The Institutional Design of Community Control

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A growing set of social movements has in recent years revived interest in "community control," the idea that local residents should exercise power over services like the police, infrastructure, and schools. These range from a call from the Partnership for Working Families, a grassroots coalition, to build community control through the direct democratic governance of local infrastructure, to the push from the Movement for Black Lives, a racial justice coalition, to institute community control of law enforcement agencies. For these movement reformers, community control grants local communities greater power over both the levers of urban policy-making and the direction of local services and resources. These social movement visions of community control offer a real-time exploration of potentially transformative institutional designs to shift power in a more equitable direction.

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This Article uses two current movement governance proposals—community control of the police and community control of local economic development—to develop a broader, transsubstantive framework for analyzing how local governance institutions might shift power and attempt to redress inequality. We identify three key dimensions along which to analyze the potential for power-shifting and contestation in local governance: the nature of authority, the composition of the governing body, and the moment of authority. Community control may or may not be part of the answer to longstanding structural inequality. But it is still worth exploring the dynamics of local governance that can (or cannot) facilitate contestation, build power, and push back on the antidemocratic structures of law themselves. This Article begins to take on that task.

INTRODUCTION

In June 2018, the Partnership for Working Families, a coalition of grassroots community organizations, launched a multicity campaign challenging urban inequality. The "We Make This City" campaign emphasizes the importance of community control through the direct democratic governance of the city's "infrastructure," including parks, housing, and transit systems.[1] Meanwhile, the Movement for Black Lives, the racial justice collective reshaping advocacy around criminal law and policing,[2] has called for "[d]irect democratic community control of local, state, and federal law enforcement agencies," with a transfer of power to "communities most harmed by destructive policing."[3] Both of these calls for community control are part of a larger struggle in which grassroots groups working for racial and economic justice in the United States have sought to transform the relationship between the state and marginalized groups—especially poor people of color—by designing institutionalized forms of engaging in contestation and exercising countervailing power.

The calls of social movements for community control are particularly loud in the areas of policing and local economic development. Take policing: from Chicago to Oakland to Houston to Nashville, local grassroots groups have pushed for civilian commissions that transfer power from the police to the communities most affected by mass incarceration.[4] These institutions of community control would then have the ability to set policies, discipline officers, and control police budgets.[5] Although "civilian review" of policing has for decades been a mainstay in national police reform efforts,[6] the current push for

1. *The Problem & Solution*, P'SHIP FOR WORKING FAMILIES, WE MAKE THIS CITY, http://wemakethiscity.org/the-problem-solution [https://perma.cc/88NX-WSBY]; *see also* P'SHIP FOR WORKING FAMILIES, WE MAKE THIS CITY: CAMPAIGN LAUNCH TOOLKIT (2018) (on file with authors) (emphasizing same campaign focal points).

2. For a history of the formation of the Movement for Black Lives and the other organizations that make up the Black Lives Matter Movement, see BARBARA RANSBY, MAKING ALL BLACK LIVES MATTER 1–10 (2018).

3. *Community Control*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/community-control [https://perma.cc/6VA8-MRSN].

4. *See generally* Ted Alcorn, *Who Will Hold the Police Accountable?*, ATLANTIC (July 25, 2019), https://www.theatlantic.com/politics/archive/2019/07/battle-over-police-accountability/594484/ [https://perma.cc/85BP-Z2V7] (discussing local efforts to hold police accountable in various U.S. cities).

5. *See generally* M Adams & Max Rameau, *Black Community Control over Police*, 2016 WIS. L. REV. 515, 530–38 (laying out the current arguments for community control over the police); Larry Redmond, *Why We Need Community Control of the Police*, 21 LOY. PUB. INT. L. REP. 226 (2015) (detailing the push for community control of the police in Chicago, New Orleans, Detroit, Berkeley, and Minneapolis); *Community Control*, *supra* note 3.

6. *See generally* SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT (2001) (documenting the history of civilian oversight and civilian review in the United States); JOSEPH DE ANGELIS ET AL., OJP DAGNOSTIC CTR. & NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF LAW ENF'T, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT (2016),

community control over policing has a more direct focus on shifting power over policing policies down to the people most affected by everyday policing.[7] Grassroots organizations are similarly seeking control over local governance in the area of local development. In places like Oakland, Detroit, and New York, movement actors are running neighborhood planning meetings to offer a homegrown alternative to major urban redevelopment plans developed by city officials. With pressure from these groups, some of these cities have created new commissions comprised of community members themselves, with the power to oversee and monitor major development projects.[8] As with policing, these activists are increasingly searching for ways to create tangible methods of control over local governance, rather than seeking only influence or input.

This Article uses these two examples of current pushes for community control over policing and economic development to develop a transsubstantive framework[9] for analyzing institutions of local governance aimed at shifting power and redressing inequality. With their pushes for community control, social movement actors aim to accomplish two transformative goals: first, contesting deep structural inequalities of race and class; and second, building and institutionalizing more direct forms of control over local governance. The degree to which such new governance arrangements actually shift power downwards turns a great deal on institutional design questions. Imagine local officials propose building a new institution of local governance—one which claims to allow "communities" to "participate" in an important city function or service— with the explicit goal of countering systemic inequalities. Imagine further that this new institution decenters decision-making to a neighborhood or district within a larger locality.[10] This new institution likely (or hopefully) provides some form of community representation on a decision-making body and, in doing so, shifts some share of formal authority to traditionally powerless constituencies. On the surface, this looks like a radical, democratizing transformation that empowers local residents. But whether real power-shifting is taking place depends on a number of factors. The distinction between

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https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/161/attachments/original/1481727977/NACOLE _short_doc_FINAL.pdf?1481727977 [https://perma.cc/TB4M-ZQZY] (reviewing models of contemporary civilian oversight of the police).

  7.   *Cf.* Adams & Rameau, *supra* note 5, at 538 ("To be perfectly clear, this is not a call for some type of civilian investigative, oversight, or review board. With full control over the police, civilian review is redundant and unnecessary.").

  8.   *See* K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 345–51 (2018) [hereinafter Rahman, *Policymaking*].

  9.   *See generally* David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1191 (defining transsubstantive as "doctrine that, in form and manner of application, does not vary from one substantive context to the next").

  10.   *See* Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 509–21, 531–32 (1997) (defining structures of sublocal governance); Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1327–29 (2014) (identifying the burgeoning of "new local" legal institutions at the sublocal level).

democratizing reforms and mere window dressing turns in large part on the specifics of institutional design.

In this Article, we place this analysis of governance solutions and their design at the forefront. We approach this task not by proposing ideal forms of governance from first principles, but rather by looking to the efforts of social movement actors on the ground as they continually reimagine and redesign local institutional arrangements. Drawing on each of our own works studying bottom-up resistance in criminal legal institutions[11] and the democratization of economic governance,[12] we focus on renewed calls for community control within two distinct areas of law and localized political debate: policing and urban development. By looking to current campaigns for institutional reform for insight, this Article excavates specific tools and approaches that scholars can and should incorporate into discussions of how to not simply address, but rather to redress, the complex interactions between law, power, structure, and inequality.

We identify three key dimensions along which to analyze the potential for power-shifting and contestation in local governance: the nature of authority, the composition of the governing body, and the moment of authority. The first of these dimensions is the *nature of authority*, a level of analysis that zeroes in on the extent to which a local governance institution possesses power over, or merely input into, its domain of authority. This level of analysis also assesses whether that power of authority governs an area of governance with connections to deep structural drivers of inequality or distribution. The second dimension, the *composition* of the governing body, looks directly at whether there are safeguards in place to ensure that traditionally powerless populations are represented on the governing body and whether those participants are truly independent, thus facilitating forms of contestation from below that might otherwise be silenced. And the third dimension, the *moment of authority*, asks whether the governing body's decision-making occurs upstream, affecting the wider distribution of resources or services, or downstream, focusing on a more restricted or incremental range of decisions. Taken together, these three dimensions provide a way to conceptualize power-building with reference to specific institutional mechanisms and strategies, and they lay bare instances in which local institutions that claim to encourage participation from below may in fact foreclose real contestation and structural change.

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11. *See, e.g.*, Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016); Jocelyn Simonson, *Democratizing Criminal Justice through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017) [hereinafter Simonson, *Democratizing Criminal Justice*]; Jocelyn Simonson, *The Criminal Court Audience in a Post-trial World*, 127 HARV. L. REV. 2173 (2014); Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) [hereinafter Simonson, *The Place of "the People"*]; *see also* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. (forthcoming 2021) (in a parallel work, analyzing power-shifting in governance in police reform).

12. *See, e.g.*, K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2017) [hereinafter RAHMAN, DEMOCRACY AGAINST DOMINATION]; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018); Rahman, *Policymaking*, *supra* note 8.

Our examples of policing and economic development are not meant to be definitive case studies, but rather intended to illustrate broader themes of power, contestation, and bottom-up democratic control animating the efforts of movement activists. One important (though not the only) implication of our analysis is that building genuine power may require more than conventional processes of civic engagement exemplified by the reigning ideals of community policing and civic engagement in urban planning decisions. It may require instead a power-oriented view of participation that focuses on the ability of historically disempowered groups to engage in forms of contestation that move beyond oppositional politics to institutionalize power. We have each argued in the past that certain realms of law are constitutive of citizenship and democracy as much as they are informed by them.[13] We do not defend those claims in detail in this Article. Instead, we look forward toward potential antidotes to the antidemocratic nature of many systems of law and governance, honing in on ways structures of governance can (or cannot) build power and push back on the antidemocratic structures of law themselves.

Questions of democratic institutional design are, of course, a central matter of concern for public law, including questions of balancing factional power, preventing interest group capture, and assuring responsive and accountable forms of governance.[14] But viewing these institutional design questions from the vantage point of on-the-ground social movements complements these familiar literatures in several key ways. First, it is interesting to see how grassroots actors and policy-makers alike develop institutional designs and innovations organically in real time—often without direct engagement with legal expertise, yet formulating institutions that capture and deepen many of the familiar insights of legal institutional design debates. We will have more to say about the potential of greater interaction between legal scholarship and movements in Part IV

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13. *See, e.g.*, RAHMAN, DEMOCRACY AGAINST DOMINATION, *supra* note 12, at 139–65 (explaining how democratic agency can inform the regulatory process); Simonson, *Democratizing Criminal Justice*, *supra* note 11, at 1610–12 (arguing that the criminal legal system is antidemocratic at multiple levels).

14. The literature here is voluminous. *See generally* STEPHEN P. CROLEY, REGULATION AND PUBLIC INTERESTS (2008) (describing institutional design and democracy challenges in the administrative state); PREVENTING REGULATORY CAPTURE (Daniel Carpenter & David A. Moss eds., 2014) (outlining novel approaches to ensuring democratic accountability and preventing interest-group capture in bureaucratic governance); ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL (2007) (summarizing how institutional design choices advance various democratic goals); Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002 (2017) (examining structural features of the institutional design of agencies); Archon Fung, *Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 J. POL. PHIL. 338 (2003) (describing design principles for participatory governance mechanisms); Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (synthesizing literatures on the design choices that should inform regulatory institutional structure); Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631 (2017) (describing mechanisms for entrenching balance of political power in constitutional design to improve rule of law and stability).

below. Second, these real-time policy fights represent attempts to balance the need to transform structural power relations on the one hand, and to do so in ways that are concrete, discrete, and connected to on-the-ground realities on the other. And so, there is something distinctive about power-shifting institutional designs arising from the bottom up and at the local level, rather than through the more rarefied debates about constitutional structure.

Our analytic framework does not offer any magic bullets. We do not, in this Article at least, claim that these tools and methods are necessarily the best or most productive approaches to local governance, or to governance on any level. Nor do we intend to stake a ground firmly within the scholarly debate over the merits of localism with respect to state or federal governance.[15] Policing, for example, has been notoriously resistant to change via community oversight,[16] and has at times proven amenable to both state and federal oversight.[17] Our claim, instead, is that we should not be too quick to abandon the promise of "community control": facilitating communal contestation over drivers of structural inequality through the design of local institutions. To return to the example of policing, it is often easy to dismiss the idea of community oversight by pointing to the historical failure of civilian review of police departments.[18] However, to lump the concept of community oversight into one limited historical trajectory is to miss out on the variety of dimensions along which community oversight of policing can operate. It also ignores the ways in which oversight institutions with varying designs have historically ceded, or more frequently not ceded, real power over structure to policed populations.[19] In policing, in local economic development, and in any number of policy areas, social movement visions of institutional design can help demonstrate the range of governance options—the roads not taken—that are worth taking seriously in any effort to combat structural inequality.

That the social movement visions of governance we study are taking place largely at the local level is nevertheless significant. Policing and economic

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15.   *See generally* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 963–84 (2019) (laying out the current state of that debate).

16.   *See generally* WALKER, *supra* note 6, at 44–45 (expressing ambivalence over the success of civilian oversight of policing); Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1034 (2016) ("[T]here is a growing feeling that these [civilian oversight] institutions have too often failed when it comes to overseeing police departments.").

17.   *See* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015); Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999 (2020); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015).

18.   *See* WALKER, *supra* note 6, at 44–45.

19.   *Cf.* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 114–20 (2008) (arguing that reigning ideas about, and approaches to, democratic policing as "community policing" are limited in their ability to combat inequality, and mask other ways of thinking about democracy and policing); Simonson, *Copwatching*, *supra* note 11, at 400–05 (arguing that community policing reinscribes existing power imbalances more than it shifts them).

development are two quintessentially "local" matters of public policy.[20] They also manifest deeper, systemic concerns regarding the spatial nature of structural racism and economic inequality.[21] The institutions of local governance, being more plastic and porous, seem to offer movement actors more opportunities than do national politics for potentially transformative institutional change.[22] Indeed, as cities and states have become the focal point for progressive politics in the age of President Donald Trump, the resources of social movements are increasingly targeted at shifting the levers of power in local governance.[23] While in some sense these interventions might seem small scale and modest, there is another way in which they represent bold proof-of-concept campaigns and stepping stones toward more transformational change that can be scaled up in the future.[24]

At the same time, social movement actors recognize that localities have historically been central to the construction of systemic racial and economic inequality.[25] There are, therefore, dangers in relying on localism as a panacea

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20. *See* RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A DIGITAL AGE 253 (2016) (describing "security, education, transportation, health, and shelter" as the "basic and obvious" central urban goods); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 58, 80–85 (1998) (observing that policing is a typical city service and analyzing the relationship between crime prevention and economic development); Harmon, *supra* note 17, at 877 ("Localism may be American policing's most distinctive characteristic . . . ." (citing William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 665 (2002))).

21. *See generally* David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 MARQ. L. REV. 601, 603 (2018) (describing the role of place-based differences in the creation and perpetuation of structural inequality); *see also infra* Part II.B.

22. *See* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 625–27 (2017) (analyzing local bureaucracies as potential sites of democratic engagement, as well as exclusion); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7–8, 24–25 (2010) [hereinafter Gerken, *Federalism All the Way Down*] (describing the benefits of allowing minorities to exercise a "muscular form of voice" within institutions at the sublocal level); Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 130–32 (2017) (arguing that city power and local political participation have the potential to counter economic inequality caused by market capitalism).

23. *See, e.g.*, ROXANA TYNAN ET AL., L.A. ALLIANCE FOR NEW ECON. ET AL., UNMASKING THE HIDDEN POWER OF CITIES 2, 7–18 (2018), https://laane.org/wp-content/uploads/2018/06/Unmasking-the-Hidden-Power-of-Cities.pdf [https://perma.cc/G9YF-QZ82] (identifying "the seven core legal powers of local governments to identify the potential scale of impact" on progressive policy-making). This turn to the local has been a focal point for social justice movements even before the Trump Administration. *See, e.g.*, MANUEL PASTOR, JR. ET AL., THIS COULD BE THE START OF SOMETHING BIG: HOW SOCIAL MOVEMENTS FOR REGIONAL EQUITY ARE RESHAPING METROPOLITAN AMERICA (2009) (describing the modern turn by progressive social movements to focus on urban and regional politics as a way to pioneer inclusive public policy); SCHRAGGER, *supra* note 20, at 165 (describing the potentially expansive power cities have to address issues of economic inequality, racial discrimination, and more in the modern context).

24. On the "right to the city" and urban political movements, see Richard Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231, 237–42 (2013).

25. *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 453 (1990) ("[A]n absolute commitment to local autonomy is not a basis for a progressive social transformation but rather can be an obstacle to efforts to reduce inequality and ameliorate class and race antagonisms."); Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413,

without also examining whether new or reformed local institutions are truly addressing historical inequalities along axes of power and structure.[26] Even the word "community" is itself fraught, carrying with it associative dangers of vagueness and co-optation.[27] But we use the movement term of "community control" throughout this Article because it is itself a way through which movement actors are reclaiming and redefining what they see as a more inclusionary view of what community should be. By putting forth new local institutional designs and making a claim on the definition of "community," social movements are engaging in real time with longstanding debates over the benefits and drawbacks of local governance solutions to structural inequality.

Our analysis is indebted to legal scholars who have paved the way for us, including Heather K. Gerken's pioneering theorizing of issues of power and composition in local decision-making bodies[28] and the approach of democratic experimentalism, in which scholars have looked to the reform of institutional practices as a way of revisiting dominant ideas of how legal change happens,

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450–64 (2017) (describing how local government structures mirrored, and at times exacerbated, racial anxiety during Reconstruction); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994) (describing the "oppressive and disempowering" nature of boundary-drawing in local government).

26.   *See* Briffault, *supra* note 10, at 508–09 (analyzing the drawbacks of sublocal structures, which may "tend to enhance the place of private interests in urban governance"); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1987–90 (2000) (describing how localism and the fragmentation of governance can place more resources in the hands of the already-privileged and exclude marginalized populations, especially poor people of color); Davidson, *supra* note 15, at 958 ("[A]s much as local governments can advance economic fairness, social justice, and policy innovation, they can – and often do – use their power as a tool of exclusion, reinforcing racial and socioeconomic inequality."); Farbman, *supra* note 25, at 495 ("One person's local control is another person's tyranny."); Shoked, *supra* note 10, at 1380 ("Micro-localism can only engage residents in participatory politics if real political powers, pertaining to issues that 'matter,' are delegated to them.").

27.   *Cf.* LAURA I APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION 70–91 (2015) (discussing the difficulties with defining community in relation to criminal justice); Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. REV. 343, 349–64 (critiquing the idea of community in the context of the restorative justice and "community justice" movements).

28.   *See* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1746 (2005) [hereinafter Gerken, *Dissenting by Deciding*] (considering how dissenting minorities potentially influence state decision-making); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1164 (2005) [hereinafter Gerken, *Second-Order Diversity*] (discussing how minority groups "have a chance to exercise control in making democratic judgments" at the intralocal level).

especially at the local level.[29] And we are inspired by efforts both old[30] and new[31] to use the visions and practices of social movement actors at "the bottom"[32] as a source of inspiration, example, and analysis.[33] Our approach builds off of these theories and methodologies, opening up what we hope is a new way of conceptualizing the interaction between localized power, structure, and governance. Our framework asks scholars to pay closer attention to the specific levers of power over which historically disempowered groups seek control, asking not just whether shifting power downward makes sense, but also how those shifts can (or cannot) be institutionalized.[34]

The rest of this Article proceeds as follows. Part I begins by laying out a conception of contestatory participation in local governance, and connecting that idea of contestation as power-building to broader goals of democracy and equality. Part II turns to the contemporary movement landscape, exploring two examples of social movement visions of "community control": policing and local economic development. These two examples are indicative of the ways in which social movements are imagining new institutional arrangements that shift political power in an effort to combat structural inequality. Part III then builds on these examples to present a set of conceptual tools for theorizing power-building in local institutional design. We present a taxonomy of three dimensions of the relationship between structure and power that can facilitate a deeper examination of the potential for building power and contesting structure in deep

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29.   *See* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 477 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

30.   *See, e.g.*, Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987) (suggesting that legal scholars could study "the actual experience, history, culture, and intellectual tradition of people of color in America" to create critical legal theories from the bottom, rather than from the top, of power).

31.   *See, e.g.*, STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie E. White & Jeremy Perelman eds., 2011) [hereinafter STONES OF HOPE]; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 473 (2018) ("[S]ocial movement imaginations . . . invest us in a creative, imaginative project sorely missing from law scholarship."); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. Rev. 1464, 1468 (2017) ("In this particular moment in American political culture, the propagation of accounts of activists and lawyers engaged in creative social justice campaigns is a worthy end in and of itself.").

32.   Matsuda, *supra* note 30, at 324 ("Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.").

33.   *Cf.* Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. Rev. 1554 (2017) (arguing that one function of studying the interaction between law and social movements is to facilitate an analysis of the complex relationship between law and democracy).

34.   *Cf.* Davidson, *supra* note 22, at 626 (arguing for the importance in local government law scholarship of returning to "basic questions of community, participation, and exclusion"); Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 112–42 (2016) (calling for legal scholars to pay closer attention to the mechanisms of power and power-shifting in institutions of public law).

and enduring ways. These dimensions emerge from the examples explored in Part II, and resonate with previous scholarly explorations of democratic and participatory governance. In Part IV, we explore our approach's implications for current debates in policy reform and legal scholarship, particularly regarding the revived interest in power and institutional design in public law, the new literatures on cities and local government law, research on law and social movements, and the burgeoning focus on local strategies for change in both criminal law and economic development scholarship. We conclude by suggesting that scholarly and political hesitancy around community control may be rooted less in the supposed inability of communities to exercise effective control over complex structural dynamics, and more in an elite suspicion of, and hesitancy with, bottom-up democracy itself—what we term a problem of "demophobia."

I.

POWER, STRUCTURE, AND DEMOCRATIC CONTESTATION

In this Part, we briefly present a set of interlocking ideas about democracy, contestation, structure, and power inspired by both scholarly conversations and social movement strategies. We center the relationship between communal contestation and structural inequality, setting the stage for the study in Parts II and III of current efforts of social movement actors to institutionalize local power.

A.   *Conceptualizing Democratic Contestation*

What is contestation, and how does it build power? We begin in this Part by focusing in on a conception of democratic participation that prioritizes contestation over consensus, with special attention to power imbalances among different populations within a polity.[35] In this approach to democratization, the goal of democratic institutions is not necessarily to forge consensus or agreement. Rather, our emphasis is on institutional structures that catalyze and facilitate greater contestation of governmental decisions, particularly by disempowered or marginalized constituencies. We start from the premise that in the lived reality of modern-day democracy, some constituencies already possess greater capacity for power and influence. The task of democratizing reform then

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35.   There are vast scholarly literatures recounting efforts to improve civic engagement, grassroots participation, and collaboration between communities on the one hand, and policy-makers on the other. Although the literature is too vast to be summarized here, for a good overview of these debates, see generally JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION (2009) (summarizing the developments in deliberative democracy theory and real-world examples of deliberative and participatory governance in action); BETH SIMONE NOVECK, SMART CITIZENS, SMARTER STATE 4–7 (2015) (describing the rise of the "Civic Science" movement and efforts to improve participation and civic engagement in government policy-making); Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216 (1969); Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. 66 (2006).

is to better enable countervailing interests and community groups to assert their views, to hold governments and other actors to account, and to claim a share of governing power. As a variety of democratic theorists have argued, such contestation is essential to holding government and economic elites accountable.[36] More than that, it is necessary to shift and build countervailing political power in a world characterized by profound inequality.

By focusing on inequality, our account of the benefits of collective contestation differs somewhat from leading accounts.[37] By contestation, we generally mean any form of political action that involves direct opposition to reigning laws, policies, or state practices. But we also mean to focus in on contestation from populations and communities that have historically had a reduced voice in generating reigning ideas about how to govern and how to distribute state resources, including local services such as policing and housing. This account of contestation comes close to what Chantal Mouffe terms *agonistic politics*, in that it involves political opposition to hegemonic ideas that uphold dominant and oppressive political structures.[38] Moreover, as in Mouffe's account of agonism, the action happens in an adversarial manner but within the bounds of current political structures.[39] But by using the word contestation, we also mean to invoke the broader idea that building countervailing political power is itself a goal of legal and political change; when relatively powerless people or groups engage in contestatory practices, it can lead to the building of political agency and the remedying of power imbalances.[40] This account is spelled out in more detail in our past work, in which we have both focused on a view of democracy that emphasizes not participation for its own sake, but rather contestatory participation that shifts and builds countervailing political power.[41]

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36. *See, e.g.*, CHANTAL MOUFFE, AGONISTICS 1–18 (2013) (arguing that contestation is necessary to overcome dominant, elite hegemonic ideas and social arrangements); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (David Miller & Alan Ryan eds., photo. reprt. 2002) (1997) (articulating a modern theory of republicanism where political legitimacy and freedom are premised on the ability of citizens to contest the actions of the state).

37. *See, e.g.*, PETTIT, *supra* note 36.

38. MOUFFE, *supra* note 36, at 1–18; *see also* Simonson, *Copwatching, supra* note 11, at 435–36 (using the lens of agonism to argue for the importance of respecting the practice of organized copwatching by marginalized populations).

39. *See* MOUFFE, *supra* note 36, at 51 (identifying the preservation of democratic spaces as necessary for agonism); Simonson, *Copwatching, supra* note 11, at 437 (describing how agonistic contestation happens "through civic engagement with the processes in place").

40. The links between social movement mobilizations and longer-term power-building is a key theme for social movement scholars. *See, e.g.*, HAHRIE HAN, HOW ORGANIZATIONS DEVELOP ACTIVISTS (2014) (describing different organizational structures of social movements and advocacy groups, and how they can build long-term power); K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER (2019) (arguing that democratic contestation can build durable power and redress power imbalances by establishing more effective civil society organizations and more participatory governance institutions).

41. *See, e.g.*, Simonson, *Democratizing Criminal Justice, supra* note 11; Simonson, *The Place of "the People," supra* note 11; RAHMAN, DEMOCRACY AGAINST DOMINATION, *supra* note 12, at 105–08.

This Article focuses on how collective contestation can potentially happen *within* institutions of governance, in ways that give historically disempowered populations power over the very levers of decision-making that control the distribution of local resources.[42] To be sure, productive collective contestation can happen in multiple forms, including bottom-up participation in everyday adjudication,[43] large-scale litigation,[44] and communal forms of organization and protest outside of formal state channels.[45] But local governance in particular has the potential to generate political power over the institutions that are closest to everyday decisions about the distribution of services and resources. Heather Gerken has long explored how local decision-making by political minorities— "dissenting by deciding"—can have the benefit of mixing real power-wielding with contestation over broader political priorities and ideals.[46] And, in a different vein, the global municipalist movement has recently focused in on the potential of movement control over institutions of local governance as a way to distribute both power and resources.[47] One of our goals in this Article is to use the governance designs put forth by political minorities themselves to explore institutional forms that can (or cannot) provide mechanisms of dissenting by deciding—asking not just if those groups are doing the deciding, but also exploring the relationship between those decisions and larger issues of structural exclusion and group power.

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42.   *Cf.* Levinson, *supra* note 34, at 83–92 (arguing for the importance of tracing power-shifting through institutions).

43.   *See, e.g.*, Simonson, *The Place of "the People," supra* note 11, at 287–90 (describing communal forms of contestation in everyday criminal adjudication).

44.   *See, e.g.*, Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (describing how losing litigation may be beneficial for social movements); Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 809–18 (2016) (suggesting that community participation in consent decrees may help shift power when litigation outcomes fail to reform police-community relations).

45.   *See, e.g.*, Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 62–63 (2011) (describing forms of communal governance outside of the state); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2762–77 (2014) (describing how Fannie Lou Hamer and other activists with the Mississippi Freedom Democratic Party engaged in collective contestation over the meaning of political representation); Simonson, *Copwatching*, *supra* note 11, at 407–27 (focusing on collective contestation from organized copwatching groups).

46.   *See* Gerken, *Dissenting by Deciding*, *supra* note 28, at 1777 (describing dissent of local decision-making bodies as "both an act of affiliation and an act of contestation"); *see also* Gerken, *Federalism All the Way Down*, *supra* note 22, at 65 ("Dissenting by deciding . . . represents an intriguing blend of loyalty and rebellion. It fuses an act of governance with an act of contestation.").

47.   *See* Bertie Russell, *Fearless Cities Municipalism: Experiments in Autogestion*, OPEN DEMOCRACY (Feb. 21, 2019), https://www.opendemocracy.net/en/can-europe-make-it/fearless-cities-municipalism-experiments-in-autogestion/ [https://perma.cc/86LZ-8J9D] (describing the use of local governance to "transform[] the institution itself and its mechanisms in order to distribute power" (citation omitted)); Christian Iaione & Elena De Nictolis, *Urban Pooling*, 44 FORDHAM URB. L.J. 665, 686–87 (2017) (describing how social movements, especially in Europe, have "evolved from the early resistance mode" toward building municipal platforms).

When we speak of power in this article, we are thinking of direct political power: the ability of a person, or a group of people in our case,[48] to influence policy outcomes and control the distribution of state resources. This is a strong view of power; one that, to paraphrase Max Weber, requires that a group of people be able to enact their policy despite resistance to it.[49] Power in this reading requires the ability to make decisions that stick,[50] whether it is through the power to enact policy, what Daryl Levinson calls "capacity," or the power to check state actors, what Levinson calls "control."[51] Other forms of power exist—the power to shape ideology[52] or the power to build political capacity through organizing.[53] But our focus is on a strong version of political power, one that allows us to highlight both current inequalities in political power, and the difference between contestatory and consensus-based methods of political participation.[54] It also allows us to differentiate our analysis from a more general call for populism, for the creation of institutions that will raise up an exclusionary ideal of "the people" in the name of us all.[55] To the contrary, a focus on contestation as power-wielding demonstrates the multifaceted nature of "the people" and the necessity of creating institutions that aim to equalize power among the many different groups within a polity.[56]

This conceptual approach to thinking about democracy and contestation in governance is valuable in an era in which disparities in political power magnify pervasive inequalities.[57] It also points toward the need to reform democratic

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48. *Cf.* Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 36 (2011) ("We each have in our bodies the power to move stones, but if we can coordinate our bodies with other bodies, we have the power to build cities. This, crudely, is why power comes from organizing people.").

49. *See* MAX WEBER, ECONOMY AND SOCIETY 53 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. eds., 1968) ("Power . . . is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance . . . .").

50. STEVEN LUKES, POWER (2d ed. 2005) (distinguishing between decision-making and non-decision-making power).

51. Levinson, *supra* note 34, at 46–48.

52. LUKES, *supra* note 50, at 7–8.

53. Grinthal, *supra* note 48, at 34 (defining "organizing as the processes by which people build and exercise power by collecting and activating relationships").

54. *Cf.* CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 33–34 (photo. reprt. 2009) (2005) ("Instead of trying to erase the traces of power and exclusion, democratic politics requires us to bring them to the fore, to make them visible so that they can enter the terrain of contestation.").

55. *See* JAN-WERNER MÜLLER, WHAT IS POPULISM? 3–4 (2016) (describing a core belief of populism that only some of the people are truly "the people"). *But see* Jason Frank, *Populism Isn't the Problem*, BOS. REV. (Aug. 15, 2018), http://bostonreview.net/politics/jason-frank-populism-not-the-problem [https://perma.cc/454M-W4E3] (arguing that it is dangerous to equate authoritarianism with populism).

56. *Cf.* Simonson, *The Place of "the People," supra* note 11, at 287–90 (expanding on this idea in the context of criminal adjudication).

57. *See, e.g.*, Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 421 (2015) ("Rising inequality has been accompanied by the concentration, or reconcentration, of political power among wealthy individuals . . . ."); Levinson, *supra* note 34, at 134–40; Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional*

institutions in ways that better balance political power. If power is made a central concern, then the solution involves less focus on "substantive" policy answers, and more on the institutional configurations that can alter the balance of who governs. Indeed, as we describe in Part I.B, it is precisely because structural forms of inequality are so vast and diffuse that they are so difficult to contest. In order to counteract these structural forms of inequality, affected constituencies, particularly those that are historically disempowered and underresourced, may need to build institutions through which they can exercise power. For example, recent debates about the future of worker organizing have noted the importance of building durable civil society and state institutional structures through which workers can effectively influence governance.[58] And it is hard to imagine how minority or poorer communities in a gentrifying city can win more favorable policies without community organizing to build their influence—and without city or even regional institutions through which they can affect the larger processes of zoning, planning, and urban development.[59] Institutional design is therefore key to making such bottom-up contestation possible.[60]

B.   *The View From Social Movements: Power Over Structure*

These normative concepts of contestation and control find expression among social movements seeking to radically democratize policy-making. Grassroots groups working for racial and economic justice in the United States have for decades sought to put forward methods of transforming the relationship between the state and marginalized groups, especially poor people of color. These social movements have long used a "structural" lens, where the causes of inequality, racial disparities, and even violence cannot be reduced to the actions of individual people or policies. Instead, a structural approach centers on the relations of power over time, on the interactions between seemingly disparate policy areas, and on how ideologies that separate out class from race, or race from gender, reify the inequalities around us.[61] For example, policies of racial

Theory, 101 CORNELL L. REV. 1445, at 1467–71 (2016); *cf.* Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 352–70 (2016) (theorizing the relationship between poverty and a political powerlessness).

58.   *See, e.g.*, Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623 (2016); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013); KATE ANDRIAS & BRISHEN ROGERS, REBUILDING WORKER VOICE IN TODAY'S ECONOMY, ROOSEVELT INST. (Aug. 2018), https://rooseveltinstitute.org/wp-content/uploads/2018/07/Rebuilding-Worker-Voices-final-2.pdf [https://perma.cc/T84M-9Y7V].

59.   *Cf.* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 68–69 (2013) (describing the importance of regional governance structures in an era of interregional mobility).

60.   *See, e.g.*, JOHN P. MCCORMICK, MACHIAVELLIAN DEMOCRACY (2011) (arguing for institutional designs to empower the people to hold business and political elites accountable).

61.   *See* Akbar, *supra* note 31, at 435–60; Gary L. Blasi, *What's A Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1085–94 (1994); Scott L.

discrimination and exclusion in housing, zoning, and urban planning have created shockingly persistent patterns of racial and economic segregation, and intergenerationally depressed upward mobility and wages.[62] And in the realm of criminal law, there is a toxic interaction between systems of mass incarceration, state austerity, privatization, and continued racial subordination and exclusion.[63] This structural diagnosis of the problems of inequality and exclusion is important for shaping movement visions of democratic control: if the problems are structural in nature, then for democratic control to make a difference, that control must be designed in ways that can tackle pervasive structural forces.[64]

The Movement for Black Lives (M4BL), a grassroots coalition of more than fifty organizations from across the United States, exemplifies this structural approach.[65] Although M4BL emerged as a response to police violence against people of color,[66] its vision for change goes well beyond the idea of police violence to look at transforming the overall relationship between the state and the marginalized people who are most often the victims of police violence. In the words of activists from Black Youth Project 100, an organization that is part of M4BL: "America's economic system has systematically failed Black communities for whole lifetimes with discriminatory policies; investment in policing, surveillance, incarceration; and chronic underinvestment in our

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Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 480–87 (2001) (exploring the challenges movements face in organizing around structural issues).

    62.   *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) [hereinafter ROTHSTEIN, THE COLOR OF LAW] (describing how the U.S. government enacted and enforced racially discriminatory policies in housing and zoning throughout America); PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013) (describing how geographic patterns of birth and residency have intergenerational effects on wealth and mobility especially for communities of color); Troutt, *supra* note 21.

    63.   *See generally* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) (describing the political economy of the prison boom in California); Akbar, *supra* note 31, at 421–60 (describing connections between American policing and larger systems of racial and economic domination); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (describing the structural conditions, including racial isolation and class marginalization, that undergird the estrangement of poor people of color from the police); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (describing the interdependence of the criminal and welfare states); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017) (describing the spiraling interactions between democratic inequalities, the criminal legal system, and white supremacy).

    64.   *Cf.* Charles F. Sabel & William H. Simon, *The Duty for Responsible Administration and the Problem of Police Accountability*, 33 YALE J. ON REG. 165, 205 (2016) (considering race discrimination in the juvenile justice system as an example supporting the idea that "[s]ometimes the most effective way to vindicate civil rights values is to change an institution's core practices").

    65.   *See About Us*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/about/ [https://perma.cc/CTG2-BTR3].

    66.   *Id.* For histories of this emergence, see also RANSBY, *supra* note 2, at 1–10 (describing the founding organizations of the Black Lives Matter movement); KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 153–91 (2016); Akbar, *supra* note 31, at 421–23 (describing the rise of the Movement for Black Lives).

livelihood."[67] As Amna Akbar has highlighted in recent work, this structural vision of the problem with policing departs substantially from mainstream accounts, in particular because M4BL brings with it deep critiques of the interlocking set of systems of oppression that lead to police violence.[68]

M4BL's broad diagnosis of the drivers of racial inequality led it to put forth a set of sophisticated and far-reaching demands called the Vision for Black Lives.[69] M4BL critiques standard reforms that merely tweak the current landscape of policing, including community policing, putting forth instead a vision of a criminal legal system transformed to serve the people it claims to protect.[70] Inspired by Black intellectual movements of the past,[71] these social movement actors are seeking out "transformative" or "nonreformist" reforms that shift power and wealth in concrete ways.[72]

The strategies of M4BL member organizations are transsubstantive: they cut across and link together multiple issue areas as codeterminants of a deeper problem of historical inequalities and oppression. Consider, for example, the "Invest/Divest" strategy of many M4BL member organizations.[73] Activist groups in cities around the United States are demanding that local governments reduce spending on policing and increase investment in poor communities in other ways, for example through schooling, health care, infrastructure, and social services.[74] The demand to Invest/Divest is deeply connected to a sense that, historically, overpolicing and underinvestment in communities of color have gone hand in hand. Under this view, the mass incarceration and prosecution of poor people of color are inseparable from the ways in which the state abandoned their neighborhoods by denying them basic education, housing, and other forms

67.   *Our Impact*, BLACK YOUTH PROJECT 100 (2019), https://byp100.org/our-impact/ [https://perma.cc/DPA5-HGN8].

68.   Akbar, *supra* note 31, at 411–15.

69.   *See Platform*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/platform/ [https://perma.cc/WSN6-QDTM].

70.   *See* Mariame Kaba, Opinion, *Police "Reforms" You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), http://www.truth-out.org/opinion/item/27852-police-reforms-you-should-always-oppose [https://perma.cc/4FCV-TCSE]; *cf.* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) ("The most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct.").

71.   *See generally* CHRISTOPHER J. LEBRON, THE MAKING OF BLACK LIVES MATTER (2017) (describing the intellectual history of the Black Lives Matter movement); TAYLOR, *supra* note 66, at 153–91 (same).

72.   Ruth Wilson Gilmore describes "nonreformist reform" as "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization." GILMORE, *supra* note 63, at 242; *see also* ANDRÉ GORZ, STRATEGY FOR LABOR 6 (Martin A. Nicolaus and Victoria Ortiz trans., 1967) (presenting a theory of "reforms which advance toward a radical transformation of society").

73.   *E.g.*, KATE HAMAJI ET AL., THE CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES 1, 4 (2017), https://populardemocracy.org/sites/default/files/Freedom To Thrive%2C Higher Res Version.pdf [https://perma.cc/6R4Q-RUUR].

74.   *Id.*

of social support.[75] Nor can the issue be reduced to government spending on people of color; instead it is wound up in deep study of how the state treats women, children, queer people, immigrants, and other marginalized groups.[76]

This structural view of the determinants of inequality and exclusion drives a similarly transsubstantive economic policy agenda in movement circles. In early 2016, for example, a coalition of racial and economic justice advocacy groups—the Center for Community Change, the Center for Popular Democracy, Jobs With Justice, the Leadership Conference on Civil and Human Rights, and the Working Families Organization, each of which operates as a hub for dozens of membership-based movement affiliates around the country—released a comprehensive economic agenda entitled "Putting Families First."[77] The report linked together familiar economic policy issues, such as affordable housing and the minimum wage, with a larger, explicit focus on the ways in which longstanding policies and ideologies at the state and local level combine to create durable, structural racial and economic inequality.[78] Thus, to address the economic crisis in poor and minority communities, the agenda called for a combined approach that integrated everything from housing and transportation policy to criminal law reform to labor, poverty, and safety net reforms.[79]

This movement focus on the interaction between structural inequality and political power echoes a rich tradition in legal and public policy scholarship. Scholars of economic and racial justice have long explored the importance of understanding inequality and injustice in structural terms, from the construction of intergenerational economic and racial inequality through city planning,[80] to

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75.   For example, a recent report from a coalition of local organizations committed to racial justice leads off this way: "The massive divestment from communities of color historically coincided with the US government's 'War on Drugs' and 'tough on crime' policies, which are themselves some of the newest linchpins in the nation's long history of social control and criminalization of marginalized people." *Id*. at 3.

76.   In the words of a movement leader in Detroit: "We cannot have this high police spending while folks are being displaced, while children in the city do not have the same educational opportunities as their suburban counterparts, while families go without water. Higher police budgets do not make us safe." *Id.* at 36 (quoting Denzel McCampbell, Chapter Co-Chair, Black Youth Project 100 Detroit).

77.   DORIAN T. WARREN, COLUM. U. & ROOSEVELT INST., PUTTING FAMILIES FIRST: GOOD JOBS FOR ALL (2015), https://scholars.org/sites/scholars/files/families-first-report.pdf/ [https://perma.cc/FV35-SSQ5].

78.   *Id.*

79.   *Id.*; *see also* ANDREA FLYNN ET AL., REWRITE THE RACIAL RULES: BUILDING AN INCLUSIVE AMERICAN ECONOMY, ROOSEVELT INST. (June 6, 2016), https://rooseveltinstitute.org/wp-content/uploads/2016/06/Structural-Discrimination-Final.pdf   [https://perma.cc/AF7P-MYCB] (developing a similarly broad structural focus integrating racial and economic policy dimensions at the macro level).

80.   *See, e.g.*, ROTHSTEIN, *supra* note 62 (synthesizing historical, social science, and legal literature, and case law on the use of urban planning, zoning, redlining, and other legal tools to construct racial and economic segregation, and to systematically exclude minority communities from major vehicles of wealth aggregation such as homeownership); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934 (2015) (same); SHARKEY, *supra* note 62 (documenting the racialized intergenerational effects of urban planning and economic segregation on economic opportunity).

the inequalities baked into the administration of welfare programs,[81] to the systemic disparities of political economy driving and created by the criminal legal system.[82] This structural approach shifts focus from questions of individual mistreatment or blameworthiness to underlying systems of legal interpretation and institutional design that create larger patterns of racial, gender, economic, or other inequality. The scholarly attention to structure is evident both in classical traditions of critical legal scholarship[83] and in renewed scholarly attention to questions of political economy, power, and inequality.[84] Overlying this structural focus, there has been a renewed interest among scholars in how law, structure, and public policy create disparities of political power between different interest groups and constituencies—and a focus on the need to design legal systems to better balance power among those different groups and social movements.[85]

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81.   *See, e.g.*, KATHRYN J. EDIN & H. LUKE SHAEFER, $2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA (2015); DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS (2016). For a classic statement of the problem, see Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984) (describing how administrative processes inhibit access to entitlements), and Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. ON POVERTY L. & POL'Y 13, 54 (2005) (discussing how the 1996 welfare reform law contributed to bureaucratic disentitlement, and assessing whether the pretermination hearings required by *Goldberg v. Kelly* provide meaningful protection against bureaucratic disentitlement).

82.   *See, e.g.*, GILMORE, *supra* note 63, at 30–128 (connecting the rise of mass incarceration to issues of inequality and political economy); Bell, *supra* note 63, at 2118 (2017) (theorizing part of the problem of policing as one of "structural exclusion," which "corresponds with intersecting race, class, and geographic marginalization"); Sharon Dolovich & Alexandra Natapoff, *Introduction* to THE NEW CRIMINAL JUSTICE THINKING 1, 4 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (highlighting "the role that the criminal system has long played in the collective generation and perpetuation of national legacies of racism, sexism, classism, and other forms of systemic discrimination"); Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1554 (2003) (examining "social, economic, legal, and political mechanisms through which spatial concentration transforms a spike in incarceration from an acute external shock into an enduring internal feature of the neighborhood fabric"); Roberts, *supra* note 63, at 1598–1604 (2007) (describing the interlocking aspects of the "anti-democratic" nature of criminal justice).

83.   *See, e.g.*, Blasi, *supra* note 61, at 1091 (pushing poverty law theorists to attend more to structure); Cummings, *supra* note 33 at 1572–79 (describing how law and social movements scholarship provides an analytic framework to address structural phenomena in the law through the interactions between the law and collective social movements).

84.   *See, e.g.*, David Singh Grewal et al., *Law and Political Economy: Toward a Manifesto*, LAW & POL. ECON. (Nov. 6, 2017), https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto/ [https://perma.cc/96VA-RFBM] (calling for a renewed attention to questions of political economy and power in shaping legal scholarship and linking to some examples of scholarship that does so).

85.   *See, e.g.*, Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 2 (2016) (arguing for the shifting of power in public law by "creating new structures for citizens' collective engagement with government"); Sameer Ashar & Annie Lai, *Access to Power*, 148 DÆDALUS 82, 82–84 (2019) (exploring how lawyers can contribute to the redistribution of power in society through models of legal service); Levinson, *supra* note 34, at 33 (calling for legal scholars to address "basic questions of where power is located in the American political system, how it should be distributed or redistributed, and even what 'power' means or which kinds of power should matter for different purposes").

But while these larger and deeper structures are very much at the heart of diagnoses of inequality and exclusion, they pose a particularly difficult challenge for advocacy and reform efforts. Structures are often hidden, deeply embedded, and diffuse, arising from the confluence of multiple patterns of law, policy, and behavior.[86] And once diagnosed, these features also make structures difficult to dismantle. This poses a problem for democratic action.[87]

The dialectical relationship between structural inequalities and political power compounds this difficulty: multiple layers of democratic and structural exclusion reinforce each other, reproducing unequal, racialized systems of justice and of governance. For example, when people directly affected by the criminal legal system attempt to intervene in policy debates over criminal law and procedure, they find their calls muted because they are members of a population that has been systematically disenfranchised by the very systems of criminal law that they aim to reform.[88] And when groups historically relegated to geographically segregated communities with subpar infrastructures attempt to remedy those imbalances, they find themselves thwarted by the very resource gaps they aim to close.[89] The antidemocratic nature of our legal systems reinforces structural inequality; the result is that increasing community participation does not, on its own, truly tackle these deeply embedded structural problems. Instead, movements are rethinking the notion of community participation itself.

In the urgency and aspiration of these movements, real-time experiments and innovations in strategies have emerged, aimed at contesting these deeper structures. In the next Part, we highlight some illustrative examples of one particular type of strategy for contesting structure: the push for community control over key institutions of local governance. This is by no means the only, or even primary, strategy articulated by movement actors. Nor is it universally embraced in movement circles. But the push for community control marks an important departure from more traditional calls for "community participation" in local governance. There is a distinctive approach to participation and power in these movements' vision of participation. This is participation with a purpose, seeking a share of authorship over those decisions that have material

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86.   *See, e.g.*, IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 52 (2011) ("Structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests . . . ."); K. Sabeel Rahman, *Constructing and Contesting Structural Inequality*, 5 CRITICAL ANALYSIS L. 99, 103 (2018) ("[A]ccumulated *human* choices congeal into a larger structure, which places individuals in subordinate positions.").

87.   *See* RAHMAN, DEMOCRACY AGAINST DOMINATION, *supra* note 12, at 84–88.

88.   *See generally* Simonson, *Democratizing Criminal Justice*, *supra* note 11, at 1610–15 (describing how attempts to democratize institutions within the criminal legal system, for example through community policing, often reinscribe existing power imbalances rather than truly shift power).

89.   *See, e.g.*, ROTHSTEIN, *supra* note 62 (describing the systematic racial discrimination baked into housing and urban policy over decades).

repercussions for the welfare and well-being of groups of people,[90] thereby contesting dominant understandings of the purposes and priorities of governance institutions themselves.

II.
CONTESTING STRUCTURE THROUGH COMMUNITY CONTROL

Part I put forth a particular vision of democracy, one echoed in current movement work, that emphasizes contestation and control over drivers of structural inequality. But what would such a shift entail when it comes to on-the-ground governance policies? In this Part, we seek a tentative answer to this question by focusing on institutional designs put forth by movement actors themselves. Movement visions found in the contemporary push for "community control" over both policing and local economic development exhibit a rich ferment over questions of power, democracy, and social change. These movement visions exemplify a self-conscious effort among social-change activists to connect deep engagement with the historical and structural drivers of racial and economic inequality to novel demands for community control over these underlying structures.

With policing, movement actors have focused not just on top-down policy recommendations, for example, use-of-force policies, but also on creating civilian oversight institutions with real power to create policing policy and to discipline individual officers. The quest is not community policing, or even civilian review, but rather civilian control. Similarly, in battles over urban inequality, movement actors are beginning to experiment with measures that do more than seek policy outcomes—such as increased developer investments in local neighborhoods or mandated "local hiring" provisions—to develop governance arrangements in which communities themselves play a more direct role in controlling and monitoring development projects.

"Community control" is not in itself a new strategy; indeed, the 1960s and 1970s saw widespread calls for community control from social movements aimed at combatting systemic racial and economic inequality.[91] And in the decade before the emergence of the Movement for Black Lives, Black organizers

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90.   *See* Peter Houtzager & Lucie E. White, *The Long Arc of Pragmatic Economic and Social Rights Advocacy*, *in* STONES OF HOPE, *supra* note 31, at 172, 172–73 ("Having an impact on structural injustice requires more than winning lawsuits or sparking social justice mobilization; it requires that such strategic victors achieve innovation in the institutions that provide food, shelter, healthcare, housing, jobs, and the like to impoverished people, on the ground." (citation omitted)).

91.   For a summary of this trend, see ALAN A. ALTSHULER, COMMUNITY CONTROL: THE BLACK DEMAND FOR PARTICIPATION IN LARGE AMERICAN CITIES (1970). The term "community control" was especially prevalent within the Black Power Movement in the 1960s and 1970s with respect to community control of schools. *See* Barbara R. Hatton, *Schools and Black Community Development: A Reassessment of Community Control*, 9 EDUC. & URB. SOC'Y 215 (1977) (describing this push for community control of schools within the Black Power Movement); *see also* notes 102–106, *infra*, and accompanying text (describing the Black Panthers's push for community control of the police in the 1970s).

in the South resurrected the idea of communal economic democracy in places like Jackson, Mississippi.[92] But the last six years have seen a resurgence in the demand for community control, buoyed in large part by the burgeoning strength of local social movements in our "movement moment."[93] The respective pushes for community control over policing and over economic development illustrate the ways in which local social movements seek not just to shift policy, but also to contest structure and power inequality. Indeed, they suggest that from the movement point of view, to seek only input into policy, without power over it, is a hollow approach to legal change.

The local politics of these interventions also tell an important story. It is at the local level that these movements have been able to target a greater degree of political power and influence, both through grassroots organizing and through connections to potential allies and interlocutors in city councils, mayors' offices, and other positions of real authority. Thus, we reference the city of Oakland in both the policing and development examples below; that is in part because the alignment of a reform-minded city council and mayor created an opening for these kinds of demands to be taken seriously. At the same time, these strategies do not track partisan divisions; in some of these cases, such as the battle for police reform in Chicago, movement demands for greater community control are framed in opposition to liberal democratic leaders like Mayor Rahm Emmanuel. Indeed, one of the lessons from our examples below is that to simply look at the winning institutional models that emerge from democratic or left-leaning local governments is to miss out on the more radical nature of the movement-driven institutional visions of power-shifting in local governance.

A. *Police Accountability: From Review to Control*

At the center of the push for police accountability post-Ferguson are social movement actors calling for the formation of new institutions that create communal power over policing policies and decisions. This push for police accountability has gained incredible momentum in the last five years, as national attention to police violence against people of color, especially African Americans, has sparked a public debate about police policies such as the use of deadly force[94] and police surveillance of Black and brown people.[95] Since 2015,

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92.   *See* Kamau Franklin, *The New Southern Strategy: The Politics of Self-determination in the South*, *in* JACKSON RISING: THE STRUGGLE FOR ECONOMIC DEMOCRACY AND BLACK SELF-DETERMINATION IN JACKSON, MISSISSIPPI (Cooperation Jackson et al. eds., 2017).

93.   *See* Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 356–60 (2015) (defining the movement that began in 2015).

94.   *See, e.g.*, PHILLIP ATIBA GOFF ET AL., CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE, CTR. FOR POLICING EQUITY (2016), https://www.issuelab.org/resources/25200/25200.pdf [https://perma.cc/QJ59-ELZU].

95.   *See, e.g.*, Timothy Williams, *Can 30,000 Cameras Help Solve Chicago's Crime Problem?*, N.Y. TIMES (May 26, 2018), https://www.nytimes.com/2018/05/26/us/chicago-police-surveillance.html [https://perma.cc/FE89-FUTQ].

leaders at all levels of government have pushed for police reforms by, for example, revisiting their use-of-force policies and shifting disciplinary processes for officers who use deadly force.[96] But movement actors are not just focused on changing policing policies, procedures, or laws; they are equally focused on transforming the landscape of power in policing. The result has been a focus on the potential of a strong civilian control process. From Atlanta to Los Angeles to Houston to Nashville, activists have honed in on the potential of civilian control of policing to promote racial justice beyond the acts of individual officers. Sometimes movements have focused on the creation of new civilian review institutions,[97] and other times they have put forth scathing critiques of existing institutions of civilian review.[98] Activists behind all of these pushes have seized on the idea of community control of the police as a potential lever of power-shifting.

This push for civilian control of policing is intimately connected to concerns with structural and historical inequalities in local governance. The Vision for Black Lives lays it out plainly:

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96.   *See generally* RAM SUBRAMANIAN & LEAH SKRZYPIEC, TO PROTECT AND SERVE: NEW TRENDS IN STATE-LEVEL POLICING REFORM, VERA INST. JUST. (2017), https://www.vera.org/downloads/publications/041417-PolicingTrendsReport-web.pdf [https://perma.cc/ZF66-HPSK] (summarizing trends among seventy-nine police reform bills passed by at least thirty-four states between 2015 and 2016); *The State of Justice Reform 2017: The State of Policing*, VERA INST. JUST. (2017), https://www.vera.org/state-of-justice-reform/2017/the-state-of-policing [https://perma.cc/TJY8-XZ3N] (describing reforms at state and local levels across the country). Federal reform efforts, however, have been all but eliminated under the Trump Administration. *See id.*

97.   For example, in Houston, a call for a civilian review board with subpoena power is part of a new Right2Justice Coalition. *See* Brian Rogers, *Houston Activists Call for Criminal Justice Reform*, HOUS. CHRON. (Aug. 16, 2016), https://www.chron.com/news/houston-texas/houston/article/Houston-activists-call-for-criminal-justice-reform-9145919.php [https://perma.cc/3L54-Z5NR] (describing how "more than a dozen activists called a press conference to demand independent prosecutors to investigate police shootings overseen by civilian review boards with subpoena power"); *see also* Vision and National Demands, FERGUSON ACTION, http://fergusonaction.com/demands/ [https://perma.cc/HWM5-JNE5] (demanding community oversight of policing and discipline); *Community Oversight Now Launches Charter Referendum Petition for a Community Oversight Board 50 Years After the Death of Dr. Martin Luther King, Jr.*, COMMUNITY OVERSIGHT NASHVILLE (June 6, 2018), https://communityoversightnashville.wordpress.com/2018/06/06/community-oversight-now-launches-charter-referendum-petition-for-a-community-oversight-board-50-years-after-the-death-of-dr-martin-luther-king-jr [https://perma.cc/9QTG-3DMR] (launching a winning petition drive for a charter referendum to create an independent Community Oversight Board (COB) with compulsory and investigative powers).

98.   For example, movement actors in Atlanta have consistently put forward a strong critique of a local civilian review board hailed as progressive by others. *See* Gloria Tatum, *Atlanta Citizens Review Board Gets on Activists' Last Nerve*, ATLANTA PROGRESSIVE NEWS (May 15, 2015) http://atlantaprogressivenews.com/2015/05/15/atlanta-citizens-review-board-gets-on-activists-last-nerve/ [https://perma.cc/WA3M-95AF]. In Los Angeles, the local Black Lives Matter chapter has worked to call attention to the potential of recent reforms to re-entrench inequalities. *See* David Zahniser, *After Election Loss, Critics of Charter Amendment C Call for Sweeping Review of LAPD Discipline*, L.A. TIMES (May 17, 2017), https://www.latimes.com/local/lanow/la-me-ln-lapd-discipline-measure-20170517-story.html [https://perma.cc/GLK7-5FU2]. According to one community leader, "[w]e refuse to let the police union and Police Commission distort the meaning of 'civilian' and stack the deck in favor of bad officers." *Id.*

We demand a world where those most impacted in our *communities control the laws, institutions, and policies that are meant to serve us* – from our schools to our local budgets, economies, police departments, and our land – while recognizing that the rights and histories of our Indigenous family must also be respected. This includes…[d]irect democratic community control of local, state, and federal law enforcement agencies, ensuring that communities most harmed by destructive policing have the power to hire and fire officers, determine disciplinary action, control budgets and policies, and subpoena relevant agency information.[99]

Here the point is not simply to revise police policies or push for constitutional policing, but rather to ensure "direct democratic community control" of law enforcement. These groups are seeking freedom from the domination of their local governments and looking for power over how it operates—not for the sake of control, but because shifts in power are necessary in order to push back against the longstanding history of racialized state violence. For these groups, power, structure, and histories of inequality are inseparable from one another.[100] As two longtime activists explain, "This is a call for Community Control over Police as a means of shifting power, enforcing democracy, deconstructing the historic relationship between the police and the Black community, and re-imagining a social force designed to actually protect and serve its population as policy."[101]

This call for community control of the police is not new; it was the center of the call by the Black Panthers and other radical activists of color in the 1960s to reclaim control of their local governments.[102] The heart of this historical push for Black community control was the idea that local police precincts should be independent of elites who are elected or appointed at the city or county level, transferring power over policing to the people who interact with police officers

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99. *Community Control*, *supra* note 3.

100. *See id.* ("Lack of empowered civilian oversight with [law enforcement] creates significant roadblocks to law enforcement transparency and accountability and prevents any means for communities most impacted by lethal force, excessive force and misconduct to effectively reduce other types of violence."); *see also* Akbar, *supra* note 31, at 433 ("[T]he emphasis on community *control*, rather than simply on community *input*, challenges how the concept of community is conventionally deployed in criminal law reform conversations.").

101. Adams & Rameau, *supra* note 5, at 530–38; *see also Community Control*, *supra* note 3.

102. *See, e.g.*, *Police Petition*, Berkeley Monitor, Aug. 8, 1970, at 12, http://www.itsabouttimebpp.com/Community_Control/pdf/Community_Control_Police_No1.pdf [https://perma.cc/NNP4-UM38]; Bobby Seale, *Community Control of Police Was on the Berkeley Ballot in 1969*, S.F. Bay View (Aug. 13, 2015), https://sfbayview.com/2015/08/bobby-seale-community-control-of-police-was-on-the-berkeley-ballot-in-1969/ [https://perma.cc/KR3T-A96A]. Like the Movement for Black Lives, the idea of community in the Black Panther philosophy was not just about community control of the police, but also schools and other local government services. *See* Glen Ford, Opinion, *The Complexities of Black Community Control of Police*, Truthout (Feb. 13, 2015), http://www.truth-out.org/news/item/29100-the-complexities-of-black-community-control-of-police [https://perma.cc/G7XV-G73G] (connecting current demands for community control of the police to the history of similar Black Panther demands).

every day on the streets. This would simultaneously build political power and promote safety.[103] Although few local jurisdictions in the 1960s actually implemented true community control, a weaker form of "civilian review" of police disciplinary decisions did spread as a method of police reform.[104] In Berkeley, California, for instance, voters in 1971 rejected a community control referendum by a two-to-one margin but two years later approved a referendum for a "Police Review Commission" with independent authority to investigate police complaints.[105] Overall, localities did not implement "community control"; instead, they created institutions of "civilian review" that largely kept power in the hands of the police and city or county officials.[106]

By the end of the twentieth century, civilian oversight had become a significant feature of much policing in the United States, with 80 percent of large police departments having some form of oversight.[107] This vision of civilian review usually comprises civilian commissions reviewing complaints about individual officer misconduct and participating in some way in the decision whether to discipline the offending officer.[108] In practice, however, the civilian review boards that emerged in the 1970s and then replicated throughout the country were notoriously ineffectual,[109] and their influence waned with the rise of "community policing" in the 1980s and 1990s.[110] In a 2016 study, Udi Ofer found that of the nation's fifty largest police departments, only twenty-four had a form of civilian oversight of the police, and of those, all but nine had a majority of the board nominated or controlled by the mayor or the police chief.[111] In recent

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103.   *See generally* ALTSHULER, *supra* note 91, at 13–66; Rita Mae Kelly, *Sources of the Community Control over Police Movement*, 7 J. VOLUNTARY ACTION RES. 25 (1978). *See also* Elinor Ostrom & Gordon Whitaker, *Does Local Community Control of Police Make a Difference? Some Preliminary Findings*, 17 AM. J. POL. SCI. 48 (1973).

104.   The idea that independent agencies run by civilians should oversee or monitor the newly professionalized police emerged as early as the 1920s, and was then endorsed by the Wickersham Commission in 1931. *See* WALKER, *supra* note 6.

105.   *Id.* at 32–33; *see also* Redmond, *supra* note 5, at 229–30 (discussing this Berkeley history); Seale, *supra* note 102 (describing the community control referendum in Berkeley).

106.   *See* Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 636–37 (2016) ("Other than the Berkeley effort, . . . community control proved to be too radical an idea about the proper form of governing the police and gained no traction in other communities.").

107.   WALKER, *supra* note 6, at 40.

108.   *See generally* DE ANGELIS ET AL., *supra* note 6 (detailing a range of civilian oversight models).

109.   *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 572 (2008) ("Ironically, . . . one of the reasons citizen review panels have spread so broadly is that they have almost always proven much more sympathetic to rank-and-file officers than the unions feared and than most of the original backers of the idea expected."); *e.g.*, ROBERT A. PERRY, N.Y. CIVIL LIBERTIES UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY 1994-2006 1, 45–48 (2007), https://www.nyclu.org/sites/default/files/publications/nyclu_pub_mission_failure.pdf [https://perma.cc/WT3J-6B3H] (criticizing the New York City Civilian Complaint Review Board for being ineffectual).

110.   *But cf.* WALKER, *supra* note 6, at 44–45, 53–54 (arguing that evaluating the history of civilian oversight of the police is more complicated than most commentators acknowledge).

111.   Ofer, *supra* note 16, at 1041–42.

years, though, many jurisdictions have placed renewed emphasis on reforming or designing new police accountability institutions with civilians at their helm. And social movement actors have been at the forefront of pushing for civilian control—for true *power over* policing, rather than just *input into* it.[112]

In what follows, we highlight two recent debates over local ordinances to create civilian oversight of the police that exemplify this focus in jurisdictions with longstanding policies of "community policing." The first, in Chicago, reveals a contrast between a liberal view of civilian oversight that prioritizes conversations with communities—but leaves policy-making to technocrats—and a movement-driven vision that truly shifts power. And the second, in Oakland, demonstrates how movement actors are pushing their local governments to think carefully about who "the people" are when transferring power to civilians.

1. Defining the Scope of Community Oversight: the 2016 Chicago Debate

Like many American cities, in 2016 Chicago found itself with a police department mired in scandals both old and new, including the police killing of civilian Laquan MacDonald and revelations surrounding Homan Square, the "black site" for secret interrogations conducted by the Chicago Police Department (CPD).[113] While Mayor Rahm Emmanuel heralded his own form of community policing,[114] the City Council, in contrast, responded by considering the creation of a new institution to review the actions of the police department. Whereas the Democratic elites who controlled the City Council sought a "review" model, in which a new Civilian Office of Police Accountability (COPA) could investigate alleged misconduct, movement actors to their left sought a "control" model, in which civilians had control over police departments at the neighborhood level.[115] In the words of those activists: "We believe

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112. *Cf.* Barry Friedman & Maria Ponomarenko, *Democratic Policing,* 90 N.Y.U. L. REV. 1827, 1833 (2015) (arguing that police departments have never been subject to true democratic control, only to ex post mechanisms of review).

113. *See generally* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE & N. DIST. OF ILL., U.S. ATTORNEY'S OFFICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017), https://www.justice.gov/opa/file/925846/download [https://perma.cc/SW6Y-X5XY] (summarizing the findings of the DOJ investigation of the CPD); Bernard E. Harcourt, *In Rahm Emanuel's Chicago Surveillance State, Controlling the Data Is Key*, INTERCEPT (Dec. 14, 2015), https://theintercept.com/2015/12/14/in-rahm-emanuels-chicago-surveillance-state-controlling-the-data-is-key/ [https://perma.cc/MX5R-P65Z] (analyzing Chicago Mayor Rahm Emmanuel's response to the shooting of Laquan McDonald); *Homan Square*, GUARDIAN, https://www.theguardian.com/us-news/homan-square [https://perma.cc/U5KH-6H2K] (last visited June 9, 2020).

114. *See* Simonson, *Democratizing Criminal Justice*, *supra* note 11, at 1615–16 (describing Emmanuel's Chicago Alternative Policing Strategy (CAPS) initiative).

115. *See* D.D. Guttenplan, *This Chicago Politician Is Showing How to Govern from the Left*, NATION (July 13, 2017), https://www.thenation.com/article/meet-chicagos-movement-politician/ [https://perma.cc/5ZWX-HZMM].

democratic civilian control of the police means the community tells the police what to do."[116]

The main grassroots group behind the push for a Civilian Office of Police Accountability has been the Chicago Alliance Against Racist and Political Repression (CAARPR), a group founded in 1973 as part of the mass movement to free Angela Davis.[117] Building on the group's longstanding presence organizing in largely African American neighborhoods, CAARPR now works with Black Lives Matter Chicago, the Black Youth Project 100, and other local groups to push for a transformative vision of how policing can look in Chicago.[118] Their 2016 proposed ordinance to create a Civilian Police Accountability Council (CPAC), which was sponsored by the most progressive members of the city council,[119] would have created a new police accountability council with elected positions drawn from each district and forbidden individuals with personal or professional connections to police officers from serving on the Council.[120] And the CPAC would have had tremendous power: to appoint the superintendent, to adopt rules for police conduct, and to sign off on all disciplinary decisions.[121] Essentially, the proposed Chicago ordinance would have created a new body, much like an elected school board, to govern the local police department.[122]

Although the movement-driven CPAC proposal had substantial support in the City Council, it ultimately lost to a proposal backed by the mayoral administration of Rahm Emmanuel. Under Emmanuel's Civilian Office of Police Accountability, which began operations in 2017,[123] the powers of the civilian-staffed review commission remain mainly investigatory, including the capacity to issue subpoenas and investigate both individual allegations of misconduct and

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116.   NAT'L ALL. AGAINST RACIST & POL. REPRESSION, THE PEOPLE'S GUIDE TO AN ELECTED (2015), http://naarpr.org/wp-content/uploads/2015/05/CPAC_B-W_PeoplesGuide_March2015.pdf [https://perma.cc/6CAA-YW5D].

117.   *See* CHI. ALL. AGAINST RACIST & POL. REPRESSION, https://www.caarpr.org/ [https://perma.cc/LYY2-6GZH]; Redmond, *supra* note 5, at 232–34 (detailing the history of CAARPR and its current push for community control).

118.   *See, e.g.*, Press Release, We Charge Genocide, Community Policing is Not the Answer (Oct. 28, 2015), http://wechargegenocide.org/press-release-community-policing-is-not-the-answer-countercaps-report/ [https://perma.cc/6JFL-X99K] (listing organizations working together on a Counter-CAPS report to expose the limits of community policing in Chicago).

119.   *See* Guttenplan, *supra* note 115 (describing progressive councilman Carlos Ramirez-Rosa's support of the CPAC proposal).

120.   Amendment of Municipal Code of Chicago by Adding New Chapter 2-83 Entitled "Civilian Police Accountability Council," CHI. CITY COUNCIL O2016-5707, at 1–3 (2016).

121.   *Id.*, CHI. CITY COUNCIL O2016-5707 at 3–8.

122.   *See id.*, CHI. CITY COUNCIL O2016-5707 at 1, 3–8; CHI. ALL. AGAINST RACIST AND POL. REPRESSION, *supra* note 116.

123.   *See* Press Release, Civilian Office of Police Accountability, The Civilian Office of Police Accountability Is Officially Open (Sept. 19, 2017), http://www.chicagocopa.org/press/the-civilian-office-of-police-accountability-is-officially-open/ [https://perma.cc/8Z38-9SS8]; Annie Sweeney, *Civilian Office of Police Accountability to Launch in September, Replace Long-Criticized IPRA*, CHI. TRIB. (Apr. 12, 2017*)*, http://www.chicagotribune.com/news/local/breaking/ct-copa-start-date-met-20170412-story.html [https://perma.cc/LDE2-95CF].

patterns of misconduct.[124] Although the COPA makes policy recommendations, these recommendations are nonbinding.[125] Under this winning setup, the power goes to a new, independent "Inspector General" and the superintendent of police who can decide whether to heed the advice and recommendations of the civilian council.[126]

The contrasts between the winning 2016 "review" model and the movement-driven "control" model exemplify the ways in which movement actors are pushing for countervailing power in the struggle over police violence. Although the Emmanuel review model recognizes the need for transparency, public participation, and independent oversight of everyday policing,[127] the movement-driven control model seeks more direct shifts in power. As CAARPR wrote in a pamphlet promoting its model, the goal is to move away from "closed loops of power" in writing police rules and disciplining individual officers.[128] The elected, all-civilian council would have "re-writ[ten] the police 'rulebook' deciding what CPD can do on the streets," investigated all complaints, and wielded final authority regarding discipline.[129] Although this vision did not win the day, the on-the-ground organizing behind the proposal reflected its status as a true contender in local Chicago politics: out of four competing proposals, it was the only one that came close to defeating the COPA model that ultimately won.[130] And movement actors have not given up the fight; to the contrary, in 2018, in response to the demands of movement actors, the Chicago City Council held a set of hearings on reforming COPA, or replacing it, to give it more

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124. CHI., ILL., MUN. CODE chs. 2-78-110, -120 (2019).

125. *See id.* chs. 2-78-110, -130(b).

126. *See id.* chs. 2-56-010, -205; *id.* ch. 2-78-120, -130; *Municipal Ordinance*, CIVILIAN OFF. POLICE ACCOUNTABILITY, https://www.chicagocopa.org/about-copa/ordinance [https://perma.cc/KA82-TS7S].

127. *See* CHI., ILL., MUN. CODE chs. 2-78-120; Chi., Ill., Ordinance SO2016-6309, at 1–2 (Sept. 13, 2016).

128. *Before CPAC - Closed Loops of Power and the Chicago Police Department*, NAT'L ALL. AGAINST RACIST & POL. REPRESSION, http://naarpr.org/wp-content/uploads/2013/12/BeforeCPAC_closed_loops_power.png [https://web.archive.org/web/20160813151920/http://naarpr.org/wp-content/uploads/2013/12/BeforeCPAC_closed_loops_power.png]; *see also Civilian Police Accountability Council*, NAT'L ALL. AGAINST RACIST & POL. REPRESSION, http://naarpr.org/civilian-police-accountability-council-cpac/ [https://perma.cc/QRV3-CPSN] (outlining CPAC's powers and duties).

129. *See Chicago: Democrat-Led Cops Continue Racist Killing Spree*, INTERNATIONALIST (Aug. 2018) http://www.internationalist.org/chicopskeepkillingblackpeople1808.html [https://perma.cc/F967-XCLM]; Amendment of Municipal Code of Chicago by Adding New Chapter 2-83 Entitled "Civilian Police Accountability Council," CHI. CITY COUNCIL O2016-5707, at 3, 8 (2016).

130. *See* Charles Preston & Jeremy Borden, *What Went Wrong? Inside City Council's Police Reform Fight***,** CITY BUREAU, https://www.citybureau.org/what-went-wrong [https://perma.cc/MH7K-3DJC] (describing how the two police oversight proposals other than COPA and CPAC did not come to a vote in the council at all).

power.[131] In 2019, the CPAC was once again before the Chicago City Council—with twice the number of co-sponsors as it had in 2016.[132]

2.   The Push for Community Control of the Police in Oakland

A similar debate has played out in Oakland, where, like in Chicago, the City Council responded to community pressure to rein in racialized police violence by creating a new institution to review the actions of the police department. Recent debates in Oakland over the details of the new Civilian Police Commission and the Community Police Review Agency take on a number of similar themes, including the independence of the commission from the mayor and the amount of power that the civilian-controlled agency will have. Beyond that, the debates also concern the *who* of civilian control: Just who are the civilians, and how can we ensure that they come from the communities most affected by current policing policies? This question headlined discussion in City Council forums and local newspapers in the summer of 2017 as movement actors pressured the City Council for a civilian review board operated independently from the mayor, comprised of people from affected communities, and armed with resources at its disposal.[133]

Like in Chicago, Oakland has a long history of Black activism against police brutality and for community control of the police.[134] And, like in Chicago,

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131.   *See* Claudia Morell, *Got Something to Say About Police Oversight? Here Are the 4 Plans*, WBEZ 91.5 CHI. (May 15, 2018), https://www.wbez.org/shows/wbez-news/got-something-to-say-about-police-oversight-here-are-the-4-plans/70c7206b-e7f8-4b43-958b-4c90b9a237df [https://perma.cc/DXD9-RDVZ]; Annie Sweeney, *First Public Hearing on Civilian Oversight of CPD Abruptly Breaks Up Amid Protest*, CHI. TRIB. (May 16, 2018), http://www.chicagotribune.com/news/local/breaking/ct-met-community-oversight-commission-hearing-20180516-story.html [https://perma.cc/9DA5-CGQC] (describing how two movement-written proposals for a police review agency are now being debated in the Chicago City Council, along with a different Emanuel-backed plan).

132.   *See* Amendment of Municipal Code Title 2 by Adding New Chapter 2-83 Entitled "Civilian Police Accountability Council," CHI. CITY COUNCIL O2019-3943 (2019); Matt Masterson, *Chicago Alderman Renews Push for Elected Police Oversight Council*, WTTW NEWS (May 14, 2019), https://news.wttw.com/2019/05/14/chicago-alderman-renews-push-elected-police-oversight-council [https://perma.cc/VYB2-4YRX]. This time, however, there is a competing community-driven proposal for civilian oversight, from the Grassroots Alliance for Police Accountability (GAPA), to keep COPA but create a Commission for Public Safety and Accountability to oversee COPA and the police board. *See* Aneel Chablani, *Community Police Oversight Is Long Past Due*, CRAIN'S CHI. BUS. (June 10, 2019), https://www.chicagobusiness.com/lightfoot-100/community-police-oversight-long-past-due [https://perma.cc/4T26-SBXH] (distinguishing GAPA from other reform proposals); Masterson, *supra*.

133.   *See* Darwin BondGraham, *Civilians Are Finally in Charge of Complaints Against Oakland Cops. Kind of. Not Yet*, E. BAY EXPRESS (May 20, 2015), https://www.eastbayexpress.com/SevenDays/archives/2015/05/20/civilians-are-finally-in-charge-of-complaints-against-oakland-cops-kind-of-not-yet [https://perma.cc/GA58-S46B].

134.   *See generally* JOSHUA BLOOM & WALDO E. MARTIN, JR., BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY 45–63 (2013) (detailing the killing of Denzil Dowell by police and the rise of the Black Panther Party in the 1960s); Paul Harris, *Oakland Police: Controversial History Sets Tone for City's Discord*, GUARDIAN (Oct. 26, 2011), https://www.theguardian.com/world/blog/2011/oct/26/oakland-police-department-black-community

recent years have seen a continual push from activists for robust civilian review and control of the police department. In 2010, for example, a coalition of Oakland grassroots organizations, dissatisfied with the existing internal affairs process for dealing with allegations of police misconduct, pushed for the formation of a Citizens Police Review Board.[135] The proposal passed the City Council in 2011 but was only activated in 2015—with a milder version than the language in the original statute proposed by movement actors.[136] Then, in 2016, voters overwhelmingly approved a referendum to create a new Civilian Police Commission to oversee the police department's policies and procedures.[137] The referendum granted the new Commission the authority to terminate the police chief and created a new Community Police Review Agency to investigate and recommend discipline of individual officers.[138] The measure succeeded largely due to the organizing work of the Coalition for Police Accountability and other grassroots organizations with longstanding roots in the struggle for racial and economic justice.[139]

Since voters approved a general referendum to create the Civilian Police Commission and the Community Police Review Agency, the City Council has worked to finalize how these new bodies will operate.[140] The coalition of activists that had been the driving force behind the new Commission

[https://perma.cc/3MU7-YN44] (highlighting instances of killings by Oakland police over the past several decades).

135.   Don Mitchell et. al, *"Broken Windows Is Not the Panacea": Common Sense, Good Sense, and Police Accountability in American Cities*, *in* POLICING THE PLANET 237, 256–57 (Jordan T. Camp & Christina Heatherton eds., 2016) (describing interview with policing activist involved in a coalition of Oakland organizations seeking police accountability and presenting proposal to the Oakland City Council in 2010).

136.   *Id.*

137.   *See* Lisa Fernandez, *Oakland Approves Civilian Police Commission to Investigate Misconduct*, NBC BAY AREA (Nov. 9, 2016), http://www.nbcbayarea.com/news/local/Oakland-Approves-Civilian-Police-Commission-Measure-LL-400544611.html [https://perma.cc/V7F6-CXEU].

138.   *See id.*; *Oakland, California, Civilian Police Commission, Measure LL (November 2016)*, BALLOTPEDIA, https://ballotpedia.org/Oakland,_California,_Civilian_Police_Commission,_Measure_LL_(November_2016) [https://perma.cc/CMM3-7N7U]. Specifically, the measure required that the City amend its charter to create both a civilian commission to oversee the Police Department "by reviewing and proposing changes to [Oakland Police] Department policies and procedures . . . and having the authority to terminate the Chief of Police for cause" and a Community Police Review Agency "to investigate complaints of police misconduct and recommend discipline." *See Oakland, California, Civilian Police Commission, Measure LL (November 2016)*, *supra*.

139.   *See* Luis Daniel Gascón & Aaron Roussell, The Limits of Community Policing 221 (2019) (describing this influence).

140.   *See, e.g.*, Darwin BondGraham, *Oakland Officials Wrestle for Control over New Police Commission Staff Positions*, E. BAY EXPRESS (June 20, 2018), https://www.eastbayexpress.com/SevenDays/archives/2018/06/20/oakland-officials-wrestle-for-control-over-new-police-commission-staff-positions [https://perma.cc/GJL2-AM25]; Jaime Omar Yassin, *Commissioner Claims City Administrator and City Attorney Are Obstructing Police Commission*, POST NEWS GROUP (Apr. 25, 2019), https://postnewsgroup.com/2019/04/25/commissioner-claims-city-administrator-and-city-attorney-are-obstructing-police-commission/ [https://perma.cc/W7Z6-LWEA].

simultaneously criticized the City Council's leading version of the enabling ordinance, putting forth a competing vision. For the Coalition for Police Accountability, the key sticking points concern the *who* of who gets to be on the Commission: first, activists pushed to ensure that the mayor does not control a majority of the Commission;[141] and second, they sought to remove a provision of the new law that would require criminal background checks of all potential commissioners.[142] Finally, it concerns the Coalition that the legislation does not mandate robust staffing of the Commission and that the Commission will not have much power if it does not have the resources to hire its own staffers.[143]

This debate surfaces important questions about the constitution of the polity—the "civilians"—deserving of inclusion in the project of "civilian control."[144] The enabling legislation, as enacted, states that the selection panel to pick the civilian commissioners will be "broadly representative of Oakland's diversity and . . . represent communities experiencing the most frequent contact with the Department."[145] Current and former police officers, as well as current or former representatives of a police officer labor union, are excluded from serving.[146] But the legislation also requires a criminal record check, a provision that would be taken out of the amended bill put forth by the activists.[147] Although this debate has not yet been settled, initial flyers recruiting applicants to apply for the Commission encouraged formerly incarcerated people to apply.[148] (For their part, the police do not like the idea; the president of the Oakland Police Officer's Associated penned an op-ed titled "Are you serious, recruiting felons

141.   *See* Coalition for Police Accountability, Amendments to Enabling Legislation for Police Commission (June 2017) [hereinafter Amendments to Enabling Legislation], https://coalitionforpoliceaccountability.files.wordpress.com/2017/06/proposed-amendments-6-8-rg.doc [https://perma.cc/WKY5-6UKS]; *see also* BondGraham, *supra* note 140 (describing the fight in city council over the language of the ordinance regarding independence from the mayor).

142.   Coalition for Police Accountability, Coalition Proposed Ordinance of June 13, 2017 (June 13, 2017), https://coalitionforpoliceaccountability.files.wordpress.com/2017/06/coalition-substitute-ordinance-6-13-17-lb-6-8.doc [https://perma.cc/RB9P-U3A8]; Amendments to Enabling Legislation, *supra* note 141.

143.   As one movement leader told the press: "There's a reason for the expression, 'The devil is in the details.'" Darwin BondGraham, *Crucial Legislation for New Oakland Police Commission Stalls in Committee as Activists and Councilmembers Fight Over Rules*, E. BAY EXPRESS (June 14, 2017), https://www.eastbayexpress.com/SevenDays/archives/2017/06/14/crucial-legislation-for-new-oakland-police-commission-stalls-in-committee-as-activists-and-councilmembers-fight-over-rules [https://perma.cc/ULB4-LUUG].

144.   On the exclusion of marginalized populations from reigning ideas of which people are worthy of inclusive public participation in criminal justice, see Simonson, *The Place of "the People,"* *supra* note 11 at 270–86.

145.   OAKLAND, CAL., MUN. CODE ch. 2.45.030 (2019).

146.   *See* Application for Position of Commissioner, CITY OF OAKLAND, https://cao-94612.s3.amazonaws.com/documents/Police-Commission-2019-Application-With-Translations-Due-6.17.19.pdf [https://perma.cc/A255-3FPZ].

147.   *See* OAKLAND, CAL., MUN. CODE ch. 2.45.060; Amendments to Enabling Legislation, *supra* note 141.

148.   David DeBolt, *More than 100 Apply for Powerful Oakland Police Commission,* E. BAY TIMES (July 21, 2017), http://www.eastbaytimes.com/2017/07/21/hundreds-apply-for-powerful-oakland-police-commission/ [https://perma.cc/NLM3-8R33].

for Oakland Police Commission?"[149]) This debate centers on who we mean when we call for civilian control of the police: those who have been most affected by the harms of mass incarceration, or those who are able to claim that they are law-abiding and have professional experience to make them qualified to serve?[150] Activists underscore this question, asking that Oakland take its history of disempowering incarcerated people and their families into account when giving power over the police to the new Commission.

The struggles in Oakland, Chicago, and throughout the country demonstrate that many movement actors have moved beyond trying to solve the problem of police violence with model rules for use of force, stronger discipline, or any other top-down strategy of reining in excessive police violence. They have for the most part moved beyond traditional ideas of "community policing."[151] Instead, many movement actors have pushed toward bottom-up power-building, often through the search for community control of the police. To be sure, "community control of the police" is not the central rallying cry of every local group pushing for racial justice. Many cities have chosen to seek out other inroads in the fight for power, rather than focus their attention on civilian review at all. Moreover, whether community control is the ideal form of democratic governance for policing remains far from a given in both movement[152] and scholarly circles.[153] But in many cities, including Oakland, Chicago, Newark, Houston, Nashville, and Los Angeles, the call for community control represents part of a multi-pronged approach to tackle structural racism in policing.[154]

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149. Barry Donelan, Opinion, *Are you serious, recruiting felons for Oakland Police Commission?*, E. BAY TIMES (June 25, 2017), http://www.eastbaytimes.com/2017/06/25/opinion-convicted-felons-on-new-police-commission-really/ [https://perma.cc/RU36-9T37].

150. This question—who comprises "the people" who count in the democratic processes of criminal procedure and criminal law—echoes throughout a number of other current tactics of movement actors, including community bail funds, participatory defense, and courtwatching. For an analysis of these questions, see Simonson, *The Place of "the People," supra* note 11 at 266–70.

151. *See, e.g.*, Press Release, We Charge Genocide, *supra* note 118 (reporting on the wide-ranging critique of community policing in Chicago from social movement actors).

152. *See, e.g., Solutions*, CAMPAIGN ZERO, https://www.joincampaignzero.org/solutions#solutionsoverview [https://perma.cc/NZZ2-FXKT] (describing civilian oversight as only one of ten central tenets in the push for police reform).

153. For alternative scholarly perspectives on democratizing policing, see, for example, Bell, *supra* note 63, at 2143–46 (proposing democratizing the police through a combination of public rulemaking, transparency, and reconciliation); Friedman & Ponomarenko, *supra* note 112, at 1891–1903 (arguing for administrative rulemaking as a way to ensure democratic policing and popular input); Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1526–35 (2017) (arguing for a focus on procedural justice as a way of furthering democracy); and Maria Ponomarenko, *Rethinking Police Rulemaking,* 114 NW. U. L. REV. 1, 48–59 (2019) (arguing that inspectors general are best suited to hold police accountable); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 134–40 (2016) (arguing for public rulemaking).

154. *See generally* TERRANCE LANEY & JANAÉ BONSU, BLACK YOUTH PROJECT 100, AGENDA TO KEEP US SAFE 9 (2016), http://agendatobuildblackfutures.org/wp-content/uploads/2016/01/BYP100-Agenda-to-Keep-Us-Safe-AKTUS.pdf [https://perma.cc/FZ5X-8QUE] (listing the Chicago CPAC as model legislation for democratic policing).

Social movement actors who focus on community control have brought into public debate important questions worth highlighting: whether community review boards must be *of the people*, drawn from the very populations most affected by police violence; whether they must be *independent* of mayors, police chiefs, and other dominating figures; and whether they must have *power*, more than simply input, to create rules rather than to advise on rules; to impose discipline on officers rather than suggest discipline; and to investigate, subpoena, and tell the public what they learn.[155] The political climate today has created a unique opportunity for some jurisdictions to tackle some of these questions at the local government level. Nevertheless, most jurisdictions remain far from these governance arrangements envisioned by the people who live with police violence every day.

B.   *Equitable Development: From Mandates to Oversight*

Movement advocates on the ground have also experimented with emphasizing community control as a way to tackle structural inequalities in urban development. As in the case of police reform, cities represent central sites in battles over economic inequality, economic development, investment, and urban planning decisions.[156] Racial justice movements like the Movement for Black Lives have helped highlight the intersection of policing and mass incarceration on the one hand and the financial pressures faced by local governments struggling under austerity budgets on the other. Indeed, the city of Ferguson, Missouri, one of the central flashpoints in the recent movements against police brutality, also represents the historical and structural challenges of inequitable urban development: lack of funding has made the city dependent on policing and fines as a source of revenue, while larger patterns of zoning and urban planning have concentrated poverty and recreated racial segregation within Ferguson in relation to the larger St. Louis metro region.[157]

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155.   *Cf.* Ofer, *supra* note 16, at 1047–50 (arguing that most civilian review boards have some limited ability of a police chief to review a disciplinary decision, but that the default should be that the discipline sticks).

156.   *See generally* Barbara L. Bezdek, *Citizen Engagement in the Shrinking City: Toward Development Justice in an Era of Growing Inequality*, 33 ST. LOUIS U. PUB. L. REV. 3 (2013) (examining approaches to increasing citizen engagement in local government decision-making).

157.   *See, e.g.*, Fant v. City of Ferguson, 107 F. Supp. 3d 1016, 1021–24 (E.D. Mo. 2015) (class action alleging racially discriminatory treatment in the form of repeated jailings for unpaid fines); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 102 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/PS2T-NTUR] (identifying that Ferguson has capacity to reform its approach to law enforcement); Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of Its Troubles*, ECON. POL'Y INST. (Oct. 15, 2014), https://www.epi.org/publication/making-ferguson [https://perma.cc/6B72-JRZL] (arguing that contemporary segregation in a community like Ferguson stems from government policies and not private prejudice alone); *see also* Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 16–18 (2018) (analyzing the need for race-centered ideas and approaches rather

These urban economic policy issues—efforts to secure capital investment, zoning and planning decisions around housing and neighborhood revitalization, and more—remain central to battles old and new between cities, communities, and capital.[158] Decisions over zoning, land use, development, investment, transit structures, and even streetscapes can reproduce and entrench racial and economic segregation and lower economic opportunity and mobility.[159] Any attempt to tackle structural economic inequality in the city, then, will have to address these structures that concentrate wealth and deepen exclusion. Furthermore, localities themselves constitute potentially fruitful spaces for social movement organizing and for experimentation with more collective and democratic forms of decision-making.[160]

Battles for community control over urban development have long represented a central fault line for economic justice movements, pitting them against both City Hall and private developers.[161] The grassroots activists in the War on Poverty, for example, sought a radical transformative vision that prioritized both policy goals (seeking vastly increased federal investments in poverty-stricken neighborhoods) and power goals (leveraging statutory opportunities to establish community-based governance bodies to challenge traditional power structures and local officials).[162] As Tara Melish has argued, these efforts to transform urban economic development—and more broadly, the distribution of political power over those policy decisions—fell short precisely because of how threatening the move to community control felt to existing city

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than race-neutral or even race-conscious ones); Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. ON RACIAL & ETHNIC JUST. 1, 2 (2018) (describing how both Ferguson and Flint "model the racial dimensions of local government failure"); Angela Harris, *Law and Neoliberalism in* Keilee Fant v. City of Ferguson, Missouri, LAW & POL. ECON. BLOG (May 9, 2018) https://lpeblog.org/2018/05/09/law-and-neoliberalism-in-keilee-fant-v-city-of-ferguson-missouri [https://perma.cc/PC6D-N8A7] (critiquing how neoliberal policies end up punishing the poor through the criminal justice system).

158.   *See, e.g.*, GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 60–74 (photo. Reprt. 2013) (2008); SCHRAGGER, CITY POWER, *supra* note 20; Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482 (2009) (describing municipal efforts to reassert control over business investment and local economic development decisions).

159.   *See generally* Schindler, *supra* note 80; ROTHSTEIN, THE COLOR OF LAW, *supra* note 62.

160.   *See, e.g.*, Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281, 290 (2016) (describing the city as "an enabler and facilitator of collaborative decision making structure(s)"); Davidson, *supra* note 22, at 574 (suggesting that local administration might "serve less as a repository of technical expertise and more as a mediating body to channel local input and knowledge"); *id.* at 609 (suggesting that the informality of local administration can create opportunities for participation and also for private capture).

161.   *See, e.g.*, Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-wage Workers*, 2009 U. CHI. LEGAL F. 187, 187–91 (2009).

162.   For several recent analyses of the positive political effects of the War on Poverty and their implications for today, see, for example, NOEL A. CAZENAVE, IMPOSSIBLE DEMOCRACY: THE UNLIKELY SUCCESS OF THE WAR ON POVERTY COMMUNITY ACTION PROGRAMS (2007); THE WAR ON POVERTY (Annelise Orleck & Lisa Gayle Hazirjian eds., 2011); and Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1 (2010).

and federal officials who, while convinced of the need to alleviate urban poverty, nevertheless presumed to maintain their monopoly on political control.[163] As a result, commentators both at the time frequently viewed and today often view the War on Poverty as a failure.[164] But that failure stems in large part from the deliberate retreat from more radical visions of grassroots, community assertions of control over city planning, zoning, and investment decisions.

Since then, clashes over urban economic policy have taken a different form, experimenting with more tentative models of community participation. The clashes of the War on Poverty helped fuel a subsequent wave of community economic development movements that sought a less confrontational approach, emphasizing collaboration with banks, investors, and city officials. This community economic development movement of the 1980s and 1990s led to the flourishing of a wide range of community-based non-profit organizations, encompassing housing and lending cooperatives to neighborhood development funds and more.[165] But in comparison to the more radical vision of the War on Poverty era organizers, the extent to which these organizations shifted the underlying balance of power remains unclear, even as they achieved real gains for local residents.[166]

More recently, economic justice movements have started to experiment with more radical institutional transformations aimed at shifting power over urban economic development policy. The Partnership for Working Families, for example, has led a series of campaigns aimed at promoting economic justice specifically through policies around key areas of urban planning and urban policy, from transportation to economic development to city utility governance. Notably, it framed its recent campaign entirely in terms of power and governance: the "We Make This City" campaign launched in 2018 explicitly

163.   *See* Melish, *supra* note 162, at 28; *cf.* Wendy A. Bach, *Mobilization and Poverty Law: Searching for Participatory Democracy amid the Ashes of the War on Poverty*, 20 VA. J. SOC. POL'Y & L. 96, 136 (2012) (arguing that there were some intermittent successes during the War on Poverty with "administrators who were flexible as to means but committed to, or at least willing to be pulled toward, robust forms of participation and effective advocacy by poor communities").

164.   *See* Melish, *supra* note 162, at 26–27 (documenting the ways in which both commentators at the time considered and historians today consider the War on Poverty to have been ineffectual); *see also* Bach, *supra* note 163, at 128 ("[T]he vast majority of scholars studying Community Action at the time concluded that the involvement of representatives in poor communities in the administration and governance of local Community Action Agencies (CAAs) [did not provide] a meaningful platform for community based groups to wield significant power . . . .").

165.   *See generally* WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT (2001) (describing this wave of less confrontational community economic development movements).

166.   For a critique of collaborative governance arrangements as reifying power imbalances in the context of poverty law and local level policies, see, for example, David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 565 (2008), as well as Bach, *supra* note 163, at 155 (discussing how tokenistic representation is unlikely to lead to power-shifting), and *infra* note 204 and accompanying text (discussing critiques of new governance).

focuses on shifting from what the organization frames as "corporate-controlled" cities to "community-controlled" ones.[167]

One key site for this attempt to shift power over the control of urban infrastructure has been the revival of interest in "community benefits agreements" (CBAs)—contracts that commit developers to particular benchmarks and mandates, for example, investing in a local park or green space or committing to hire some fraction of its workers from the local community where the development is located.[168] The track record of CBAs has been decidedly mixed, and some have even been tainted by the presence of groups purporting to represent the local community but that actually receive funding and backing by the developers themselves.[169] Wherever a well-organized, effective community organizing presence capable of holding developers accountable to the terms of the agreement exists, CBAs have been more successful in hitting their mandates.[170] But even in these settings, CBAs risk being divorced from larger structural patterns and decisions around urban planning, housing, transit investments, and other land-use issues.[171] In recent years, however, some urban justice groups have experimented with novel approaches to CBAs. Crucially, these strategies focus not just on policy outcomes, but also on shifting governance and monitoring arrangements themselves.

What is most interesting, and most fraught, in these debates is the ways in which the relevant stakeholders have struggled over questions of power: Who exercises control over the governance of these projects and at what scale? These questions of power and control critically shape the degree to which CBAs do in fact tackle deeper structural inequities of the modern city. In the following Part we recount two recent policy battles between urban justice movements, city officials, and developers: the CBA around the Oakland Army Base, and the recent debate over community benefits agreements in Detroit. Both episodes highlight the ways in which urban justice movements have focused on shifting structural inequality by claiming a greater share of political power over urban planning decisions. But the contrasts between these cases also highlight the difficult design decisions that can wildly shift the degree to which these movements are actually able to institutionalize community power.

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167.   *See We Make This City Campaign*, P'SHIP FOR WORKING FAMILIES, WE MAKE THIS CITY, http://wemakethiscity.org/the-problem-solution/ [https://perma.cc/VS3P-PRX8].

168.   *See* Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1784–87 (2016) (defining CBAs and describing how they work).

169.   *Id.* at 1789–91; *see also* SCHRAGGER, CITY POWER, *supra* note 20, at 155–61 (describing the mixed results and potential tradeoffs involved in early CBAs).

170.   *See* Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic of the New Accountable Development Movement*, 17 J. COMMUNITY PRAC. 88, 90 (2009).

171.   *See* De Barbieri, *supra* note 168, at 1823–24.

1.   Claiming a Share of Community Control: the Oakland Army Base

The recent redevelopment of the Oakland Army Base illustrates this approach. Oakland launched a $152 million effort to restore its old army base into a major shipping and logistics hub.[172] In 2013, the developers entered into a community benefits agreement and a project labor agreement with the City of Oakland and a coalition of community organizations, spearheaded by Revive Oakland, a coalition of faith groups, labor organizations, racial and economic justice organizations, and community members.[173] One of the key players in the coalition is the East Bay Alliance for a Sustainable Economy (EBASE), the Oakland affiliate of the Partnership for Working Families.[174]

While the army base CBA successfully incorporated significant commitments to local hiring, the key to this initiative was not just the policy itself, but rather the broader effort to shift governing power towards grassroots communities. In particular, the CBA established a participatory enforcement regime to ensure the meeting of commitments to local hiring. The city chartered a new oversight body, the Oakland Army Base Jobs Oversight Commission, to monitor the project—an oversight board comprised of eleven members appointed by the mayor,[175] removable for cause.[176] Most importantly, the board members include representatives from the developers and community organizations. Five of the members must come from community organizations and coalition groups specified in the ordinance with an additional two members from organized labor. Two members are drawn from city officials, and two from the developer.[177] Crucially, community representatives from the Revive Oakland coalition more broadly hold seven of the eleven seats combined, giving them the balance of power on the board.[178]

The powers of the Commission are broad. The Commission's charge includes reviewing the implementation of the CBA, monitoring compliance with the agreement, and negotiating directly with the developers for remedies of possible violations.[179] The City itself has committed to enforcing the agreement as a backstop if such negotiations fall short.[180] Furthermore, the Commission is

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172.   This section adapts Rahman's previous work. *See* Rahman, *Policymaking*, *supra* note 8, at 346–48; RAHMAN & HOLLIE RUSSON GILMAN, *supra* note 40, at 194–200.

173.   *See EBASE and Revive Oakland Win Big*, P'SHIP FOR WORKING FAMILIES (June 29, 2012), http://www.forworkingfamilies.org/article/ebase-and-revive-oakland-win-big; [https://perma.cc/56AP-XC58]; *see also* Rahman, *Policymaking*, *supra* note 8, at 347 (describing the role of Revive Oakland in securing the CBA).

174.   *See About Us*, E. BAY ALL. FOR SUSTAINABLE ECON., http://workingeastbay.org/about/ [https://perma.cc/LBP9-Z94U].

175.   *See* OAKLAND, CAL., ORDINANCE 13140 §§ 1, 3 (Nov. 13, 2012) (establishing the Oakland Army Base Jobs Oversight Commission).

176.   *Id*. § 7.

177.   *Id*. § 3.

178.   *See id*.

179.   *Id*. §§ 2(a)–(c).

180.   *Id*. § 2(d).

charged with issuing reports and findings and is empowered to develop additional procedures for its monitoring functions.[181] For grassroots groups focusing on equitable implementation of urban development projects, this Commission was also valuable as a forum where community members could air grievances, especially if developers reneged on local hire or community benefits investments.[182] As a result, the Commission serves both as a unique focal point for civic engagement and as a vital point of leverage for community members to influence the project on an ongoing basis. By 2015, the Port of Oakland reported that over 60 percent of the new army base workforce had come from neighboring constituencies.[183]

This commission structure provides a foothold of oversight power for the communities themselves. While it retains a focus on policy outcomes—local hiring, for example—it crucially also experiments with a shift in governing *power* by placing community members in positions of actual oversight and monitoring.

The Oakland CBA might well become the next wave in this history of battles over urban development and community benefits. On the one hand, it represents a productive and collaborative approach to urban development. But on the other hand, it seeks to claim a real share of political authority—however incremental and localized.

2. *The Battle Over Detroit's Community Benefit Ordinance*

An even more ambitious battle over community benefits in post-bankruptcy Detroit reflects the shift toward contestatory governance. While projects like the Oakland Army Base have hooked community participation and community benefits on specific (albeit massive) development projects, the debate in Detroit was over a citywide community benefits ordinance. Detroit's ordinance would have codified substantive CBA commitments and a tougher enforcement system for all major development projects. This shift, from a case-by-case negotiation over community benefits to a default requirement, represented a major escalation of CBA ambition. Yet the debate in Detroit also highlights a sharp battle between urban justice movements and mostly progressive city officials over questions of power and control.

In November 2016, Detroit approved a first-of-its-kind citywide CBA ordinance that applies to developments that receive over $1 million of public

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181. *Id*. § 5.
182. RAHMAN & HOLLIE RUSSON GILMAN, *supra* note 40, at 198.
183. Press Release, Port of Oakland, 61% Local Hiring Reached at Port of Oakland's Army Base Development (Apr. 22, 2015), https://www.portofoakland.com/press-releases/press-release-406/ [https://perma.cc/T4Q4-TZHT].

subsidies (such as tax abatements) and that cost at least $75 million.[184] For such projects, the City will form a nine-member advisory council comprised of residents.[185] Two of the council members will be neighborhood residents.[186] The ordinance requires regular meetings between the developer and the council.[187] The developer must report to the city planning department its proposals to address the neighborhood council's concerns.[188] The ordinance is ambitious and far reaching: it makes community benefits agreements and the neighborhood advisory process default, mandatory rules, rather than ad hoc, case-by-case outcomes that movements must secure through individual targeted campaigns. This new default rule represents a significant shift in power because it both imposes substantive obligations on developers and creates a formal process for neighborhood participation.

While the Detroit ordinance expands on the Oakland model, it also casts into relief a controversial battle between the visions of progressive city councilmembers who proposed the ordinance, and organizers' more radical visions for community control. The ordinance, passed first by the City Council and then by citywide referendum, competed with an alternative, more aggressive proposal a coalition of grassroots groups put forth under the "Rise Together Detroit" campaign.[189] Rise Together's proposal for the ordinance would have created a much lower trigger for the CBA process—applying the process to all developments that cost over $15 million and received $300,000 of public subsidies.[190] The Rise Together proposal contained a very different procedural mechanism, requiring developers to negotiate directly with a neighborhood council formed by communities without the involvement of the city administration.[191] And it would have created a legal cause of action allowing communities to sue to enforce the terms of the agreement.[192] City officials, unions, and the chamber of commerce bitterly opposed Rise Together's proposal. These powerful players viewed the proposal as so onerous that it would inhibit

184.   Erick Trickey, *The Test Just Began for the Community Benefits Movement*, NEXT CITY (Feb. 20, 2017), https://nextcity.org/features/view/detroit-test-began-community-benefit-agreements-movement [https://perma.cc/AYK6-LW9G]. For text of the codified ordinance, see DETROIT, MICH., CODE ch. 14, art. XII (2019).

185.   DETROIT, MICH., CODE ch. 14, art. XII, § 14-12-3(b)(3).

186.   *Id.* § 14-12-3(b)(3)(a).

187.   *Id.* § 14-12-3.

188.   *Id.* § 14-12-3(d)(2)(d).

189.   *See* Linda S. Campbell & Daniel Kravetz, *In Detroit, the Fight for Community Benefits Begins Anew*, SHELTERFORCE (Nov. 9, 2017), https://shelterforce.org/2017/11/09/in-detroit-the-fight-for-community-benefits-begins-anew/ [https://perma.cc/9QJZ-DWZD] (describing passage of the 2016 referendum and the debate around it); RISE TOGETHER DETROIT CAMPAIGN, https://www.facebook.com/risetogetherdetroit [https://perma.cc/7E49-KUZW].

190.   *Read the People's CBO – Proposal A on the November Ballot*, DET. PEOPLE'S PLATFORM (Aug. 19, 2016), http://detroitpeoplesplatform.org/2016/08/read-the-peoples-cbo-proposal-a-on-the-november-ballot [https://perma.cc/E5MF-Q23M].

191.   *See id.*

192.   *See id.*

development and investment that Detroit desperately needed.[193] The Rise Together proposal was the first to arrive on the political scene; the campaign secured enough petition signatures to place their proposal up for referendum first.[194] Only afterwards did the City Council and its coalition hastily engage to offer their alternative proposal.[195] With the City Council version having passed, the Rise Together coalition is now pushing to toughen the ordinance.[196]

As in the case of police reform in Chicago, the clash in Detroit between the relatively progressive City Council and grassroots movement actors is revealing. As the scale and ambition of the CBA proposal have increased, so too have the stakes of the conflicts over the substantive policy design—at what thresholds of investment and subsidy to set the CBA trigger—and the questions of power and control. Indeed, further questions remain about the scale and scope of the power CBAs afford. More recent grassroots advocacy efforts have, for example, focused on a broader strategy of contesting the influx of big, business-driven, neighborhood-defining investments even prior to the formation of a CBA. For example, activists in New York City were central in publicizing and then rolling back a series of tax breaks and backdoor agreements that Amazon had attempted to finalize with the City of New York as part of a deal to establish a major Amazon headquarters in Queens, New York.[197] These fights can be seen as, among other things, a next iteration of the attempt to create more democratic

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193.   *See, e.g.*, Trickey, *supra* note 184; Christine Ferretti, *Prop B Wins, Prop A Fails in Detroit Community Benefits*, DET. NEWS (Nov. 8, 2016), https://www.detroitnews.com/story/news/politics/elections/2016/11/08/detroit-community-benefits-results/93507310 /.[https://perma.cc/KJ7Y-F2KH].

194.   Kirk Pinho, *Benefits Ordinances Disturb Developers*, CRAIN'S DET. BUS. (July 24, 2016), https://www.crainsdetroit.com/article/20160724/NEWS/160729916/community-benefits-ordinances-disturb-developers [https://perma.cc/S46K-C98A] (describing the community-led Proposal A, the opposition to it, and the subsequent introduction of the more modest Proposal B offered by elected officials).

195.   *Id.*

196.   *See* Campbell & Kravetz, *supra* note 189; Violet Ikonomova, *Detroit Activists Seek Changes to 'Toothless' Community Benefits Law*, DET. METRO TIMES (Nov. 9, 2017), https://www.metrotimes.com/news-hits/archives/2017/11/09/detroit-law-asking-developers-to-provide-community-benefits-amounts-to-lip-service-activists-say [https://perma.cc/382C-G9XA].

197.   *See, e.g.*, Press Release, P'ship for Working Families, REACTION TO AMAZON: Local, National Housing Advocates Release Statement Regarding Amazon's Two-City HQ2 Announcement (Nov. 13, 2018), https://www.forworkingfamilies.org/article/reaction-amazon-local-national-housing-advocates-release-statement-regarding-amazon%E2%80%99s-two [https://perma.cc/9U7D-UVKS] (providing an example of the public posture of one of the key coalition members advancing the fight against Amazon's proposed developments); Gaby Del Valle, *Amazon Won't Be Building HQ2 in New York City After All*, VOX (Feb. 14, 2019), https://www.vox.com/the-goods/2019/2/14/18225003/amazon-hq2-new-york-pulling-out [https://perma.cc/5N22-ZGWG] (describing the impact of grassroots movements pushing for a shift in the development plan); Amy Plitt, *Amazon HQ2 and NYC: A Timeline of the Botched Deal*, CURBED (Feb. 18, 2019), https://ny.curbed.com/2019/2/18/18226681/amazon-hq2-new-york-city-timeline [https://perma.cc/E4K3-XBNN] (describing the timeline of events from Amazon's proposal to the deal's collapse).

forms of contestation and equitable power over big land-use and economic-development-planning decisions.

As each of the cases in this Part highlight, the call for community control over economic development or policing is merely the first step. The ensuing questions over institutional design play a large role in shaping the degree to which these proposals are successful both politically and in shifting power.

III.
CONCEPTUALIZING POWER-BUILDING IN LOCAL GOVERNANCE

The movement visions of community control over local governance highlighted in Part II are illustrative of governance processes that establish greater community control over the day-to-day administration of major urban systems and services. Movement-designed proposals do not always win the day; indeed, in both Detroit and Chicago, movement proposals lost out to local bills backed by city officials already in power. But these nuanced movement visions are worthy of study. In this Part, we develop a typology of dimensions along which social movements are envisioning power-building at the local level and are setting up methods of contesting the distribution of resources. This typology helps draw out the tradeoffs and design principles that we can glean from the examples in Part II, and can inform parallel debates about structure, power, and institutional design in other areas of law and public policy.

A. Three Institutional Design Dimensions

The examples of visions of community control in Part II reveal the clashes between social movement actors and policy-makers in their struggles to develop new institutional forms of democratic control and participation over policing and urban economic development policy. These competing institutional design proposals revolve around three distinct design dimensions: (1) the nature of the authority that the institution grants to impacted populations; (2) the representativeness of the institution, particularly with respect to disempowered constituencies; and (3) the moment of the institution's authority, whether it is situated *upstream* at an early stage of policy-making, or *downstream* where much of the policy in question has already been locked in. These dimensions help distinguish power-shifting arrangements from more modest proposals. In turn, they can inform how scholars conceptualize the design of local institutions and the interaction between political power and legal change.

1. Nature of Authority: Power Versus Input

One of the most striking aspects of the movement-driven visions for local governance we described in Part II is the way in which these movements seek to secure power that moves beyond input, and which turns to actual governance: administration, implementation, enforcement, and monitoring. The input-control distinction is not an on-off switch, but is rather a continuum ranging from a body

whose recommendations are merely advisory, at one extreme, to a body with complete, non-reviewable control over policies and decisions that govern local services, at the other. The movement visions highlighted in Part II are animated in part by a critique of more conventional approaches to civic engagement that emphasize input. Even when input is "real"—even when it leads to shifts in significant policies—input is different than having direct power over the policies.[198]

This input-control distinction plays out most clearly in the example of policing above: whereas the liberal vision of those in power is a more traditional idea of civilian *review*, in which civilian review boards provide nonbinding input and recommendations to police departments, movement actors instead lift up a vision of community *control*, in which local bodies have decisive power to determine policing policies and impose discipline.[199] It is not a coincidence that these movement visions suggest control rather than input; the proposals from movements are born from intense critiques of past forms of governance, such as community policing, that fail to shift structural interactions at the local level and may even reinscribe existing power imbalances.[200] For example, the distribution of policing, or decisions over major development projects, can have outsized ripple effects on the larger practices, behaviors, and patterns of activity that construct the modern city. To the extent that movements can secure a role with power over such day-to-day governance decisions in the administration, implementation, enforcement, and monitoring of these systems—beyond inputs into specific policy goals—they can help gradually reshape these background structures themselves, piecemeal, over time.

This distinction between mere input and actual power parallels a tension within scholarly debates about democracy, participatory governance, and institutional design. Indeed, a major strain among scholars of democracy and participation explains the ideal of bottom-up engagement through an input framework. Scholars of *new governance* or *democratic experimentalism* have, for example, often pointed to the value of participatory input as a way to improve collective decision-making and to make government more effective.[201] And for

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198.   *Cf.* Gerken, *Dissenting by Deciding*, *supra* note 28, at 1776 (contrasting "the dignity to participate" with "the dignity to decide" in local and sublocal governance); Shoked, *supra* note 10, at 1380 ("Micro-localism can only engage residents in participatory politics if real political powers, pertaining to issues that 'matter,' are delegated to them.").

199.   *See supra* notes 113–133 and accompanying text.

200.   *See* Simonson, *Democratizing Criminal Justice*, *supra* note 11, at 1615–16 (describing the movement critique of Chicago of Rahm Emanuel's community-policing initiative).

201.   *See, e.g.*, CRISTIE FORD, INNOVATION AND THE STATE 85–100 (2017) (outlining major scholarly frameworks around responsive regulation, new governance, and other similar approaches); Dorf & Sabel, *supra* note 29 at 283–89 (outlining how novel forms of local participation can help citizens hold institutions to account); William H. Simon, *The Institutional Configuration of Deweyan Democracy*, 9 CONTEMP. PRAGMATISM 5, at 15–30 (describing principles of collaborative governance) (2012); Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV.

decades, community policing has been a go-to solution for scholars precisely because of its potential to include disempowered populations in policing through deliberation and cooperation with police officials.[202] Similarly, recent interest in theories of *epistemic democracy* emphasize the informational benefits of such participation.[203] But while these literatures exhibit a deep interest in participation, others have rightly critiqued these approaches for falling short in actually shifting the balance of power. Thus, scholars have highlighted the limits of new governance approaches to stakeholder consultation[204] and have critiqued the consensus-based focus of community policing.[205] Similarly, studies have highlighted how outsized influence and sophistication of more well-resourced interests can skew even empowered engagement processes.[206]

227, 227–32 (discussing background conditions for new governance); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 78–89 (2011) (arguing for a shift towards regulatory and administrative designs that prioritize experimentalism, adaptability, and collaborative governance).

202.   *See, e.g.*, Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC'Y 73, 73–80 (2001) (discussing how community policing in Chicago exemplifies "Empowered Deliberative Democracy"); Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 204–08 (2003) (citing JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996)) (discussing how police departments can use the ideas of deliberative democracy and procedural justice to increase citizen participation); *see also* SKLANSKY, *supra* note 19, at 114–20 (describing and critiquing the ascendance of community policing); Simonson, *Copwatching*, *supra* note 11, at 392–95 (describing the scholarly and popular focus on consensus and deliberation in community policing).

203.   *See generally* COLLECTIVE WISDOM (Hélène Landemore & Jon Elster eds., 2012) (recounting current state of scholarship on epistemic democracy).

204.   *See, e.g.*, Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 362 (2009) ("[P]articipatory structures may rhetorically include disempowered stakeholders but actually cede little or no power."); Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 413–17 (2013) (describing the problem of "cosmetic participation" in New Governance initiatives when those who participate lack power over the results of decisions. *See, e.g.*, Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 476 (noting how agency consultations with industry as a form of civic engagement resulted in outsized influence for financial firms).

205.   *See, e.g.*, STEVE HERBERT, CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY 55–59 (2006) (describing how in Seattle's community policing program, the same three to five people "represent[ed]" the "community" in community meetings); SKLANSKY, *supra* note 19, at 114–20 (critiquing the practice of community policing); James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 14–16, 19–22 (2004) (describing and collecting studies of the uneven inclusion of populations with little political power in community policing, especially poor people of color and young people); Simonson, *Copwatching*, *supra* note 11, at 398–407 (detailing the shortcomings of consensus-based community policing).

206.   *See, e.g.*, SCHRAGGER, CITY POWER, *supra* note 20, at 155–61 (discussing the possibility of co-optation by private capital in the context of CBAs); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 1–35 (2006) (noting the greater influence by business lobbies in notice-and-comment procedures). Financial reform offers a particularly powerful example of this failure. *See* Brian Libgober & Daniel Carpenter, Lobbying with Lawyers: Financial Market Evidence for Banks' Influence on Rulemaking (Jan. 9, 2018) (unpublished manuscript), http://equitablegrowth.org/wp-

Scholars working in the new governance vein are not blind to the need to proactively facilitate stakeholder engagement, particularly among less powerful groups.[207] But in the end, the ability of groups to participate—and the likelihood that such participation actually shifts policy outcomes and power disparities—depends critically on how much power is actually at stake in the first place. As Jerry Frug wrote in his seminal law review article on the subject, "Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so."[208] Movement visions of power beyond input suggest that for such participatory institutions to generate real power, they may need to focus less on mere information-gathering or consensus, and more on engaging and structuring productive forms of contestation, where there is real power at stake.[209]

2. *Composition and Representation*

As the discussion of power and input suggests, the degree to which new institutions for decision-making actually shift control to traditionally disempowered groups depends, in part, on the design and structure of the institution and its processes. A second key feature of the design of participatory institutions is the representativeness of the bodies proposed by movement actors, whether in the policing context or in the urban development context. Of central importance to social movement actors is whether there is representation of traditionally powerless groups affected by the policies in question. This dimension requires an analysis of who "the people" are who are invited to participate in these modes of governance.[210] Movement actors center this

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content/uploads/2018/01/01162018-WP-lobbying-w-lawyers1.pdf   [https://perma.cc/QYN2-QRGZ] (empirically documenting how rule-makers quoted financial firms with more influential comments in financial regulation notice-and-comment procedures, which correlates with billions of dollars of increased financial returns compared to other actors whose comments rule-makers did not quote). *See generally* Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-making of Financial Reform*, 55 ARIZ. L. REV. 53 (2013) (documenting how financial regulation notice-and-comment procedures are dominated by financial firms).

207.   *See, e.g.*, Sabel & Simon, *supra* note 201, at 82 (describing how design of stakeholder consultation processes in new governance approaches can help facilitate greater engagement and more effective participation).

208.   Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1070 (1980).

209.   *Cf.* MCCORMICK, *supra* note 60 (describing institutional designs built to facilitate contestation between social classes as beneficial for both democratic participation and checks on state and elite power); Gerken, *Federalism All the Way Down*, *supra* note 22, at 7–8 (describing the importance of shifting power to minorities via local and sublocal governance decisions); Jane Mansbridge et al., *The Place of Self-interest and the Role of Power in Deliberative Democracy*, 18 J. POL. PHIL. 64, 93 (2010) (calling to embed nondeliberative forms of negotiation in deliberation).

210.   *Cf.* Forman, *supra* note 205, at 2 (arguing that youth should be included in community policing); Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 463 (describing how, for civilian review institutions, the "motivations, resources, and leverage depend to a significant extent on the manner in which these entities are created and staffed"); Simonson, *The Place of "the People*," *supra* note 11, at 252–57 (critiquing exclusionary conceptions of "the people" in the criminal legal system).

question because many social movements are themselves comprised of individuals from groups who have been historically disempowered, and who seek to build collective power as a means of social change.[211]

The fight over the makeup of the civilian police review board in Oakland, for instance, illustrates the types of struggles at stake. There, the debate centers on whether to appoint individuals who have had contact with the criminal legal system to the new police review board. In Oakland, movement actors seek not just to allow people with criminal records to serve on the board, but to prioritize them. Movement actors seek to focus on people with criminal records as the very people who, because of their experiences with policing, are most likely to shift long-cemented, problematic understandings of how policing happens. In contrast, institutional actors have countered by demanding "relevant experience," a term that excludes the very individuals who have been hampered from achieving experience by the structures at hand: the distribution of policing and the interaction between criminal records, employment, and race.[212]

The debate in Oakland brings up a key conflict that animates any effort at representation: how to achieve representation on local bodies by those who have been systematically excluded from political participation. This concern is especially pointed in the context of policing, for it is policies about criminal law and procedure that *create* the very power disparities themselves. Those who already have power select patterns of policing, prosecution, and punishment that play a direct role in disenfranchising people of color, destabilizing neighborhoods, disrupting families, and otherwise undermining political participation among marginalized populations.[213] In this way, the criminal legal system is not just undemocratic, it is antidemocratic.[214] The antidemocratic nature of legal systems is not limited to criminal law, making issues of

211. *See* Charles Tilly, *From Interactions to Outcomes in Social Movements*, *in* HOW SOCIAL MOVEMENTS MATTER 253, 257 (Marco Giugni et al. eds., 1999) (defining a social movement as "a sustained challenge to power holders in the name of a population living under the jurisdiction of those power holders by means of repeated public displays of that population's worthiness, unity, numbers, and commitment").

212. *See generally* Devah Pager, *The "Stickiness" of Race in an Era of Mass Incarceration*, *in* BEYOND DISCRIMINATION: RACIAL INEQUALITY IN A POSTRACIST ERA 257 (Fredrick C. Harris & Robert C. Lieberman eds., 2013).

213. *See* Jeffrey Fagan et. al., *supra* note 82, at 1554 (describing the "social, economic, legal, and political mechanisms through which spatial concentration transforms a spike in incarceration from an acute external shock into an enduring internal feature of the neighborhood fabric").

214. *See generally* AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 58–195 (2014) (describing how contact with the criminal justice system disenfranchises and alienates people from political systems); Bell, *supra* note 63, at 2067 ("[A]t both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic."); Janet Moore, *Isonomy, Austerity, and the Right to Choose Counsel*, 51 IND. L. REV. 167, 176–79 (2018) (detailing "the antidemocratic impacts of the carceral state"); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 279–86 (2007) (describing the criminal justice system's "antidemocratic impact").

representation in the face of long-standing political oppression relevant to any number of government functions.

A related concern over composition and representation arises in the debates over CBAs and the neighborhood advisory bodies: if those already in power select community representatives, those representatives might not be truly independent from those who already hold power. Revive Oakland, for example, was careful to construct the composition of the advisory body to include representatives from different stakeholder groups, with a particular focus on affected but traditionally disempowered constituencies. The city ordinance codified a representative structure that included developer and city representatives as well. In Detroit, Rise Together was concerned with the final ordinance because the City's role in hand-picking representatives could lead to a watered-down advisory board.

The point here is not that there is an abstract ideal structure to representative bodies, but rather that design choices and the individual leaders involved can play a large role in making bodies more or less powerful. A first set of design choices question how representatives are selected, who they are selected by, and what qualifications might be required. For example, institutions composed of self-selected representatives will function differently than those composed by lottery-selected, elected, or appointed representatives.[215] A second set of design choices question whether, once selected, representatives have autonomy and independence from city (or neighborhood) leaders: Do they serve on an ad hoc basis, at the pleasure of an administrator, or with set terms? Asking such questions can help focus on whether the composition of a local body has the potential to truly shift political power in the face of structural inequality.[216] A third set of design questions turns on the interaction between representatives and their larger constituencies. As theorists of representation have suggested, representatives are never truly independent of their constituents; rather, they exist in a dynamic relationship between representative and mass movements.[217] That interaction shapes both the views and actions of the representative *and* the ideas, values, and influence of constituencies themselves.[218] These questions, taken together, suggest the importance of focusing on the composition of local government bodies with respect to historically disempowered populations.

3. *Moment of Authority: Upstream Versus Downstream*

Community representation and decision-making on local governing bodies can take place at different points in the policy process. Think of a simple

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215.   *See* Fung, *supra* note 35, at 67–68.

216.   *Cf.* Gerken, *Second-Order Diversity*, *supra* note 28, at 1177–82 (describing the values and risks of shifting power over local decision-making to political minorities).

217.   *See, e.g.*, Lisa Disch, *Toward a Mobilization Conception of Democratic Representation*, 105 AM. POL. SCI. REV. 100, 100–03 (2011).

218.   *See id.*

spectrum characterizing a policy-making process. Some decision points take place upstream, early in a policy-making discussion when many possibilities are live. Such upstream decisions are thus also likely to be more structural, as more is up for grabs. Other decision points take place downstream, where there are still possible changes, but prior decisions have already locked much more in place. The moment when participation and community control take place thus plays a large role in defining the degree of power that an institution affords to a given constituency. Upstream decisions have larger ripple effects and thus can address a wider range of structures and issues. Downstream interventions are more discrete, with fewer impacts on the ground. And, of course, the length of the stream is itself structured by the interactions between local boundaries and state and federal laws.

For example, the Detroit CBA represents a more radical shift in power dynamics over traditional processes of urban development because it moves further upstream than prior ad hoc, project-based CBAs; it creates a new default rule affecting all developments throughout the city. Economic and racial justice claims might have even greater force when operating at the level of upstream city zoning decisions or at the scale of the metro region, rather than at the neighborhood or community board level. Indeed, many experiments in participatory urban planning have been hyperlocal, focused on a very small community and a relatively downstream set of decision points.[219] Confining participation to hyperlocal institutions in such a way not only undermines the scope of power exercised by communities in these processes, but also increases the potential pathologies of an overly fragmented and localized form of participation.[220] Here, too, movement actors raise institutional design choices that parallel tensions within participatory-governance scholarship. While many scholars of participatory governance have highlighted the value of small-scale "mini-publics," where participation can take place over more concrete issues through small-group deliberations,[221] other scholars have warned that such governance may not operate at a sufficiently high scale to generate meaningful power.[222]

A related variation on the upstream-downstream distinction is a contrast between policies that operate ex ante and those that operate ex post. Policing provides a useful example here: while traditional civilian *review* boards focus

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219.   *See* Shoked, *supra* note 10, at 1380 (discussing microlocal institutions).

220.   *Id.*

221.   *See, e.g.*, Robert E. Goodin & John S. Dryzek, *Deliberative Impacts: The Macro-political Uptake of Mini-publics*, 34 POL. & SOC'Y 219 (2006).

222.   *See generally* Ford, *supra* note 25 (describing the racialized history of boundary-drawing in local government law, which calls into question the benefits of change at the local level); Archon Fung, *Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future*, 75 PUB. ADMIN. REV. 513, 521 (2015) ("There are many different ways to restrict participation so that, at the limit, it is trivial: participants exercise little influence over outcomes, the agenda of issues that they consider can be highly constrained, or the resources and authorities invested in a participatory process can be tiny.").

exclusively on reviewing the performance of individual police officers or even department performance as a whole, movement-driven visions for civilian *control* boards focus more explicitly on ex ante policy-making.[223] Control boards allocate or reduce funding for police department weapons, while review boards decide whether to discipline an individual officer after they have allegedly used a weapon with excessive force. Key words such as "oversight" and "review" often imply this latter sort of downstream review of performance of individual government actors. In contrast, an ex ante influence over policy directives themselves—for example, deciding how many police officers should be dispatched to a given neighborhood, or whether police officers should even be allowed to carry guns—may give bottom-up governance the potential to intervene more deeply in the structural dispersal of policing resources, and in the distribution of violence at the neighborhood level.[224] Ex ante influence may also facilitate broader contestation of dominant ideas about the purpose and benefits of services such as policing in the first place. For example, a question about funding for weapons requires discussing the relationship of police violence to the geographical distribution of money and power, while a question of individual discipline of a police officer does not. The distinction between ex ante and ex post may therefore sometimes—though not always—mean a distinction between wholesale or retail power, between decision-making that affects an entire sublocal system or one that merely affects individual projects or people, and between affirming or contesting dominant conceptions of the meanings and purposes of local government institutions themselves. The retail level is not necessarily less powerful, but it tends to be.

B. *Three-Dimensional Thinking About Power and Local Governance*

These three dimensions—the nature of authority, the composition of authority, and the moment of authority—are all related but distinct. Each dimension demarcates a spectrum along which power over structure can be loosely measured. Taken to one extreme, the result is a weak form of community involvement: only providing input, so late in a process that it affects relatively little, through a body that does not prioritize participation by the historically disempowered. At the other extreme, these three dimensions together sketch a contrastingly powerful model of community control: exercising real power, significantly upstream to affect a wide range of policy decisions, through a representative body independent of those already in power. In practice, these dimensions are likely to interact in different ways, opening up a variety of design

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223. For more on the importance of distinguishing between ex ante and ex post democratic participation in policing, see Friedman & Ponomarenko, *supra* note 112, at 1831–35.

224. *Cf.* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 160–61 (2015) (describing New York City's "stop-and-frisk" policy, an example of how much everyday policing operates on a systemic programmatic level rather than at the level of individual-officer decisions).

choices and strategies. Thus, some interventions might institutionalize stronger forms of power that go beyond mere input, but do so at points that are relatively downstream in a policy-making process, and therefore exercise more bounded authority on policy decisions. By contrast, other interventions might involve conventionally weak forms of participation—such as ex post monitoring—but might provide a level of power and authority that makes them highly influential.

These three dimensions provide a way to read the comparisons between different visions of institutional reform. For example, in the economic development context that we describe in Part II.B, the Revive Oakland campaign successfully created a representative body with real community power, but focused on a very domain-specific context of the Army Base redevelopment. As big as the army base project is, it does not encompass the entirety of land-use and urban-planning crises facing Oakland in this period of rapid gentrification and widening inequality. And while the community role in monitoring compliance with the CBA represents a significant shift in power relationships around urban development projects, it falls short of radical aspirations for community control of the local economy. The Detroit CBA, by contrast, sought to secure a wider citywide scope—operating upstream, along dimension three. But in the end, it faced its own tradeoffs, gaining wider scope and reach, but reducing the grassroots calls for more robust power. It settled for more of an advisory input form of authority—operating toward the input side of the spectrum, along dimension one. This tradeoff is in a sense understandable: Detroit remains at the mercy of developers whose investment it hopes to secure in the quest to rebuild the city after its catastrophic collapse. But the Rise Together proposal also faced some design challenges of its own. By cutting the city administration out of the neighborhood-council process, the Rise Together proposal sought to avoid a potential danger of developer-city capture that might dilute community control. And newer fights around major economic development projects, like the Amazon headquarters debate, represent further attempts at establishing community control even more upstream, targeting the prior negotiations between companies and the city even before a CBA is entered into. These newer fights seek to claim community influence that is more upstream, but so far lack the kinds of institutionalized structures that would entrench greater community power and representation.

These three dimensions thus provide a way to analyze institutional reform proposals. Table 1 below summarizes the different proposals described in Part II along these different dimensions.

Table 1: Three Dimensions of Authority

	Dimension One: Nature of Authority: Power vs Input	**Dimension Two: Composition and Representation of Disempowered Populations**	**Dimension Three: Moment of Authority: Upstream vs Downstream**
Community Control of the Police			
Chicago CPAC (losing movement-driven proposal)	*Strong*: power to adopt rules for police conduct	*Strong*: mandated independence from police and city leaders	*Strong*: power over both ex ante police policy and ex post police discipline, suggests more structural, far-reaching influence
Chicago COPA (winning Emmanuel-backed proposal)	*Weak*: investigatory body; recommendations nonbinding	*Medium*: claims independence, but no safeguards in the ordinance itself	*Medium*: main focus is on ex post discipline, but some focus on broader patterns of misconduct
Oakland Community Police Review Agency	*Medium*: largely investigatory body	*Strong*: mandated representation and encouragement of justice-involved residents	*Weak*: Main focus is on ex post police discipline in individual cases; little influence on broader policies or patterns
Community Control of Local Economic Development			
Detroit CBA Ordinance (losing movement-driven proposal	*Strong*: mandatory community benefits requirements	*Strong*: more representative body	*Strong*: more upstream and structural focus on citywide development process

from Rise Together)			
Detroit CBA Ordinance (as enacted by City Council)	*Weak*: less power, more input	*Medium*: potentially representative body, but concerns that it may not be	*Strong*: more upstream and structural focus on citywide development process
Revive Oakland (as enacted by City Council, with movement support)	*Medium*: some degree of real power through monitoring of CBA	*Strong*: representative advisory body	*Medium*: relatively limited focus on a single development project of the Army Base; but that project is itself massive and hugely important in Oakland's economy and politics

Comparing the different institutional reform proposals from Part II along these three dimensions reveals a series of insights that can help shape thinking around institutional design at the local level. First, note how movement-driven visions of institutional reform are more radical along all three dimensions than the official versions enacted by city governments: in the policing reform fight, it is the losing CPAC proposal in Chicago that is strong in all three dimensions, and in the CBA debate, it is the Rise Together movement's proposal that is strong in all three dimensions. Although neither of these radically powerful proposals won the day, the winning proposals contain very real experiments with power-shifting institutional designs in some official city policies. For instance, the Revive Oakland campaign has a strong representative body. It makes strides in seeking power over input and in moving relatively upstream in the development process.

Table 1 also demonstrates how the different dimensions interact and offset one another. An institutional proposal that might be weak on one dimension can compensate by shifting more power on another dimension. Thus, the Detroit CBA as enacted, with an advisory role for a potentially unrepresentative body, is weak along Dimension One. But, it does exercise more structural power through its upstream citywide reach. As suggested in Part II above, these hybrid proposals that are weak in some respects and strong in others might well be more likely outcomes of politically contested reform debates. City officials may be willing to countenance more far-reaching forms of structural influence if the form of input is more advisory. Similarly, there may be more willingness to allocate greater power to representative bodies if their scope of influence is limited to specific cases rather than larger policies or patterns.

Furthermore, while these three dimensions of power-shifting in institutional design are conceptually independent, they are often politically linked. These three dimensions taken together suggest that genuine power-

building, as conceived at the social movement level, may require a real shift in decision-making authority and a shift in who is capable of deciding, halting, or shaping policy outcomes. Such participation departs from more conventional accounts of civic engagement, participation, or collaborative governance. But the specter of such community power—power that goes beyond mere input—is often terrifying to policy-makers and proponents of expert-driven "good governance." And perhaps institutional actors should be terrified at the potential for contestation over larger ideas of what local government should be: calls for community control of the police in Chicago, for example, often go hand in hand with a call to disarm, defund, or even abolish the police department itself.[225] If democracy is to have real meaning, it should be messy and conflictual, facilitating contestation over important and therefore controversial decisions.[226] Moreover, the forms of change necessary to shift and undermine longstanding structural inequalities will necessarily destabilize the status quo. Politically, though, this means that efforts to institutionalize more robust forms of power are likely to generate more opposition—even from otherwise favorably inclined public officials.

All that said, a few caveats are in order. First, these dimensions do not exhaust the terrain of institutional design choices.[227] The literature on institutional design is vast, and there are many further decisions to be made, for example, about how exactly to set up representative bodies, or whether to increase participation in a standard-setting phase, or a monitoring-and-enforcement-phase.[228] And of course these design choices do not exhaust the wide range of institutional design considerations that will be familiar to public law scholars in the context of debates over constitutional structure, administrative agencies, and the like.[229] Second, this discussion is not meant to imply that all, or any, forms of community control are productive at the policy-making level. Even in institutions that reflect greater power-shifting along these three dimensions, reformers still face the challenge of structuring the inner workings of those new institutions in ways that make such community control

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225. In 2019, for example, activists joined together in a coalition that is backing the new CPAC bill and simultaneously calling for the defunding and disarming of the police. *See* @BLMChi, TWITTER (June 12, 2019, 11:25 AM), https://twitter.com/BLMChi/status/1138875087577387009 [https://perma.cc/Z84Z-SNMQ] ("Defund, Disarm, Disrupt CPD and business as usual. #FIGHTBACK #CPACNow.")

226. *See supra* Part I.A (arguing for the centrality of contestation to combatting structural inequality).

227. *See generally* VERMEULE, *supra* note 14 (summarizing how institutional-design choices advance various democratic goals); Fung, *supra* note 35 (outlining a framework for understanding major institutional design variations in contemporary participatory institutions).

228. On the role of participation in monitoring and enforcement in various contexts, see, for example, Melish, *supra* note 162 (performance monitoring of social welfare institutions); K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, 50 POL. SCI. & POL. 751 (2017) (describing how enforcement and monitoring can be a mode of participatory power); and Simonson, *Copwatching*, *supra* note 11 (citizen copwatching).

229. *See generally* sources cited *supra* note 14.

actually effective in changing city services on the ground. Indeed, movement visions of community control *are* often flawed, or, in the end, face the danger of being co-opted by more traditional arrangements that maintain existing power relationships.[230] Third, and relatedly, this discussion thus far bypasses the many restraints that states, and to a lesser extent the federal government, impose on the power of local governments themselves.[231] Finally, there may be some criticisms that these interventions are not power-shifting enough—for example, one could imagine, as American city policy-makers have in the past, even more direct forms of state and democratic control over public infrastructure and decision-making.[232]

Taken together, though, these movement visions suggest that a genuine commitment to democratic contestation and bottom-up power-building might require a radically different approach to institutional and policy design, emphasizing power, not merely input; ensuring representation; and situating that power upstream enough to have real impact on the larger structures of government policy. This approach comes from a recognition that governance is an ongoing process in which historical inequalities are embedded. "Good governance," therefore, should value not just efficiency and expertise, but also justice, inclusion, and democratic legitimacy. The three dimensions of power-building we present do not provide a blueprint for an ideal form of governance. But they do lead us to a hypothesis: that strong levels of each of the three dimensions will lead to forms of governance that are the most likely to facilitate collective contestation and shift power. And, in turn, this hypothesis leads to a series of empirical questions for which we do not yet have answers. Would a radical vision of community control lead to policy outcomes better than or different from those created by other forms of local governance? Would an institution of community control that is strong along every dimension truly shift power, or might it still be subject to the same risks of co-optation other governance arrangements face? Might it devolve into an ugly form of populism?

230.   *Cf.* FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 5 (1977) (arguing that demands for participation from poor people too often lead to elite-designed institutions that mute oppositional politics).

231.   *See generally* Edward W. De Barbieri, *Urban Anticipatory Governance*, 46 FLA. ST. U. L. REV. 75, 84–86 (2019) (summarizing state-local dynamics in the context of urban planning decisions); Schragger, *The Political Economy of City Power*, *supra* note 22 (summarizing the limitations cities face in adopting and protecting their own laws). For a recent example of a state government taking away local power to engage in police oversight, see Natalie Allison, *Tennessee Republicans File Bill Stripping Nashville Police Oversight Board's Subpoena Powers*, TENNESSEAN (Feb. 4, 2019), https://www.tennessean.com/story/news/politics/2019/02/04/police-oversight-board-subpoena-power-tennessee-house-bill/2773233002/ [https://perma.cc/9QRX-SZB9].

232.   *See, e.g.*, Dan Kaufman, Opinion, *The City Sanders and Ocasio-Cortez Would Have Loved to Live In*, N.Y. TIMES (Oct. 19, 2019), https://www.nytimes.com/2019/10/19/opinion/sunday/socialism-milwaukee.html [https://perma.cc/3ZZL-QGEN] (on Milwaukee's long history of "sewer socialism" as a model for today's battles with inequality); DANIEL T. RODGERS, ATLANTIC CROSSINGS 335–40 (1998) (describing municipal socialism and the innovation of urban public utilities).

And would a proposal that is strong on every dimension ever be politically feasible, even in the most progressive city? Part of what we have attempted to do by presenting this framework is to put such questions on the table, as a challenge to study more directly and think more deeply about the potential for radical shifts in local governance.

IV.

HOW TO SHIFT—AND STUDY—POWER

Contemporary social justice movements recognize and confront the problem of disparate power over deep, structural conditions giving rise to patterns of economic, racial, and gendered inequality and exclusion. As a result, these movements have begun to pioneer new institutional arrangements aimed at democratizing control over the policies that shape those deeper structures and patterns. In Parts II and III we highlighted two of these movement-created institutional design experiments, in the areas of policing and economic development. These examples and the typology that emerges from them raise important questions for scholars and policy-makers focused on questions of power and institutional design. As we laid out in Part III, there are at least three distinct dimensions of institutional design choices along which movement actors move: the nature of authority, the scope of representation, and the moment of authority. These dimensions in turn may shape the degree to which institutions actually do or do not shift power over background structural conditions. In this Part, we outline the implications of our analysis for the study of law, social change, and legal institutions more broadly. In particular, we highlight the ways in which our framework of institutional design dimensions can be useful in thinking about law, policy, and institutions across a number of different specific policy debates, including policing, economic development, algorithmic justice, and the distribution of public goods, as well as across transsubstantive areas of legal scholarship such as public law, local government law, and law and social movements.

A. *Shifting Power in Local Governance*

Across the United States, movement actors continue to push for community control of local services and resources in cities both large[233] and small.[234] The

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233.   *See* Bryce Covert, *A Nationwide Campaign to Take Back Cities from the Corporations that Rule Them*, IN THESE TIMES (July 3, 2018), http://inthesetimes.com/working/entry/21253/privatization-Amazon-campaign-We-Make-This-City-Working-Families   [https://perma.cc/ZKC9-4J6M] (describing the "We Make This City" campaign, which calls for community control of local governance in Atlanta, Boston, Denver, Los Angeles, New York, Oakland, Pittsburgh, San Diego, San Jose, and Seattle).

234.   *See, e.g.*, CITIZENS' NETWORK OF PROT., PROPOSAL FOR AN EVANSTON BOARD OF POLICE OVERSIGHT,   ACCOUNTABILITY,   AND   TRANSPARENCY   (2018), https://docs.wixstatic.com/ugd/e3aa4b_e6af3785d5854baca8b44258bd801889.pdf

conversations these demands generate differ from traditional public policy debates, which are understood in terms of their substantive concerns and possible outcomes: How many units of affordable housing are needed and constructed in a city; how many improper arrests are there in a year and how can that number be driven down? The pushes for community control over policing and economic development have a different focus: the policy-making process itself. These social movement campaigns are worth paying attention to—not just for their larger calls for democracy and equality, but also for the nuanced ways in which they seek democratic power over structural drivers of inequality at the local level. Movement actors ask: Who governs these policy issues and makes these decisions on a day-to-day basis, and how can people democratize that control and make it more inclusive? As we detailed in Part III, these institutional design questions revolve around three key design dimensions: the nature of authority, the composition and representation of disempowered populations, and the moment of authority. We now extend this three-dimensional institutional design framework to a range of debates to help frame further inquiry into the policy solutions and institutional design choices facing movement actors, policy-makers, and scholars alike.

We begin with the first local policy area we explored above: policing. Although the concept of civilian oversight of policing is reemerging nationwide in our movement moment, to date few, if any, jurisdictions have taken up institutions of community control such as those envisioned by movement actors in Chicago and Oakland and analyzed in Part II.A above. As jurisdictions continue to look to civilian oversight of policing as a potential fix,[235] attending to the specifics of institutional design will be necessary to avoid the pitfalls of past pushes for civilian oversight.[236] Indeed, a three-dimensional comparison of current institutions of civilian review and past movement-driven pushes for community control does not support the widespread view that civilian review, as a concept, is ineffectual; to the contrary, it suggests that we have never actually experimented on the ground with forms of civilian review that truly shift power over policing to community members.[237] When thinking about any new institution of civilian review of the police, then, one might use the framework to

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[https://perma.cc/V46N-VVS6] (calling for a civilian board to serve as a means of oversight, investigation, and review of civilian complaints against the Evanston, Illinois, police).

235.   *See* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 26 (2015) (recommending civilian oversight institutions and noting "[t]here are important arguments for having civilian oversight even though we lack strong research evidence that it works"), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/97X7-9K5S].

236.   *See* Ofer, *supra* note 16 (detailing how most civilian review boards have little power and have led to little change).

237.   *See id.* at 1039 (arguing that civilian review boards have failed because they were "rigged to fail," which has led to a loss in faith in the concept); *cf.* WALKER, *supra* note 6, at 44–45, 53–54 (criticizing the widespread view that civilian oversight has been ineffectual and arguing that the reality is more nuanced).

analyze whether that institution would truly shift power away from the police and toward those who have historically been the targets of police violence, asking specific questions about the scope and nature of the power of the oversight board, and the representativeness of its members. These questions about power might even *precede* questions of effectiveness in the traditional sense, such as whether police culture can be changed from the outside or whether laypeople would likely implement police policies that minimize police violence. When power-shifting is separated out from these traditional measurements of success, it is easier to analyze and even to measure.

A similar sequence of questions might arise when considering the three-dimensional framework in scholarship about criminal law and procedure more broadly. For there has been a renewed focus in both scholarship and policy in recent years on ways to "democratize" institutional sites of criminal law and procedure, including policing and criminal adjudication.[238] As scholars continue to think through the democratization of policing and criminal adjudication, our framework suggests they should take a cue from social movements and think beyond conventional mechanisms of democratic inclusion represented by, for example, "community justice"[239] or notice-and-comment rulemaking.[240] Instead, they should ask whether deeper contestation and more radical institutional change may be necessary to truly shift the antidemocratic nature of much criminal law and procedure.[241] And then, from there, they might move to an analysis of whether these forms of deep democratization are indeed compatible with the specific criminal procedure at issue.

A similar set of questions arise when applying the view from social movements in the context of local economic development policy and

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238. *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 29–60 (2012) (describing how the inner workings of today's criminal justice system undermine democratic notions of oversight, transparency, and governance); Symposium, *Democratizing Criminal Justice*, 111 NW. U. L. REV. 1367 (2017) (a collection of essays on the theme of democratizing criminal law); Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1452 (2017) (outlining reforms that could protect and promote input into policing and prosecutorial decision-making); Friedman & Ponomarenko, *Democratic Policing*, *supra* note 112 (advocating for increasing democratic inputs into policing priorities); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011) (arguing that democratic and participatory procedures would improve criminal justice policy).

239. *See generally* SKLANSKY, *supra* note 19, at 114–32 (describing the limitations of scholarship focused on community policing and other forms of community justice that center only on consensus-based methods of public participation); Simonson, *Copwatching*, *supra* note 11, at 399–407 (describing how the consensus-based efforts at community justice reinscribe existing power imbalances).

240. For recent pushes to implement notice-and-comment and other mechanisms of traditional administrative law into the criminal process, see, for example, Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012); Friedman & Ponomarenko, *Democratic Policing*, *supra* note 112; and Slobogin, *supra* note 153.

241. *See generally* Simonson, *Democratizing Criminal Justice*, *supra* note 11 (making this argument); *cf.* Roberts, *supra* note 63 (arguing that American systems of law enforcement are by their nature antidemocratic, and that democratizing criminal law therefore requires looking beyond increasing public participation in criminal justice in the conventional sense).

scholarship. Take the tactic of community benefits agreements, such as those in Detroit and Oakland discussed in Part II.B. There has been much scholarly scrutiny of the specific elements of CBAs, especially focused on their potential to result in outcomes that are beneficial to communities and developers alike.[242] And scholars like Vicki Been and Ted De Barbieri have also provided nuanced analysis of the representativeness and independence of community members in CBAs, as well as ways in which the power dynamics of CBAs can potentially backfire.[243] But the view from social movement actors suggests there are additional questions worth asking, especially as the proposed scope of CBAs continues to expand. It shifts the questions away from those about big-picture policy outcomes, or inefficiencies of bargaining, to think more specifically about the nature of the power given to community members, and to whom exactly that power is given. This view asks questions about who exactly participates as a representative of the "community," seeking novel institutional designs like the oversight board in Oakland. It also explores a wider range of possible modes of participation, looking not just to ex ante participation but also to ex post modes of participation in monitoring and enforcement. And it suggests some benefits to larger CBAs that move beyond individual projects, even if the benefits might result in other forms of inefficiencies. Applying our framework does not necessarily result in a conclusion that every CBA is a good thing—far from it— but doing so expands the range of institutional design questions beyond an appeal to "community participation" and a focus on policy outputs and outcomes, demanding instead attention to questions of power and structural inequality.

While this Article has focused on two distinct areas of policy reform— policing and local economic development—our three-dimensional framework for community control and democratic institutional design is also portable to a range of other issues. Take, for example, recent debates over designing new democratic institutional mechanisms to govern the world of big data, algorithms, and online platforms. With the rise of digital platforms for the online public sphere like Facebook and Google, and the proliferation of big data and algorithmically-based governance forms like scoring systems[244] and "predictive policing,"[245] a growing set of scholars, reformers, and activists are highlighting the ways in which these technological systems are themselves creating new

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242.   *See* Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010); De Barbieri, *supra* note 168; *see also* Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 FORDHAM ENVTL. L. REV. 543, 557 (2010) (outlining types of CBAs and the policy and legal issues surrounding them); Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 37 (2008) (proposing that focusing on accountability and inclusiveness in CBAs will improve their effectiveness).

243.   *See* Been, *supra* note 242; De Barbieri, *supra* note 168.

244.   *See, e.g.*, Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014).

245.   *See, e.g.*, Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1149–93 (2017).

forms of inequality.[246] These problems no doubt involve technical issues that will require specific remedies to the regulation and operation of algorithms, platforms, and Big Data systems. But long-term structural solutions to the problem of technological exclusion and inequality will likely have to involve the creation of new governance regimes.[247] For example, in 2017, New York City announced the passage of the first algorithmic-transparency ordinance in the country and the creation of an algorithmic-accountability "taskforce" to generate community input into the algorithms the City uses in everyday governance.[248] Three-dimensional thinking about the creation of new institutions of algorithmic accountability should give us both pause and excitement about announcements like this. Not all civilian accountability mechanisms are created equal; instead, we should not applaud the creation of new governance regimes without a careful analysis along the dimensions we have proposed. Indeed, in the years since New York City's algorithmic-transparency law was enacted, external reviews have raised serious concerns about how New York City engaged with affected communities, and whether the City's policies did in fact address issues of bias and surveillance.[249]

Or consider how debates over access to public goods like the water crisis in Flint have led reformers to imagine new governance arrangements for utilities that leverage greater community control as a way to assure access and accountability.[250] The water crisis in Flint is not just a policy failure on the part of state and local environmental authorities; it is also rooted in an underlying disparity of political power, as local residents lacked sufficient institutionalized levers through which they could pressure state and local officials to respond

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246.   *See, e.g.*, VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2017) (describing how algorithmic and technological surveillance tools disproportionately harm the poor and communities of color); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016) (describing the rise of algorithm-based forms of governance and highlighting the problems they pose for accountability and equality).

247.   *See, e.g.*, FRANK PASQUALE, THE BLACK BOX SOCIETY (2015) (describing how corporations and powerful actors use data to manipulate society, and arguing for greater forms of democratic and public oversight of these systems)

248.   *See* N.Y.C. Council 2018/049 (2018); Lauren Kirchner, *New York City Moves to Create Accountability for Algorithms*, PROPUBLICA (Dec. 18, 2017), https://www.propublica.org/article/new-york-city-moves-to-create-accountability-for-algorithms) [https://perma.cc/2VYH-SD6V].

249.   *See* Charlie Innis, *"Shadow Report" Clashes with City Algorithms Report*, KINGS COUNTY POL. (Dec. 16, 2019) (describing the critique of New York City's public report on algorithmic bias by third-party review), https://www.kingscountypolitics.com/shadow-report-clashes-with-city-algorithms-report/ [https://perma.cc/J3JY-Q83Y]. *Compare* N.Y.C. AUTOMATED DECISION SYS. TASK FORCE, NEW YORK CITY AUTOMATED DECISION SYSTEMS TASK FORCE REPORT (2019), https://www1.nyc.gov/assets/adstaskforce/downloads/pdf/ADS-Report-11192019.pdf [https://perma.cc/4C47-XFEX] (New York City report), *with* AI NOW INST., CONFRONTING BLACK BOXES: A SHADOW REPORT OF THE NEW YORK CITY AUTOMATED DECISION SYSTEM TASK FORCE (Rashida Richardson ed., 2019), https://ainowinstitute.org/ads-shadowreport-2019.html [https://perma.cc/9Q8V-NWUZ] (critiquing the New York City report).

250.   *See* K. Sabeel Rahman, *Infrastructural Exclusion and the Fight for the City: Power, Democracy, and the Case of America's Water Crisis*, 53 HARV. C.R.-C.L. L. REV. 533, 534 (2018).

more rapidly and aggressively to the lead poisoning crisis.[251] And indeed, grassroots reform efforts are raising these questions of power and participation, seeking institutional reform of the legal structure of emergency management, water utility structure, and other design questions.[252] Our framework can therefore offer useful insights and directions for these fights over power and participation in the water context.

As with any new institution, the creation of an institution of local community control will never be a panacea. Indeed, in Part III.B, we alluded to a number of potential problems with community control institutions, including the potential for capture by more powerful interests and the legal hurdles local governments face. Moreover, for movements focused on profound shifts in power, community control over discrete services will still fall short of the immense power needed to promote a greater redistribution of resources—to take the example of the Invest/Divest movement,[253] it is hard to divest from policing and invest in education if you only have control over one of the two systems.[254] More broadly, local governments themselves may not have power over the generators of profound structural inequalities, making community control difficult as a structural fix.[255] But community control should not be so easily cast aside as politically infeasible or unwise without first digging into which levers of power will be at play, how those levers will be pulled, and by whom.

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251. *Id.* at 543 ("The kinds of infrastructural exclusion . . . are not just products of a misconception of the nature and importance of water; they are the result of existing disparities of power as well as structural and institutional dynamics shaping the exercise of public and private authority over the water system.")

252. *Id.* at 540–45.

253. *See supra* notes 73–76 and accompanying text.

254. But it is not impossible; in Los Angeles, for example, Black Lives Matter activists succeeded in gathering signatures for a referendum to simultaneously bolster the powers of the Civilian Review Commission and require "community reinvestment" by transferring resources from local jails to community services. *See* Jeffrey Cawood, *Black Lives Matter Leader's Referendum Qualifies for Presidential Primary Ballot in 2020*, DAILY WIRE (Sept. 13, 2018), https://www.dailywire.com/news/35808/black-lives-matter-leaders-referendum-qualifies-jeffrey-cawood [https://perma.cc/7XYF-SZBW]. The measure passed by a "landslide" in March 2020. *See Los Angeles County, California, Measure R, Civilian Police Oversight Commission and Jail Plan Initiative (March 2020)*, BALLOTPEDIA, https://ballotpedia.org/Los_Angeles_County,_California,_Measure_R,_Civilian_Police_Oversight_Commission_and_Jail_Plan_Initiative_(March_2020) [https://perma.cc/Y2QR-HBKW]; Jeffrey Cawood, *LANDSLIDE: Black Lives Matter Leader's Ballot Measure Wins Big in Los Angeles County*, DAILY WIRE (Mar. 5, 2020), https://www.dailywire.com/news/landslide-black-lives-matter-leaders-ballot-measure-wins-big-in-los-angeles-county [https://perma.cc/QS35-Y9T4].

255. *Cf.* JAMES FORMAN, JR., LOCKING UP OUR OWN 12–13 (2017) (describing how in Washington, D.C., reformers in the 1970s wanted to combat local crime through *both* criminal law and broader anti-poverty policies, but "American racism narrowed the options available to Black citizens and elected officials in their fight against crime"); Ford, *supra* note 25 (describing how intralocal inequalities and boundaries between local governments can make local change difficult).

B. *Studying Power in Legal Scholarship*

Contemporary legal scholars can play an important role in this renewed debate about democracy, equality, and governance. For legal scholarship itself plays a unique role in the world of law and policy, providing a forum for sharpening a normatively driven set of commitments to the rule of law and democracy.[256] In addition, legal scholars can and do bring their expertise in governance and institutional design to discrete policy fights, envisioning how different governance arrangements might be set up, and how they might play out. These governance questions are often most apparent in public law scholarship debates over issues like constitutional structure, administrative agency design, and the like.[257] But as this Article suggests, legal scholars engaging in these debates should also take a closer look at the more radically democratic alternative institutional designs being proposed by movement actors, looking for expertise on the ground and joining with movements to create frameworks for and theories of legal change. Moreover, even if movement actors may debate and generate institutional design frameworks that mirror those discussed in existing public law scholarship, their on-the-ground efforts to contest day-to-day questions of politics and power are themselves worthy of study and attention when scholars take up these questions.

It is not that the idea of "community control" itself presents a new set of concerns or aspirations for reform movements or scholars—the question of democratic community control has long been an aspiration in democratic theory and among more radical reform movements. Indeed, there have been remarkable moments of rich scholarly and reformist exploration over democratic institutional design and methods for instantiating greater community control, including in the work of activists and policy-makers during the War on Poverty,[258] and the burst of scholarship on community control in the 1960s and 1970s.[259] More recently, scholarship in local government law,[260] law and social movements,[261] and participatory governance[262] has made the powerful case for

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256.   *Cf.* Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 10 (2016) (describing and defending the practice in legal scholarship of taking normative viewpoints).

257.   *See generally supra* note 14 and accompanying text.

258.   *See, e.g.*, *supra* note 162 and accompanying text.

259.   *See, e.g.*, ALTSHULER, *supra* note 91; SCHOOLS AGAINST CHILDREN: THE CASE FOR COMMUNITY CONTROL (Annette T. Rubinstein ed., 1970); Hatton, *supra* note 91.

260.   *See, e.g.*, FRUG & BARRON, CITY BOUND, *supra* note 158 (calling for a new structure in state-local relations to improve city governance); GERALD E. FRUG, CITY MAKING (1999) (considering how law and policy has empowered and disempowered American cities); SCHRAGGER, CITY POWER, *supra* note 20 (analyzing the governing power of American cities); Gerken, *Dissenting by Deciding*, *supra* note 28, at 1748–49 (observing that a city's decision, resulting in action, may be considered a dissenting, minority view within the polity as a whole).

261.   *See, e.g.*, STONES OF HOPE, *supra* note 31 (focusing on social and economic rights activism in Africa).

262.   *See* HOLLIE RUSSON GILMAN, DEMOCRACY REINVENTED: PARTICIPATORY BUDGETING AND CIVIC INNOVATION IN AMERICA (2016) (explaining how participatory budgeting combined with

exploring greater possibilities of democratic governance. But we can and should dig deeper. In particular, our call for legal scholarship to invest more time in imagining democratic institutional-governance arrangements has implications in particular for three growing, transsubstantive areas of legal scholarship: power in public law, local government law, and law and social movements.

First, in public law scholarship, there has been a recent revival of interest in power.[263] This suggests the importance of leveraging plastic administrative processes[264] and decentralization[265] to enable social movements and often-disempowered constituencies to exercise greater political power and community control. But, this revival has for the most part remained largely theoretical. The three-dimensional framework provides greater clarity for what a focus on power in public law institutions might mean, and how power might be better balanced in governance processes, particularly at the local level. It can give scholars a step forward, showing them where to look for visions of institutional design and how to think about power-balancing within local institutions.

Second, our focus on cities builds on and extends the recent revival of interest in decentralization in general, and local government law in particular. By putting two seemingly disparate focal points of local governance—policing and economic development—in conversation with each other, we emerge with broad principles for institutional design at the city level. There has been a rise in the celebration of cities as spaces for incubating new policies and as arenas for democratic politics.[266] Politically, we are in the midst of an urban revival: progressive cities are rising up as leaders in the fight against inequality, and with the presidency of Donald Trump, cities are taking center stage as sites of

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technology can be a means to engaging citizens in democratic policy-making); Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC'Y 5 (2001) (analyzing examples of "empowered deliberative democracy" and its potential as a strategy for progressive institutional reform).

263.   *See, e.g.*, Andrias, *Confronting Power in Public Law*, *supra* note 85 (applying a normative approach to analyzing power in and reform of public law); Levinson, *supra* note 34, at 38 (calling for scholars to "make better sense of how power is, and should be, understood, located, and distributed in public law").

264.   *See, e.g.*, Levinson, *supra* note 34 (arguing that scholars should study how power moves through institutions of public law); Sitaraman, *supra* note 57 (contemplating its puzzling absence); Rahman, *Policymaking*, *supra* note 8 (advocating for a power-building orientation to designing administrative processes).

265.   *See, e.g.*, Gerken, *Dissenting by Deciding*, *supra* note 28 (exploring the importance of, and power in, disaggregated decision-making bodies); Bierschbach, *supra* note 238 (arguing for a fragmented approach to criminal sentencing).

266.   *See generally* Davidson, *supra* note 22, at 574–79 (outlining the important role of administrative law in fostering experimentalism and democratic accountability). *See also* DAVID HARVEY, REBEL CITIES 25 (2012) ("Urban innovations with respect to environmental sustainability, cultural incorporation of immigrants, and urban design of public housing spaces are observable around the world in abundance."); SCHRAGGER, CITY POWER, *supra* note 20, at 165–90 (discussing "the ways in which urban political movements 'shift scales' between local and nonlocal political actors and how these shifts can provide leverage for the pursuit of progressive policies").

resistance and contestation.[267] Scholars of local government have noted how this revival of interest represents a notable shift in the conventional politics of decentralization: while conventionally localism and decentralization may have been a common value among conservative political movements and viewed with skepticism by progressive movements, now the prospects of progressive state and city governance are more openly celebrated.[268] Our analysis in this Article suggests that part of the value of this focus on the city is not just in the substantive policies cities can innovate and experiment with, but also in the processes and strategies for power-shifting they can develop. Cities, on our read, are vital in part as incubators for new democratic practices and strategies.

At the same time, we do not mean to suggest the valorization of local politics for its own sake. Indeed, we recognize, along with social movement actors themselves, that local control can be as oppressive as it can be liberatory.[269] Moreover, the rise of progressive local policy has unsurprisingly generated a crackdown as more conservative state and national regulators have sought to preempt and limit many states' abilities to pursue these reforms.[270] Indeed, the institutional design lessons coming from experiments in community control do not have to remain local. As social movements seek to gain control of broader institutions of political power, we might imagine the same design questions shaping institutional- and policy-reform questions at the federal, state, or regional levels.[271] Our normative call, then, is not for localism-qua-localism,[272] but rather for a scholarly focus on concrete mechanisms of power-

267.   *See, e.g.*, TYNAN ET AL., *supra* note 23 (advocating effective ways for cities to advance progressive agendas).

268.   *See, e.g.*, Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018) (describing efforts in the last decade by Republican state legislatures to block increasingly progressive local legislative efforts); Davidson, *supra* note 15 at 963–74 (describing the "renewed urgency" of localism as national politics become increasingly polarized); Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY 37 (2012) (describing how historical progressive unease with decentralization stems from the experience of civil rights movements in the 1960s, and arguing for the value of empowering constituencies through greater local governance); Heather K. Gerken, *Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087, 1088 (2017) (describing how progressives can "use their control over blue cities and states to shape the national agenda").

269.   *See generally* Briffault, *supra* note 25, at 340–59 (describing the political and structural variability of local governments); Ford, *supra* note 25, at 1844 (describing how local governments facilitated racial segregation).

270.   See generally Briffault, *supra* note 268, at 1999–2008 (describing the rise of recent state efforts to preempt progressive local legislation and other local policy efforts). *See also* David J. Barron, *Blue State Federalism at the Crossroads*, 3 HARV. L. & POL'Y REV. 1 (2009) (describing the successes of progressive reform at the local level and the threats of state and national preemption arising in response to these successes). The problem of state and national preemption is, of course, a classic concern for scholars of local government law. *See, e.g.*, FRUG & BARRON, CITY BOUND, *supra* note 158, at 68–74 (describing how state governments preempt city government officials' power).

271.   *Cf.* Cashin, *supra* note 26, at 2033–34 (advocating, in part, for the creation of new regional institutions that facilitate grassroots engagement—but warning that those new institutions could be co-opted by the powerful as much as local institutions can be).

272.   *Cf.* SCHRAGGER, *supra* note 20, at 254 ("Decentralization is not a good in itself; it must be measured against a set of ends.").

shifting in governance toward the relatively powerless.[273] And in the current political landscape, it is often at the local level that these institutional designs emerge.

Third, this paper contributes to ongoing questions in the literature on law and social movements. Scholarship in law and social movements has long emphasized the importance of movement organizing in building power and shifting norms, culture, and ultimately, law.[274] This Article provides another example of movement actors doing law-making from the ground up,[275] but it centers on institutional design choices that movement actors are making. Our approach contributes to a broad sense of the possible strategies and tools through which social movements can claim greater power and influence—not just through legal action, or attempts to shift laws and norms, but also through a direct engagement with, and transformation of, the institutions of ordinary, day-to-day governance. We are hopeful that it can be a part of the renewed interest in law and social movement scholarship that elevates on-the-ground expertise from those most exposed to and impacted by the law's violence.[276] But we also see this paper as adding an important complement to law and social movement themes, as the focus here has been not on norm-shifting or organizing, but rather on the conversion of grassroots mobilization into actual governing power. As more egalitarian social movements successfully gain a foothold in local (and perhaps even regional, state, and national) policy-making bodies, it will be increasingly important for movement actors to shift from a pure advocacy stance to one that seeks to design and implement a governing agenda, including institutional reform.[277] This Article provides a preliminary step in fleshing out that movement-driven exercise of governing power.

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273.   To the extent that we are entering the debate over the value of localism in the context of federalism, we would also endorse a normative frame that places limits on localism to the extent that it bumps up against values of equality and inclusion. *Cf.* Davidson, *supra* note 15, at 984–93 (laying out a normative frame for doing this in the context of judicial review of state preemption).

274.   *See, e.g.*, Akbar, *supra* note 31; Ashar, *supra* note 31; Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946–48 (2006); Cummings, *supra* note 33; Guinier & Torres, *supra* note 45, at 2757–68; Michael W. McCann, *How Does Law Matter for Social Movements?*, *in* HOW DOES LAW MATTER? 76, 90–100 (Bryant G. Garth & Austin Sarat eds., 1998).

275.   *Cf.* Matsuda, *supra* note 30 (issuing a call for scholars to examine law-making at "the bottom" as a source of liberatory legal interpretation).

276.   *Cf.* Akbar, *supra* note 31 (exploring what it means to think radically about law from a movement perspective); Ashar, *supra* note 31 (describing how lawyers engaged with activists and undocumented youth to create an antienforcement immigration mobilization from 2009 to 2012 as a form of law-making).

277.   Indeed, progressive local officials are increasingly pooling resources and ideas for institutional change. *See, e.g.*, Steve Early, *Diverse, Radical, and Ready to Resist: Meet the First in the New Wave of Local Progressive Officials*, IN THESE TIMES (Aug. 8, 2017), https://inthesetimes.com/article/20412/local-progress-fights-trump-local-elections-resist-labor-education [https://perma.cc/53RC-TGKB] (describing Local Progress, a national network of progressive local officials).

CONCLUSION

This Article has looked to the institutional designs generated by local social movements to put forth a set of three dimensions along which activists, policy-makers, and scholars can think about power-shifting and democracy in the realm of local institutional design. Taken together, this three-dimensional thinking about power and contestation in local governance suggests a way forward for legal scholars and grassroots social movements to work together in developing new institutions and public policies that not only address deeper structural disparities of inequality and power, but also help revive our democratic institutions. At the very least, for those of us interested in democracy and equality, these institutional designs are worth our attention, engagement, and respect.

More broadly, as a cue for future work, we view these institutional design dimensions as an alternative to a widespread but often hidden problem in legal scholarship and policy-making alike: the hesitancy to engage with the details of what it means to "democratize" something. Our hunch is that this hesitancy expresses an underlying fear of democratic control, rather than a robust exploration of possible democratizing institutional alternatives. Indeed, the idea of democratic participation and governance is often too easily dismissed. Radically participatory democracy, especially, can be often viewed as infeasible, or as likely to produce bad policy outcomes. And it is harder to quantify the benefits of power-shifting in a world of data-driven discussion. This Article's analysis of the three-dimensional thinking about governance by social movement actors demonstrates that these dismissals are too facile, which in our view suggests a more pernicious underlying suspicion or distrust of democracy as an ideal—what we think of as a problem of "demophobia." Demophobia is a fear of democratic governance, a presumption of democratic failure, inefficiency, and chaos, and it often can operate behind the scenes, leading scholars, policy-makers, and reformers to preemptively avoid an in-depth exploration of *how* we might institutionalize and embody effective, contestatory democratic governance.

This Article, by contrast, has taken a different approach, taking seriously movement actors' aspirations for radically democratized governance, and exploring the different institutional design questions that are necessary to make such democratized governance effective. Pushing back against demophobia means being willing to dig into those questions with seriousness, and in collaboration with those closest to the problem.