

URBAN ANTICIPATORY GOVERNANCE

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ABSTRACT

Legal scholars who study cities and urban governance discuss participation in a number of ways, and at various moments in the legal process. Frequently, however, less attention is placed on anticipatory participation—forward-looking, flexible, and inclusive public engagement—and its role in promoting effective and legitimate policy. The emerging concept of anticipatory governance synthesizes different notions of improving participation and places focus on how residents can best participate in society’s most difficult decisions. At the local level, such matters are often those that address land use and economic development.

The recent climate change preparedness strategic plan in New York City, known as PlaNYC, is an example of a local anticipatory governance process addressing population growth as well as global climate change. Building on the PlaNYC case, this Article illustrates ways that cities can, and in fact already do, address participation early on in the planning process to improve the quality of resident engagement. This Article offers a framework for how local government can use anticipatory governance concepts to promote resident participation in influencing how projects are developed in the built environment. Residents, the primary users of public space, have unique expertise and can engage with professionals to plan accessible and equitable cities. Anticipatory participation may even assist in moving beyond difficult land use decisions where compromises appear most remote. An urban anticipatory governance approach addresses society’s most complex issues, in flexible ways, allowing residents and experts to work together, with enough time for that collaboration to have a meaningful impact on decisions.

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I. INTRODUCTION

Imagine a city in the United States.¹ There are parks, tree-lined streets, buildings, homes, and a central business district. There are schools and municipal infrastructure, such as sewers and water treatment facilities. Railroad tracks carry freight cars. Interstate highways bisect brownfields and industrial blocks from residential areas and divide affluent communities from poor ones, segregating neighbors largely by race. The city is surrounded by wealthy suburbs with “good” schools and a mostly homogeneous white population.² The city is predominantly people of color.

1. There is no single definition of a city. As an idea, the city “signifies a complex microcosm of the state or nation and a socially, economically and culturally dynamic part of the larger polity.” Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 347 (1990). Legal doctrine has left American cities largely powerless, especially when set against the sovereign power of states. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1059 (1980). From the perspective of population, it may be helpful to consider the definition of an “Urbanized Area” as one having 50,000 people or more. *2010 Census Urban and Rural Classification and Urban Area Criteria*, U.S. CENSUS BUREAU, <https://www.census.gov/geo/reference/ua/urban-rural-2010.html> [https://perma.cc/DXY7-ZTKM]. In the 2010 Census, 80.7 percent of the U.S. population was urban. *2010 Census Urban Area Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/geo/reference/ua/uafacts.html> [https://perma.cc/4G98-JZNF]. Here, the author invites the reader to consider the above and to use their own lived experience of cities for this hypothetical.

2. As Briffault points out, suburbs benefit much more than central or large cities from local legal autonomy. Briffault, *supra* note 1, at 355 (“Local autonomy enables these suburbs to protect their resources from the fiscal needs of nearby cities while securing their independence from involvement in the resolution of urban or metropolitan economic or social problems.”).

In this city, a number of large real estate development projects are being proposed. Massive brownfields and former industrial sites along transportation routes like highways and rail lines—or rivers, lakes, and oceans—are poised for new industry. Developers with means and access to elected officials and other city leaders seek to anchor a project with office space, retail stores, condominiums, or a mix of all three. There is a major entertainment venue planned as well, such as a sports stadium or a casino.

The city, county, or state may own land that will be redeveloped. Private landowners will seek tax breaks, and other incentives, for redevelopment projects. Public notices call attention to local legislative review of proposed projects as well as public hearings. Those hearings are in the evening. Parents without the ability to obtain childcare and low-income workers who have more than one job will likely be unable to attend. Most residents will not know how to make their voices heard unless they are politically involved; and let's face it, most are not. In fact, most city residents do not even vote in local elections.³

Planning for projects occurs mostly prior to the hearings. All that is left, really, is the spectacle of the hearings. In one case, the city council requires ten percent of housing constructed to be affordable. The developer makes oral commitments to hiring local workers. The project is approved by a majority of council members, which is enough to pass. Depending on a number of factors—including the vagaries of the real estate market and the economy as a whole—the project may eventually be completed. Eminent domain may be used to acquire additional land not already in the developer's control. Residents and small businesses will be displaced. Individuals and groups sue to stop the project—but such lawsuits will only cause delay. The development project, in some fashion, at this point, is inevitable.

* * *

The description of public infrastructure and land-use planning outlined above is commonplace across the country.⁴ Public projects in the built environment occur largely without *ex ante* local input, though at the expense of residents and stakeholders. Zoning laws and planning commissions are supposed to regulate what can be built where, and to

3. David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 764 (2017) (describing the lack of voter information, knowledge, and implications on state democracy).

4. A recent report argues that cities ought to organize communities and invest discretionary funds on infrastructure improvements to create jobs and broad economic growth. ROXANA TYNAN ET AL., UNMAKING THE HIDDEN POWER OF CITIES: USING THEIR AUTHORITIES, ENERGY AND PROMISE TO SECURE THE COMMON GOOD 13 (2018). Advocates against increased government spending are actively campaigning against new infrastructure development and the tax and other revenue raising tools that accompany it. Hiroko Tabuchi, *How the Koch Brothers Are Killing Public Transit Projects Around the Country*, N.Y. TIMES (June 19, 2018), <https://nyti.ms/2M3R2OR> [<https://perma.cc/5A32-6VY9>].

govern the process by which developers may deviate from zoning codes.⁵ However, most opportunities for the public to provide input on the built environment in cities happen after a project has significant momentum.⁶

Given the prevalence of this current procedure, it is not difficult to understand the underlying rationales. For one, cities lack the legal authority to make decisions of their own accord.⁷ Authority to regulate land uses at the regional or local level is derived from the state.⁸ As a result, local government officials choose potential land use and economic development projects that they will support.⁹

Local government officials are not interested in inauspicious projects. A failed planning process for an economic development project makes a local government executive appear weak and a city legislature intractable. Local officials want successful projects and will do what is necessary to make that happen—including allowing for public input after a project is mostly planned. Often public input risks negative political support. Limiting public input during the planning process protects against the possibility of opposition viewpoints. In the end, it is simpler for projects that already have enough momentum to overcome local opposition to move forward without the delay of lengthy public input.

But the current procedure is imprudent in a number of ways. Weak participation in city planning early on limits how residents and stakeholders participate in planning the built environment of which they are the primary users.¹⁰ Lack of participation in planning can lead to additional costs, inefficiencies in design, and inadequate implementation. Also, the current procedure does not account for residents' inter-

5. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926).

6. For example, in the 1950s, local representation on advisory committees “simply provided a ‘rubber stamp,’ legitimating urban redevelopment decisions that had already been made by the local government.” Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 *BROOK. L. REV.* 861, 870 (2000). McFarlane points out the “minimal forms of citizen participation” in contemporary redevelopment programs, such as the U.S. Department of Housing and Urban Development’s Community Development Block Grant program. *Id.* at 882.

7. All power for cities to act is delegated by state government. Frug, *supra* note 1, at 1062 (citing 1 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 2.00 (1979)).

8. *See, e.g.*, TENN. CODE ANN. § 13-7-101 (2018).

9. There are at least two different kinds of urban development projects: those proposed by private developers and those proposed by public developers. Here, it is recognized that public development agencies have a limited number of projects to propose, fund, and build. As a result, this scarcity means that city officials are less likely to initiate projects that either lack political support or are unlikely to overcome local opposition.

10. *See, e.g.*, K. Sabeel Rahman, *Policymaking as Power-Building*, 27 *S. CAL. INTERDISC. L.J.* 315, 345-50 (2018).

est and ability in partnering with experts and professionals to creatively solve challenging city planning problems. Finally, the current procedure limits the ability of planners to use resident participation in making technology and new innovations most useful in meeting human needs through city planning.

How and when to involve the public in planning large urban land uses at the local level is a fraught endeavor.¹¹ Scholars have focused on the *lack* of public involvement in urban redevelopment planning. This Article places focus on *when* residents are involved in the process by arguing that more attention should be given to planning prior to execution; it focuses on urban planning, and indeed urban governance, in an anticipatory manner.

Although the act of planning, by definition, seems anticipatory, not all planning successfully anticipates future challenges. As this Article will show, the planning process too frequently fails to include public participation in its early stages. This poses a problem because individuals and groups who bear the cost of development ought to have a voice in the development process.¹² In addition, state and local governments, that compete for jobs and economic development, continue to pursue large developers in technology and industry by giving away significant public incentives.¹³

Unnecessary disputes and litigation arise too frequently, and this can yield unsatisfactory results. Participation in planning and design from the start is key to the concept of anticipatory governance. In the context of urban development, an anticipatory governance framework would involve approaching residents before a project has been identified; a step that rarely occurs now.

Anticipatory governance places focus on the ability of average residents to give their opinion in designing systems and structures. An *urban anticipatory governance* approach to land use planning would engage residents before a finished proposal has taken shape—at a

11. Progressive property law scholars theorize of public urban spaces—including parks and other spaces, as well as vacant land and affordable housing stock—as part of the “commons.” Inherent in this conception is the competition and governance challenges for use of urban space. See, e.g., Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POLY REV. 281, 282 (2016) (“City space is highly contested space.”).

12. The costs of shifting decision-making to outside parties are well articulated in the environmental federalism literature. The advent of federal environmental regulation preempted local control over land uses. Scholars have thus noted that “[i]f there is a victim of federalism, it is undoubtedly the community.” Keith H. Hirokawa & Jonathan Rosenbloom, *The Cost of Federalism: Ecology, Community and the Pragmatism of Land Use*, in THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS 243 (Kalvani Robbins ed., 2015).

13. See *infra* IV.B.7.

moment when their input can be used in designing a plan. Early involvement allows residents and experts to engage in discussions about empirical evidence and community values. Such processes avoid the negative impacts of relying on facts or disputes about the nature of facts, without understanding the potential impact on people.¹⁴ Potential solutions for involving the public in difficult local governance questions share common themes. These themes include forward-focus,¹⁵ flexibility,¹⁶ and participation.¹⁷ Placing focus on involving the public before large urban redevelopment projects are approved can improve the quality of those projects and their ability to respond to future challenges.

This Article is organized around the central argument that urban governance decisions can benefit from involving residents, stakeholders, and experts earlier on in the planning and approval process. Part I describes the current procedure used in the urban governance of land use and the main reasons for its existence. Part II challenges the current procedure and argues for greater focus on expertise, resident input, flexibility, and forward-looking perspectives in the planning process. Part III explores how urban anticipatory governance practices can improve on areas where the current procedure does not allow for full public participation.

II. URBAN GOVERNANCE CHALLENGES

Community organizers on the South Side of Chicago are once again lining up against a controversial new development.¹⁸ Groups are advocating for shared economic opportunity for long-time residents in the

14. Scholars have articulated the empirical turn in family law and other bodies of law, along with its consequences. Claire Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227 (2018).

15. Sometimes called “foresight.” Leon S. Fuerth, *Foresight and Anticipatory Governance*, 11 FORESIGHT 14, 29 (2009).

16. Lobel discusses a “flexible and fluid” policy-making environment that replaces or complements traditional static features of the regulatory model. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 388 (2004). Flexibility is necessary when changes are uncertain, as in the context of sea-level rise and global temperatures. A variety of outcomes are possible, and strategies must be flexible for adapting to those changes. Ray Quay, *Anticipatory Governance: A Tool for Climate Change Adaptation*, 76 J. AM. PLAN. ASS’N 496, 498-99 (2010). In this sense, the way that new governance scholars approach flexibility differs to, say, the climate change adaptation approach.

17. See McFarlane, *supra* note 6, at 865 (“[E]mpowerment theories that explicitly connect participation to a redistribution of decision-making power are an important yet overlooked aspect of the basis for community participation in development.”).

18. Saul Alinsky, whose work focused on improving Chicago’s South Side, described his community organizing philosophy of building power through confrontation. SAUL D. ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* 3 (Vintage

\$500 million project through a private contract called a “community benefits agreement.”¹⁹ What is different this time is that the development project is not some shiny new condominium, but it is the Obama Presidential Library.²⁰ Former President Barack Obama, whose work as an organizer in Chicago is key to his political identity, was the target of popular protest because of a sticky land use issue. This example highlights the extent to which neighbors seek to impact urban land use and development.²¹ Repetitive, perfunctory public hearings culminating in a rubber-stamp city council vote leads one to question at what point the needs of local residents are even being considered.²²

* * *

In 2016, Baltimore’s city council approved a controversial \$660 million financing deal for the redevelopment of a larger waterfront district, including the expansion of the offices of the apparel company Under Armour.²³ Observers at the time noted that review of the project was rushed and opportunity for feedback limited.²⁴ In part because of the lack of local resident engagement, a number of organizations—including the ACLU—opposed the project, arguing that the development and its public support would perpetuate the racial divide in an already

Books ed., 1989) (“*The Prince* was written by Machiavelli for the Haves on how to hold power. *Rules for Radicals* is written for the Have-Nots on how to take it away.”).

19. Among other terms, community groups are calling for participation in the development of the neighborhood around the project to prevent gentrification. Curtis Lawrence, *Hope and Change Collide on the South Side*, CITYLAB (Nov. 7, 2017), <https://www.citylab.com/equity/2017/11/hope-and-change-collide-on-the-south-side/545243/> [<https://perma.cc/WJ5W-29PQ>].

20. A video posted online shows President Obama discussing the positive benefits of gentrification in Chicago neighborhoods. Pete Grieve (@pete_grieve), TWITTER (Feb. 28, 2018, 4:27 PM) https://twitter.com/pete_grieve/status/968960791096512513 [<https://perma.cc/PN57-QKLF>] (“If you go into some neighborhoods in Chicago where there are no jobs, no businesses, and nothing’s going on—in some cases the rent’s pretty cheap but, our kids are also getting shot on that block.”).

21. Edward McClelland, *Meet the Community Organizers Fighting Against ... Barack Obama*, POLITICO (Feb. 28, 2018), <https://www.politico.com/magazine/story/2018/02/28/barack-obama-library-chicago-217093> [<https://perma.cc/4RW9-3JWY>].

22. Mitchell Armentrout, *Chance the Rapper Slams Aldermen over Obama Center Community Benefits Agreement*, CHI. SUN TIMES (May 23, 2018), <https://chicago.suntimes.com/news/chance-the-rapper-slams-aldermen-over-obama-center-community-benefits-agreement/> [<https://perma.cc/SWW9-3CZ8>].

23. Ian Duncan, *Second Port Covington Lawsuit Filed Against Kevin Plank by Under Armour Shareholder*, BALT. SUN (May 1, 2018, 12:55 PM), <http://www.baltimoresun.com/business/bs-md-ci-port-covington-lawsuit-20180501-story.html> [<https://perma.cc/4LQ4-JZGK>] (discussing the 2016 agreement entered into by Plank’s real estate development company and the city, as well as the resulting shareholder derivative actions).

24. Barbara Samuels, *Building a More Equitable Port Covington*, BALT. SUN (July 27, 2018, 3:09 PM), <https://www.baltimoresun.com/news/opinion/oped/bs-ed-port-covington-20160726-story.html> [<https://perma.cc/U9TM-A7ZL>].

segregated Baltimore.²⁵ The vote followed an agreement reached after community groups negotiated for shared economic benefits with the developer.²⁶ Whether the eventual development yields the promised economic growth is unclear; nevertheless, observers question whether it is a good deal for Baltimore and how limited a role residents play in governance once such developments are proposed.²⁷

* * *

The Willets Point area in Queens, a large brownfield site, has been a target for redevelopment since master-builder Robert Moses's efforts in the 1960s.²⁸ The highest court in the State of New York, the Court of Appeals, held in 2017 that a proposal could not move forward because the development included retail shopping and entertainment facilities which could not be built on mapped parkland without violating the public trust doctrine.²⁹ The most recent development plan is to construct over one thousand units of affordable housing and to create a taskforce led by local elected officials to plan the remaining parts of the project.³⁰ The recent Willets Point development is held up as an example of how tricky redevelopment efforts are in New York when they "fail to address the needs of local residents" where competing interests are plenty.³¹

* * *

Local governments are faced with the often difficult challenge of involving public input in local land use and economic development decisions, especially in urban areas.³² On the one hand, governments that

25. Letter from ACLU of Md. & Pub. Justice Ctr. to Thomas J. Stosur, Dir., Balt. City Dep't of Planning (June 16, 2016), http://www.aclu-md.org/uploaded_files/0000/0837/port-covington_master_plan_comments_use_this_version.pdf [<https://perma.cc/5P5Y-4VUQ>].

26. Memorandum of Understanding between the Mayor & City Council of Balt. and Sagamore Dev. Co., <http://www.buildiaf.org/site/wp-content/uploads/Port-Covington-MOU.pdf>.

27. Adam Marton, Natalie Sherman & Caroline Pate, *Port Covington Redevelopment Examined*, BALTIMORE SUN, <http://data.baltimoresun.com/news/port-covington/> [<https://perma.cc/5B74-Y2GF>].

28. Moses is said to have called the area an "eyesore and a disgrace to the borough of Queens." Terry Pristin, *Home Is Where the Auto Parts Are*, N.Y. TIMES (Sept. 17, 2006), <https://www.nytimes.com/2006/09/17/nyregion/home-is-where-the-auto-parts-are.html> [<https://perma.cc/DT2Q-3CZA>].

29. *Avella v. City of New York*, 80 N.E.3d 982 (N.Y. 2017).

30. Charles V. Bagli, *Rising from the Ashes, Willets Point Redevelopment Will Go Forward, City Says*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/nyregion/willets-point-redevelopment-de-blasio.html> [<https://perma.cc/7Z23-ZT3U>] (noting that this project "illustrates the difficulty of building in New York, where projects can expect to encounter environmental hurdles, community opposition, litigation and the riptide of politics, particularly when they fail to address the needs of local residents").

31. *Id.*

32. See generally, e.g., Patience A. Crowder, "Ain't No Sunshine": *Examining Informality and State Open Meeting Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623 (2007) (discussing the opportunities for public involvement in

rely on top-down, command-and-control style decision-making risk vulnerability to demands for transparency and accountability.³³ On the other hand, neighbors can stymie the development of affordable housing, transportation infrastructure, and other important projects because of strong localized opposition.³⁴

There are many opportunities for the public to provide comment and opinion on state and local government processes.³⁵ Police civilian complaint review boards,³⁶ criminal court juries and audiences,³⁷ agency rulemaking,³⁸ and environmental review³⁹ are only a few examples of opportunities for residents to participate in local decisions.⁴⁰ The U.S. Constitution protects the public's right to participate in government and

inner-city redevelopment decisions processes and arguing that such processes ought to be more formal).

33. The archetypal command-and-control urban planner, Robert Moses, was frequently criticized for not incorporating public input into large development projects. *See generally* ROBERT A. CARO, *THE POWER BROKER* (1975).

34. *See, e.g., Avella*, 80 N.E.3d at 983-84, 991 (holding that a mixed-use shopping mall could not be constructed on mapped park land following an administrative challenge by a number of community groups and individuals).

35. *See* Crowder, *supra* note 32, at 664.

36. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 665 (1997) (stating that the principle that residents should participate in the review of complaints against police officers is widely accepted).

37. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 868 (1994) (arguing that as jury composition became more democratic, the role of the jury in society declined). Some scholars have discussed the role of the criminal court audience in providing solutions to overincarceration and accountability. *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2175 (2014) (arguing that the criminal court audience is more important than in the past because of the infrequency of criminal trials).

38. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61 (1985) (describing how executive agency must allow participation in the regulatory process by affected groups); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1302 (2003) (considering the public law perspective in the guarantee of public participation as contained in the Administrative Procedure Act).

39. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211 (1977) (discussing the values of noncentralized decision-making and the moral virtues of diversity in setting environmental policy because of the impact of development on the patterns of life and perception).

40. Local city council hearings are open to the public, as are committee meetings of the state legislature. But average residents rarely attend these open sessions. People are also unlikely to know who their state elected officials are or what issues are before their state legislature. *See* Schleicher, *supra* note 3, at 764 (describing the lack of voter information and knowledge and those implications on state democracy).

civic affairs,⁴¹ to speak about public matters,⁴² and to seek government redress for grievances.⁴³ Simply requiring that the public participate, however, is not necessarily desirable, nor does it automatically result in a greater quantity or quality of participation.⁴⁴

A. *State-Local Relations and Their Effects on Urban Governance*

Many of the urban governance challenges facing cities limit their ability to deviate from procedures that limit resident participation. The legal academic literature has placed the problem of public participation in local matters, not simply with mistrust of local residents and arguments for greater autonomy but with the restrictive efforts of states.⁴⁵ Such challenges include state-imposed limitations on revenue generation activities, such as imposing taxes, financing infrastructure, and other major land use projects. Scholars studying state-local relations argue for the importance of understanding conflicts between regional equity and local autonomy.⁴⁶ Some matters are best addressed regionally or at the state level. In his seminal piece “*Our Localism: Our Localism: Our Localism*,”

41. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622, 626 (1969) (applying strict scrutiny to invalidate a New York State law requiring property ownership or status as a parent or guardian as a condition to voting in a school board election).

42. *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) (“Speech by citizens on matters of public concern lies at the heart of the First Amendment . . .”).

43. See, e.g., Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153 (1998).

44. For example, under federal transportation law, metropolitan planning organizations (MPOs) are required in areas with populations of 50,000 or more. 23 U.S.C. § 134 (2012). The Federal-Aid Highway Act of 1962 first mentioned a requirement that the Secretary of Transportation must work with the states to develop “a continuing comprehensive transportation planning process carried on cooperatively” with the states for metropolitan areas with a population of fifty thousand or more. Federal-Aid Highway Act of 1962, Pub. L. No. 87-866, 76 Stat. 1145. MPOs are required to produce transportation improvement programs (TIPs). 49 U.S.C. § 5303(j) (2012). MPOs are also required to report on efforts to involve the public in the production of TIPs and other work. *Id.* § 5303(i)(6)(C)(iii). Federal law requires a participation plan be developed in consultation with interested parties. *Id.* § 5303(i)(6)(B). But such laws do not on their own accord improve participation among all groups. See *HILLSBOROUGH PLAN*, *infra* note 62.

45. The literature on state-local relations and the consequences of a state legal structure that limits local power is well-developed. Gerald Frug and David Barron describe New York City’s difficulty in adopting a congestion-pricing program to address vehicle and truck traffic in the central business district because of needed approval from New York’s state legislature in Albany. GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* ix-xiii (2008); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *COLUM. L. REV.* 1, 5-6 (1990) [hereinafter *Our Localism: Part I*] (discussing how the suburbanization of the law leads courts to defer to local control in school finance and exclusionary zoning cases and urging scholars “to give greater attention to the state as a political and legal focal point in the system of local governments”).

46. See FRUG & BARRON, *supra* note 45, at 46-49; see also Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 *N.C. L. REV.* 293 (2019).

Part I,” Richard Briffault argues that “legal doctrines and governmental structures . . . need[] to encourage state governments to take a state-wide perspective on local problems.”⁴⁷

The ability of local government to regulate matters of local concern is largely underappreciated.⁴⁸ Yet interlocal government competition and the separation of municipalities based on residential and commercial uses, as well as by ethnic and income groups, parochializes local government decisions.⁴⁹ New legal doctrines and approaches to the structure of government can better use state power to overcome local actions and bring a state-wide focus to local problems.⁵⁰

In response to state government limitations, cities are forced to continue with an approach to planning urban land use projects and other governance challenges that limits resident participation. There are many reasons why state and local government officials operate this way. It takes significant resources to build a successful major urban project; officials want to make sure that they attract interested developers with the means to carry out what is planned. For example, because Amazon is likely to build a second headquarters if it says it will, it makes sense to focus on planning and approving a project that Amazon is likely to pursue. Due to the limited bandwidth given to government officials, focusing on projects carried out by large developers makes sense since those are most likely to be successful. A government cannot pursue every project; thus, a vetting structure to focus only on those with significant support and public backing is wise. It is simpler to plan and approve projects initiated by professional developers. It makes sense to respond to criticism when, and if, it arises. Why involve a public that does not otherwise express an interest in being involved?

Cities are beholden to states for legal authority to pursue a range of significant activities. Addressing affordable housing,⁵¹ managing vehicle traffic congestion,⁵² setting tax policy,⁵³ and funding city government

47. *Our Localism: Part I*, *supra* note 45, at 6.

48. *Id.* at 1 (“Localism as a value is deeply embedded in the American legal and political culture.”).

49. *Id.* at 5-6.

50. *Id.* at 6.

51. NEW YORK CITY, N.Y., ADMIN. CODE §§ 26-501-20 (2018).

52. Nicholas Confessore, *Congestion Pricing Plan Dies in Albany*, N.Y. TIMES: CITY ROOM (Apr. 7, 2008, 3:01 PM), <https://cityroom.blogs.nytimes.com/2008/04/07/congestion-pricing-plan-is-dead-assembly-speaker-says/> [<https://perma.cc/3FN5-KXP7>]; see also FRUG & BARRON, *supra* note 45.

53. RICHARD T. ELY, TAXATION IN AMERICAN STATES AND CITIES 19-20 (Thomas Y. Crowell & Co. 1888) (citing article IX, section 1 of the Constitution of Illinois and article XIV of the Constitution of Maryland and noting that the power to tax lies with the general assembly for needful revenue).

operations⁵⁴ are a few of the more notable examples. In some instances, state legislatures have adopted laws to intentionally impede local government legislative actions.⁵⁵ As a result, local governments may take a path of least resistance. Soliciting public input in ways that are not already required by law is imprudent. Public participation initiatives can be expensive. Funding such programs and paying for staff time to ensure program success is an additional burden that local executives may otherwise not be able to address.

B. Successful Urban Governance

Like most law, urban governance is largely reactive. In the land use context, some uses may be constructed simply as-of-right—there is no need for a public hearing or local government vote. Other uses require a developer to seek public approval. At that point, typically there is a process for granting or denying the approval.⁵⁶

There is a rationale for this process. Part of that rationale is economic. Creating a particular quality of life, especially in urban neighborhoods, can be costly. There is infrastructure to consider—in some cases a honeycomb of underground transit tunnels, surface roads, and even air rights. Engaging in economic development projects in built space requires resources. Thus, developers with means to carry out those projects are more likely to see their projects approved.

Neighbors try to influence, limit, and stop certain undesirable projects. Sometimes this activity is characterized, often pejoratively, as NIMBYism.⁵⁷ Local opposition is expected and may be a proxy for limiting the development of affordable housing or transportation projects.

54. Mayors from Albany, Rochester, Syracuse, New York City, and other cities gather in the New York State Capital each year for “Tin Cup Day,” where mayors seek funding for essential city operations. In 2018, Albany, New York Mayor Kathy Sheehan said,

I would love to come to [the state legislature] and talk about infrastructure and economic development and many other issues that impact our city However, because the inequity in unrestricted aid continues to exist, I’m forced to return here every year to request equitable state funding

Amanda Fries, *Albany Once Again Makes Case for Permanent \$12.5M from State*, TIMES UNION (Feb 5, 2018, 8:32 PM), <https://www.timesunion.com/news/article/Albany-once-again-makes-case-for-permanent-12-5M-12553543.php> [<https://perma.cc/NV86-534G>].

55. In one recent example, the Michigan Legislature passed the Local Government Labor Regulatory Limitation Act to prohibit local governments from enacting living wage ordinances in excess of the state minimum wage. H.R. 4052, 98th Leg., 1st Reg. Sess. (Mich. 2015).

56. For an example of how this process occurs in cities, see *infra* II.A.3.

57. NIMBY stands for “not in my backyard.” “NIMBYs are homeowners who vociferously oppose new developments in their communities . . . and they have the political clout to get their way with local regulatory authorities.” Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 491 (2017).

Nevertheless, in theory, large developers still seem to receive favorable treatment despite resident disapproval.⁵⁸ As a result, projects proposed by large developers are frequently supported by city legislative bodies.

Staff in city planning offices have limited resources. Mayors set policy with respect to urban development, and city planning offices carry out prescribed programs. Since those officials cannot entertain all projects, they must choose the ones that are most likely to move forward. They are more likely to choose projects that have more means behind them. It is simpler to focus on approving potentially viable projects than it is to reject many potentially unviable projects.

III. URBAN GOVERNANCE OPPORTUNITIES

A. Resident Participation

Resident participation presents three different types of issues. First are substantive issues. Increasing participant involvement creates more opportunities for better public engagement. To the extent the public is engaged, outcomes with respect to input and collaboration increase. A more engaged public is important since apathy and disengagement can lead to societal harms stemming from isolation and collective hopelessness.

Second are procedural issues. Participants who are involved in public processes are more likely to go along with specific decisions—even those with which they disagree—if they were involved in the process. Developing stakeholder buy-in leads to greater legitimacy of outcomes. When decisions and outcomes lack legitimacy, popular mistrust rises.

Third are institutional issues. Engaging participants in a public process generally leads to them being better informed and more educated. Better education about issues makes for a more engaged public and improves our institutions. More engagement leads to increased participation and a better quality of participation. An educated public can, ideally, move beyond disagreements that would otherwise lead to open conflict or physical violence and other hostile behavior. Thus, in theory, institutions of democracy can better perform and achieve their goals through greater participation.

58. By analogy, states and local governments offer major financial incentives to large employers to locate a corporate headquarters, or manufacturing facility, in a particular jurisdiction. Elected officials do this event despite local opposition. *See, e.g., Rick Romell, Village of Mount Pleasant Declares Foxconn Area as Blighted, May Use Eminent Domain to Take Properties*, MILWAUKEE J. SENTINEL (June 5, 2018, 9:03 AM) <https://www.jsonline.com/story/money/business/2018/06/05/village-says-foxconn-area-blighted-may-use-eminent-domain/671976002/> [<https://perma.cc/KBZ3-2RF2>] (describing state and local subsidies for a technology manufacturer to locate a factory in Wisconsin and the local opposition to the project).

Public participation is central to U.S. law and political economy. The U.S. Constitution grants states a right to express their own manner of government.⁵⁹ Community participation has been central to federal law, particularly in matters of local concern, such as development.⁶⁰ Scholars argue that participation in direct voting is appropriate in certain instances but not others.⁶¹

It is not enough for laws to require—structurally—that the public provide input on a decision.⁶² Many types of laws, from federal transportation law,⁶³ environmental law,⁶⁴ and urban development law⁶⁵ often require that the public take part in decisionmaking in some manner. What is often overlooked, however, is that the consequences of requiring participation in law do not necessarily lead to public participation in practice.⁶⁶

59. Constitutional protections enshrined in the Guarantee Clause provides each state with a republican form of government. U.S. CONST. art. IV, § 4. The Supreme Court has praised federalism for “increase[ing] opportunity for citizen involvement in democratic processes” and “allow[ing] for more innovation and experimentation in government.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Despite the use of the word “citizen” in the previous quote above, this Article does not focus only on participation by “citizens.” Instead, focus is placed on participation and involvement of the “public,” “residents,” and “participants” generally. For a discussion of citizenship and the limitations of territoriality, see Seyla Benhabib, *Borders, Boundaries, and Citizenship*, 38 PS: POL. SCI. & POL. 673 (2005).

60. See McFarlane, *supra* note 6, at 863.

61. See, e.g., Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 984 (2001) (suggesting steps to make ballot initiatives more easily available for statutes and less used in constitutional amendments).

62. See HILLSBOROUGH CTY. METRO. PLANNING ORG., PUBLIC PARTICIPATION PLAN: MEASURES OF EFFECTIVENESS 62, 66 (2016) [hereinafter HILLSBOROUGH PLAN] http://www.planhillsborough.org/wp-content/uploads/2017/01/PPP-MOE-CH8_Summary-Results-Recommendations.pdf [https://perma.cc/TFN5-8PKD] (finding that despite high numbers of participants in Transportation Improvement Program planning, involvement of racial minority groups, low-income individuals, and the transportation disadvantaged was still low).

63. See, e.g., U.S. DEPT OF TRANSP., LADDERS OF OPPORTUNITY: TRANSPORTATION EMPOWERMENT PILOT, LADDERSTEP (2016), https://www.transportation.gov/sites/dot.gov/files/docs/LadderSTEP_2015-2016_Report_December_2016_Final.pdf [https://perma.cc/F8JQ-XTXU].

64. 40 C.F.R. § 6.203 (2017).

65. 24 C.F.R. § 91.105 (2017).

66. Before addressing each benefit of public participation, a word about the “who” in “public.” By “public” or “participant” or “resident,” this Article refers to individuals and communities impacted by a given decision or result. For instance, global climate change might impact all people through rising sea levels or temperature change, though particular changes might affect some in low-lying or coastal areas more immediately. Nevertheless, references to participants in this case would include the broad and undefined class of people affected by climate change. This Article borrows from the field of participatory research in deriving this definition. In participatory research, “community” is defined broadly as those affected by research results. Lawrence W. Green & Shawna L. Mercer, *Can Public Health Researchers and Agencies Reconcile the Push From Funding Bodies and the Pull From Communities?*, 91 AM. J. PUB. HEALTH 1926 (2001).

1. Substantive

From a substantive perspective, increasing participant involvement itself is a benefit of public participation.⁶⁷ At a basic level, “the need to belong is a powerful, fundamental, and extremely pervasive motivation.”⁶⁸ One does not have the opportunity to belong unless one participates.

Participation often begins through involvement in the market economy,⁶⁹ but it extends through participation in civic and government affairs. Struggles of traditionally excluded groups—such as women, African Americans, and immigrants—to assert their rights to participate in public life are often invisible because focus is often placed solely on voting as a measure of participation.⁷⁰

Courts have broadly interpreted individuals’ rights to participate in and discuss public matters, and to seek redress of grievances from the government.⁷¹ In a well-known case, *Morris Kramer*, a 31-year-old, single, stockbroker living with his parents in New York, successfully challenged a statute limiting school board voting to property owners and parents or guardians.⁷² Prior to *Kramer*, there was little guidance to local jurisdictions about how to interpret the doctrine of one person, one vote. The holding in *Kramer* cements the notion that once voting rights are extended, states cannot discriminate between different types of voters to remove those rights.⁷³ But as Eugene Mazo points out, *Kramer* is really about local political communities defining who is

67. It is difficult to argue against individuals contributing to public decisions. Sherry Arnstein is often quoted on this subject: “[I]t’s a little like eating spinach: no one is against it in principle because it is good for you.” Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLAN. 216, 216 (1969).

68. Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497 (1995).

69. Reform efforts to address the rights of traditionally excluded groups, such as women, initially focused on ensuring women’s participation in the market economy. See generally Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1497 (1983) (arguing that transcending the market/family dichotomy will improve the lives of all individuals).

70. See Mark, *supra* note 43, at 2153. As an example of women’s struggle to serve in elected office, women comprise 50.8 percent of the U.S. population, yet only 19.8 percent of congressional seats are held by women. *Current Numbers*, CTR. AM. WOMEN & POL., <http://www.cawp.rutgers.edu/current-numbers> [<https://perma.cc/G294-HR33>]; *U.S. Population*, WOMEN’S HEALTH USA 2013, <https://mchb.hrsa.gov/whusa13/population-characteristics/us-population.html> [<https://perma.cc/TKT4-G8KA>].

71. *SLAPP a NIMBY?*, SAINT CONSULTING: THE SAINT REP. (Oct. 3, 2017), <http://tscg.biz/slapp-a-nimby/> [<https://perma.cc/K27B-NVU4>].

72. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

73. Eugene D. Mazo, *The Right to Vote in Local Elections: The Story of Kramer v. Union Free School District No. 15*, in RICHARD BRIFFAULT ET AL., *ELECTION LAW STORIES*, 87, 90 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

a member of that community and choosing who has a say over local political affairs.⁷⁴

The right to speak out on public matters is perhaps the most well-known of all the substantive rights to participation protected by the Constitution. The Supreme Court recognizes a right for individuals—especially public employees—to voice opinions about matters affecting the government.⁷⁵ It is logical that individuals most closely involved with delivering essential government services—for instance, school teachers—be able to speak out about how to best allocate government funds spent on schools.⁷⁶

A democratic strand runs through the history of the right to petition. In the past, those seeking to petition did not solely collect and deliver grievances, but also suggested remedies for those grievances.⁷⁷ This seems anathematic in our current climate of stalemate, compromise-averse politics.

Though, at the local level—especially for land use and other matters of local regulatory control—seeking petition for grievances is very much about direct advocacy.⁷⁸ Lobbyists help developers gain access to approvals to start new developments.⁷⁹ Broadly, the substantive rights to participate shift the focus to participants.

Placing focus on the role of participants both within formal legal processes and outside legal processes is important for a number of reasons. Community groups have taken direct action to address local economic development, and even criminal justice reform, through direct engagement.⁸⁰ For example, community coalitions are negotiating community benefits agreements to share the economic benefits of large

74. *Id.*

75. In one case, the Court noted that teachers, for instance, are well-suited “to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.” *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968).

76. *Id.*

77. *See Mark*, *supra* note 43, at 2154.

78. Small businesses, for example, often face displacement because of large urban economic development projects. Their only recourse is direct advocacy to government officials. *See infra* Part II.A.3.

79. As to the amount of work involved, the top ten lobbyists in New York City, for example, reported compensation of over ninety-five million dollars in 2016. LOBBYING BUREAU OF THE OFFICE OF THE CITY CLERK, ANNUAL REPORT 15 (11th ed. 2017), <http://www.cityclerk.nyc.gov/downloads/pdf/LobbyingAnnualReport2017.pdf>. Forty percent of the work done was for real estate, construction, engineering, and developers. *Id.* at 35.

80. Efforts to advance the economic rights of low-income people through nonprofit, non-governmental organizations that are accountable to a defined community are core to the definition of “Community Economic Development.” WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT 3 (2001).

developments.⁸¹ In other instances, community organizations are observing police behavior in attempts to hold police departments accountable.⁸² These examples focus on attempts to use organized and private activities, negotiation, and filming police officers to achieve outcomes outside legal processes. The emergence of such activities follows efforts by governments to privatize the delivery of government services.

A substantive focus on increasing participation has benefits both to public processes and privatized ones. For public processes, more involvement of participants ensures greater transparency and accountability; the same holds true for privatized processes. The more participants are engaged, the harder it is to hide or shield from public view misfeasance or malfeasance that can have the effect of harming the public.

2. Procedural

Procedurally, public participation is key to civil society and peaceful order. In order to express differences of opinion, individuals need to engage each other in discourse.⁸³ There is value in discourse and developing a process by which both government and citizens can address matters of public concern.

Participation is also a key component of legitimate decision-making.⁸⁴ Borrowing from behavioral psychology, scholars find that people tend to support a given decision, even one they disagree with, once they have an opportunity to participate in the decision-making process.⁸⁵ In a recent study, researchers found that participants in a laboratory experiment were more inclined to pay a “tax” once they were consulted about how the proceeds from the tax would be spent.⁸⁶ Re-

81. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1776 (2016).

82. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 391 (2016).

83. John Dewey writes, notably in our current alternative fact paradigm, that “[i]f one wishes to realize the distance which may lie between ‘facts’ and the meaning of facts, let one go to the field of social discussion.” JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 41 (Melvin L. Rogers ed., 2012).

84. A recent study regarding brownfield decision-making indicates that when individuals perceive an inability to influence a decision, then the final decision is more likely to be seen as unsuccessful and lacking fairness. Shevon Letang, *Citizens’ Perspectives of Access to the Decision-Making Process as a Factor in Acceptance of Brownfields Redevelopment Projects in Passaic County New Jersey* (Jan. 20, 2016), <https://ssrn.com/abstract=2717862> [<https://perma.cc/6RB8-95FC>].

85. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton Univ. Press 2006).

86. Cait Lamberton et al., *Eliciting Taxpayer Preferences Increases Tax Compliance* 1 (Harv. Bus. Sch., Working Paper No. 14-106, 2014) (describing a lab experiment where participants were charged a lab tax, and those who were given an opportunity to consult on how

searchers like Cait Lamberton and Michael Norton cite to participatory budgeting—the process of having residents vote directly on local government spending—as evidence that people are willing to voice preferences on how taxes should be spent.⁸⁷ Legitimacy is a key component of governance and should be prioritized in any decision-making process that places focus on participation and inclusion.

Some examples help elaborate on the importance of the procedural benefits of public participation. For instance, parties seek to limit the substantive participation rights of individuals through “Strategic Lawsuits Against Public Participation” (SLAPP).⁸⁸ So-called SLAPP suits attempt to silence opposition.

In the SLAPP context, individuals or companies attempt to limit the speech of those with whom they disagree. SLAPP suits are commonly used against low-income workers seeking to change their working conditions.⁸⁹ Also, SLAPP suits can be used to limit political speech and social protest generally. In response, twenty-eight states have enacted anti-SLAPP laws to prevent the limitations of speech.⁹⁰ These procedural steps allow for greater participation in public discourse, especially for groups that are traditionally excluded.

A clear procedural benefit of public participation is elevating the level of public discourse on difficult topics. Social movements can percolate up challenging subjects. The advent of technology and social media make sharing such ideas easier and faster. Those who argue that public participation does not replace a rights-based approach to advocacy may underappreciate the ability of public input to advance the conversation about collective rights or the rights of particular groups.

3. Institutional

Institutions of government are enhanced through the involvement of residents. Moderating disparate public views expressed through participation enhances the role of institutions. While some are skeptical of direct voting and referenda, institutions can protect the public

the tax proceeds should be spent were more likely to pay the tax in full).

87. Cait Lamberton & Michael I. Norton, *To Get More People to Pay Taxes, Give Them a Voice*, WALL ST. J. (Feb. 12, 2018, 10:10 P.M.), <https://www.wsj.com/articles/the-secret-to-getting-more-people-to-pay-their-taxes-1518405000> [<https://perma.cc/2GU3-ZPHL>] (noting that giving taxpayers “a voice in as little as 10% of the [federal] budget” could increase the rate at which taxpayers pay taxes).

88. See GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996).

89. See, e.g., Nicole Hallett, *From the Picket Line to the Courtroom: A Labor Organizing Privilege to Protect Workers*, 39 N.Y.U. REV. L. & SOC. CHANGE 475, 478-79 (2015).

90. Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State’s New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495, 502 (2012) (footnote omitted).

from moving to extreme or harmful positions.⁹¹ For instance, the Founders were skeptical of the will of people expressed directly. Passing popular views through the “medium of a chosen body” of elected representatives—the institution—was key to federalism.⁹²

Robert Putnam offered a critique about the decline of civil society and democracy in the United States in his ground-shifting *Bowling Alone*. There, Putnam noted how the “quality of public life and the performance of social institutions” is greatly “influenced by norms and networks of civic engagement.”⁹³ With failing social norms that tend towards individualism and away from the collective good and poor civic engagement, the quality of institutions decline.

Public participation strengthens institutions by developing leadership skills among diverse individuals across groups. Tenants associations, local business groups, organizations of low-wage workers all rely on the leadership of individuals to collectively advance group interests. Without having the experience of taking on leadership roles, individuals are less likely to step up. Thus, opportunities are lost to advance collective rights.

The ability to develop consensus among groups with differing opinions is lacking in much of our political and social life. As Cass Sunstein notes, individuals who associate with others who share a similar viewpoint tend to move to more extreme views.⁹⁴ In theory, unless individuals learn to spend time with those who think about the world in different ways and to build consensus with those individuals, society and the institutions that hold it together lose.

91. See Collins, *supra* note 61, at 987. There are instances where the public will vote down otherwise beneficial legislation because of confusion or short-term thinking. For instance, when local government administrators or city councils were deciding whether to add fluoride compounds to their drinking water, most decided to do so. However, when the question of fluoridation was put to voters, over 60 percent of referenda were voted down. CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 54 (2016).

92. THE FEDERALIST NO. 10 (James Madison).

93. Robert Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 65 (1995).

94. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 14 (2001). Scholars have challenged this notion and offered evidence to suggest that individuals are able to moderate their viewpoints when presented with neutral information. See Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1100 (2006) (book review) (describing the body of literature suggesting that deliberation can sometimes lead to moderation or convergence of opinion).

4. *Participation in Practice*

Participation in the context of urban governance assumes a number of factors. These include the following: there is adequate notice; participants have ability and capacity to participate; participants have interest and time; and finally, participants actually can show up.

Most state constitutions typically ensure the rights of local governments through various home-rule protections.⁹⁵ Our primary mechanism for government is a system of elected representatives. Some recent political rhetoric has raised public expectations about returning the government to the people.⁹⁶ In other cases as well, there are instances where people are demanding a role in governance beyond simply voting for an elected official. Participatory budgeting—participants voting on specific budget items—is one such example.⁹⁷ Deliberative polling—obtaining opinions from groups of randomly selected participants after they have received information about a given issue—is another.

Referenda and other forms of direct voting are rife with problems. Namely, cost, inefficiency, and challenges connecting to the citizenry—including bridging wealth and education gaps. Scholars have argued that ballot initiatives are more effective for statutes and less so for constitutional amendments.⁹⁸

Environmental review processes are another example where otherwise technical information is presented for comment both in writing and at public hearings. However, unless an individual (1) knows about the existence of the hearing; (2) has the ability to read the review; (3) has the time to read the review; and (4) has the ability to offer comments in writing or at a hearing, they are unlikely to offer an opinion. Once administrative decisions are made, it is possible for individuals or groups to sue to stop a project or other governmental decision. These suits, however, require money and time making it unlikely that poor people or those lacking access to lawyers and the justice system will

95. New York, for instance, has a “bill of rights” for local government that provides for, among other things, a locally elected legislature and power to adopt local laws. N.Y. CONST. art. 9, § 1 (West, Westlaw through Jan. 1, 2002 amendments).

96. President Trump’s inauguration speech is an example of this. Donald J. Trump, President of the United States, Inaugural Address (Jan. 20, 2017), <https://www.whitehouse.gov/inaugural-address> [<https://perma.cc/8R2L-FRHJ>].

97. Alexa Kasdan & Erin Markman, *Participatory Budgeting and Community-Based Research: Principles, Practices, and Implications for Impact Validity*, 39 NEW POL. SCI. 143, 143 (2017) (discussing the participatory action research method used by the Community Development Project of Urban Justice Center in evaluating the use of participatory budgeting in the New York City Council’s budget process).

98. Collins, *supra* note 61 (suggesting steps to make ballot initiatives more easily available for statutes and less used in constitutional amendments).

participate. As a result, it is difficult for under-resourced individuals and groups to influence the outcomes of decisions.

Certain groups of individuals chronically lack access to participate in government.⁹⁹ Youth, for instance, are prohibited from voting in elections even though many regulations impact their lives;¹⁰⁰ formerly incarcerated individuals who have committed felonies are excluded from taking part in elections;¹⁰¹ undocumented workers as noncitizens lack voting rights.¹⁰² These groups are excluded because of some particular status that society has agreed should limit their ability to participate.

Other groups are excluded under different factors. Educational level,¹⁰³ income,¹⁰⁴ and other factors prevent certain groups of individuals from participating. This is a problem when certain groups do not participate in, or are excluded from, public decisions that affect a neighborhood.¹⁰⁵ Groups—either tenants, homeowners, or landlords of multifamily housing units—may only participate when they see the decision impacting their lives.¹⁰⁶

99. There are numerous examples of how mistreatment of racial groups, women, and others leads to limitation of group political rights. Unconscious bias based on race is one example of how political participation is shaped to the detriment of certain racial groups. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349 (1987) (“Unconscious aversion to a group that has historically been vilified distorts the political process no less than a conscious decision to place race hatred before politically legitimate goals.”).

100. In her early writings, Hillary Rodham Clinton noted the limited rights of children based on notions of reliance and dependency on their parents. Hillary Rodham, *Children’s Policies: Abandonment and Neglect*, 86 YALE L.J. 1509, 1522 (1977) (book review) (describing changes to the law’s treatment of children and how “[p]resumptions about children’s capacities are being rebutted; the legal rights of children are being expanded.”).

101. *Owens v. Barnes*, 711 F.2d 25, 27-28 (3d Cir. 1983) (holding that a Pennsylvania law granting voting rights to unincarcerated felons but denying them to incarcerated felons was not a violation of equal protection).

102. Cambridge, Massachusetts—a progressive bastion—advocates for local voting rights of noncitizens. MICHAEL CASTAGNA ET AL., *SECURING NON-CITIZEN VOTING RIGHTS: DETERMINING THE FEASIBILITY OF ENABLING LEGISLATION IN MASSACHUSETTS* (2005), https://as.tufts.edu/uep/sites/all/themes/asbase/assets/documents/fieldProjectReports/2005/4-securing_noncitizen_voting_rights.pdf [<https://perma.cc/6QL6-8VQA>].

103. Sigal Alon, *The Evolution of Class Inequality in Higher Education: Competition, Exclusion, and Adaptation*, 74 AM. SOC. REV. 731 (2009) (finding that exclusion and adaptation increases the expansion of class inequality).

104. *Our Localism: Part I, supra* note 45, at 1 (describing the separation of groups based on income and ethnicity into separate municipalities and questioning the “public” nature of local political activity).

105. Scholars, for instance, have proposed frameworks for the role of tenant input in federally funded low-income housing programs. Georgette C. Poindexter, *Who Gets the Final No? Tenant Participation in Public Housing Redevelopment*, 9 CORNELL J.L. & PUB. POL’Y 659, 661 (2000) (arguing for a tempered but not disempowered tenant voice in federal low-income housing redevelopment).

106. Tenants’ rights groups are some of the most active, vocal, and willing participants

Parents of school age children may be more likely to participate in school board elections and decisions because of the impact on their children.¹⁰⁷ This impacts frequently excluded groups as well. One study indicated, intuitively, that low levels of education and wealth actually resulted in higher participation in meetings with law enforcement in high crime areas of Chicago.¹⁰⁸ In response, governmental groups seeking feedback can vary meeting times and use social media and other technology to allow for wider participation.¹⁰⁹ Understanding how typically excluded groups participate in governance is a key component of a participatory governance project. While there is not one model, it is clear that government and quasi-governmental groups are exploring how to make it easier for groups of people to participate.

When certain groups are excluded or processes are not followed, the underlying legitimacy of a particular decision rendered by an institution comes into question.¹¹⁰ In recent years, institutions that once formed the bedrock of society have been rocked by scandals and failures that challenge their legitimacy. To the extent that decisions exclude certain

in decisions that affect tenants. Tenant groups and tenant advocate organizations were recently successful in lobbying the Rent Guidelines Board in New York City to freeze one-year and two-year rent escalations for Rent Stabilized tenants. See N.Y.C. RENT GUIDELINES BD., 2015 APARTMENT & LOFT ORDER #47 (2015), <https://www1.nyc.gov/assets/rentguide/linesboard/pdf/guidelines/aptorder47.pdf> [<https://perma.cc/X8EE-QN94>]. *New York City Rent Increase*, NYC.GOV, <http://www1.nyc.gov/nyc-resources/service/2069/new-york-city-rent-increase> [<https://perma.cc/48C3-R2VY>] (“For renewal leases beginning between October 1, 2016, through September 30, 2017, the rent increase for rent stabilized apartment and loft renewals is: 1-year lease: 0%.”).

107. Scholars conclude that parenthood encourages participation in local school district elections. M. Kent Jennings, *Another Look at the Life Cycle and Political Participation*, 23 AM. J. POL. SCI. 755, 757 (1979) (citing ROBERT DAHL, WHO GOVERNS? ch. 11 (1961) and noting that it is unclear whether mothers and fathers are equally affected).

108. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 330-31 (1998) (citing CH. COMMUNITY POLICING EVALUATION CONSORTIUM, COMMUNITY POLICING IN CHICAGO, YEAR THREE 20-23 (Ill. Criminal Justice Info. Auth. 1996) and finding that contrary “to the de facto exclusion of the poor and the uneducated from the politics . . . [in] democracies, the high-crime Chicago neighborhoods with lower” education rates and wealth had higher participation rates in community meetings with police).

109. One public transportation planning body moved public meeting times to 6 PM to permit people who work during the day to attend, it added a live-call-in option, and it used a Facebook “event” to solicit feedback. See HILLSBOROUGH PLAN, *supra* note 62, at 63 (“By doing so the [planning board] is encouraging more public participation and mak[ing] it easier for people who have other time constraints to voice their opinion.”).

110. Scholars have noted that legitimacy has to do with institutional integrity. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 51 (1979) (“Even a ‘success’ might raise questions of legitimacy because the legitimacy of the institution turns on criteria that are independent of result. Legitimacy is largely a point about institutional integrity.”).

groups of people, it is likely that decisions will continue to be seen as illegitimate.¹¹¹

Jürgen Habermas discusses the notion of legitimation crisis when economic systems fail to have a given level of mass loyalty.¹¹² For Habermas, the process of formal democratic institutions making administrative decisions takes place through a legitimation process involving “diffuse mass loyalty—but avoid[ing] participation.”¹¹³ Habermas, rather uncharitably, argues that the notion of public opinion is a necessary fiction in constitutional democracies committed to social rights.¹¹⁴

5. *Avella v. City of New York*

In a recent example, the New York Court of Appeals decision in *Avella v. City of New York* prevented a major economic development project in northern Queens from moving ahead.¹¹⁵ Known as the “Valley of Ashes” in *The Great Gatsby*, the site of the project includes a polluted brownfield where small auto repair shops have repaired vehicles for decades.¹¹⁶ Those same business owners—primarily immigrant entrepreneurs¹¹⁷—have thrived without passable streets, sewers, sidewalks, and other infrastructure.¹¹⁸ For decades, the government has tried unsuccessfully to redevelop the area, which is called Willets Point.¹¹⁹

111. Although full inclusion in deliberative processes is not possible, scholars have noted legitimate rules for exclusion. John Parkinson, *Legitimacy Problems in Deliberative Democracy*, 51 POL. STUD. 180, 190 (2003) (“What I have tried to do is identify the rules which make exclusion legitimate, to avoid what I see as the impossibility of full inclusion.”).

112. JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 46 (Thomas McCarthy trans., 1975) (“Input crises have the form of a *legitimation crisis*; the legitimizing system does not succeed in maintaining the requisite level of mass loyalty . . .”).

113. *Id.* at 36.

114. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 237 (Thomas Burger trans., 1989) (“[T]he constitutional reality of large democratic states committed to social rights has to maintain the institutionalized fiction of a public opinion without being able to identify it directly as a real entity in the behavior of the public of citizens.”).

115. *Avella v. City of New York*, 80 N.E.3d 982, 990-91 (N.Y. 2017) (finding that a developer could not build a mixed-use shopping mall on mapped park land because a 1961 law did not support a shopping and entertainment complex when it alienated the park land).

116. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 21 (Cambridge Univ. Press, 15th ed. 2013).

117. TOM ANGOTTI & STEVEN ROMALEWSKI, *WILLETS POINT LAND USE STUDY*, HUNTER C. CTR. FOR COMMUNITY PLAN. & DEV. 2 (2006), <http://www.hunter.cuny.edu/ccpd/repository/files/willetspoint.pdf> [<https://perma.cc/A9GG-KH3H>].

118. EDWARD W. DE BARBIERI, *URBAN JUSTICE CTR.*, *OFF POINT: THE DESTRUCTION OF IMMIGRANT-OWNED SMALL BUSINESSES AND LOW-WAGE JOBS IN THE WILLETS POINT SECTION OF QUEENS* 5 (2009), https://cdp.urbanjustice.org/sites/default/files/willets_22sep09.pdf [<https://perma.cc/DQ2X-9SN5>].

119. *Id.* at 6.

The primary issue on appeal in *Avella* was whether mapped park land upon which a portion of the development project was to be built had been alienated by the state legislature.¹²⁰ In the decision, the majority interpreted a 1961 state law to prohibit the development of a retail and entertainment shopping mall complex next to Citi Field where the Mets play baseball.¹²¹ The Chief Judge's dissent argued in favor of the construction, finding that the park land had been alienated, and that the retail and entertainment uses were consistent with the trend in modern ballparks—and even the Circus Maximus in ancient Rome—to co-locate retail, restaurant, and entertainment shops near stadiums.¹²²

The majority's decision to affirm the Appellate Division's reversal of the Supreme Court's denial of plaintiff's request for declaratory and injunctive relief is the correct result. The decision, as the majority points out, leaves room for the legislature to specifically authorize the project to move forward. Practically, this is possible, though unlikely without a significant lobbying effort in [the state legislature].¹²³

While the majority decision yields the correct result, both the majority and the dissent get it wrong, at least in part. Both the majority and the dissent fail to address the harm the city's actions caused to surrounding small businesses. This is a mistake since loss of small business activity has significant negative social and economic impacts on the families who relied on income earned in the area, and consumers who frequented the repair shops for an affordable vehicle repair option.¹²⁴

120. An intermediate appellate court reversed a trial court's dismissal of an action seeking to halt the development of a shopping mall on mapped park land where a major league baseball stadium had previously stood. *Avella v. City of New York*, 13 N.Y.S.3d 358 (N.Y. App. Div. 2015).

121. See *Avella v. City of New York*, 80 N.E.3d 982, 990-91 (N.Y. 2017).

122. *Id.* at 998 (“As early as the sixth century B.C., shops existed adjacent to the Circus Maximus to serve the needs of the spectators . . .”). Charioteers in the Circus Maximus who wrapped the reins around their waists were often dragged to the ground and pulled under their chariots to a gruesome death. Eve D’Ambra, *Racing with Death: Circus Sarcophagi and the Commemoration of Children in Roman Italy*, 41 *HESPERIA SUPPLEMENTS* 339, 341-42 (2007). The Chief Judge does not discuss changes in the types of entertainment that the modern public enjoys compared with ancient times.

123. Edward W. De Barbieri, *Public Benefits and the Public Trust Doctrine in ‘Avella v. City of New York’: Outside Counsel*, N.Y. L.J. (Online) (July 18, 2017), <http://bit.ly/2By6xwu> [<https://perma.cc/FB6E-7SRJ>].

124. Charles V. Bagli, *New York City Declines to Fight in Court for Complex Near Citi Field*, N.Y. TIMES (Aug. 19, 2015), <https://www.nytimes.com/2015/08/20/nyregion/new-york-city-declines-to-fight-in-court-for-complex-near-citi-field.html> [<https://perma.cc/L2UE-8524>] (interviewing one shop owner who received a 30-day eviction notice who was unable to afford to move his business).

The narrow issue on appeal before the court was whether the area where Shea Stadium used to stand, now used as a parking lot, had been alienated.¹²⁵ Developers argued that in order to redevelop the Willets Point area where the shops stood, they also needed to develop a large retail and entertainment facility on the parking lot, the park land in question.¹²⁶ Some might argue that a discussion about small business displacement is not ripe. Given the \$287 million in public funds the city spent acquiring private property from landowners, removing hazardous materials, and relocating tenants, it is important to discuss what taxpayers received for this enormous public investment.¹²⁷

Stepping back to look at the big picture, economists criticize spending significant public subsidies on arena construction. A 2016 report by the Brookings Institution concludes that the spillover effect on local businesses of arena tax-exempt bond financing is weak at best, and that stadiums in general should not be funded by tax-exempt bonds in the current form.¹²⁸ In 2015, the Obama Administration's 2016 budget called for Congress to prevent the use of tax-exempt bonds to finance sports arenas.¹²⁹ In June 2018, Senators Cory Booker and James Lankford introduced a bipartisan bill to end federal subsidies for sports stadiums.¹³⁰

The New York Court of Appeals' decision reveals a weakness in the law regarding the approval process for major land use and economic development projects. The result of a four-year court case is essentially no benefit to anyone. The park land in question remains a parking lot for Mets' games—not usable recreation space for area residents and families to enjoy. The plaintiffs gain little, other than delay until the next redevelopment proposal comes along. Dozens of small businesses in the southernmost part of Willets Point were displaced years ago. Those businesses gain nothing from the Court's decision, and over a

125. *Avella*, 80 N.E.3d at 984-85.

126. *Id.* at 984.

127. Charles V. Bagli, *Rising from the Ashes, Willets Point Redevelopment Will Go Forward, City Says*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/nyregion/willets-point-redevelopment-de-blasio.html> [<https://perma.cc/W3P6-9GYS>].

128. TED GAYER ET AL., TAX-EXEMPT MUNICIPAL BONDS AND THE FINANCING OF PROFESSIONAL SPORTS STADIUMS (Sept. 2016), https://www.brookings.edu/wp-content/uploads/2016/09/gayerdrukkergold_stadiumsubsidies_090816.pdf [<https://perma.cc/EYM5-GPQE>].

129. Eliot Brown, *Use of Taxpayer Money for Pro-Sports Arenas Draws Fresh Scrutiny*, WALL ST. J. (Mar. 8, 2015, 7:17 PM), <https://www.wsj.com/articles/use-of-taxpayer-money-for-pro-sports-arenas-draws-fresh-scrutiny-1425856677> [<https://perma.cc/7XZZ-LXLW>].

130. Press Release, Cory Booker, U.S. Senator for N.J., Booker, Lankford Introduce Bipartisan Bill to End Federal Subsidies for Sports Stadiums (June 13, 2017), https://www.booker.senate.gov/?p=press_release&id=612 [<https://perma.cc/GCY7-UWEH>].

quarter billion dollars in taxpayers' resources gone,¹³¹ with additional significant judicial resources consumed. In one positive development, the city has recently announced that it has reached an agreement to move ahead to build a new neighborhood, including 1,100 units of affordable housing, a school, open space, and retail shops.¹³²

Before they were evicted, several dozen businesses formed an organization called Sunrise Cooperative, Inc.¹³³ Sunrise worked with the city to lease and construct a suitable building in the Bronx in which to operate. However, the funds provided by the city and the developer as the result of a settlement of litigation, similar to the *Avella* case, were not enough to cover build out and relocation. Sunrise filed for bankruptcy protection last year. This result was unfortunate and avoidable.

An alternative legal step could have involved first obtaining the support of local residents and business owners in deciding whether or not the project would provide enough benefits to justify the costs. There is precedent for community coalitions negotiating community benefits agreements (CBAs). A CBA is a contractual agreement between a community coalition and a developer where the coalition agrees not to oppose a project in exchange for specific benefits.¹³⁴ CBAs have been used in major stadium construction projects in Los Angeles, San Diego, and elsewhere. A CBA was negotiated around the development of the Kingsbridge National Ice Center in the Bronx.¹³⁵

The City of Detroit recently enacted an ordinance requiring CBAs for certain large projects above a certain square footage and construction budget.¹³⁶ Recently announced, there will be a CBA related to the development of the Gordie Howe International Bridge connecting Detroit and Canada.¹³⁷ CBAs continue to be a legal tool useful for community groups

131. See Bagli, *supra* note 127 (“ . . . where the city has already spent \$287 million on buying land, cleaning it of the remains of hazardous chemicals and paying for the relocation of businesses . . . ”).

132. See *id.*

133. The author was part of a legal team that represented Sunrise Cooperative, Inc. in its efforts to negotiate relocation for the small businesses being displaced.

134. See De Barbieri, *supra* note 81, at 1776 (citing *Policy & Tools: Community Benefits Agreements and Policies*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies> (last visited July 28, 2015)).

135. See De Barbieri, *supra* note 81, at 1778-79.

136. Memorandum from Melvin Butch Hollowell, Corp. Counsel to Hon. Brenda Jones, City Council President (July 14, 2016), http://www.detroitmi.gov/Portals/0/docs/City%20Clerk/Council%202016/New%20Business/DOC_8071916.pdf?ver=2016-07-18-170704-770 [https://perma.cc/L648-4AJX].

137. John Gallagher, *Community Benefits Deal Removes Major Obstacle to Gordie Howe Bridge Project*, DETROIT FREE PRESS (June 23, 2017, 9:37 PM), <https://www.freep.com/>

and developers to discuss and resolve issues outside of formal government approval processes.

A press release from the City of New York's Department of Housing Preservation and Development alludes to a CBA surrounding the Willets Point redevelopment providing funding for affordable housing.¹³⁸ While the funding is important and the housing needed, it is incorrect to call it a part of a community benefits agreement since no coalition of community groups negotiated the funds with the developer. Instead, it refers to funds that the local councilmember was able to secure.

Some scholars have suggested creating a fund to compensate landowners in the event that land values are diminished because of a land use approval; such a fund could be paired with a CBA.¹³⁹ Borrowing this idea, one could imagine a Small Business Displacement Fund to which businesses and workers could make claims. Businesses and workers claiming displacement could make claims pursuant to a process outlined in a CBA, for instance.

Relocation benefits of this type are not unheard of in current law. New York City's administrative code requires modest compensation for displaced commercial tenants.¹⁴⁰ The federal Uniform Relocation Assistance and Real Property Acquisition Act of 1970 mandates certain benefits be provided to displaced businesses when federal dollars are involved.¹⁴¹ In this case, the city did not meet its obligations under existing law. Sunrise and other small businesses that eventually sued the city and the developer were offered relocation assistance in the form of retraining, and eventually compensation, after years of uncertainty.

CBAs do have their own issues. In the development of the Barclays Center in downtown Brooklyn, for instance, an attempt was made at a community benefits agreement. That CBA effort failed because it lacked a representative and inclusive community coalition. Scholars and practitioners have argued that the agreement at Barclays did not

story/money/business/john-gallagher/2017/06/23/gordie-howe-bridge-delray-neighborhood/423686001/ [https://perma.cc/7PXP-QZMG].

138. Press Release, NYC Housing Preservation and Dev., HPD, Queens Borough President, Council Member Julissa Ferreras-Copeland, HANAC, Enterprise Community Partners, LiveOn NY, and Partners Celebrate Groundbreaking for Energy-Efficient Affordable Homes for Seniors in Corona (Oct. 25, 2016), <http://www1.nyc.gov/site/hpd/about/press-releases/2016/10/10-25-16.page> [https://perma.cc/4KY2-VFCG].

139. David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1730 (2013) (discussing how a program to reduce property taxes in areas with new land use projects can be combined with CBAs to secure new project approvals).

140. NEW YORK CITY, N.Y., LOCAL LAW No. 77 (2016).

141. Uniform Relocation Assistance and Real Property Acquisitions Act of 1970, Pub. L. No. 91-646 § 301(3), 84 Stat. 1894.

include a coalition that was representative of the community.¹⁴² But this does not mean that CBAs as a whole are flawed—just that they must be done correctly.

Other efforts are underway to ensure local government transparency around disclosing the value of tax subsidies. The Governmental Accounting Standards Board's (GASB) rules by which local governments account for their budgets recently included a statement regarding disclosure of the actual value of tax income forewent because of various tax abatements to spur economic development.¹⁴³ Such disclosure will yield additional data points about taxpayer resources that are devoted to economic development projects. With the new data, the public may question what benefits they receive in exchange for the government abating taxes for particular stadium projects and other economic development.

If there is any truth in fiction, it might be that those who lack power risk their lives and livelihoods being disrupted by those with power. Just as in *The Great Gatsby*, where personal tragedy befalls a vulnerable small business owner in the Valley of Ashes, so too have Willets Point business owners lost their livelihoods, all due to the failure of a mega development project. Reforming land use and economic development law can avoid future tragedies.

B. Resident and Expert Collaboration

This section presents several cases involving anticipatory governance processes that address local issues in a regional manner. One example is New York City's climate change preparedness.¹⁴⁴ This example highlights how anticipatory governance processes are already being used at the local level.

Almost 15 years ago, New York City launched a Climate Change Task Force to study potential effects of volatile and more violent weather on the city's water infrastructure.¹⁴⁵ The process for designing a climate change adaptation plan included quantifying the impacts of climate change, identifying impacts on the city and creating strategies

142. Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291, 311 (2008).

143. GOV'T ACCOUNTING STANDARDS BD., STATEMENT NO. 77 OF THE GOVERNMENTAL ACCOUNTING STANDARDS BOARD: TAX ABATEMENT DISCLOSURE 3 (2015).

144. Quay discusses this example specifically as an anticipatory governance process. Quay, *supra* note 16, at 501-03.

145. *A Local Law to Amend the Administrative Code of the City of New York, in Relation to Reducing Greenhouse Gas Emissions, Hearing Before the Committee on Environmental Protection, City Council, City of New York* (Jun. 21, 2006) (testimony of Dr. Robert R. Kulikowski, New York City Office of Environmental Coordination).

to mitigate those impacts, launching a citywide strategic planning process, and working with vulnerable communities to create particular adaptation strategies.¹⁴⁶ The process educated key stakeholders about the consequences of climate change, focusing on global warming, rising sea levels, increasingly violent weather, and the polar ice-melt.¹⁴⁷ The use of an inclusive strategic plan, along with a focus on communities who might need additional assistance, is a distinctive characteristic of an anticipatory governance process.

Here, the strategic plan to reduce carbon emissions took the form of PlaNYC, a forty-year plan to reduce carbon emissions in New York City.¹⁴⁸ The notion of a forty-year plan to reduce carbon emissions prior to the early 2000s seemed bizarre.¹⁴⁹ And yet, by 2005, the need to combat global climate change in some regard was obvious.¹⁵⁰ Studies show that a majority of New Yorkers believe that it is likely that parts of the city will need to be abandoned in the next fifty years because of climate change.¹⁵¹ Reducing carbon emissions from buildings was key—buildings being the leading cause of carbon emissions in New York City to the tune of eighty percent of the city's carbon dioxide emissions.¹⁵² In 2007, the New York City Council was able to pass legislation—the New York City Climate Change Protection Act—committed to reducing carbon emissions.¹⁵³ Mayor Bloomberg signed the bill, making it law.¹⁵⁴

How, specifically, is New York City's climate change preparedness an example of anticipatory governance? Experts analyzed a range of possible futures for four climate risk factors: air temperature, precipitation, sea-level rise, and arctic ice melt. Afterwards, stakeholders determined the potential impact each risk factor would have on the city's social systems and infrastructure.¹⁵⁵ Next, a climate change adaptation

146. See Quay, *supra* note 16, at 501.

147. PLANYC, A GREENER, GREATER NEW YORK 107 (2011), http://www.nyc.gov/html/planyc/downloads/pdf/publications/planyc_2011_planyc_full_report.pdf [<https://perma.cc/9FV5-VBSM>] (finding that buildings account for 75 percent of all greenhouse gas emissions in New York City).

148. *Id.* at 3.

149. *Id.*

150. *Id.*

151. CTR. FOR RES. ON ENVTL. DECISIONS, THE NEW YORK CITY GLOBAL WARMING SURVEY (2008), http://cred.columbia.edu/files/2013/08/CRED_NYC_GlobalWarming_Results.pdf [<https://perma.cc/2AAA-4ME3>].

152. *Energy Efficiency*, NYC: BUILDINGS, <https://www1.nyc.gov/site/buildings/homeowner/energy-efficiency.page> [<https://perma.cc/HC2C-5MHZ>].

153. NEW YORK CITY, N.Y., ADMIN. CODE §§ 24-801 - 24-805 (2007).

154. Stu Loeser & Matthew Kelly, *Mayor Bloomberg Signs Legislation Codifying Planyc Emissions Reduction Targets*, N.Y.C. (December 5, 2007), <http://www1.nyc.gov/office-of-the-mayor/news/444-07/mayor-bloomberg-signs-legislation-codifying-planyc-emissions-reduction-targets> [<https://perma.cc/CDM5-K5V3>].

155. See Quay, *supra* note 16, at 502.

risk matrix was created to identify and implement adaptation strategies for the risks most likely to occur.¹⁵⁶ Finally, neighborhood-based workshops were planned in areas most likely to face climate change impacts to discuss strategies with residents.¹⁵⁷ The combination of expert fact-gathering, stakeholder involvement, and average resident participation makes this an example of anticipatory governance.

Some have criticized PlaNYC for avoiding the traditional avenues for public involvement.¹⁵⁸ These criticisms, however, focused largely on failure to obtain state legislative approval to enact congestion pricing on automobile traffic in Manhattan's central business districts.¹⁵⁹

Naturally, the forward-looking aspects of anticipation place focus on the future. With any endeavor that is focused on the future, assumptions must be made. For instance, we assume that cities will need water to survive in the future based on what we know now. As a result, municipalities plan today for future water infrastructure.

Municipalities in the United States and abroad use anticipatory processes to plan for water infrastructure needs¹⁶⁰ and climate-related planning. The following are a number of examples of anticipatory-governance-type processes in action. After these additional examples are identified, other instances of processes that have some elements of anticipatory governance are discussed to describe what an anticipatory governance process is not.

In 2012, President Obama created the Hurricane Sandy Rebuilding Task Force¹⁶¹ and then, in 2013, the State, Local, and Tribal Leaders

156. *Id.* at 503.

157. See PLANYC, PROGRESS REPORT 2009, http://www.nyc.gov/html/planyc/downloads/pdf/publications/planyc_progress_report_2009.pdf [<https://perma.cc/ADB2-2PA2>].

158. See Tom Angotti, *Is the Long-term Sustainability Plan Sustainable?*, GOTHAM GAZETTE (Apr. 21, 2008), <http://www.gothamgazette.com/index.php/development/3942-is-the-long-term-sustainability-plan-sustainable> [<https://perma.cc/UX5E-YMW8>].

159. *Id.* For a discussion about congestion pricing in New York City, and the limits of cities in achieving legislative victories on matters that require state legislative approval, see FRUG & BARRON, *supra* note 45. Recently, New York State Governor Andrew M. Cuomo has floated the idea of passing congestion pricing. Marc Santora, *Cuomo Calls Manhattan Traffic Plan an Idea 'Whose Time Has Come'*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/nyregion/cuomo-rethinks-opposition-to-tolls-to-ease-manhattan-traffic.html> [<https://perma.cc/58QF-FT5Z>]. For a discussion about the need for fewer vehicles in urban areas, see SAMUEL I. SCHWARTZ & WILLIAM ROSEN, STREET SMART: THE RISE OF CITIES AND THE FALL OF CARS (2015).

160. See Emily Boyd et al., *Anticipatory Governance for Social-ecological Resilience*, 44 AMBIO J. HUM. ENV'T 149 (2015), <https://link.springer.com/content/pdf/10.1007%2Fs13280-014-0604-x.pdf> [<https://perma.cc/4BUX-J8MD>] (discussing the fragmentation of anticipatory governance scholarship and using a case study of regional water governance in Sweden to attempt to define the field and how its principles work in practice).

161. *Executive Order -- Establishing the Hurricane Sandy Rebuilding Task Force*, WHITE HOUSE (Dec. 7, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/12/07/>

Task Force on Climate Preparedness and Resilience.¹⁶² The Hurricane Sandy Rebuilding Task Force led federal agencies to consider future risks in design planning.¹⁶³ Specifically, the Department of Housing and Urban Development (HUD) required all of its grantees to assess current and future dangers and create strategies to combat them.¹⁶⁴ The Department of Transportation allocated several billion dollars for projects designed to increase transportation system resilience.¹⁶⁵ One of the ways that HUD planned for resilience was by launching the Rebuild by Design planning competition.¹⁶⁶

The Hurricane Sandy Design Competition, which partnered with the organization, 100 Resilient Cities,¹⁶⁷ featured a collaborative research and design process that highlighted forty-one concepts, eventually funding ten of them.¹⁶⁸ The competition process involved recruiting talent, conducting research, engaging in collaborative design, and then implementing the selection process with stakeholder input.¹⁶⁹ The aspect of consultation, forward-thinking, and flexibility made the federal response to Hurricane Sandy resiliency an anticipatory governance process generally, with Rebuild By Design being a particularly important participatory process in the overall response.

Elsewhere in transportation development, anticipatory governance style processes are being used to avoid displacing long-time residents. In June 2007, a Final Environmental Impact Statement was approved by state and federal highway agencies to extend the Newtown Pike highway in Lexington, Kentucky.¹⁷⁰ In response to concerns that the

executive-order-establishing-hurricane-sandy-rebuilding-task-force [https://perma.cc/9884-NH8F].

162. Exec. Order No. 13,653, 3 C.F.R. § 7(a) (2013).

163. PRESIDENT'S STATE, LOCAL, AND TRIBAL LEADERS TASK FORCE ON CLIMATE PREPAREDNESS AND RESILIENCE, RECOMMENDATIONS TO THE PRESIDENT 6 (Nov. 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/task_force_report_0.pdf [https://perma.cc/9Q5J-LEXL].

164. Alice Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 COLUM. J. ENVTL. L. 390, 411 n.92 (2014).

165. Notice of Funding Availability for Resilience Projects in Response to Hurricane Sandy, 78 Fed. Reg. 78486 (Dec. 26, 2013).

166. See *Hurricane Sandy Design Competition*, REBUILD BY DESIGN, <http://www.rebuildbydesign.org/our-work/sandy-projects> [https://perma.cc/FH3Y-P7PY] (explaining that the design competition “coupled innovation and global expertise with community insight to develop implementable solutions to the region’s most complex needs”).

167. *About Us*, 100 RESILIENT CITIES, <http://www.100resilientcities.org/about-us/> [https://perma.cc/PLZ6-N2K7].

168. See *Hurricane Sandy Design Competition*, *supra* note 166, at 9.

169. Thousands of community members were involved in consultation, planning, and implementation. REBUILD BY DESIGN 24-25 (2015), <http://www.rebuildbydesign.org/data/files/500.pdf>.

170. U.S. DEPT. OF TRANSP. & KY. TRANSP. CABINET, No. FHWA-KY-EIS-03-01-f, FINAL ENVIRONMENTAL IMPACT STATEMENT, NEWTOWN PIKE EXTENSION (2007), <http://newtownextension.com/wp-content/uploads/2015/06/CompleteEISNewtownPikeExtension.pdf>

extension would displace long-time residents in the historically African-American neighborhood of Davistown, the Southend Park Urban Village Plan was adopted to construct affordable housing using a community land trust model.¹⁷¹ The construction of the Extension following previously unsuccessful attempts was possible because of community and political buy-in through partnership instead of opposition.¹⁷² Considering the need for housing construction for long-time residents alongside the extension of a major highway, this is forward-looking. The creation of a land trust may even create stability in the neighborhood. How will urban planners and residents adapt strategies to stabilize neighborhoods alongside future changes in transportation—whether from driverless cars, drone delivery, and even the hyperloop?¹⁷³

C. *Resident Input in Design of Human Facing Aspects of Technology and Innovation in Urban Redevelopment*

There is a neighborhood in Toronto that planners would like to make the smartest urban environment in the world.¹⁷⁴ Entrepreneurs are developing technology to advance sustainability, affordability, mobility, and economic opportunity.¹⁷⁵ The developers were awarded the

[<https://perma.cc/F3QG-TK7V>] (the FEIS discussed the Kentucky Transportation Cabinet's Division of Right-of-Way and Utilities' Relocation Assistance Program and the Uniform Relocation Assistance and Real Property Policies Act of 1970, as amended, as well as the National Environmental Policy Act of 1969 as sources of law requiring the mitigations approved with the FEIS).

171. See *Davis Park Residents Use Transportation Project Mitigation to Strengthen Their Neighborhood*, PD&R EDGE [hereinafter *Davis Park*], <https://www.huduser.gov/portal/pdredge/pdr-edge-inpractice-051616.html> [<https://perma.cc/8UE5-5UT5>]; see also LEXINGTON COMMUNITY LAND TRUST, <http://www.lexingtonclt.org> [<https://perma.cc/AT2R-R46W>].

172. *Davis Park*, *supra* note 171.

173. The hyperloop is a rapid transport concept using magnetic levitation in a very low-friction environment. *Hyperloop Alpha*, SPACE X, http://www.spacex.com/sites/spacex/files/hyperloop_alpha-20130812.pdf [<https://perma.cc/Q7QF-9PJE>]. The implications of anticipatory governance on disruptive transportation technologies like the hyperloop is beyond the scope of this Article, but they are ripe for additional study.

174. Darrell Etherington, *Alphabet's Sidewalk Labs to Turn Toronto Area into a Model Smart City*, TECHCRUNCH (Oct. 17, 2017), <https://techcrunch.com/2017/10/17/alphabets-sidewalk-labs-to-turn-toronto-area-into-a-model-smart-city/> [<https://perma.cc/2PMJ-F9GE>].

175. *About*, SIDEWALK TORONTO, <https://sidewalktoronto.ca/> [<https://perma.cc/54NC-2K7J>] (“Sidewalk Toronto will begin with a new neighborhood, called Quayside, located at Parliament Slip, just southeast of Downtown Toronto.”). Aarian Marshall, *Alphabet is Trying to Reinvent the City, Starting with Toronto*, WIRED (Oct. 19, 2017, 6:00 AM), <https://www.wired.com/story/google-sidewalk-labs-toronto-quayside/> [<https://perma.cc/5JB9-5T9G>]. Sidewalk Toronto held a community town hall event on November 2, 2017. *Sidewalk Toronto Community Town Hall (11/1)*, YOUTUBE (Nov. 2, 2017), <https://www.youtube.com/watch?v=ycZDGwXVKJ8&feature=youtu.be> [<https://perma.cc/QBT7-ZDNE>]; SIDEWALK LABS, <https://www.sidewalklabs.com/> [<https://perma.cc/WMX4-C9Y8>].

project, known as Quayside, through a competition run by a quasi-government agency tasked with redeveloping Toronto's waterfront.¹⁷⁶ The group, Sidewalk Toronto, is holding a series of town hall meetings to involve the public and determine priorities of local residents in the development of the new neighborhood.¹⁷⁷

Restrictive zoning laws, some of which were explicitly designed to segregate communities based on race,¹⁷⁸ continue to increase racial separation and income inequality. Sidewalk Labs is hoping that form-based coding¹⁷⁹ of property—looking at the form of building and property rather than use—can be combined with technology developments to make neighborhoods more pleasant with fewer legal and bureaucratic barriers.¹⁸⁰ This type of form-based, or contextual, coding will need significant expert consulting and research. It can also benefit tremendously from public engagement.

Sidewalk Labs, to some extent, is already using anticipatory governance techniques in rolling out the Quayside neighborhood project in Toronto.¹⁸¹ But Sidewalk Labs will need to go further to develop a legal system for deciding how new technology will be used in the urban environment. It is likely that town-hall-style forums are just the beginning of engaging the public in a meaningful conversation about how new technology will be developed. Thus far, Quayside has largely avoided typical “not in my backyard,” or “NIMBY” backlash, perhaps in part because the area slated for re-development is primarily industrial.

176. At the project's announcement, Canadian Prime Minister Justin Trudeau said that “technologies . . . will help us build smarter, greener, more inclusive cities which we hope to see scaled across Toronto's eastern waterfront and eventually . . . around the world.” David Rider, *Google Firm Wins Competition to Build High-Tech Quayside Neighborhood in Toronto*, STAR (Oct. 17, 2017), https://www.thestar.com/news/city_hall/2017/10/17/google-firm-wins-competition-to-build-high-tech-quayside-neighbourhood-in-toronto.html [https://perma.cc/2C2X-KLQT]. Waterfront Toronto is a quasi-governmental authority formed by the national government of Canada, provincial government of Ontario, and the municipal government of Toronto. WATERFRONT TORONTO, <https://waterfronttoronto.ca/nbe/portal/waterfront/Home?MOD=AJPERES> [https://perma.cc/7V3Z-R78L]. Waterfront Toronto makes commitments to transparent and open decisionmaking and notes that its key objective is to engage the community in the revitalization of the waterfront. *Id.*

177. E-mail from Sidewalk Toronto to Author (Feb. 27, 2018, 10:45 AM EST) (on file with author).

178. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 41-42 (1993).

179. *Form-Based Codes Defined*, FORM-BASED CODES INST., <http://formbasedcodes.org/definition/> [https://perma.cc/V9PX-Y7V9].

180. *Zoning: The Legal and Social Codes of Urban Planning*, SIDEWALK LABS (Sept. 21, 2017), <https://www.sidewalklabs.com/blog/zoning-the-legal-and-social-codes-of-urban-planning/> [https://perma.cc/FB4Y-YEMN].

181. See *Sidewalk Toronto Community Town Hall*, *supra* note 175. It may not come as a surprise that one of the driving forces behind PlaNYC, Dan Doctoroff, is the current chief executive officer at Sidewalk Labs. *Dan Doctoroff*, LINKEDIN, <https://www.linkedin.com/in/danddoctoroff> (last visited Feb. 26, 2019).

At a time when populist politics is returning on both sides of the political spectrum, exploring decisionmaking that involves residents is key. Many long- and short-term societal problems require government to act quickly in ways that may either be helpful toward a viable solution or that may have a catastrophic impact on the future. From climate change to nuclear proliferation to improving adaptable infrastructure, government and residents must arrive at a range of likely outcomes and determine what actions to take based upon those outcomes. The challenge presented by such governance problems requires stakeholders to plan for the inevitable, but also to anticipate the unexpected. Many different disciplines have much to say about the pragmatic and cognitive difficulties inherent in such an undertaking. However, legal scholarship presents a uniquely helpful perspective. Public officials, government offices, and even legislation itself are often the very vessels and instruments that turn problems into solutions, catastrophes, or something in between.

1. Anticipatory Governance and Nanotechnology

To the extent legal scholars have explored anticipatory governance, they have focused on how it is used in technology assessment and critiqued its use in shaping public opinion about technology development. Anticipatory governance—the process of using technology assessment among the general public—has been used in the development of new technology, such as nanoscience and in urban planning and resiliency. A possible strength is the ability of anticipatory governance to take account for community concerns of residents without power. Anticipatory governance may prove particularly useful if it is able to get neighbors to look past individual concerns to see needs across neighborhoods. Anticipatory governance can also combat the negative perception among some scholars that participatory processes cause inefficient delays.

An example of anticipatory governance at the federal level is the National Nanotechnology Initiative (Nanotechnology Initiative). In 2003, President George W. Bush signed into law the 21st Century Nanotechnology Research and Development Act, launching the National Nanotechnology Initiative.¹⁸² The fact that Congress decided to devote public resources to the research and development of products using atomic-level manufacturing—nanotechnology—is not surprising.¹⁸³ It was noteworthy, however, that Congress required the study

182. 15 U.S.C. §§ 7501-04, 08 (Supp. 2007).

183. Worldwide, products using nanotechnology are projected to generate \$3.7 trillion in sales in 2018, and applications are still emerging. NAT'L SCI. AND TECH. COUNCIL, THE

of the societal impacts of nanotechnology, and that developments include public input and wide discussion.¹⁸⁴ This is significant because requirements designed to create public participation struggle at involving all residents, especially low-income populations and people of color.¹⁸⁵

The Nanotechnology Initiative,¹⁸⁶ which included a strategic emphasis on responsible nanotechnology,¹⁸⁷ led Congress to fund two university centers to research how to implement the technology humanely.¹⁸⁸ The Center for Nanotechnology in Society at Arizona State University uses anticipatory governance techniques to encourage scientists, engineers, and policymakers to see their role within a process involving other actors.¹⁸⁹ For instance, a project called NanoFutures used a web-based platform to engage participants about their perspectives on six different future scenarios.¹⁹⁰ The process included “read,” “revise,” and “rant” steps that guided participants through educational sharing of information, an opportunity to express how the given technology might be used, and then a free-form comment process for participants to talk about the given technology.¹⁹¹

Scholars identify the need for public involvement in the governance and regulation of nanotechnology development.¹⁹² Research shows that

NATIONAL NANOTECHNOLOGY INITIATIVE SUPPLEMENT TO THE PRESIDENT'S 2018 BUDGET 1 (2017).

184. 15 U.S.C. §§ 7501(b)(10), (b)(10)(D) (2012) (“[E]nsuring . . . ethical, legal, environmental [sic], and other appropriate societal concerns [sic] [through the use of] public input and outreach.”).

185. See HILLSBOROUGH METRO. PLANNING ORG., PUB. PARTICIPATION PLAN MEASURES OF EFFECTIVENESS (2016).

186. See 15 U.S.C. §§ 7501-7509 (2012).

187. *Id.* at § 7501(b)(10) (“[E]nsuring that ethical, legal, environmental, and other appropriate societal concerns, including the potential use of nanotechnology in enhancing human intelligence . . .”).

188. Albert C. Lin, *Technology Assessment 2.0: Revamping Our Approach to Emerging Technologies*, 76 BROOK. L. REV. 1309, 1360 (2011).

189. David H. Guston, *Understanding ‘Anticipatory Governance’*, 44(2) SOC. STUD. SCI. 218, 219 (2013).

190. The scenarios included tissue printing technology to build organs, using a microchip to insert information directly into the brain, analyze DNA harvested in waste water to screen large populations, early-state disease detectors, a radio-controlled drug to limit the mobility of prisoners, and bionic eyes. Cynthia Selin & Rebecca Hudson, *Envisioning Nanotechnology: New Media and Future-Oriented Stakeholder Dialogue*, 32 TECH. SOC’Y 173, 175 (2010).

191. *Id.* at 176.

192. Linda K. Breggin & Leslie Carothers, *Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge*, 31 COLUM. J. ENVTL. L. 285, 307 (2006) (describing the need for public involvement and information dissemination in nanotechnology regulation); Lin, *supra* note 188, at 1322 (“Because emerging technologies can drastically transform society and the environment, such technologies should be carefully assessed and subjected to public input.”); Gregory Mandel, *Nanotechnology Governance*, 59 ALA. L. REV. 1323, 1379-80 (2008) (arguing that broad stakeholder engagement and communication,

individuals who are unfamiliar with the development of new technology use it in surprising ways not obvious or apparent to experts conducting technology assessments.¹⁹³ Skeptics question the utility of average residents weighing in on potential technology.¹⁹⁴ Albert Lin has described where the processes used by researchers in conjunction with the Nanotechnology Initiative falls short.¹⁹⁵ A primary limitation, writes Lin, is that citizen reports do not necessarily impact nanotechnology development.¹⁹⁶ Another challenge is that only five percent of federal funding allocated between 2005 and 2008 for nanotechnology funding went to research on health and environmental effects.¹⁹⁷

2. *Anticipatory Governance and the New Governance Literature*

Local governments are using new technologies and innovation combined with civic engagement to enable stakeholders to contribute to governance.¹⁹⁸ New governance legal scholarship—emphasizing movement to collaborative, multi-party, multi-level, adaptive, and problem-solving strategies and away from command-style, fixed-rule governance—has taken account for this shift in focus.¹⁹⁹ Scholars have begun to apply new governance theory to urban land use decisions, including affordable housing and economic development.²⁰⁰

Although the definition of new governance in the literature is emerging, in general, it describes a range of activities that function outside of command-and-control type legal institutions.²⁰¹ Common

which should encourage public involvement, will increase public trust in the system for nanotechnology governance).

193. Selin & Hudson, *supra* note 190, at 173.

194. See, e.g., ANDREW KEEN, *THE CULT OF THE AMATEUR* 9 (2008).

195. Lin, *supra* note 188, at 1360-61 (describing how technology assessment and environmental impact assessment were both tools designed to increase public participation around understanding the ramifications of new technology and attempts to use anticipatory governance to understand advances in nanoscience).

196. *Id.* at 1361.

197. *Id.* at 1362.

198. See Lobel, *supra* note 16, at 345. Lobel argues that there is a shift in legal scholarship away from a top-down, command-and-control framework emanating from the New Deal regulatory state to a downward and outward governance paradigm. In this new governance model, the central goals of government are to scale up success stories from local or private levels. *Id.* at 365-67.

199. Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473 (2004).

200. See Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago’s Public Housing Reform Experiment*, 16 GEO. J. POVERTY L. & POL’Y 117, 154 (2009) (arguing for “hard law” and “soft law” approaches when working with traditionally marginalized stakeholders); McFarlane, *supra* note 6.

201. Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 2 (Gráinne de Búrca & Joanne Scott eds., 2006).

features of new governance examples show a shift from top-down decisionmaking to regulatory approaches that are “less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature.”²⁰² New governance scholarship views approaches—such as privatization, devolution, and deregulation—as creating opportunities for participation through collaborative and dynamic planning.²⁰³ This scholarship recognizes participation as fundamental to governance. Such approaches draw on the pragmatism embodied in thinkers such as John Dewey.²⁰⁴

Lisa Alexander linked new governance trends with public housing reform in Chicago.²⁰⁵ Alexander describes the body of new governance jurisprudence as having an optimistic viewpoint of stakeholder collaboration.²⁰⁶ Essentially, this viewpoint observes that those who are governed ought to have a role in how governance occurs.

When one speaks of anticipatory governance, many of the features and common themes of new governance are present. Forward-focus, flexibility, and participation are consistent with the types of normative values included in new governance models. Specifically, anticipatory governance is a method for finding ways to achieve participation. It does not matter if one is able to collaborate on governance if one does not have a seat at the table. Anticipatory governance focuses on how to get disparate and underrepresented voices heard.

Anticipatory governance continues the new governance theme because of a similar focus on collaboration and planning. However, a key distinction is that anticipatory governance has tools available to achieve the theories described in the new governance scholarship. For instance,

202. *Id.*

203. See Lobel, *supra* note 16, at 343.

204. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 214 (2003) (discussing the role of teachers in modeling behavior for students, connecting individual students to the school community, and tailoring instruction to each student).

205. See Alexander, *supra* note 200, at 121.

206. *Id.* at 121 n.12 (citing Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Bradley C. Karkkainen, *Adaptive Management and Regulatory Penalty Defaults: Toward a Bound Pragmatism*, 87 MINN. L. REV. 943 (2003); Liebman & Sabel, *supra* note 204; Lobel, *supra* note 16; Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); David Trubek & Louise Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 EUR. L.J. 343 (2005); Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819 (2008).

anticipatory governance makes use of focus groups, citizen forums, and other methods for involving the public in decisionmaking.

New governance has its criticisms and so does anticipatory governance. This Article addresses criticisms of anticipatory governance below. As for criticisms of new governance, scholars have critiqued new governance processes for reinforcing existing power dynamics and making change more difficult.²⁰⁷ But that is not surprising since the goal of the scholarship is more describing what norms have developed than prescribing the way that law should work in all cases.

It is much the same with anticipatory governance. There are instances where anticipatory governance is well-suited. This section provided a connection between anticipatory governance and the literature about new governance.

3. *Anticipation*

Often, anticipation is associated with dread and fear.²⁰⁸ On the other extreme, one may anticipate something triumphant, as in a major victory or an honor or award. Or one may simply anticipate doing what is expected, like showing up at a place of business to clock in for work. At its extremes, anticipation can bring about our greatest worries and also can be our best, most authentic, creative, and imaginative moments.²⁰⁹ Or perhaps, in its most universal sense, anticipation is neither good nor bad until one puts a value on the type and quality of anticipation. In this sense, a neutral approach to anticipation is the most universal. In the context of anticipatory governance, one can understand anticipation as positive, negative, or neutral effects.

207. Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 330 (2009) (suggesting the continued relevance of rights-claiming and the role of the attorney in court-centered change theory and practice).

208. Honoré de Balzac is attributed as saying “[o]ur worst misfortunes never happen, and most miseries lie in anticipation. Our worst fears lie in anticipation – that’s not me, that’s Balzac.” *Mad Men: Out of Town* (AMC television broadcast Aug. 16, 2009). Anticipation, as defined by the German philosopher Heidegger, is “the possibility of understanding one’s *ownmost* and uttermost potentiality-for-Being—that is to say, the possibility of *authentic existence*.” MARTIN HEIDEGGER, BEING AND TIME 307 (John Macquarrie et al. trans., 1962). Anticipation yields both authenticity and dread.

209. In the context of climate change, one scholar describes this polarity in this way: “[A]nticipation is about intentionality, action, agency, imagination, possibility, and choice; but it is also about being doubtful, unsure, uncertain, fearful, and apprehensive.” MARK NUTTALL, ANTICIPATION, CLIMATE CHANGES, AND MOVEMENT IN GREENLAND 23 (Assoc. Inuk-siutiit Katimajit Inc. et al. eds., 2010).

(a) *Neutral*

In the context of neutral impacts, anticipation is neither good nor bad—it just is. Perhaps the most universally accepted concept of anticipation is one that has a neutral impact. Specifically, an anticipatory system is “a system containing a predictive model of itself and/or of its environment, which allows it to change state at an instant in accord with the model’s predictions pertaining to a later instant.”²¹⁰ This definition describes how a system can use the elements of its environment to adjust based on a predicted future event. It is neither positive nor negative—it just exists that way.

(b) *Positive*

Anticipation can achieve significant positive results. For example, one might anticipate securing financial gains from creating a work of art or work of intellectual property.²¹¹ Or collectively, groups can collaborate to address climate change through a hopeful and goal-oriented approach where ambitions are realized.²¹² In the context of nanotechnology, anticipation can manage emerging knowledge-based technologies while management is still possible.²¹³

The argument advanced here is that anticipatory processes can yield positive outcomes in certain instances. If decisionmakers take anticipation into account when creating governance processes, it is possible to achieve positive change. Participation is connected to positive outcomes because certain changes will only happen when using anticipation in a participatory manner. It does not matter if decision-making occurs in an anticipatory way if the people whose lives are impacted by a certain decision lack a seat at the table.

(c) *Negative*

The negative results of anticipation emphasize potential harms of forethought. The harms of anticipatory behavior might arise where there is an expectation that a certain group is about to engage in ethnic

210. ROBERT ROSEN, *ANTICIPATORY SYSTEMS: PHILOSOPHICAL, MATHEMATICAL AND METHODOLOGICAL FOUNDATIONS* 339 (1985).

211. Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?*, 68 *CHL.-KENT L. REV.* 715, 719 (1993).

212. See NUTTALL, *supra* note 209.

213. David H. Guston, *The Anticipatory Governance of Emerging Technologies*, 19 *J. KOR. VACUUM SOC.* 432, 433 (2010) (presenting the Center for Nanotechnology in Society at Arizona State University and discussing its method of real-time technology assessment to achieve an anticipatory governance strategic vision of nanotechnologies).

cleansing.²¹⁴ In other instances, anticipation could be punished because of the connection of the anticipated event to a harmful act.²¹⁵

It can be difficult to pin down exactly how anticipatory processes fit within an anticipatory governance theory.²¹⁶ Further, a deep investigation into the term “anticipatory” yields interesting and important insights. Based on definitions offered thus far in the literature, it appears that the public decision-making process might benefit from anticipating complicated conflicts which require educating the public about future events about which actions and decisions now might have significant impact.

Scholars separate anticipation into explicit and implicit types. Explicit meaning those anticipatory behaviors that one is aware of; implicit meaning those activities that are below the threshold of consciousness.²¹⁷ A more fulsome investigation of implicit anticipation is beyond the scope of this project. Yet, it is worth noting the distinction within the field of anticipation studies.

IV. URBAN ANTICIPATORY GOVERNANCE

A. *An Urban Anticipatory Governance Framework*

Although participant involvement in local decisions is core to the rule of law in the United States,²¹⁸ challenges presented in designing participatory processes to handle difficult decisions at the local level are legion.²¹⁹ Potential solutions to involving the public in difficult local

214. The doctrine of “the responsibility to protect,” for instance, explores approaches for governments to invade the sovereignty of another nation that is failing to protect its residents against harm. Christopher C. Joyner, “*The Responsibility to Protect*”: *Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT’L L. 693, 711 (2007).

215. Generally in criminal law, individuals are not punished for crimes that involve solely a mental element. Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 731 (1960) (imposing criminal sanctions “in the absence of any requisite mental element has been held by many to be incompatible with the basic requirements of our Anglo-American . . . jurisprudence”).

216. Boyd et al., *supra* note 160, at 149 (discussing the fragmentation of anticipatory governance scholarship and using a case study of regional water governance in Sweden to attempt to define the field and how its principles work in practice).

217. Roberto Poli, *The Many Aspects of Anticipation*, 12 FORESIGHT 7, 12 (2010) (discussing how different disciplines approach the field of anticipation and what conditions are necessary to make systems anticipatory).

218. Federalism and decentralized government are legal bedrocks. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) (arguing that the Guarantee Clause sets a modest restraint on federal interference with state autonomy).

219. In one example—in the context of welfare reform—Jody Freeman describes the problems presented by replacing a federal entitlement program with block grants to the states. Specifically, services once provided by the government are contracted out to third

governance questions share common themes. These themes include forward-focus,²²⁰ flexibility,²²¹ and participation.²²² Scholars have described these themes, along with other unique features, under the term *anticipatory governance*.²²³ Definitions offered in the literature—that anticipatory governance is a broad-based capacity able to act on a variety of inputs to manage merging knowledge-based technologies while it is still possible²²⁴—are overly complex and unworkable in the law, especially land use regulation. The principles behind anticipa-

parties and erode public law protections, such as a right to due process. Freeman, *supra* note 38, at 1307-08.

220. Sometimes called “foresight.” Leon S. Fuerth, *Foresight and Anticipatory Governance*, 11 FORESIGHT 14, 28 (2009).

221. See Lobel, *supra* note 16, at 338. Lobel discusses a flexible and fluid policy-making environment that replaces or complements traditional static features of the regulatory model. Flexibility is necessary when changes are uncertain, as in the context of sea-level rise and global temperatures. A variety of outcomes are possible, and strategies must be flexible for adapting to those changes. Cf. Ray Quay, *Anticipatory Governance: A Tool for Climate Change Adaptation*, 76 J. AM. PLAN. ASS’N 496, 499 (2010) (discussing that in this sense, the way that new governance scholars approach flexibility differs to, say, the climate change adaptation approach).

222. See McFarlane, *supra* note 6, at 863-64.

223. David H. Guston, *Understanding ‘Anticipatory Governance’*, 44 SOC. STUD. SCI. 218-42 (2014) [hereinafter Guston, *Understanding Anticipatory Governance*] (discussing the four features of anticipatory governance; namely, foresight, engagement, integration, and the combination of the first three together). See, e.g., Quay, *supra* note 221, at 498. Outside of legal studies, the anticipatory governance theory is best articulated in the field of science and technology studies in regards to the development of nanotechnology. DANIEL BARBEN ET AL., *Anticipatory Governance of Nanotechnology: Foresight, Engagement, and Integration*, in THE HANDBOOK OF SCIENCE AND TECHNOLOGY STUDIES 979, 992-93 (Edward J. Hackett et al. eds., 3d ed. 2007) (discussing the three key components of anticipatory governance of nanotechnology: foresight, engagement, and integration. “Anticipatory governance,” they write, “comprises the ability of a variety of lay and expert stakeholders, both individually and through an array of feedback mechanisms, to collectively imagine, critique, and thereby shape the issues presented by emerging technologies before they become reified in particular ways”). Anticipatory governance is applied to synthetic biology and U.S. Food and Drug Administration oversight. Leili Fatehi & Ralph F. Hall, *Synthetic Biology in the FDA Realm: Toward Productive Oversight Assessment*, 70 FOOD & DRUG L.J. 339, 342 (2015) (discussing synthetic biology oversight and federal regulation, including an anticipatory governance framework). One study found that expert elicitation—the process of building consensus among experts where no clear conclusion exists—could be used with anticipatory governance as a quick method of risk assessment. Emma Fauss et al., *Using Expert Elicitation to Prioritize Resource Allocation for Risk Identification for Nanosilver*, 37 J.L. MED. & ETHICS 770, 772-73 (2009). Researchers have applied anticipatory life cycle assessment, another forward-looking tool, along with anticipatory governance to single-wall carbon nanotubes used in lithium ion battery development. B.A. Wender et al., *Anticipatory Governance and Anticipatory Life Cycle Assessment of Single Wall Carbon Nanotube Anode Lithium ion Batteries*, 9 NANOTECHNOLOGY L. & BUS. 201, 206 (2012) (finding that using anticipatory life cycle assessment with an anticipatory governance framework uncovers a lack of lab-generated quantitative methods, promotes stakeholder and expert communication, and possibly reorients lab research agenda).

224. See, e.g., David Guston, *Preface to ERIK FISHER ET AL. EDS., YEARBOOK OF NANOTECHNOLOGY IN SOCIETY* vi (2008).

tory governance—forward-focus, flexibility, and participation—are addressed throughout environmental and land use law scholarship, frequently using other names.²²⁵

This Part introduces a potential framework for solving complex urban governance challenges related to using space that combines resident participation, expert collaboration, flexibility, and a forward-looking perspective. An urban land use anticipatory governance decisionmaking process should be used in creating strategies to address: (1) significant, complex matters; (2) that require flexibility and foresight to adapt to changing conditions (environmental, human, or other); (3) that present an opportunity for collaboration, inclusive input, and feedback in strategy design between experts and the public; and (4) that there is time for collaborative learning and strategy design to be implemented in addressing the matter at issue. What exactly do each of these steps mean? How specifically will an urban anticipatory governance process be implemented?

1. *Significant and Complex*

First, the framework should involve significant and complex land use matters.²²⁶ These matters tend to be so large that they go beyond simply what one government agency might handle or what might fall to one level of government.²²⁷ In the context of urban land use, significant and complex matters are those that necessarily involve several levels of government—local, state, and sometimes federal—and across

225. Some recent scholarship has bridged the gap to anticipatory governance directly. In perhaps the most detailed analysis to date, Albert C. Lin discusses a new form of technology assessment through an anticipatory governance framework. *See* Lin, *supra* note 188, at 1310 (describing how technology assessment and environmental impact assessment were both tools designed to increase public participation around understanding the ramifications of new technology, and it attempts to use anticipatory governance to understand advances in nanoscience).

226. Borrowing this terminology in part from Fuerth. *See* LEON S. FUERTH & EVAN M.H. FABER, *ANTICIPATORY GOVERNANCE PRACTICAL UPGRADES: EQUIPPING THE EXECUTIVE BRANCH TO COPE WITH INCREASING SPEED AND COMPLEXITY OF MAJOR CHALLENGES* 4 (2012) (discussing moving from crisis management to a process of foresight, networked governance, and feedback).

227. Fuerth speaks about complex or wicked problems that do not fit within a single bureaucratic category. *Id.* Fuerth separates problems into two categories: those that are “complicated”—generally that originate from an identifiable source, can be broken up into chunks, and can be fixed permanently—and those that are “complex” or “wicked”—which erode customary bureaucratic boundaries, cannot be solved one piece at a time, tend to unravel into chaos, and cannot be permanently solved. *Id.* In the field of education, Larry Cuban has described this slightly differently. He writes about framing problems—which can be solved—and messy dilemmas—which cannot be easily solved. LARRY CUBAN, *HOW CAN I FIX IT?: FINDING SOLUTIONS AND MANAGING DILEMMAS: AN EDUCATOR’S ROAD MAP* 9-12 (2001).

agencies—environmental protection, transportation, and housing finance, among others.²²⁸

Matters for which there are already processes to prepare and execute solutions would not be considered a significant or complex matter necessary for the urban anticipatory governance framework. Enforcing existing zoning laws or tenant anti-harassment provisions in housing law, for example, would not require additional framework activities. However, arriving at agreeable zoning laws or protecting tenants against aggressive or illegal evictions could be significant and complex and result from a framework process. In areas where the legislative body has already acted, and the legislation needs no revisiting, such scenarios are not ripe²²⁹ for this framework approach.²³⁰

2. *Flexibility and a Forward-Looking Perspective*

Second, the framework should address matters that require flexibility and a forward-looking perspective to adapt to changing environmental, human, or other conditions. This criterion reflects the fact that an urban anticipatory governance framework can address matters about which it is not possible to know the outcome. Instead, a range of outcomes is likely.²³¹ The climate change adaption response strategies described above are an example of the type of flexibility and forward-looking phenomena that the framework would be well-suited to address. Other types of land use matters involving impending changes also reflect the need for flexibility. For instance, the decline of big box stores in suburban communities following both the economic collapse of 2008 and disruption from online retailers

228. As an example, the Willets Point development discussed above involved a number of city agencies, as well as considerations about expanding an interstate highway and construction access ramps for vehicles to be able to use the new development. *Project Description*, WILLETS POINT DEV. PLAN, http://www.nyc.gov/html/oec/downloads/pdf/dme_projects/07DME014Q/DGEIS/07DME014Q_DGEIS_01_Project_Description.pdf [<https://perma.cc/8TFF-BUQJ>] (mentioning building on land owned by the Metropolitan Transportation Authority, a governmental entity, and approvals by a number of city agencies—including the mayor's office, department of Housing Preservation and Development, City Planning Commission, and City Council, as well as state Department of Transportation and Federal Highway Administration).

229. For instance, setting federal monetary and fiscal policy at the federal level, which is done by the Board of Governors of the Federal Reserve System. Federal Reserve Act, 12 U.S.C. § 225 (2017).

230. Or, again at the federal level, considering war scenarios and determining appropriate defensive, military responses. There may be elements of new technology and how it could be used harmfully in a military context that might be ripe for anticipatory governance. But basic defense strategies are not well-suited for this type of decision-making process.

231. Quay, *supra* note 16, at 506.

necessitates creative solutions that include flexible strategies designed for individual communities.²³² Yet a specific shopping mall closure in a single community may not be appropriate, unless the mall has particularly significant and complex issues to consider. Isolated shopping malls, for instance, on Native American reservations in isolated urban or rural areas may be a good fit for this framework. A straightforward budgeting process, for instance, that does not allow for specificity, or anything without an iterative process, allowing for meaningful, continuous, feedback is best placed elsewhere.²³³ Decisions involving complexity, and fractured thinking, but also integration, makes the mark. A complex infrastructure development project involving new technology and emerging modes of disruptive transportation could be a better fit for an urban anticipatory governance framework process.²³⁴

3. *Collaboration Between Residents and Experts*

Third, the framework should provide an opportunity for collaboration and feedback between researchers, planners, and residents. For decisions under this framework, there must be a technical aspect that can be explained or understood by experts and communicated to residents. Most decisions that are significant and complex, and that also require flexibility and a forward-looking perspective, are sufficiently technical so as to benefit from expert engagement. The argument here is that residents, when presented with information, can use their values-based thinking to shape the meaning of expert analysis.

232. Scholars have described the glut of big box retailer space and solutions for local government to address this planning failure. *See, e.g.,* Sarah Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 U. COLO. L. REV. 471, 474 (2012).

233. Participatory budgeting—the process of residents voting on local government budgets—for instance, is one method for public participation and input sharing, but it is not an anticipatory governance process because the outcomes do not necessarily require significant flexibility and foresight.

234. In July 2017, Elon Musk tweeted that he had “received verbal gov[ernmen]t approval for . . . [one of his companies] to build an underground NY-Phil-Balt-DC Hyperloop.” Elon Musk (@elonmusk), TWITTER (July 20, 2017, 11:09 AM) <https://twitter.com/elonmusk/status/888053175155949572> [<https://perma.cc/U6LV-ALLF>]. One report indicates that tunnel construction in Maryland, with a terminus near Baltimore’s Camden Yards, could begin as soon as January 2018. CJ Mitchell, *Elon Musk Hyperloop May Have Terminus Near Camden Yards*, CAP. NEWS SERV. (Dec. 14, 2017), <http://cnsmaryland.org/2017/12/14/elon-musk-hyperloop-may-have-terminus-near-camden-yards/> [<https://perma.cc/J2WV-LHM8>]. Exploring how anticipatory governance might be used to plan and approve the development of the hyperloop is beyond the scope of this Article.

4. *Collaborative Learning and Resident Expertise Involved in Planning, Design, and Implementation*

Fourth, the collaborative learning and strategy design actually has to be factored into the decision. It is important that there is an opportunity for resident expertise to be included in the actual planning and implementation of the decision. Without actual involvement, the proposed framework does not address the problems identified with the current approach.

B. Applying the Urban Anticipatory Governance Framework

1. *Executive Agency Adoption vs. Legislative Proscription—Who Implements?*

An executive agency at the state or local level could, on its own, adopt an urban anticipatory governance process using the proposed framework. Such a process would likely take initiative from the agency head, who is accountable to the mayor or other chief executive. As was the case with New York City, the mayor, as chief executive, decided to put resources behind the process.²³⁵ In the case of climate change response in New York City, to actually implement the strategies arrived at by the executive agencies it seemed necessary to have legislative approval.²³⁶ Depending on the scope of the process, such an agency may or may not need legislative authority to engage in the process.

There are different roles for different branches of government in an urban anticipatory governance framework. What follows is a list of potential strategies for applying an urban anticipatory governance framework at the state or local level. In naming each possible activity, this Part develops a normative argument for all possible beneficial uses of the framework.

2. *Citizen Juries, Consensus Conferences, and Deliberative Polling*

There is a vast body of academic literature regarding deliberative democracy and the value of lay people's opinions. Relevant here are a number of tools designed to glean how lay people think and respond to information. Citizen juries, for one, are a process of bringing individuals together to discuss a public policy issue.²³⁷ Sample sizes must be

235. See PlaNYC, *supra* note 147.

236. NEW YORK CITY, N.Y., ADMIN. CODE §§ 24-801-24-805 (2007).

237. JOHN STEWART ET AL., *CITIZENS' JURIES v* (1994) (describing the citizen jury process where groups are selected and "do not make binding decisions but are expected to comment

statistically significant and be representative of the residents in a given area.²³⁸ It is important that information presented, and the final results of the jury process, be as unbiased as possible.²³⁹

Consensus conferences are meetings designed to bring together experts and disseminate research.²⁴⁰ Such conferences typically involve testimony by a number of speakers to a consensus panel who conclude in a statement of shared understanding called a “consensus statement.”²⁴¹ The consensus conference has been used to study new advancements in medical and other research over thirty plus years. Scholars have studied and suggested improvements to the consensus conference process, including avoiding bias in the selection of questions and panel members.²⁴²

A consensus conference is another technique available in an urban anticipatory governance process. The goal of the conference could be to share information and build consensus around a set of shared values. Meeting agendas could take the form of presentations by professionals and experts, followed by break-out groups designed to allow residents to give their opinions in smaller settings. The resulting conversations could be reflected in notes, shared with the larger group, and inform government officials about resident preferences.

Deliberative Polling involves exposing a random sample of residents to balanced information and encouraging conversation in a diverse group. It then involves collecting the expression of opinions once informed.²⁴³ Deliberative polls can provide useful lay feedback about particular decisions. Each process—citizen jury, consensus conference, and Deliberative Polling—can be used as a means of improving urban governance decisions and putting the urban anticipatory governance framework into place.

Debate about the problems inherent in deliberative and consensus-oriented processes abound. Scholars have criticized the way that groups with similar viewpoints go to extremes when debate occurs

on proposals and make recommendations”). See Ned Crosby & Doug Nethercut, *Citizen Juries: Creating a Trustworthy Voice of the People*, in THE DELIBERATIVE DEMOCRACY HANDBOOK 111, 113 (John Gastil & Peter Lavine eds., 2005).

238. Crosby & Nethercut, *supra* note 237.

239. *Id.*

240. Fitzhugh Mullan & Itzhak Jacoby, *The Town Meeting for Technology: The Maturation of Consensus Conferences*, 254 J. AM. MED. ASSOC. 1068 (Aug. 1985).

241. Paul M. Wortman et al., *Do Consensus Conferences Work? A Process Evaluation of the NIH Consensus Development Program*, 13 J. HEALTH POL. POL'Y & L. 469, 471 (1988).

242. *Id.* at 495.

243. James S. Fishkin & Robert C. Luskin, *Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284, 287 (2005).

within homogenous groups.²⁴⁴ This provides support for efforts to include deliberation among groups with diverse beliefs.

3. *Community Negotiated Rulemaking*

Negotiated rulemaking—typically convened by an executive agency—is a consensus-based decision making process where stakeholders affected by a rule are able to negotiate the rule's substance.²⁴⁵ Congress codified the negotiated rulemaking process reflecting what several agencies, including the Environmental Protection Agency, were already doing.²⁴⁶ Under this process, the agency establishes a negotiating committee that represents affected interest groups and seeks public comment from any additional interests.²⁴⁷ Scholars have asserted that the negotiated rulemaking process is one of perfect interest representation, where affected groups have equal voting power and government officials approve the deal as it is written and adopted.²⁴⁸

A community negotiated rulemaking—where groups with different interests participate in local government decisions—has appeal. Selection of negotiation committee members would need to be balanced and include a nonhomogenous group. In addition, participating individuals would need to have a shared understanding of the facts and interests involved. The negotiated rulemaking process assumes that participants themselves are already experts. Including lay people in a negotiated rulemaking process would require that lay people have an opportunity to share and review information prior to agreeing on a particular deal. This gap in knowledge is addressed through citizen juries, consensus conferences, and Deliberative Polling by presentation and expert testimony. Community negotiated rulemaking in an urban anticipatory governance framework could include sharing of information relevant for participants to form an opinion before reaching a deal.

Since rulemaking has binding effect and is not simply advisory, it is important to evaluate the impact of these decisions. One would want to avoid allowing groups with the loudest voices, or greatest number of members, to dominate a community negotiated rulemaking process. This could be avoided by giving groups with diverse interests the same amount of vote.

244. See Sunstein, *supra* note 94.

245. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 34 (1997).

246. 5 U.S.C. §§ 561-570 (1994).

247. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2267-68 (2001).

248. *Id.* at 2268.

4. *Meet and Confer Provisions*

Another technique is to create opportunities for disputing parties to “meet and confer.” “Meet and confer” provisions are often used in discovery dispute settlement negotiations,²⁴⁹ union negotiations,²⁵⁰ and contracts.²⁵¹ Such opportunities to discuss and resolve disputes can be aspirational. In practice, however, actually resolving the dispute can be more difficult.

A practical step to implementing an urban anticipatory governance framework could include meet and confer provisions in various agreements related to development. A meet and confer contractual obligation would present an opportunity for a particular party—individual residents or a group of residents—to discuss particular issues related to a development. Spelling out particular triggers for a meet and confer opportunity, along with a remedy for a failure to break through an impasse, can be a powerful tool in both flexibility and participation.

5. *Non-Binding Referenda, Holding Individual Actors Responsible for Negative Consequences of Development*

Albert Lin makes a number of additional recommendations that are relevant here. Namely, he suggests nonbinding referenda around technology development.²⁵² He also suggests that technology developers be held accountable for the harms to health and the environment of new technology.²⁵³

A nonbinding vote of residents would give government officials a sense for where individuals and groups stand on particular issues. This alone would stoke debate and deliberation. However, without the sharing of additional knowledge and information, such deliberation may devolve to sharing of worst fears instead of constructive guidance.

There are many high-profile efforts to hold corporations responsible for pollution and other harms caused by their products. Much can be learned from failures in these processes. However, accountability in the public sphere can develop a sense among residents that corporate

249. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 117 (2010).

250. *Minn. State Bd. for Comm. Colls. v. Knight*, 465 U.S. 271, 278-92 (1984).

251. See, e.g., COMPACT TO INCREASE EQUITY, OPPORTUNITY AND ACCESS IN SILICON VALLEY, <http://juliangross.net/docs/CBA/ETB-Facebook-CBA-2016.pdf> [<https://perma.cc/K6HB-VFXL>] (including a “meet and confer” provision in a significant community benefits agreement, section 6 states, “[a] Partner . . . shall . . . request the opportunity to meet and confer in a good-faith effort to resolve the dispute.”).

252. See Lin, *supra* note 188, at 1366-67.

253. *Id.* at 1369.

bodies and the government will respond when called to answer for particular negative behavior.

6. *Sharing Community Economic Benefits*

In November 2016, Detroit residents approved via referendum a Community Benefits Ordinance.²⁵⁴ The Ordinance articulated the city's commitment to "community outreach and engagement that promotes transparency and accountability and ensures development projects . . . benefit and promote economic growth and prosperity for all residents."²⁵⁵ Specifically, the Ordinance requires certain projects—for example, where the city is transferring city-owned property worth over one million dollars or the city is abating over one million dollars in property taxes and the development is expected to cost more than seventy-five million dollars to build—to go through a detailed community engagement process.²⁵⁶ There is a requirement to hold a public meeting, and notice must be mailed to all residents within three hundred feet of the development.²⁵⁷ Each project will also have an appointed Neighborhood Advisory Council.²⁵⁸ All development agreements between the city and the developer must include a Community Benefits Provision.²⁵⁹

Developers and the city are already using the Ordinance in development processes.²⁶⁰ The Herman Kiefer Hospital complex will make use of brownfield redevelopment funding and other incentives²⁶¹ to create a new live-work, mixed-use community on over eighteen acres.²⁶² Several community meetings held over a period of months and neighborhood leader concerns led to a detailed report on the impacts of the

254. Kirk Pinho, *Milder "Community Benefits" Ordinance Passes in Detroit*, CRAIN'S DETROIT BUS. (Nov. 9, 2017, 10:00 AM), <http://www.crainsdetroit.com/article/20161109/NEWS/161109838/milder-community-benefits-ordinance-passes-in-detroit> [<https://perma.cc/AT74-G2EC>].

255. See DETROIT, MICH., MUNICIPAL CODE § 14-12-1(a) (2012).

256. *Id.* § 14-12-3.

257. *Id.* § 14-12-3(a)(2).

258. *Id.* § 14-12-3(b).

259. *Id.* § 14-12-3(e).

260. See, e.g., MAURICE COX & R. STEVEN LEWIS, HERMAN KIEFER DEVELOPMENT COMMUNITY BENEFITS REPORT (2017), <http://www.detroitmi.gov/Portals/0/docs/Planning/CBO/HK%20CBO/Herman%20Kiefer%20Community%20Benefits%20Report.pdf?ver=2017-06-07-125022-293> [<https://perma.cc/B2EK-3PHR>].

261. HERMAN KIEFER NEIGHBORHOOD ADVISORY COUNCIL, JOSEPH WALKER WILLIAMS RECREATION CENTER (2017), <http://www.detroitmi.gov/Portals/0/docs/Planning/CBO/HK%20CBO/CBO%20NAC%20Meeting%202017-05-03%20Presentation.pdf?ver=2017-06-01-135654-797> [<https://perma.cc/X7ZJ-P93K>].

262. Robin Runyan, *New Details Emerge for Redevelopment of Herman Kiefer Complex*, CURBED DETROIT (Apr. 3, 2017, 2:20 PM), <https://detroit.curbed.com/2017/4/3/15161564/herman-kiefer-complex-redevelopment-plans> [<https://perma.cc/527Y-NG5U>].

project and the sharing of potential benefits, including hiring local workers.²⁶³

Although more study on the impacts of the Detroit Community Benefits Ordinance is needed, the codification of the public engagement process, and the resulting process, is relevant here. It follows logically that engaging with area residents about a development project prior to the development occurring would avoid disputes after the development occurs. Engagement through public meetings, as well as a local neighborhood council, allows local residents to study issues, collaborate with developers, and report back on concerns. Those concerns can then be addressed through a community benefits report. Community benefits ordinance processes are a source of suggestions of possible for an urban anticipatory governance process.

Several technology-based companies are using community benefits processes to build local consensus around development of their campuses. Facebook, Inc., and its real estate development arm, Hibiscus Properties, LLC, recently entered into a community benefits agreement with four community groups in East Palo Alto and San Carlos, California.²⁶⁴ As part of the agreement, Facebook pledged twenty million dollars towards affordable housing creation, tenant legal assistance, and job training in science, technology, engineering, and math.²⁶⁵

Google has faced challenges in expanding its current campus in Mountain View, California. A recent plan to develop housing in Mountain View was approved by the city council,²⁶⁶ following a previous rejection by the council of a development plan that included two hundred and forty million dollars in community benefits.²⁶⁷ Further south in San Jose, California, Google is proposing a massive transit-oriented development project.²⁶⁸ Community groups are already meeting on their

263. See COX & LEWIS, *supra* note 260, at 17.

264. Although the agreement was styled as a “Community Compact,” it mirrors the language, style, content, substance, and party intent identical to other recent community benefits agreements. See COMPACT TO INCREASE EQUITY, OPPORTUNITY AND ACCESS IN SILICON VALLEY, *supra* note 251.

265. *Id.*

266. Jonathan Hilburg, *Google Wins Approval in Mountain View for Sweeping Housing Plans*, ARCHITECTS NEWSPAPER (Dec. 14, 2017), <https://archpaper.com/2017/12/google-wins-approval-mountain-view-sweeping-housing/#gallery-0-slide-0>.

267. Susie Cagle, *Why One Silicon Valley City Said “No” to Google: Big Money and Even Bigger Egos are Colliding in the Tech World’s New Company Towns*, NEXT CITY (May 11, 2015), <https://nextcity.org/features/view/why-one-silicon-valley-city-said-no-to-google> [https://perma.cc/4VKJ-JSJA].

268. Reports indicate that Google has already spent over one hundred and forty million dollars for the proposed Google transit village. George Avalos, *East San Jose Town Hall Scrutinizes Google Village Project*, MERCURY NEWS (Aug. 25, 2017, 11:03 AM), <http://bayareane.ws/2kYd9KF> [https://perma.cc/E4T6-NUHN].

own to develop strategies to ensure that the planned development includes benefits for existing residents, not only new arrivals.²⁶⁹

The movement to provide shared community benefits can provide some guidance to the implementation of urban anticipatory governance. Some criticisms of the community benefits agreement process might be ones that anticipatory governance implementers can address and guard against. For example, there are those who argue that developers dominate the community benefits agreement negotiation process, and that developers create the process itself.²⁷⁰

Community forums, town hall events, and focus groups are all tools that can be included in implementing urban anticipatory governance. Developing consensus and driving attendance at such events can be challenging. Borrowing from what scholars in other disciplines have to say about civic engagement and public participation is important in ensuring successful urban anticipatory governance implementation, including scholarly studies about participation in various public processes.

C. Addressing Criticisms of the Urban Anticipatory Governance Framework

A significant criticism of efforts to increase public participation is that the participation by certain majority groups can stifle minority group perspectives. This is an important critique. Another criticism is that participation, especially participation using technology, can be faked. For instance, there is concern that over one million emails sent regarding the recent Federal Communications Commission rule-makings were fraudulent.²⁷¹

Albert Lin discusses how existing anticipatory governance processes regarding the National Nanotechnology Initiative fail to generate necessary upfront assessment of the technology and necessary public participation.²⁷² Lin argues that events that engage the public—like the National Citizens Technology Forum²⁷³—reveal that people have a desire

269. *Id.*

270. See Cagle, *supra* note 267, at 5 (summarizing the critique of community benefits agreement processes presented by Larry Rosenthal that “[w]hat started as a grassroots movement became something that was co-opted by developers and cities themselves.”).

271. James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many Are Fake*, WALL ST. J. (Dec. 12, 2017, 2:13 PM), <https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188> [<https://perma.cc/T2DS-G7T6>].

272. Lin, *supra* note 188, at 1361.

273. A report on the Forum was prepared. PATRICK HAMLETT ET AL., CTR. FOR NANOTECHNOLOGY IN SOC’Y: ARIZ. ST. UNIV., NAT’L CITIZENS’ TECH. FORUM: NANOTECHNOLOGIES AND HUMAN ENHANCEMENT (2008), https://cns.asu.edu/sites/default/files/library_files/lib_hamlettcobb_0.pdf [<https://perma.cc/R2TS-Z8S5>].

and ability to contribute to decisions about technology, and opinion reports generated at such events typically fail to actually shape technology development.²⁷⁴

A possible step is having elected officials publicize their own processes for deciding difficult questions. Lin looks to President George W. Bush's public grappling with the issue of federal funding for stem cells from human embryos.²⁷⁵ The occurrence of the president making a key decision in a public manner can lead towards broad debate among society.²⁷⁶ Lin's recommendations are useful in making sure that the participatory aspect of anticipatory governance actually occurs.

Another tension around educating individuals about a particular issue is the presence of competing normativities. Scholars sum up competing normativities as instances where firmly held values or principles oppose each other.²⁷⁷ If individuals or groups disagree about fundamental values or truths that they hold dear, it can be difficult to pass beneath the surface of the most basic issues.²⁷⁸

Scholars argue that the law ought to take account of the role social norms play in shaping human behavior.²⁷⁹ Cass Sunstein argues for the place of law in what he calls "norm management," or shaping social norms through restrained government intervention.²⁸⁰ How might the government manage norms concerning climate change or infrastructure development for Western water resources? The answer might have something to do with anticipation.

If anticipation means the act of looking forward, it follows that education is a key aspect of learning how exactly to look forward and what to conclude from looking forward. There are two aspects of education: The substance of the education and who does the educating.

It is important to note that the focus on education in this sense is not in the formal role of the state in educating its residents. However, there is a common sense that participants must be educated about decisions at the local level that impact their lives. Put differently, people

274. Lin, *supra* note 188, at 1361.

275. *Id.* at 1365.

276. *Id.*

277. Sarah R. Davies & Cynthia Selin, *Energy Futures: Five Dilemmas of the Practice of Anticipatory Governance*, 6 ENVTL. COMM. 119, 130 (2012) (identifying five tensions involved in public participation around the development of new energy technologies and suggesting ways that these tensions play out in practice).

278. *Id.*

279. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996) (challenging widely held beliefs about rationality, choice, and freedom and arguing that changing norms may be the best way to improve social well-being).

280. *Id.*

who must deal with the consequences of decisions ought to have input into the substance of the decisions.

A barrier to education is competing norms. Overcoming normative objections of residents is a key aspect of deciding which direction forward-looking anticipation should occur. Perhaps one element of gauging the success of forward-looking processes is analyzing the extent to which they avoid competing normativities.

V. CONCLUSION

Revisit in your mind the city you envisioned at the beginning of this Article. There are stories behind each development project, each land use approval, and each controversial new initiative. Given the case studies and examples presented above, it is likely the reader has a fuller idea of what happens from a law, policy, and governance perspective in the development of urban space. The mix of government action, community support or opposition, and industry demands yields a rich texture of competing interests. It is the responsibility of urban governance structures—and ultimately legal frameworks—to solve these complex urban governance challenges.

This Article set out to highlight current procedures used to govern urban challenges, primarily in the context of land use decisions, and to argue for greater resident participation in designing and planning of significant projects. As argued above, residents not only have a desire to participate in the design and planning of the built environment, but as the primary users of these spaces, they have unique wisdom and expertise. Further, working with experts, laypeople have the ability to process complex information and design and implement plans that reflect servicing of human needs in significant ways. The law and legal processes ought not just recognize this but also support it.

An urban anticipatory governance framework is introduced for such a law and regulatory change in practice. How does the city you envisioned look now given the recommended framework? Does it look different? Do residents seem more engaged? Is it the same? Is there still the same degree of confusion and insider power struggle to control public city space?

It is not the expectation that the proposals put forth here will change human nature. Actors will operate in rational self-interest to secure financial and economic gains for themselves and their businesses. Neighbors will still oppose undesirable land uses. Local disputes will not go away.

While all this may remain, the modest hope of such a proposal is that through early on participation and engagement, some residents will see beyond total opposition to important projects. Through offering suggestions to design and implementation, residents may be more

inclined to go along with a project seeing overall benefits despite certain required sacrifices. Also, resident participation—with expert information—may facilitate the sharing of the benefits of development, thus making planning more fair, equitable, and inclusive.

There are many urban governance challenges not addressed in this Article. Many are pervasive and equally deserving of attention. Mass incarceration, immigration reform, and public education all require significant attention and focus, especially in urban areas. This Article has placed attention on urban land use challenges because of the importance they have on how individuals and families access affordable housing, employment, education, and health care.

There are additional controversial land uses in the offing. Transportation infrastructure is one. Specifically, interstate highways are nearing the ends of their expected useful lives. Deciding how, when, where, and in what way to replace highways and bridges in cities are already some of the most pressing urban governance challenges facing state and local government officials.

Lingering in the background is the specter of federal action, or more likely inaction. The current struggle of the Trump Administration to pass an infrastructure plan only delays eventual construction. New technology—including ridesharing—along with declining vehicle miles traveled and declining rates of millennials obtaining drivers' licenses makes planning new transportation infrastructure important, challenging, and potentially divisive. New technology like the hyperloop faces challenges not just from an engineering perspective, but also from a law, regulation, and local participation perspective. Such challenges are beyond the scope of this Article. However, transportation infrastructure design, planning, and implementation raises many issues that the law must respond to and address. Such topics ought to be pursued further.