after the successful passage of major legislation in the second half of 2022, the percentage of “salient issues” on which Congress is gridlocked reached 70% several times in the last twenty years and declined only to 60% after this 2022 flurry; during the 1970s, that rate was generally as low as 30–40%.⁸ A recent Pew survey finds that 62% of Americans are dissatisfied with the way democracy is working.⁹

At the ground level, it’s also clear that, in the United States, government’s capacity to deliver basic public goods—roads, airports, sewage treatment plants and the like—has diminished greatly. The cost and amount of time it takes to complete such projects, when they get completed at all, have increased dramatically over the last several decades. The same “vetocracy” that Francis Fukuyama describes at the level of national government, in which the system introduces so

⁸ Sarah Binder, *Goodbye to the 117th Congress, Bookended by Remarkable Events*, WASH. POST (Dec. 29, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/12/29/congress-year-review/> [https://perma.cc/JGL2-BJTS]; Sarah Binder (@bindersab), TWITTER (Dec. 29, 2022, 9:57 AM), <https://twitter.com/bindersab/status/1608477394658070530?s=20&t=TNghCCnYKMmr0LxMA4ExjQ> [https://perma.cc/22P6-VVUZ].

⁹ Richard Wike et al., *Satisfaction With Democracy and Political Efficacy*, PEW RESEARCH CENTER (Dec. 6, 2022), <https://www.pewresearch.org/global/2022/12/06/satisfaction-with-democracy-and-political-efficacy-in-advanced-economies-2022/> [https://perma.cc/4ZHB-X3NN].

many choke points at which forces can be arrayed to block, delay, or raise the cost of action, extends down to the local level.¹⁰ Social scientists now generate collections of essays on a range of subjects exploring government dysfunction under the title, *Can America Govern Itself?*¹¹

Similarly, the Western European democracies are experiencing continual citizen dissatisfaction with their ability to deliver effective government. This dissatisfaction gets expressed in the fragmentation of European politics and the now-continual turbulence of governments there. In earlier times, many of the proportional representation (PR) democracies in Europe that are formally multi-party systems had functioned instead as, in effect, two-and-a-half party systems.¹² That generated fairly stable and continuous government, even as control might shift from one of the two dominant parties to the other.

Since World War II, for example, German politics had been organized through such a two-and-a-half party system; in the 1970s, the major center-right party (the Christian Democrats) and center-left party (the Social Democrats) together regularly received more than 90% of the vote.¹³ But the expression of dissatisfaction over the last decade has caused support for both parties to hemorrhage, leading to a burgeoning of support for new or previously small parties. Though post-War Germany had been an exemplar of political stability in Europe, German politics has now fragmented into a six-party political system. The two long-dominant major parties were unable together to receive even 50% of the vote in the recent 2021 elections.¹⁴ As a result, in both of the last two national elections, it took far longer to form a government in Germany than at any time since World War II.¹⁵

In the last two French presidential elections, the two major parties that between them had governed France since World War II (the Socialists and the Republicans) were both unable to get a candidate into the second and final round of the presidential elections.¹⁶ Disaf-

¹⁰ FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY* 488 (2014).

¹¹ *CAN AMERICA GOVERN ITSELF?* (Frances E. Lee & Nolan McCarty eds., 2019).

¹² Alan Siaroff, *Two-and-a-Half-Party Systems and the Comparative Role of the 'Half'*, 9 *PARTY POL.* 267 (2003).

¹³ Stefan Wagstyl et al., *Merkel Wins Fourth Term but Far-Right Populists Make Gains*, *FIN. TIMES* (Sept. 25, 2017), <https://www.ft.com/content/12de72a0-a11c-11e7-9e4f-7f5e6a7c98a2> [<https://perma.cc/TC74-YKYE>].

¹⁴ Sugam Pokharel et al., *SPD Narrowly Wins German Election Against Merkel's CDU but Uncertainty Remains Over Next Leader*, *CNN* (Sept. 27, 2021), <https://edition.cnn.com/2021/09/27/europe/spd-cdu-german-election-results-intl-hnk/index.html#:~:text=With%20all%20299%20of%20Germany's,to%20the%20Federal%20Returning%20Officer> [<https://perma.cc/Y6LE-BCJ7>].

¹⁵ *Id.*

¹⁶ *French Presidential Election*, *REUTERS* (May 7, 2017), <https://fingfx.thomsonreuters.com>

fection from these long-dominant parties was so great that Emmanuel Macron vaulted into the presidency, unattached to any traditional party. That Macron was then able to be re-elected to a second five-year term might suggest broad acceptance of his governance policies. But in the legislative elections that immediately followed his re-election, Macron lost a majority in the National Assembly, which threatens to paralyze the country politically.¹⁷ The broad dissatisfaction that generated Macron's unexpected rise quickly threatened to consume him—and that was before Macron resorted to raising the age of retirement for pension eligibility through unilateral executive decree.¹⁸

The United Kingdom had five prime ministers in the six years between 2016 and 2022.¹⁹ Similarly, Spain had to hold four national elections between 2015 and 2019 to attempt to form a stable governing majority, given how support for the long-dominant parties had splintered there as well.²⁰ After the 2016 election, 300 days of deadlock ensued in the effort to forge a government; finally, a minority government was formed—which then soon collapsed.²¹ After the recent 2021 elections in the Netherlands, it took nine months to form a government, the longest in Dutch history.²² That government then collapsed two years later, requiring yet another national election.²³ Nor is stolid

/gfx/rngs/France-Election/010040SZ1RE/index.html [https://perma.cc/B34K-EC7Z]; *Emmanuel Macron's Triumph, and the Challenges He Now Faces*, ECONOMIST (Apr. 30, 2022), <https://www.economist.com/leaders/emmanuel-macrons-triumph-and-the-challenges-he-now-faces/21808961> [https://perma.cc/B34K-EC7Z].

¹⁷ Tassilo Hummel & Ingrid Melander, *French Election: Macron Loses Absolute Majority in Parliament in 'Democratic Shock'*, REUTERS (June 20, 2022), <https://www.reuters.com/world/europe/macron-faces-tough-battle-control-parliament-france-votes-2022-06-19/> [https://perma.cc/9AEE-VZSP].

¹⁸ Kathryn Armstrong, *France Pension Reforms: Macron Signs Pension Age Rise to 64 into Law*, BBC (Apr. 15, 2023), <https://www.bbc.com/news/world-europe-65279818> [https://perma.cc/AT8M-VJWQ].

¹⁹ Ian Jones, *UK Gets Fifth Prime Minister in Just Over Six Years*, INDEPENDENT (Oct. 24, 2022), <https://www.independent.co.uk/news/uk/rishi-sunak-john-major-theresa-may-david-lloyd-george-gordon-brown-b2209359.html> [https://perma.cc/Q9ZK-WGNF].

²⁰ Peter Matuscheck, *Who Learns from Whom?: The Failure of Spanish Christian Democracy and the Success of the Partido Popular*, in CHRISTIAN DEMOCRATIC PARTIES IN EUROPE SINCE THE END OF THE COLD WAR (Steven Van Hecke & Emmanuel Gerard eds., 2004).

²¹ *Spanish Election: PP Wins Most Seats but Deadlock Remains*, BBC (June 27, 2016), <https://www.bbc.com/news/world-europe-36632276> [https://perma.cc/F55S-VX7Q]; Sam Jones, *Spain Avoids Third Election and Ends 10-Month Political Impasse*, GUARDIAN (Oct. 29, 2016), <https://www.theguardian.com/world/2016/oct/28/spain-to-get-government-after-10-month-political-impasse-mariano-rajoy> [https://perma.cc/R3QY-JUE7]; Raphael Minder, *Spain Heads to 4th Election in 4 Years After Failure to Form Government*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/world/europe/spain-election-government-collapse.html> [https://perma.cc/R3QY-JUE7].

²² Thomas Erdbrink, *After Months, A 'New' Dutch Coalition with the Same Leader and Parties*, N.Y. TIMES (Dec. 15, 2021), <https://www.nytimes.com/2021/12/15/world/europe/netherlands-dutch-coalition.html> [https://perma.cc/Z3KN-WRXJ].

²³ Claire Moses & Dan Bilefsky, *Dutch Government Collapses Over Plan to Further Limit*

Scandinavia immune: Sweden's prime minister, for example, in 2021 lost a no-confidence vote for the first time in modern Swedish history, and in the 2022 elections, the far-right Sweden Democrats became the largest party on the conservative side.²⁴ These are just a few examples of the continual dissatisfaction with democratic governments that has existed throughout Western Europe over the last decade.

All this turbulence, the constant search for new options and the quick abandonment of them, in turn reflects the continual dissatisfaction with how democratic governments are performing in this era. But ironically, the very fragmentation of political power that reflects this dissatisfaction also makes it all the harder for democratic governments to deliver effectively. Indeed, recent survey data reveals that the leaders of only four out of twenty-two major countries studied had approval ratings above 50%; this included two strongmen figures who are undermining democratic institutions in their countries, Narendra Modi of India and Andrés Manuel López Obrador of Mexico, in addition to the leaders of Switzerland and Australia.²⁵

President Joe Biden self-consciously defines the historical challenge that has fallen to him as proving that democratic governments can once again deliver effectively on the major issues that matter to citizens. As he has said: "We're in a contest, not with China per se . . . with autocrats, autocratic governments around the world, as to whether or not democracies can compete with them in a rapidly changing 21st century."²⁶ That is a theme that President Biden has returned to often and defined as the central one of his presidency.

Immigration, N.Y. TIMES (July 7, 2023), <https://www.nytimes.com/2023/07/07/world/europe/dutch-government-collapses.html> [<https://perma.cc/7K6D-THBV>].

²⁴ Magnus Blomgren, *Sweden's Political Crisis: How We Got Here and What's Next*, LSE BLOG (July 2, 2021), <https://blogs.lse.ac.uk/euoppblog/2021/07/02/swedens-political-crisis-how-we-got-here-and-whats-next/> [<https://perma.cc/35HR-ZCJ4>]; Jon Henley, *Sweden Gets New Government Four Months After Election*, GUARDIAN (Jan. 18, 2019, 8:02 AM), <https://www.theguardian.com/world/2019/jan/18/sweden-gets-new-government-more-than-four-months-after-election> [<https://perma.cc/M7FP-KHDS>]; Rafaela Lindeberg, *Sweden's Far Right Party Surges Into First Place in Shock New Poll*, INDEPENDENT (Nov. 18, 2019, 16:06), <https://www.independent.co.uk/news/world/europe/sweden-far-right-democrats-jimmieakesson-party-election-a9207741.html> [<https://perma.cc/WXQ4-KXZ5>]; see Jonathan Polk, *Sweden's general election: Winners, losers, and what happens next*, LSE BLOG (Sep. 15, 2022), <https://blogs.lse.ac.uk/euoppblog/2022/09/15/swedens-general-election-winners-losers-and-what-happens-next/> [<https://perma.cc/Q8DV-GHVE>].

²⁵ See Peter Baker, *This Year's G7 Summit Doubles as a Club for Unloved Leaders*, N.Y. TIMES (May 20, 2023), <https://www.nytimes.com/2023/05/20/world/asia/g7-leaders-biden.html?smid=nytcore-ios-share&referringSource=articleShare> [<https://perma.cc/75FU-P2A5>].

²⁶ See *Biden: Democratic Nations in a Race to Compete with Autocratic Governments*, REUTERS (July 13, 2021), <https://www.reuters.com/world/biden-democratic-nations-race-compete-with-autocratic-governments-2021-06-13/> [<https://perma.cc/DG9G-ZXED>].

III. PRIORITIZING EFFECTIVE GOVERNMENT

Yet as important as delivering effective government is to the vitality of democracy, it receives too little attention in political theory and legal scholarship.²⁷ As Jennifer Pahlka says in her recent book, *Recoding America: Why Government Is Failing in the Digital Age and How We Can Do Better*, “[t]he question of our government’s capacity is an afterthought in our public dialogue, if it is mentioned at all”²⁸ In other work, I have tried to address the large-scale economic and culture issues that account at the macro-level for why delivering effective government has become harder in this era.²⁹ This Article will focus on the more discrete issues that illustrate the ways in which the value of effective government is given too short shrift in the United States.

I will do that by identifying tensions between effective government and a range of other democratic values. In some of these examples, the fact that tradeoffs exist between effective government and other democratic values simply is not recognized at all. In others, this tension might be recognized, but the value of effective government is given too little weight.³⁰ In yet others, providing effective government might be directly considered, but the means chosen to attempt to do that are counterproductive or misguided.³¹

²⁷ As Professor Daryl Levinson notes, “American constitutionalists have too often ignored the costs of limiting state power.” DARYL LEVINSON, *LAW FOR LEVIATHAN*, 3 (forthcoming 2023).

²⁸ JENNIFER PAHLKA, *RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER* 269 (2023).

²⁹ *Romanticizing*, *supra* note 6.

³⁰ Tabatha Abu El-Haj notes the well-documented feedback effects between effective policy-making and citizen engagement and participation (or the lack thereof). This suggests another cost of ineffective government. Tabatha Abu El-Haj, *Making and Unmaking Citizens: Law and the Shaping of Civic Capacity*, 53 U. MICH. J.L. REFORM 63 (2019).

³¹ Effective government is both a narrower and a broader focus than “responsive” government. The latter suggests policy outcomes should reflect the public’s policy preferences, as measured perhaps through polling data. There are several problems with making responsiveness the measure of effective government. First, people’s actual political behavior is frequently very different from the preferences they express in polls, as many failed ballot measures on popular policies attest. Second, policy can legitimately reflect differences in the intensity of preferences about various groups of citizens. Third, it is not clear there should be no role for representatives to exercise political judgment, and that they should be mere transmission belts for popular opinion. Effective government, as defined in the studies relied on here, simply asks about the productivity of Congress and whether legislation addresses the issues citizens rank as most urgent. But effective government also applies to the ability to deliver public goods, such as necessary infrastructure, that captures aspects of governmental performance not reflected in measures of “responsiveness.”

A. Political Accountability Versus Effective Government

Political accountability of those in power to citizens is, of course, a central democratic value. Accountability of rulers to the ruled, such as through elections, is not just a moral value of self-government, but also a means through which government, it is hoped, will be disciplined to be more effective. But tradeoffs exist between accountability and the capacity to govern effectively: excessive accountability can undermine effective governance.

Here is one example. The two-year term for members of the U.S. House of Representatives provides exceptional electoral accountability compared to other democracies. But it might be an institutional-design mistake. Because the two-year term is hard-wired into the Constitution, it has become taken for granted and presumed to be part of the “natural” structure of American democracy. We rarely pause to notice or question it. At the time the Constitution was created, a two-year term was thought necessary to ensure that members of the House, the only directly elected body in the national government under the original Constitution, were sufficiently accountable. But as experience with democracy developed, the United States became an extreme outlier among democracies in having such short terms of office for its legislators. In most democracies, legislative bodies are elected for four- or five-year terms, although in parliamentary systems with votes of no confidence, earlier elections sometimes get scheduled.

The two-year term introduces regular turbulence into American government. With elections nearly always looming, members and parties in the House are always calculating how to maximize partisan advantage for the next election, particularly if they perceive partisan control of the House to be at stake. Indeed, the situation is even more continuously turbulent: because in the United States we use primary elections to select nominees of the parties (unlike in many other democracies), House members actually face two elections every two years. The primary system requires nominees also to pursue funding continuously, since our elections are privately financed rather than the public-financing systems used in most democracies.³²

In addition, midterm elections nearly always lead the party in the White House to lose House seats, thereby weakening the government. Yet it cannot be that every administration performs poorly enough in its first two years to warrant this judgment. Governing requires choices, and choices create losers and alienate some. Voters might be punishing the party in power for those choices. Or, more benignly, voters

³² PARTY FUNDING AND CAMPAIGN FINANCING IN COMPARATIVE PERSPECTIVE (K. Ewing and S. Issacharoff eds., 2006).

might be thermostatically adjusting to counter the administration's actions. Either way, two-year House terms provide a source of constant disruption in government. Moreover, to the extent voting is best understood as casting retrospective judgments on how the party in power has performed, twenty-one to twenty-four months in office is an exceptionally short time to judge the effectiveness of government policies, many of whose effects take longer than that to come to fruition.

To appreciate how excessive accountability can undermine the capacity for effective governance, consider if House members were elected annually. In fact, the Constitution came close to creating one-year House terms. At the time, most states had annual elections; as *Federalist No. 53* notes, a commonly held view was “that where annual elections end, tyranny begins.”³³ Elbridge Gerry, for example, proclaimed that “the people of New England will never give up the point of annual elections.”³⁴ Madison urged a three-year term, precisely to bring more stability and continuity to government. After the constitutional convention settled on the two-year term, the *Federalist Papers* had to devote a good deal of attention to fighting off the demands for annual elections.³⁵ Similarly, the most common term length for state governors was initially one year. But over time, recognition emerged that such frequent “accountability” undermined the ability to deliver effective government. Because state constitutions are easier to amend, forty-eight states eventually moved to four-year gubernatorial terms.

It is easy to see how more “accountability,” in the form of excessively frequent elections, can undermine the capacity to deliver effective government. Many other examples exist in which giving too much weight to electoral accountability undermines effective government. Perhaps the American use of primary elections to determine nominees for most offices is itself an example. In most democracies, elected party figures have a significant say in who the party nominates to represent it in elections; these figures have more direct experience with the possible candidates than voters do and can perform a kind of “peer review” in choosing competent nominees likely to function well in government.³⁶ In the presidential context, for 170 years the parties used such a system to choose their nominees; congressional caucuses, at first, then the political party conventions, gave elected party figures from throughout the country the major voice in choosing nominees.

³³ THE FEDERALIST NO. 53, at 272 (James Madison) (Ian Shapiro ed., 2009).

³⁴ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 106 (Adrienne Koch ed., 1987).

³⁵ THE FEDERALIST NO. 52, at 269–71 (James Madison) (Ian Shapiro ed., 2009).

³⁶ See generally Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647 (2018).

Only in the 1970s did the parties shift to the system we used today, in which voters in primaries determine the parties' nominees. Systems in which the political parties choose their nominees are less likely to have more extreme figures enter parliament.³⁷ The greater success more extreme candidates have via primary elections can make it more difficult to put together effective governing coalitions in the legislature. Political accountability is an important democratic value, but there are different forms of accountability and different ways of institutionalizing it. In deciding when and how much accountability is best, the reality of potential tradeoffs between accountability and effective government must be confronted.

B. Political Equality Versus Effective Government

Again, many examples could be offered of this tradeoff. I will focus mainly on one that arises from the campaign-finance context.

Concerns about political equality, along with avoiding political corruption, play a major role in campaign finance debates. In the name of these values, the Bipartisan Campaign Reform Act of 2002 (the McCain-Feingold Act) cut off soft money, funds outside the structure of the 1970s campaign finance laws, to political parties.³⁸ The result, however, was to trigger a massive torrent in spending by outside groups. While the Supreme Court's *Citizens United*³⁹ decision is often claimed to have triggered this dramatic increase in outside spending, it is actually the McCain-Feingold Act that initially catalyzed the large increase in outside spending: in the six years after McCain-Feingold was enacted, independent spending by non-party entities exploded 1,122%.⁴⁰

Money that flows not to the parties and candidates, but to outside groups, undermines the ability to govern effectively. Numerous quantitative and qualitative studies document how the rise of outside groups and spending in elections has fragmented legislatures and made governing more difficult.⁴¹ The parties reflect a broad array of interests as they are incentivized to seek broad enough bases of support to enable them to control legislative bodies. Outside groups frequently have narrower ideological agendas, organized around one or a few discrete issues. The availability of outside money also enables

³⁷ See generally Gardbaum & Pildes, *supra* note 36; see NELSON W. POLSBY, CONSEQUENCES OF PARTY REFORM 146–50 (1983).

³⁸ See Pub. L. No. 107-155, 116 Stat. 81 (2002).

³⁹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁴⁰ *Romanticizing*, *supra* note 6, at 839.

⁴¹ See, e.g., Richard H. Pildes & Mike Norton, *How Outside Money Makes Governing More Difficult*, 19 ELECTION L.J. 486 (2020).

candidates and officeholders to function more as free-agent politicians; they are less dependent on the parties and party leaders for fundraising support. It's not clear how many people think McCain-Feingold actually did enhance political equality, but if it did, it came at an enormous cost to the ability of Congress to function effectively, as members of Congress became much more dependent on outside sources of money.

A similar set of tensions is now playing out with current reform proposals to provide public matching funds for campaign donations from small donors. With the rise of the internet, small donors, typically defined as those who give less than \$200 to a candidate, are emerging as a major source of campaign funds.⁴² The internet drastically lowered the transaction costs to candidates seeking small donations and for the small donors themselves. And with the failure of legislative efforts to constrain the flow of money into elections, the major focus of reform efforts has shifted to pressing for small-donor based matching policies. In the Democrats' comprehensive voting-reform legislation that recently failed to pass—commonly known as H.R. 1—such matching policies were the heart of the campaign-finance reforms.⁴³ Under that bill, the government would have provided \$6 in matching public funds for every dollar in small donations a candidate received, up to a certain limit.

Public financing centered around small donors is alluring because it brings somewhat greater political equality and enhanced participation to the financing of elections. Many who might be interested in donating lack the resources to give the maximum amount the law permits; a six-to-one match transforms every \$200 contribution into a \$1,400 one. Among many reformers, this is an unqualified good.⁴⁴ In the contested 2016 Democratic presidential primaries, the Democratic National Committee even made a candidate's number of unique small donors one of the major factors to determine who would qualify for the main debate stages.⁴⁵

⁴² Richard H. Pildes, *Small-Donor-Based Campaign-Finance Reform and Political Polarization*, 129 *YALE LAW J. FORUM* 149, 150 (2019) [hereinafter *Small Donor*]. The term "small donors" is typically pegged to the requirements in federal election law. For those who give \$200 or less (in total) to federal campaigns, the campaigns are not required to disclose identifying individual information. See Federal Election Campaign Act, 52 U.S.C. § 30102(c) (2018) (requiring that contributions greater than \$200 be individually recorded).

⁴³ H.R. 1, 116th Cong. (2019).

⁴⁴ See Alex Tausanovitch & James Lagasse, *The Small-Donor Antidote to Big Donor Politics*, CTR. AM. PROGRESS (June 11, 2018), <https://www.americanprogress.org/article/small-donor-antidote-big-donor-politics/> [<https://perma.cc/FBX2-NPDK>]; see also Gareth Fowler & Daniel I. Weiner, *Small Donor Matching in the 'For the People Act'*, BRENNAN CTR. FOR JUSTICE (Feb. 11, 2019), <https://www.brennancenter.org/our-work/research-reports/small-donor-for-the-people-act> [<https://perma.cc/6KZJ-ZV5M>].

⁴⁵ For the first two debates, candidates had to meet the polling requirements or obtain con-

But small donors should not be romanticized. The concern with basing public financing and political reform on the preferences of small donors is that more extreme candidates benefit the most from small-donor contributions. Many of these candidates are performative politicians who are more interested in raising their profile than in governing. In addition, more extreme members of Congress make forging the compromises often necessary for legislation more difficult. In general, individual donors, large and small, are more ideologically extreme than voters overall. In the context of the internet more generally, we went through an initial period of celebrating the communications revolution as the herald of a new age of unmediated, participatory democracy. Indeed, the internet did do that—and once we saw the consequences, we shifted from celebration to anxiety about its dystopian effects, as we experienced social media’s tendencies to reward outrage and extremism, along with disinformation and misinformation. No reason exists to believe these same dynamics do not shape the explosion in small-donor fundraising that the internet has made possible.

And indeed, systematic analysis confirms the tendency of small donations to further fuel the polarization and extremism in our politics.⁴⁶ Consider two vivid, anecdotal examples. When the House stripped Representative Marjorie Taylor Greene of her committee assignments, she went on to raise over \$3 million dollars in the first quarter of that year from over 100,000 donors, with the average contribution being \$32.⁴⁷ That is more than the average House member raises in a two-year cycle.⁴⁸ Similarly, after Senator Josh Hawley became a leader of those opposed to certifying the outcome of the 2020 presidential election, a lot of his money from traditional donors dried up. But he too immediately raised over \$3 million from small donors

tributions from 65,000 unique donors, with a minimum of 200 donors in at least twenty states. For the third debate, in September, participation required meeting the polling requirements and obtaining contributions from 130,000 unique donors. Press Release, Democratic Nat’l Comm., DNC Announces Details for the First Two Presidential Primary Debates (Feb. 14, 2019), <https://democrats.org/news/dnc-announces-details-for-the-first-two-presidential-primary-debates> [<https://perma.cc/TFT3-6MPS>]; Press Release, Democratic Nat’l Comm., DNC Announces Details for Third Presidential Primary Debate (May 29, 2019), <https://democrats.org/news/third-debate> [<https://perma.cc/3B6F-YR6W>].

⁴⁶ *Small Donor*, *supra* note 42; Richard H. Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341 (2020).

⁴⁷ Olivia Beavers & Melania Zanona, *MTG’s eye-popping fundraising haul*, POLITICO, (April 7, 2021), <https://www.politico.com/newsletters/huddle/2021/04/07/mtgs-eye-popping-fundraising-haul-492390> [<https://perma.cc/PXU9-8R6N>] (last visited Nov. 27, 2022).

⁴⁸ Isaac Arnsdorf & Willis Derek, *How Josh Hawley and Marjorie Taylor Greene Juiced Their Fundraising Numbers*, PROPUBLICA (April 21, 2021), <https://www.propublica.org/article/how-josh-hawley-and-marjorie-taylor-greene-juiced-their-fundraising-numbers> [<https://perma.cc/NC4V-Q63M>] (last visited Nov. 27, 2022).

as a reward for his efforts, for which he drew national attention. On the Democratic side, Representative Alexandria Ocasio-Cortez, who presents one ideological pole in the party, is the House member most dependent on small donors.⁴⁹ In addition, while small donors might be a bit more representative of the general public than large donors, they are still a far cry from being representative of the public as a whole.

As the evidence suggests, centering public financing around small donors might well further inflame the extremes of the parties. That would make delivering effective government in our bicameral, separated-powers system, all the more difficult. But nearly all the discussion of small-donor matching programs focuses only on the input side of democracy: on the values of political equality and participation. Far less attention has been given to how this reform would affect the output side of democracy: the ability to deliver effective government. Yet in an era of such great dissatisfaction with government, the likely effect of potential reforms on the ability of government to take effective actions must be an important consideration.

There are other means of pursuing the goal of greater political equality in the financing of elections that pose less risk to the ability to deliver effective governance. Traditional forms of public financing, used in about ten states, are not based on the contribution preferences of small donors; once candidates raise a minimal amount from a small, threshold number of donors, they receive public grants of fixed amounts. Because the funds come from the general treasury, traditional public financing does not reward extremism and outrage, nor fuel political polarization. It is dangerous to fixate on just one dimension of democracy, such as political equality, without attending to other dimensions, particularly the important one of whether reforms will make it more or less likely that government will, in the end, be able to deliver effectively on the issues citizens care most about.

C. Open Government Versus Effective Government

Just as political accountability and political equality are important democratic values, so too is transparency in how government operates. Just as these other values can undermine the capacity for effective government, so too can misplaced or excessive transparency requirements.

In the aftermath of Watergate, greater transparency became a central value in the political reform agenda. Transparency was thought to be a means of combatting political corruption, of making government more accessible to the broader public (rather than well-

⁴⁹ *Small Donor*, *supra* note 42, at 160.

organized business interests), of promoting more deliberative decision-making, and of helping to legitimate and make more acceptable governmental actions.

A slew of transparency-oriented statutes emerged. For present purposes the most important are the Legislative Reorganization Act of 1970 (LRA),⁵⁰ the Government in the Sunshine Act (GITSA),⁵¹ and the Federal Advisory Committee Act (FACA).⁵² The LRA requires nearly all congressional committee hearings (other than national security ones) and drafting sessions to be open to the public.⁵³ FACA requires that all the deliberations of a federal advisory committee must be in public.⁵⁴ GITSA opens to the public every meeting of two or more members of regulatory commissions.⁵⁵ These laws reflected a shift from an emphasis on the accountability of outcomes, in which proposed policies had to be defended and justified, to the view that accountability of the processes through which decisions were reached was also necessary.

Yet as numerous studies document, and those involved in the legislative process confirm, the shift to transparency-of-process requirements stemming from the 1970s are a contributing factor in Congress' inability to compromise and deliver legislation.⁵⁶ An American Political Science Association (APSA) task force from 2012, designed to analyze the ever-growing paralysis and dysfunctionality of Congress, concluded that "gridlock in the American Congress has been exacerbated by the 'sunshine laws' that opened up committee deliberation to the public but also to lobbyists and other special interests."⁵⁷ As Democratic congressman George Miller, elected in 1974 as a post-Watergate, open-government reformer, lamented in the mid-1990s: "We were a conquering army. We came here to take the Bastille. We destroyed [Congress] by turning the lights on."⁵⁸ A recent congressional staffer commented in an important study by the congressional

⁵⁰ See Pub. L. No. 91-510, 84 Stat. 1140 (1970).

⁵¹ See Pub. L. No. 94-409, 90 Stat. 1241 (1976).

⁵² See Pub. L. No. 92-463, 86 Stat. 770 (1972).

⁵³ See Legislative Reorganization Act of 1970 §§ 103, 112.

⁵⁴ See Federal Advisory Committee Act (FACA) § 10(a).

⁵⁵ See Government in the Sunshine Act § 552(b).

⁵⁶ Mark Warren & Jane Mansbridge, *Deliberative Negotiation*, in AM. POL. SCI. ASS'N, NEGOTIATING AGREEMENT IN POLITICS 86, 108 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

⁵⁷ Cathie Jo Martin, *Conditions for Successful Negotiation: Lessons from Europe*, in AM. POL. SCI. ASS'N, NEGOTIATING AGREEMENT IN POLITICS 121, 127 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

⁵⁸ JOHN A. LAWRENCE, *THE CLASS OF '74*, at 1 (2018).

scholars James Curry and Frances Lee: “Transparency is a good thing in principle but it makes Congress more dysfunctional.”⁵⁹

Indeed, many studies find that excessive transparency requirements have been ineffective or even counterproductive to the instrumental goals they were thought to serve. Greater transparency has not generally made government decisions more widely accepted; the more transparent the congressional process is, in fact, the more the public dislikes Congress (ignoring adages about watching sausages being made has not improved perceptions of Congress). Contrary to the assertion that transparency would promote high-quality deliberation, the APSA study concluded that “the empirical evidence on the deliberative benefits of closed-door interactions [compared to public ones] seems incontrovertible.”⁶⁰ In the international context, when negotiating treaties or other agreements, it is often recognized that the terms should be worked out privately until a full package is agreed upon, only after which the complete agreement gets presented and defended publicly. It is not clear why domestic policy negotiations should be thought to work differently. And contrary to the hope that opening up committee drafting sessions to the public would weaken the power of special interests, studies conclude this has “had precisely the opposite effect. [Open sessions] enabled business lobbyists to monitor the votes of each elected official more closely.”⁶¹

Transparency requirements also change the behavior of members of Congress. A recently elected member of Congress described his discovery about this:

Most of the really angry voices in Congress are totally faking it. The same people who act like maniacs during the open meetings are suddenly calm and rational during the closed ones. Why? Because there aren't any cameras in the closed meetings, so their incentives are different. . . . What I've seen is that members of Congress are surrounded by negative incentives. There are rewards for bad behavior. . . . The big thing that modern media and modern politicians have learned is that if they can keep you angry, they'll hold your attention.⁶²

⁵⁹ JAMES M. CURRY & FRANCES E. LEE, *THE LIMITS OF PARTY: CONGRESS AND LAWMAKING IN A POLARIZED ERA* 140–41 (2020).

⁶⁰ Warren & Mansbridge, *supra* note 56, at 108.

⁶¹ David E. Pozen, *Transparency's Ideological Drift*, 128 *YALE L.J.* 100, 131 (2018) (citing DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 234 (1989)).

⁶² Noah Minnie, *Freshman Democrat says angriest voices in Congress are 'faking it,'* ABC NEWS (April 21, 2023, 1:53 PM), <https://abcnews.go.com/Politics/freshman-democrat-angriest-voices-congress-faking/story?id=98753960> [<https://perma.cc/J87Z-W3AC>].

These transparency statutes have also changed the organizational structure through which Congress legislates. In recent years, a more centralized lawmaking structure, which is leadership controlled and top-down, has replaced the traditional “regular order” process of decentralized, committee-based development of legislation and broad opportunities to amend bills on the floor.⁶³ Major legislation is now largely built in the offices of the party’s leadership and then pressed upon the party’s members from the top.⁶⁴ Indeed, in the 2020–2022 session of Congress, no final agreements on legislation came through the more traditional conference-committee process.⁶⁵ Many commentators decry these developments. Centralized control limits regular members from opportunities to debate and amend legislation.⁶⁶ It limits the incentives for committee chairs and members to develop specialized knowledge and expertise, or to be entrepreneurial in developing legislation. Newspaper editorial boards frequently urge Congress to return to the “regular order” process of committee-based legislating.⁶⁷

But these criticisms fail to recognize that transparency requirements in the modern media age have generated pressures that have led Congress, under both Republican and Democratic leadership, to turn to centralized lawmaking. The more closed-door nature of centralized lawmaking came to be viewed as necessary to enable the flexibility and compromise required to enact most major legislation.

In their extensive study of how Congress functions today, Curry and Lee interviewed senior congressional staff who explained (anonymously, of course) that centralized lawmaking is a response to the way open government, combined with social media, empowers each parties’ most zealous bases. As one staffer concisely commented, “the politics of each party’s base has made [regular order] impossible.”⁶⁸ Successful negotiations involve exploring options and tradeoffs; they require compromising on one item to win on another. But in the social media age, as one staffer observed:

⁶³ See James M. Curry & Frances E. Lee, *What Is Regular Order Worth? Partisan Lawmaking and Congressional Processes*, 82 J. POLS. 627 (2020).

⁶⁴ *Id.*

⁶⁵ Sarah Binder (@bindersab), TWITTER (July 12, 2023, 12:04 PM), <https://twitter.com/bindersab/status/1679174919437926411?s=20> [<https://perma.cc/BZ6R-XPVC>].

⁶⁶ Curry & Lee, *supra* note 63, at 630.

⁶⁷ John McCain, *It’s Time Congress Returns to Regular Order*, WASH. POST (Aug. 31, 2017, 8:21 PM), https://www.washingtonpost.com/opinions/john-mccain-its-time-congress-returns-to-regular-order/2017/08/31/f62a3e0c-8cfb-11e7-8df5-c2e5cf46c1e2_story.html [<https://perma.cc/H68E-FWWF>].

⁶⁸ Curry and Lee, *supra* note 63, at 141.

If a piece of the negotiation gets reported, it'll be seen in isolation from everything else we're trying to do, all the other moving parts Social media will start churning information—all about one little piece. It spreads like wildfire. And all this even before you can have a discussion with the skeptics. By the time you can reach them, they've already made up their minds. They're not listening to you.⁶⁹

Specific proposals that make up even a small piece of an overall package will be weaponized to sink that larger package; there are “[h]yperpartisans on both sides that will turn everything into a wedge.”⁷⁰ As other staffers reported: regular order was “covered instantly in the media . . . [but] there’s so much divisiveness inside the party’s caucuses that you render yourself pretty vulnerable if you’re putting out your gives [that is, what you are prepared to give away in negotiations] that publicly.”⁷¹ To forge compromises and successfully move legislation through Congress, one staffer observed, “you need the back-room discussions outside the view of the lobbyists, even if that’s sacrilege to the open-government people.”⁷² Staffers further observed, “[o]n lower profile issues . . . the committee process still functions.”⁷³ But on major issues, in today’s Congress, “it’s in the backroom where the deal is made.”⁷⁴

When Republicans regained control of the House in 2022, the governing rules they adopted committed to restoring features of the “regular order” process of legislating. Scholars of Congress expressed skepticism that this commitment would hold, given the difficulties of legislating under those features in today’s circumstances.⁷⁵ And indeed, in the early days of the new Congress, that commitment quickly fell by the wayside, when the House passed its initial debt-ceiling bill under a closed rule.⁷⁶ It remains to be seen whether the same conjunction of transparency requirements and the communications revolution that drove Congress to centralized lawmaking in the first place will drive it back there if significant legislation is to be enacted. As Profes-

⁶⁹ *Id.* at 142.

⁷⁰ *Id.* at 141.

⁷¹ *Id.*

⁷² *Id.*

⁷³ James Curry & Frances E. Lee, *Congress at Work: Legislative Capacity and Entrepreneurship in the Contemporary Congress*, in *CAN AMERICA GOVERN ITSELF?* 181, 197 (Frances E. Lee & Nolan McCarty eds., 2019).

⁷⁴ Curry & Lee, *supra* note 63, at 143.

⁷⁵ Sarah Binder (@bindersab), TWITTER (Jan. 9, 2023, 6:44 AM), <https://twitter.com/bindersab/status/1612430109046374402> [<https://perma.cc/8K8V-QNZT>].

⁷⁶ Sarah Binder (@bindersab), TWITTER (April 26, 2023, 7:21 AM), <https://twitter.com/bindersab/status/1651199777684463616> [<https://perma.cc/95AF-4LJH>].

sor David Pozen puts it in his leading work on the history and practical experience of modern federal transparency requirements,⁷⁷ transparency eventually came to be viewed as a “fundamental policy goal in its own right, a value to be prized and maximized.”⁷⁸ Initially justified in instrumental terms, these requirements came to take on independent normative justification.⁷⁹ That has made it difficult to recognize and consider whether certain transparency requirements need to be modified to enable government to function more effectively.

Transparency remains an important democratic value, but it is now well established—and recognized within Congress—that too much emphasis on transparency, or misguided applications of it, make it significantly more difficult for government to function effectively. Yet it is politically perilous, hence unlikely, for Congress to modify any of these post-Watergate transparency statutes. If Congress seeks to rollback any of these requirements, it risks being perceived as trying to cover something up. Congress, for example, has never raised the dollar amount, first set in the early 1970s at \$200, at which contributions to federal elections must be publicly disclosed. Congress has not done so even though the cost of presidential campaigns has gone up more than ten times since then.⁸⁰ Getting the public to recognize the costs to effective government of excessive transparency requirements is difficult. But we need an abstract ideological commitment to transparency and to recognize when excessive or misplaced transparency requirements undermine the capacity to deliver effective government.

D. “Fair” Representation Versus Effective Government

Much of election law has been concerned with the issue of political representation. Indeed, the modern era of constitutional oversight of the normative foundations of political representation began with the revolutionary malapportionment decisions.⁸¹ In upending 175 years of American political practice, those decisions concluded that a constitutional system of representation requires that the election districts for a particular representative body consist of roughly equal numbers of persons. Soon after those decisions, the Court added the constitutional

⁷⁷ Pozen, *supra* note 61.

⁷⁸ David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADM. REV. 326, 327 (2020).

⁷⁹ *Id.*

⁸⁰ In the 2020 election, the two major candidates’ campaigns raised around \$1.8 billion for the primaries and general election; in 1972, the combined figure was around \$104 million for the general election. These figures do not include spending outside the campaigns.

⁸¹ *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

requirement that structures of representation not dilute the voting power of particular minority groups.⁸²

These issues arose within the context of the United States' long-standing commitment to using single-member election districts and first-past-the-post (FPTP) voting rules to elect representatives. More recently, debates in the United States over the proper basis of political representation have shifted to questioning the FPTP system altogether. Efforts have been mounted, led mainly by academics, to persuade Americans to switch to multi-member districts (MMDs) for Congress, based on the view that this would create a multi-party system of proportional representation (PR) in the House. Federal law currently requires members of the House to be elected from single-member districts, but in recent years bills have also been introduced in Congress to change this law and permit—or require—states to use multi-member districts for Congress. Two hundred academics in the fall of 2022 sent an “open letter to Congress” supporting this change.⁸³

Debates about the advantages and disadvantages of PR systems versus FPTP systems have been ongoing ever since Belgium became the first country to adopt PR in 1899 (quickly followed over the next twenty years by many other European countries embracing PR). The central argument for PR is that it produces fairer political representation: representation that more fully mirrors the range of policy and political party preferences in a society. The main argument for the more majoritarian alternative of FPTP is that it enables more effective and more stable government.⁸⁴

The recent revival of arguments for PR in the United States reflects these long-standing positions, but the arguments rest heavily on more contingent points tied to the specific circumstances of politics today. Proponents of PR argue that it is the solution to the toxic, tribalistic, and hyperpolarized nature of our politics today.⁸⁵ As Lee Drutman, the foremost proponent of current arguments for PR, puts it in his recent book, *Breaking the Two-Party Doom Loop*,⁸⁶ the best way of

⁸² *White v. Regester*, 412 U.S. 755 (1973).

⁸³ *Letter to Congress on Ending Single Member Congressional Districts and Adopting Proportional Representation*, MEDIUM (Sept. 19, 2022), <https://medium.com/@scholars-redistricting-reform/open-letter-to-congress-to-end-single-member-congressional-districts-and-adopt-proportional-97ad1cf6aa2e> [<https://perma.cc/NQ2M-PPMD>].

⁸⁴ For a summary of these debates, with a collection of sources, see RICHARD H. PILDES ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1201-09 (6th ed. 2022).

⁸⁵ Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276 (2011).

⁸⁶ LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* (2020).

de-escalating from these current circumstances is to fragment the major parties into a series of smaller parties.

This is not an argument for PR in the sense that shapes debates over partisan gerrymandering. In those debates, an intuitive baseline often invoked (though an overly simplistic one) is that if 60% of votes statewide are cast for Democrats, then Democrats ought to win roughly 60% of the seats. Instead, the current advocates for PR seek to end the single-member districting system for Congress and have states use MMDs that would elect around five members to Congress. In that system, candidates would only need to win 17% of the vote to be elected, which would mean votes for smaller parties would not be wasted. Redesigning the election structure in this way would, proponents believe, end the two-party structure of American politics in the House and lead to the creation of between four and six political parties in Congress. Making this change would require congressional legislation that would either permit or require states to use MMDs for the House.⁸⁷

Proponents of this shift argue that it is the single-member districting system and the two-party politics it creates that has led to a type of politics in which many issues become “us against them.” In a six-party Congress, presidents would not as often have an automatic majority in Congress, nor would they face the automatic obstacle they currently face when the opposition party controls the House or Senate. Multiple parties, Drutman asserts, would create “a more responsive and flexible political system.”⁸⁸ Different majorities, we are happily told, would have to be cobbled together for different issues.

There are several reasons to be skeptical about this argument, particularly from the perspective of effective government. As an initial matter, there is reason to doubt that our single-member district (SMD) system is a primary cause of the hyperpolarized politics that has characterized the last twenty or so years. England and Canada also use the SMD system, yet have nothing like the tribalistic, affective polarization of current American politics. Much larger, unique aspects of American political culture—the role of race, religion, the nature of our media, the way we finance our elections, or our more adversarial culture—likely play a more significant role than SMDs in shaping the political culture of the last couple decades. If SMDs do not give us the political culture of Canada, it is hard to believe shifting to a MMDs and a six-party House will give us the political culture of Finland.

There are also mechanical issues to consider: the proposal would require districts to hold about five times as many people as they cur-

⁸⁷ For fuller discussion of these issues, see Richard H. Pildes, *Against Multi-Party Representation in the House*, UNIV. ILL. L. REV. (forthcoming).

⁸⁸ See Drutman, *supra* note 86, at 180.

rently do, which would mean election districts would have around 3.8 million people.⁸⁹ General elections would have ten or more candidates and the system would have to employ ranked-choice voting to work.⁹⁰ The link between representatives and those who reside in the traditional SMD is also particularly important for those who most need constituency services, such as those seeking assistance with Social Security benefits or other public benefits. It is not evident how much of that connection would be lost in districts electing five members from districts of nearly 4 million people must be considered. Moreover, nearly half the states, 21, have fewer than five representatives currently,⁹¹ meaning they could not construct the five-member districts required to make this system work. One response to these “mechanical issues” is to make other institutional changes in order to operationalize MMDs. Proponents, for example, argue the size of the House should increase to 700 members so that more states would be able to use MMDs.⁹²

If these mechanical issues are not considered sufficient obstacles to endorsing MMDs, there is also reason to question whether the shift to MMDs for the House might not, in fact, produce significant multi-party politics. The Senate and President would continue to be elected as they currently are, absent constitutional amendment. Because these higher offices will continue to be dominated by Democrats and Republicans, it is unclear how many ambitious politicians will run for the House under other party labels.

But my deepest basis for skepticism about shifting to MMDs and a multi-party Congress is that it would undermine even further the capacity of the political system to deliver effective government. In particular, while the argument for PR is based on the current circumstances of PR in the United States, it oddly ignores the current circumstances of the PR democracies in Western Europe. If we are assessing whether PR makes sense in *this* era, it is critical to notice what is happening with the democracies in Western Europe, not just what is happening with democracy in the United States.⁹³

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *United States House of Representatives Seats by State*, BRITANNICA (May 13, 2022), <https://www.britannica.com/topic/United-States-House-of-Representatives-Seats-by-State-1787120> [<https://perma.cc/HYS9-7PHJ>].

⁹² Lee Drutman, *To Fix Congress, Make It Bigger. Much Bigger.*, WASH. MONTHLY (Oct. 28, 2018), <https://washingtonmonthly.com/2018/10/28/to-fix-congress-make-it-bigger-much-bigger/> [<https://perma.cc/ZF82-5W5P>].

⁹³ I focus the comparison on Western European democracies, as those are most like that in the United States, but similar problems plague PR democracies in Latin America and Israel as well. *See* Richard H. Pildes, *It's Not Just Us: Western Democracies are Fragmenting*, WASH. POST (July 15, 2022, 2:00 PM) <https://www.washingtonpost.com/outlook/2022/07/15/elections-france->

As noted above, recent years have seen a tremendous fragmentation in the political-party structure in these democracies. The inability of European governments to deliver effective policies on the issues citizens care most about has led to a bleeding away of support for the major, long-dominant European parties. The result is that the major parties have splintered into a wider array of parties, with new, insurgent parties of various ideologies emerging or previously minor parties gaining greater support. Though these were PR systems, in many European countries the reality was that only a few major parties previously had significant enough support to play a major role in governance. Now we are seeing exactly the kind of splintering of those larger parties that PR advocates claim would be a virtue for the United States. Germany, for example, had been considered a two-and-a-half party system since World War II; but in recent years, it has become a six-party system. Earlier studies on the effectiveness of PR systems were done prior to this age of fragmentation, just as the U.S. system functions differently than in the past in our age of hyperpolarized parties.

The more fragmented party systems emerging in Europe have made governing there far more difficult, in several ways. First, it now takes much longer to form a governing majority in European parliaments, as negotiations drag on for months between the various parties and potential coalitional partners. Voters might not have a clear sense of what they are voting for, since coalitions between parties are often cobbled together after elections, in ways not always foreseeable in advance. When those governments form, they are more fragile because the departure of one or more minor parties from the coalition can cause the government to collapse. Some of these democracies have had to hold repeated national elections in the effort to find a governing majority. Others lose votes of no-confidence at new rates. When these governing coalitions do form, they are more likely to be ideologically incoherent, since parties with strongly divergent views on major issues might need to come together to form a majority. In other work, I have documented these effects in specific countries from the increased fragmentation of the party system.⁹⁴ And it hardly can be said that this fragmentation, which makes effective governance all the more difficult, has led citizens to express greater satisfaction with their governments. To be sure, the challenge of party fragmentation is greater in parliamentary systems than it would be in the presidential system of the United States; in the former, the existence of the government

spain-colombia-democracies/ [https://perma.cc/E4ZJ-U3XE].

⁹⁴ See *Romanticizing*, *supra* note 6; see also PETER MAIER, *RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY* (2013).

itself can depend on an effective majority coalition in the legislature. But this Western European experience suggests how difficult it can be to put together political majorities to enact legislation in a highly fragmented House with five or six political parties.

In the United States, the two major parties are already fragmented internally. During Republican control of the House in recent years, the party's internal conflicts led to the devouring of three of their Speakers of the House, John Boehner, Paul Ryan, and Kevin McCarthy. Boehner acknowledged he was powerless to control these internal factions; he called his Republican caucus ungovernable.⁹⁵ When the Republicans regained control of the House after the 2022 elections, their internal conflicts required fifteen rounds of balloting before the party could choose a Speaker of the House, the first time since before the Civil War that it took that many rounds of balloting to elect a Speaker.⁹⁶ The Democratic Party has its own internal conflicts between progressives and moderates, though these have not hampered its legislative agenda as much as on the Republican side. But these conflicts did delay for several months the passage of President Biden's infrastructure bill, as progressives insisted on linking it with the Build Back Better social-welfare bill.⁹⁷ That impasse was broken only after the Democrats suffered major electoral blows in state elections, after which this internal party logjam was broken and Democrats let the infrastructure bill pass on its own.⁹⁸ But this prolonged internal conflict seriously damaged President Biden's approval ratings, as well as the public view of Congress, during this period of legislative stagnation.⁹⁹

Yet these conflicts and their consequences were all *within* the two-party system, in which fellow party members have strong incentives to pull together. Imagine now if each party were split, as PR ad-

⁹⁵ See PBS NewsHour, *Watch John Boehner's Full Statement on His Resignation*, YOUTUBE (Sept. 25, 2015), <https://www.youtube.com/watch?v=rlrp1Cvbono> [<https://perma.cc/4F7A-BGC9>].

⁹⁶ Allison McCartney et al., *Vote Count: McCarthy Elected House Speaker After 15 Ballots*, N.Y. TIMES (Jan. 6, 2023), <https://www.nytimes.com/interactive/2023/01/04/us/politics/house-speaker-vote-tally.html> [<https://perma.cc/B72Q-EMTZ>].

⁹⁷ Maanvi Singh & Joan E. Greve, *House Delays Infrastructure Bill Vote As Progressives Dig In – As It Happened*, GUARDIAN (Oct. 29, 2021), <https://www.theguardian.com/us-news/live/2021/oct/28/biden-spending-package-democrats-europe-trip-us-politics-live> [<https://perma.cc/G3UK-NF7V>].

⁹⁸ Susan Cornwell & Makini Brice, *U.S. Democrats Pass \$1 Trillion Infrastructure Bill, Ending Daylong Standoff*, REUTERS (Nov. 6, 2021), <https://www.reuters.com/world/us/bidens-sweeping-infrastructure-social-spending-bills-finally-get-vote-2021-11-05/> [<https://perma.cc/E7B4-ZRDV>].

⁹⁹ Io Dodds, *Biden Approval Rating Drops Despite Wide Support for His Infrastructure and Social Spending Plans*, INDEPENDENT (Nov. 14, 2021), <https://www.independent.co.uk/news/world/americas/us-politics/joe-biden-approval-rating-b1957444.html> [<https://perma.cc/FNS2-K3P2>].

vocates would like, into three parties, generating a six-party Congress. Now envision having to cobble together majority coalitions on specific policies, if no one party has a majority—which would be a likely scenario. Each party, its leaders and members, would have incentives to try to expand the party’s support, through strategic judgments about whether being part of a majority coalition or not on specific issues would enhance the party’s electoral prospects. Each party would likely have its own red lines on what compromises it would not make, lest it undermine its appeal to core supporters. Moreover, more parties with smaller constituencies are likely to be organized around one or two major issues (a Green Party, for example, or an anti-immigration party); compromises around that issue then become more difficult, because it is central to the party’s identity. As sharp as internal factional conflicts within each of the two parties might be today, most of their members still recognize their shared identities as Democrats or Republicans, which enables some of these internal conflicts to be subordinated to the party’s overall ambitions. That sense of shared fate would dissipate when these internal factional conflicts are institutionalized and rigidified into distinct political parties, with their own distinct agendas.

PR advocates focus on the hyperpolarized party system in the United States today, but they ignore the highly fragmented and often dysfunctional nature of the party systems in the current PR systems of the Western democracies most similar to the United States. The past effectiveness of systems that were nominally PR ones, but which in practical effect were dominated by two major parties or coalitions, cannot be translated into the much more fragmented party systems of Western Europe today. Until PR advocates engage with how PR actually functions in today’s political culture in Europe, which is being roiled by many of the same economic, cultural, and technological forces that have transformed the political culture of the United States, I believe skepticism about the case for PR in the United States remains appropriate. The risk that a six-party Congress will make it even harder to deliver effective government is significant. As Frances Rosenbluth and Ian Shapiro conclude in *Responsible Parties: Saving Democracy from Itself*, their comparative study of PR and majoritarian systems: “Governments capable of formulating and implementing broad-gauge public policies for the long run require fewer parties, not more, and more party discipline, not less.”¹⁰⁰

MMD-PR would serve certain democratic values, particularly on the input side of democracy, such as a certain vision of fair political

¹⁰⁰ FRANCES MCCALL ROSENBLUTH & IAN SHAPIRO, *RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF* 212 (2018).

representation. It would also reduce opportunities for gerrymandering and reduce the significance of political geography. But in an overall assessment of the costs and benefits of making such a profound institutional change, the risk that a six-party House would have far more difficulty in enabling the political system to deliver effective government must be taken seriously. Because the inability to deliver effective government feeds the crisis of democracy today, this issue is the crucial one PR proponents must convincingly address.

E. Process and Participation Versus Effective Government

My focus thus far has been on the issue of effective government at the macro-level: the capacity of the political branches to enact policies. But the issue of effective government, and the decline of America's governing capacity, also plays out at the level of public administration at the national, state, and local levels. In this area, public debates and scholarship are just beginning to catch up to the tradeoffs that can arise between the important democratic process values of participation and the capacity to deliver public goods effectively.

Infrastructure projects in the United States in recent decades have become notoriously expensive and extraordinarily long to approve and complete. The United States is the sixth-most expensive country in the world in which to build rapid-rail transit per mile.¹⁰¹ But it's worse than that: in the five countries with higher building costs per mile, 80% of the projects require highly expensive underground tracks, which requires building tunnels, while in the United States, only 37% of the mileage is tunneled. Studies find that the cost to build one mile of interstate highway went up five times between 1990 and 2008; other studies show that a dramatic increase in these costs began in the 1970s, and that states were spending three times as much to build a mile of highway in 1980 as they were in the 1960s.¹⁰² Transit researchers have concluded that these differences are "purely institutional."¹⁰³

Some of this is due to the bureaucratic complexity of building across multiple jurisdictions in the highly decentralized U.S. political system.¹⁰⁴ But in the most comprehensive analysis of increased high-

¹⁰¹ Jerusalem Demsas, *Why Does It Cost So Much to Build Things in America?*, VOX (June 28, 2021), <https://www.vox.com/22534714/rail-roads-infrastructure-costs-america> [https://perma.cc/T5K3-DMEU] (last visited Nov 26, 2022). Figures in this paragraph are drawn from this piece.

¹⁰² Leah Brooks & Zachary D. Liscow, *Infrastructure Costs*, AM. ECON. J.: APPLIED ECON. (forthcoming 2023).

¹⁰³ Demsas, *supra* note 101.

¹⁰⁴ On the failure of democratic governments in recent years to deliver public goods, see SAMUEL ISSACHAROFF, *DEMOCRACY UNMOORED* (2023).

way costs, researchers suggest that the increase in participatory and process-oriented “reforms”—increases in “citizen voice” that began in the 1960s—played a significant role.¹⁰⁵ Changes in this era included enactment of statutes such as the National Environmental Policy Act (NEPA, which applies to both public projects and private projects that require a federal permit), the National Historic Preservation Act, and numerous other environmental and public lands statutes, along with the emergence of “hard look” judicial review of federal agency action that subjected agency decisions to more demanding judicial assessment. These constraints required agencies to spend substantial time documenting the evidence and justifications for their actions. In the early years of NEPA, an Environmental Impact Statement (EIS), designed to identify major environmental issues, might be ten pages long; but after courts implied a private right of action to enforce NEPA and aggressively began to review these impact statements, the average EIS has grown to more than 600 pages long today, with appendices that often exceed 1,000 pages, and it now also takes four and a half years to complete.¹⁰⁶ The average completion time for an EIS from 2010–18 for the Departments of Defense, Interior, and Transportation were between five and seven years.¹⁰⁷ Affordable housing advocates in places like California are now arguing that the use of state environmental laws by those opposed to development have been a major obstacle to building more housing and hence a contributor to the homelessness problem. When California’s Democratic Governor Gavin Newsom introduced legislation designed to make it easier to build infrastructure in the state, motivated by the effort to speed the transition to clean energy, the bill was opposed by a coalition of around 100 environmental groups.¹⁰⁸ Newsom expressed frustration at this resistance to speeding up permitting and procurement processes: “You can’t be serious about climate and the environment without reforming permitting and procurement in this state.”¹⁰⁹

To be sure, the new participatory and procedural rights might have produced more well-considered projects in some contexts. But it is also widely recognized that these rights are also sometimes used for

¹⁰⁵ *Id.*

¹⁰⁶ Brink Lindsey & Samuel Hammond, *Faster Growth, Fairer Growth: Reviving Innovation and Dynamism*, NISKANEN CTR. (2020), https://www.niskanencenter.org/faster_fairer/reviving_innovation_and_dynamism.html [<https://perma.cc/7UZU-58VE>] (last visited Nov. 27, 2022).

¹⁰⁷ EXEC. OFF. PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010–2018), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf [<https://perma.cc/YTX2-6D65>].

¹⁰⁸ Ezra Klein, *What the Hell Happened to the California of the ‘50s and ‘60s?*, N.Y. TIMES, https://www.nytimes.com/2023/06/18/opinion/newsom-california-building-permitting-procurement.html?utm_source=pocket_saves [<https://perma.cc/KM5K-SJEF>].

¹⁰⁹ *Id.*

self-interested purposes to attempt to stymie desirable public-goods projects, including by driving up costs and increasing delays.¹¹⁰ Even when used more appropriately, the extent of institutionalized “citizen voice” now comes at considerable cost to the ability of government at all levels to deliver public goods. With a greater focus on the importance of effective government, a re-calibration of the tradeoffs between participation and effective government might rise to greater public and political attention. In a recent article entitled *The Greens Dilemma: Building Tomorrow’s Climate Infrastructure Today*, Professors Ruhl and Saltzman identify “the trade-offs inherent between building climate infrastructure quickly enough to achieve national climate policy goals versus ensuring strong conservation, equity, and participation goals;” they seek to force a national conversation about those choices.¹¹¹

There was a time when lawyers were key figures in building the capacity of administrative government. The list includes James Landis, Felix Frankfurter, Louis Brandeis, and many others.¹¹² But first with the Administrative Procedure Act, then even more after the emergence of distrust in government that began in the 1960s, the role of lawyers and administrative law shifted, in scholarship and litigation. In one of the most important articles in administrative law in recent years, *The Procedure Fetish*,¹¹³ Professor Nicholas Bagley chastises the rapid rise of what he calls proceduralism, by which he means the full array of legal obstacles and requirements a federal agency must negotiate to complete an action that will be legally upheld.

As Bagley puts it, the development of administrative law since the 1960s, along with certain statutory developments, has meant that numerous procedural requirements have been adopted to address perceived problems in administrative government. Lawyers have played a major role in these developments. As Bagley puts it, “if all you’ve got is a lawyer, everything looks like a procedural problem.”¹¹⁴ These procedural developments were argued to be necessary mainly to (1) ensure the legitimacy of administrative action and (2) provide a public means to prevent agency decision-making from being captured by special interests, particularly business interests. Bagley argues, however,

¹¹⁰ Jerusalem Demsas, *Community Input Is Bad, Actually*, ATLANTIC (Apr. 22, 2022), <https://www.theatlantic.com/ideas/archive/2022/04/local-government-community-input-housing-public-transportation/629625/> [https://perma.cc/2CFA-S7DN].

¹¹¹ J.B. Ruhl & James Saltzman, *The Greens Dilemma: Building Tomorrow’s Climate Infrastructure Today*, EMORY L.J. (forthcoming 2023).

¹¹² THOMAS K. MCCRAW, PROPHETS OF REGULATION (1986).

¹¹³ Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

¹¹⁴ *Id.* at 380.

that these procedural “reforms” have either failed to achieve those objections or, perversely, have achieved the opposite.¹¹⁵

With respect to the first goal, embracing proceduralism has not reduced criticisms of agency power. These criticisms, he argues, are fundamentally about the effort to limit the substantive scope of administrative power from those opposed to it, not about procedures per se; no amount of procedure will be adequate, in light of that. With respect to the second goal, business interests and other well-organized entities have taken most advantage of the new procedural avenues that have been opened. They often do so for the purpose of delaying, blocking, or seeking judicial review to overturn agency action.

Although lawyers have been central in the rise of administrative proceduralism, law students prior to Bagley’s article learned too little about the costs to effective government from the aggregate effects of these developments. All administrative law casebooks discuss the balancing calculus of *Mathews v. Eldridge*,¹¹⁶ in which one of three factors is the government’s interest at stake, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Discussions about the “ossification” of formal rulemaking have also long been common. But beyond these formal acknowledgments, the major administrative law casebooks do not adequately expose students in any depth to the ways excessive proceduralism and participation, and other aspects of administrative law and policy, have so dramatically increased the cost and capacity of government to provide necessary public goods. Participation and good process have their roles, of course, but as with the other democratic values discussed here, that value must be weighed against the necessity of delivering important public goods. As John Podesta, President Biden’s Senior Advisor on clean energy reform, stated in a speech: “These delays are pervasive at every level of government—federal, state, and local. We got so good at stopping projects that we forgot how to *build* things in America.”¹¹⁷

As a specific example on one of the major issues of this era—climate change—is the maze of permitting requirements that create a substantial barrier to the major infrastructure developments required for the transition to clean energy. Permitting requirements differ across various levels of government and numerous agencies within a

¹¹⁵ *Id.* at 368–69. See also Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601 (2006).

¹¹⁶ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

¹¹⁷ Remarks as Prepared for Delivery by Senior Advisor John Podesta on Biden-Harris Administration’s Priorities for Energy Infrastructure Permitting Reform, (May 10, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/05/10/remarks-as-prepared-for-delivery-by-senior-advisor-john-podesta-on-the-biden-harris-administrations-priorities-for-energy-infrastructure-permitting-reform/> [https://perma.cc/JPN2-AUVW] (emphasis original).

single jurisdiction.¹¹⁸ Many of these requirements stem from views about democratic governance and participation, including how far the role of citizens in the election sphere should be extended into the realm of policymaking itself. But there has been too little attention to the tradeoffs between democratic values of participation and government's ability effectively to deliver public goods such as infrastructure.

This is a particularly pressing problem for zero-carbon energy sources, because the areas abundant in such sources—solar, wind, geothermal—do not necessarily correspond to areas of high electricity demand, and because of intermittency problems. To reduce reliance on fossil fuels, for example, Massachusetts agreed with Canada to transmit electricity from Canadian hydroelectric sites. But doing so requires a transmission line to run through a border state. After local opposition blocked a path through New Hampshire, Maine's governor supported running the line through Maine. The project received various federal and state permits and three-fourths of the necessary corridor had been cleared.¹¹⁹ But in an exercise of citizen voice, via the most expensive referendum in Maine's history, a coalition of competing power companies and environmentalists persuaded voters to reject the interstate transmission line.

Similarly, the crisis in homelessness and affordable housing has been attributed, in part, to the exploitation of participatory and procedural rights through which vested interests hinder increasing the supply of housing.¹²⁰

Since 2010, the largest amount of transmission infrastructure installation in one year was 4,100 miles. To meet the goal of a carbon-

¹¹⁸ Philip K Howard, *Two Years, Not Ten Years: Redesigning Infrastructure Approvals*, COMMON GOOD (2015), <https://www.commongood.org/articles-reports-and-media-appearances/two-years-not-ten-years-redesigning-infrastructure-approvals-1> [<https://perma.cc/U4ZD-SQ6H>] (last visited Nov. 27, 2022). See also Nadja Popovich & Brad Plumer, *Why the U.S. Electric Grid Isn't Ready for the Energy Transition*, N.Y. TIMES (June 12, 2023), <https://www.nytimes.com/interactive/2023/06/12/climate/us-electric-grid-energy-transition.html> [<https://perma.cc/B6U4-HSN2>] (noting highly fragmented nature of the country's power grid and regulatory control of it).

¹¹⁹ Matthew Yglesias, *America Needs More Interregional Electric Lines*, SLOW BORING (July 14, 2021), <https://www.slowboring.com/p/america-needs-more-interregional> [<https://perma.cc/C4FV-ZWAV>]; *Maine Voters Reject Quebec Hydropower Transmission Line*, REUTERS (Nov. 3, 2021), <https://www.reuters.com/world/americas/maine-voters-reject-quebec-hydropower-transmission-line-2021-11-03/> [<https://perma.cc/JXW8-MKBS>] (last visited Nov. 27, 2022).

¹²⁰ Christopher Elmendorf & Timothy Duncheon, *When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law*, 49 ECOLOGY L. Q. (2022); Moira O'Neill et. al., *Examining Entitlement in California to Inform Policy and Process: Advancing Social Equity in Housing Development Patterns 101* (2022) (Prepared for the California Air Resources Board and the California Environmental Protection Agency), available at [bit.ly/3HAyFiF](https://perma.cc/JB62-CZ83) [<https://perma.cc/JB62-CZ83>] (finding that "neighborhood level politics" is a principal cause for inability to build more housing in San Francisco); see also *Horn v. County of Ventura*, 596 P.2d 1134 (Ca. 1979) (concluding that state due process law requires neighbors to be given notice and opportunity to be heard before local government can approve certain land-use decisions, such as approval of new housing projects).

free electricity power system by 2035 will require new approved installations of over twice that magnitude—every year for a decade.¹²¹ With the bipartisan passage in Congress of infrastructure legislation, political efforts to reform the permitting system are once again gaining attention. As the Secretary of Energy, Jennifer Granholm, recently said: “It is insane that it can take ten years or more for a transmission line.”¹²² Prior efforts have failed to have significant effect. At the time of this Article’s completion, it remains unclear whether Congress or the Federal Energy Regulatory Commission will manage to enact significant permitting reform. Certain proposals would create new federal siting authority for interregional transmission projects and thus streamline the approval process.¹²³ But these efforts will have to confront, among other issues, the ideology of local control and citizen voice that are important, but that taken too far or applied inappropriately, can hamper the effective delivery of public goods.

As an example of how the public’s approval of government is tied to effective provision of public goods, Democratic Governor Josh Shapiro of the purple state of Pennsylvania had a net favorability rating of 34 points after he enabled the reconstruction in twelve days of a collapsed section of an interstate highway—in part by fast-tracking the permitting process without compromising safety.¹²⁴ As Governor Shapiro himself observed: “Yet today it often seems like every project—big or small—gets mired in a slog of reviews, permits and delays. This saps our innovative spirit, reduces citizens’ trust that government can get things done and ultimately slows our progress as a nation.”¹²⁵

Participation, voice, and appropriate process are important democratic values. But focusing only on the input side to democracy neglects the important output side, which is so critical to the legitimacy of government. Effective government, including practical realities of

¹²¹ Ruhl & Saltzman, *supra* note 111, at 12.

¹²² POLITICO (@politico), TWITTER, <https://twitter.com/i/broadcasts/1mnxeRvAyVEKX> [<https://perma.cc/NNG3-EH84>].

¹²³ Press Release, Whitehouse, Quigley Reintroduce Bill to Modernize the Nation’s Electric Grid (Mar. 3, 2023), <https://www.whitehouse.senate.gov/news/release/whitehouse-quigley-reintroduce-bill-to-modernize-the-nations-electric-grid-> [<https://perma.cc/VN4Y-DFC9>]; see also Lucas Davis et. al., *Transmission Impossible? Prospects for Decarbonizing the US Grid*, NBER Working Paper 31377 (June 2023) (on file with the *University of Chicago Legal Forum*).

¹²⁴ E.J. Dionne Jr., Opinion, *Josh Shapiro is Showing How to Break the Politics of Resentment*, WASH. POST. (Aug. 6, 2023, 6:30 AM), <https://www.washingtonpost.com/opinions/2023/08/06/shapiro-pennsylvania-democrats-fixing-politics/> [<https://perma.cc/XAF2-FDR4>].

¹²⁵ Josh Shapiro, Opinion, *We Fixed I-95 in 12 Days. Here Are Our Lessons for U.S. Infrastructure.*, WASH. POST. (July 16, 2023, 7:00 AM), <https://www.washingtonpost.com/opinions/2023/07/17/interstate-95-repair-infrastructure-shapiro-pennsylvania/> [<https://perma.cc/6EUS-URE6>].

time limits and budgetary constraints, must be taken into account as well.

IV. CONCLUSION

Democracies in our era have entered a turbulent age, with voters continually dissatisfied with the ability of governments to deliver on the issues their citizens care about most urgently. The failure of traditional parties and political leaders to satisfy these demands has led to a constant churn in politics, in which voters continually seek out new alternatives, including populist forces of the left and right or harder-to-characterize ideologies. The struggle of democracies throughout the West to deliver effective government poses a major challenge—maybe the major challenge—to democracies today. Populism, including illiberal populism, is partly a response to the perceived failure of democracies to deliver effectively.

Democratic theory and legal scholarship need to focus more attention on the importance of effective governing in assessing the design of democratic institutions at the large scale and, at a smaller scale, the administration of government at both the national and decentralized levels. Tradeoffs frequently exist between the capacity of government to function effectively and other important democratic values, such as political accountability, equality, transparency, and participation. We need more work assessing where pursuit of these latter values has significantly compromised state capacities, as some of the work discussed in this Article begins to do. Future proposed political reforms need to be evaluated not just in terms of whether they express a commitment to values such as equality or participation, but how they are realistically likely to affect the ability to deliver effective government.

This Article offers a number of brief examples in which pursuit of certain democratic values has undermined the capacity to govern effectively. Taken as a whole, the point of these examples is to bring attention to the value and importance of state capacity to deliver effectively. Viewing current arrangements and proposed reforms through the lens of effective government opens up new directions for scholarship on democracy. But the first step is to recognize that the failure to deliver effective government is roiling most democracies today and that if democracies cannot overcome that challenge, popular frustration, anger, distrust, or worse, will continue to grow.