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MIKE LIVERMORE: Welcome to the Free Range podcast. I'm your host Mike Livermore. The episode today is sponsored by the Program on Law, Communities, and the Environment at the University of Virginia School of Law.

With me today is Sabeel Rahman, a professor at Cornell Law School who recently served in the Biden administration in the Office of Information and Regulatory Affairs, sometimes referred to as OIRA, as senior counselor, and then later as the acting administrator. Before that, he was the president of the think tank Demos, and he's also the author of the book *Democracy Against Domination*, amongst other works. Hi, Sabeel. Thanks for joining me today.

SABEEL RAHMAN: Thanks for having me.

MIKE LIVERMORE: So in your book *Democracy Against Domination*, you describe two broad visions about how to do policy making that we've had in the US, maybe thinking back to the New Deal as a watermark anyway, of a moment that we might look to as the origin of this. And so on the one hand, there's kind of a laissez-faire, what we might say libertarian these days, approach to governing or not governing the marketplace, the economy. And then there's a managerial, technocratic approach that has antecedents but we really see coming into full flourishing during the New Deal, post New Deal periods.

And you argue in the book, or at least that's the way I read it, that both of these approaches, there's something non-democratic, or at least distrustful about democratic politics in both of these approaches. It really limits the ability of people to affect policy outcomes. And neither-- again, this is kind of my reading; I'd be very interested in your take-- they don't address a key challenge of our particular time, which is economic and political inequality. And so you argue, again paraphrasing, for an anti domination understanding of democratic institutions, and you have reforms that you offer for the regulatory process, among other things.

So I'd love to talk about all of this in more detail. But just to further situate where the book was, it was published in 2016. And if I look at the publication date correctly, it was in November 2016. So it was a momentous period of time in American politics.

And it was also one where the regulatory state was in the news. There was Donald Trump during his campaign talking about draining the swamp and all of the deep-state rhetoric that he was deploying that struck a chord with a lot of voters. So I'm curious how, as the book came out and as the administrative state was in the news, how you saw your arguments contrasted with this alternative vision that was being offered by the Trump campaign at the time.

SABEEL RAHMAN: Yeah, well, so first, Mike, thanks so much for starting us there. It's been really interesting to think back on the book in light of the Trump era and everything that's come since. So going back to that original moment, a lot of what really got me going in that book project was really the financial crisis that started in 2008 and in particular this concern that I had watching the response to the financial crisis play out.

On the one hand here, you had such a great, very clear example of corporate and financial power, the deregulation of financial markets, the huge economic influence and power that these mega firms had, really bringing the entire financial and larger economy down to its knees. And it really got me thinking about this question of economic power on the one hand, and then on the other hand, how very technocratic-- like let's just engineer financial markets a little bit better, how that mentality just seemed to not be meeting the moment that it seemed was called for at that time, between Occupy Wall Street and the larger, longer tail of the financial crisis.

It really seemed like a moment tailor-made for a top to bottom rethinking of our political economy. And we got some of that in terms of public debate and grassroots social movements but comparatively less of that in terms of public policy.

So I say all that because that's what really got me to try to do this work of trying to unpack, well, where are those constraints coming from? And they're really intellectual, paradigmatic constraints. We're used to thinking about big government versus markets as our left-right formulation. The right cares about markets. The left cares about big government that will solve public problems.

And I'm a big believer in democratic government. But what I was troubled by is the way in which a certain kind of wonky, technocratic, managerialist approach to government among progressives or liberals really suffered from two problems. One, it often would take as a given a lot of the underlying inequities and disparities of economic power in the market economy, reduced to a nibbling around the edges kind of orientation.

And two, really almost shared with the laissez-faire view, the libertarian view, a distrust of democratic politics, that at the end of the day, we don't really think "we the people" ought to govern on these complex matters. It really should be done by people who what they're doing. We look to the Fed rather than to the Congress or to folks on the street to decide what should happen.

And so that was the motivation for the project. Now fast forwarding, I think what's interesting in 2023 is two things. One is that a very narrow, managerial, technocratic approach to economic policy I think leaves a huge, gaping, moral void in which, among other things, the kind of appeals that you saw from Trump can flourish, because it's offering a critique both of a seemingly distant, unaccountable state and in its own way, a critique of an existing political economy. That's one problem. And then the other problem is that managerialist approach to policy design just didn't have enough resources, intellectual or moral, to imagine a much more transformative, different way of structuring our economy.

And I think the pandemic created another moment to rethink both the substance and the form of economic policy-making. And I think you've seen a very different political and policy response since 2020 this time around.

**MIKE
LIVERMORE:**

Yeah, it's super interesting. And there's a lot to-- and maybe we can return to this question of the moral void and Donald Trump stepping into that. It's really interesting. And then maybe offering potentially competing visions, some kind of competing vision, as seemingly inchoate as that was.

But maybe just to get further pieces of the argument on the table, we could dive into this notion of inequality, economic inequality, political inequality a little bit more. There's a quote in the book that I like that I wanted to maybe have you expand on a little bit.

So here's how it goes. "The fundamental problem of the modern economy is understood not as a matter of income inequality or distributive justice, but rather as a broader problem of power and domination." OK, so that's the quote.

So then the question is, just to unpack that a little bit, what is the distinction you're drawing here between, on the one hand inequality or distributive justice, and on the other hand, power and domination? How are these related to each other? But how are they distinct? And what is the distinction you're trying to draw out?

**SABEEL
RAHMAN:**

Yeah, totally, so they're related, but they're two very different lenses, I think, on diagnosing the economic problems. So distributive inequality, we have an intuitive sense of what that is. There's some folks who just have a lot more than other people, in Bernie Sanders' formulation, the top 1% versus the 99%. And that's certainly true.

But what I was hoping to capture by a focus on power and domination is that it's not just the literal dollars in a bank account. What we really ought to be concerned about is who gets to govern, who gets to decide. And so the problem of, say, the financial crisis wasn't just that you had these mega firms that were worth so much money and whose collapsed then immiserated huge swaths of the country in a recession that workers and communities had to bear the brunt of the costs. So that's a problem of just income and inequality and distributive shares, sure.

But there's another, deeper problem, which is that, in a sense, we are all subjects to the arbitrary whims and desires of these masters of the universe whose decisions are not accountable to us and whose decisions affect all of us. And so that, to my mind, was the bigger problem of shadow banking or of, take some of the debates now about corporate concentration and antitrust, for example, which is another area that I talk a little bit about in the book but has really flourished as a newer area of policy attention of late.

Then in some ways, what we really ought to be worried about is the sense that the firms and individuals and groups that sit at the commanding heights of our economy, they're essentially making decisions, governing decisions, about who wins and who loses, which products make it to market, which regions will live or will thrive or die based on where investment goes. They're making these decisions that are really political decisions that ought to be in a Democratic society responsive, to in some form, larger democratic politics.

And so that's what a shift in power gets us, is it gets us an attention to who's actually governing and how, which downstream, then, can affect distribution. But you could easily redistribute income without redistributing power. And that's a bad outcome, I think, for a democracy if we were to have it.

**MIKE
LIVERMORE:**

Yeah, that's a really interesting, just the last thing that you said. It's a really interesting thought. So just to continue to play with that, I think just to offer maybe the counterclaim or maybe the argument that you're arguing against or, again, just trying to situate the arguments in the book, I think a classic libertarian laissez-faire type would say something like, yeah, it's bad when these big firms accumulate all this power, and then they go to government with their hands out. And the government uses its coercive power to extract wealth from folks who don't have political power and deliver it to these well-organized interest groups. So of course, their solution is to shrink government, shrink it way down so that it can't be captured functionally by these powerful actors.

And then, of course, just to, again, maybe offer the slightly more liberal version of that would say, no, we can't do that, because there's too much that we need government for. There's externalities. The marketplace just operating on its own is going to lead to all kinds of inefficiencies, market failures, and also a horrendous distribution of wealth that's going to lead to just a small number of very wealthy people having all of the having all of the wealth in society. And that's not good.

And so the program would be something like, OK, we're going to have government, and then what we're going to do, what government is going to do, is it's going to correct for these inefficiencies. It's going to do the redistribution of wealth that is called for in order to maximize well-being. And then we're going to insulate the government from these political forces, from the large economic actors.

And then once we have a distribution of wealth that makes sense, then the markets are going to discipline the big economic actors. And then the government is going to solve for these inefficiencies and do redistribution. And it's going to be insulated from these economic actors. So that's the nice-- you might think of it as the standard story at some level.

So what do you see as the flaws? What where are the weak points there?

**SABEEL
RAHMAN:**

Yeah, so it's so interesting, because in a way, both of those standard models, even though they often are not presented as theories of power and accountability, they are implicitly partial theories of power and accountability. So the free market idea, in its strongest form I think, is an attempt to rein in the potential concentration of economic and political power by resorting to market mechanisms. In a competitive market, no one firm dominates. And in a limited government, you don't have that accountable rule by political elites that you alluded to.

That's an account of power that actually has quite a bit of compellingness to it. But what it misses, what the standard liberal argument highlights, is that market mechanisms are themselves systems that encode structural inequities and disparities and actually allow for other kinds of power to flourish-- other kinds of unaccountable power, I should say, to flourish.

Flip that around for the standard liberal, big government story, that's a response to certain forms of market power and inequities in a market system, so that's why you want government to do things like provide public goods and so forth. But in its thinner, "just trust us because we are government experts" version, that argument for government, I think, is normatively brittle.

Because it doesn't have the kind of moral resources to respond to the very real concern and challenge of like, well, what happens when government gets it wrong? What happens when we don't really think the experts are expert or the experts actually what's best for all of us? Which is a very real concern.

And so this all sets up what for me the focus of the book then ends up being, is, can we imagine systems of democracy that are built to respond to both of these forms of unaccountable power? We democracy as a way to protect against economic domination, the domination of dominant firms, the domination of employers over employees in the workplace, the domination of the market system that structurally encodes class, race, and gender inequities on the one hand, and also a form of democracy that responds or protects against political domination, the control of government by unaccountable political elites of one form or another.

And so that then becomes the crux of the book. I should say one more thing. This is all super abstract. Part of what I really loved in that project was discovering along the way some really interesting historical figures who are grappling with this exact tension. And so I spent some time in the book talking about thinkers and reformers and activists like Louis Brandeis and like John Dewey and grounding some of this in previous moments of reform, not quite the New Deal, but certainly in the pre-New Deal period around labor, financial regulation, the first wave of antitrust regulation, as really having this explicit democratic, small-D democratic valence to it that often gets lost in the traditional government versus market story.

**MIKE
LIVERMORE:**

Right, yeah, and that's definitely a very interesting part of the project, is to recover some of these ways of thinking about government, about markets that are not perhaps altogether lost, but maybe lived more in history departments and the occasional labor scholar and weren't so much an active part of the discourse, at least in the legal academy. And so yeah, so that's super interesting as well.

Of course, there's been a whole movement around you and other folks, Lina Khan, now at a very high level at government making similar arguments, Jed Purdy, who we had on the podcast not that long ago. So yeah, so that's all super interesting.

So OK, so if we think of this dynamic here, we've got market failure on the one hand. And there's different ways of describing market failure, of course. So from a straightforward economic perspective, they're going to talk about things like externalities. And they might talk about things like the diminishing marginal utility of consumption and concerns that the marketplace is going to just concentrate too much wealth in a way that's actually quite inefficient from the perspective of human well-being.

But that's a very different way of thinking than the way you're often talking about the failures in the marketplace, where you're concerned with, or you seem to be concerned with domination, like we don't like certain types of relationships that maybe even an "ideally" functioning market, quote unquote around ideal, but let's call the economist idealized version of the marketplace might generate. And that's a whole interesting subset that we could probably dig into.

But in any case, however one thinks about market failure, we've got that problem. We've got a problem of political failure on the other side, which again, different people might diagnose slightly differently. But broadly speaking, we're going to have a shared understanding that it's the government not delivering on its promise of maximizing well-being for the public, however we understand that.

And then your solution here is democratic reforms. And actually, I really want to get into those. And here I think we can go back to Donald Trump. Because also offered an alternative to this dynamic, where he wasn't a laissez-faire guy, really. I mean, he's not altogether coherent, obviously. But sometimes he would talk in that way.

But he also was happy to talk about the government supporting coal to bring back jobs in West Virginia. Or he intervened in-- he was happy to say, no, we shouldn't have free trade with China. The government should be intervening here.

And so he was pretty interventionist. But it was very much like I, the president, am going to intervene on behalf of a favored political constituency, basically. And he was pretty clear about that.

And you offer something that's very different, is this notion of a democratic alternative. So maybe you could just describe, just in broad strokes, what that democratic alternative looks like. And then, of course, I'm going to try to complicate it and--

SABEEL Yeah, of course.

RAHMAN:

MIKE And those could get into the difficulties. But yeah, let's start with, what is the vision?

LIVERMORE:

SABEEL Yeah, totally, and there are many, many difficulties and challenges, to be sure. It's not an easy thing to do as a society.

RAHMAN:

But a couple of things I'd say about this. I mean, one is-- so first, it's really important, even as we juxtapose some of the Trumpist appeals-- you alluded to this, Mike-- but the Trumpist appeal has a particular view of who the demos is, in addition to making some of these gestures towards breaking with free trade orthodoxy and breaking with the standard Republican approach to committing to cut Social Security. There's some really important breaks from conventional laissez-faire or libertarian, neoliberal, what have you economic orthodoxy, which I actually think did play a big role in his crossover support in 2016. A lot of people coded Donald Trump as being more moderate than he really was because of those economic positions he had, even though he didn't govern that way at all.

But it's really important that his account of democracy is, I think, both plebiscitarian, A, to your point, sort of like, I, the president, say so. It's plebiscitarian bordering on autocratic and increasingly more autocratic as he went up to January 6.

And it was also first implicitly but then increasingly explicitly a white nationalist view of who the demos is, right? The demos is white people and people who have made their peace with white supremacy in the country.

So contrast that, then, with what I think we ought to want, which is, A, a full embrace of the moral equality of all persons in our polity. And so that means a multiracial, multiethnic, feminist democracy. And B, then thinking about a political regime that isn't just about who wins an election and isn't just about who shows up at a town hall, but creating structures that allow for meaningful collective agency over our shared conditions of political, economic, and social life.

And so in the book I try to frame this around an idea of contestatory democracies or drawing from a bunch of different traditions in political theory and the idea there being democracy is going to require continual experimentation, debate, disagreement, productive disagreement, because we have a diverse polity and we're not necessarily going to always agree. And we want to be able to revise your collective judgments over time.

And that requires institutional structures. So I'm also critical in the book about thin notions of democracy, like the town hall, notice and comment, mechanisms that are perfectly fine as a piece of a larger whole, but if you think that that is equivalent to real, meaningful agency, particularly for those who are the most vulnerable or impacted, then that's a problem. And so the later parts of the book is an attempt to try to think through what hard constraints might we need to prevent concentrations of economic and political power, what affirmative channels or vehicles might we need for productive participation that can handle complexity of the kind that you have in, say, financial regulation but that also is rooted meaningfully in community.

MIKE LIVERMORE: Yeah, OK, great, so this is-- it's very attractive vision, especially when compared to the alternative. And I tend to agree that the administrative state in its current manifestations faces legitimacy problems and always had. It's interesting to contrast your vision with an earlier podcast guest Jed Stiglitz, now your colleague at Cornell. Because you're both thinking in deep ways about these questions of legitimacy and the administrative state but coming to, I think, some pretty different conclusions. But that's good in a productive way.

So one of the paradigms that I think offer in the book when thinking about reforms-- so I should say, there's again kind of a standard move when we talk about democratizing the administrative state-- and it's probably worth going through this-- is to say, yeah, absolutely, we've got big democratic problems in the administrative state. There's a huge democratic deficit. And what we need is a more robust nondelegation doctrine. We should celebrate decisions like *West Virginia v. EPA* and the major questions doctrine that takes power out of the hands of these unaccountable, pointy headed bureaucrats and puts it back in the hand of Congress, the true democratic institution in our society. And there go. That's the argument.

And then there's a standard response kind of along these Democratic lines, which you address in the book, which is the presidential supervision response, Justice Kagan's argument that, no, administrative agencies have good, sound, democratic pedigree due to presidential supervision. And those, again, are pretty standard moves in the literature. And you don't go with either one of those. I don't take you as a proponent of the nondelegation doctrine.

SABEEL RAHMAN: Right.

MIKE LIVERMORE: But I don't think you're fully on board or feel that the Kaganite presidential supervision argument is sufficient. So yeah, so what of Congress, what of agencies if we're trying to think about democratizing political decision-making?

SABEEL RAHMAN: Yeah, this is great. And it's funny for me to revisit this part of the book now after having spent some time in the deep heart of the regulatory apparatus over the last couple of years. But no, I think that's right. So I'm absolutely not a fan of the nondelegation doctrine or its modern version of the major questions doctrine, which we can talk about if you like, in part because I actually see that as an arrogation of antidemocratic power unto the court away from both the Congress and the executive branch.

So it masquerades-- but it goes to the broader point where we started the discussion, that I think some of the-- insofar as there's a normative moral appeal that some of those arguments hold, it's because it's tapping into some of these anxieties about our limited democratic, small-D democratic role and control as citizens of the polity. And it's trading on that to then, by sleight of hand, to then accomplish a further concentration of political power away from the public and in favor of those corporations and already powerful interests who benefit from a gutting of those specific regulations. The major questions doctrine was not invoked, for example, to rein in the Trump administration's attacks on communities of color and immigrants. And that's notable.

So yeah, I think definitely not for nondelegation. I think on presidential administration, that's an interesting wrinkle. So in the book I tried to formulate this account of regulatory agencies as sites of democratic participation. And by that what I meant is it's not just that we elect the president and then the president makes policy. That's part of it.

But if you actually think about what it means to meaningfully engage as individuals and as communities in collective governance, collective decision making, you actually need more than just sanctioning someone to rule in your stead. You want to be able to get into the weeds a little bit. You want to be able to convey what are the particular needs of your particular constituency or your particular region. How might that cash out in context of a particular set of proposals around housing policy, say, or environmental policy?

And so this idea of agencies who marry some forms or who in an ideal form could potentially marry some forms of grassroots engagement and participation and input with technical expertise of the kinds you need was really interesting to me, that you need institutional spaces and structures to exercise collective judgment. This is one of the big lessons, I think, from, for example, the vast deliberative democracy literature. It's not just people sit around and think deep thoughts when we have delivered democracy. It's that you actually need to construct institutional spaces that enable and empower and enlighten people into the ability to exercise collective judgment.

And so the idea of a regulatory agency that isn't just doing whatever the president says but is also engaged in greater specificity on policy issues than what, say, the legislature might be able to do at a higher level *ex ante* seemed like an important missing piece in our institutional ecology for democracy. And so that's a very different read of the regulatory agency's potential. It's not regulatory agency as bastion of technocratic expertise, but rather regulatory agency as a place where a range of constituencies and needs and values and goals can all be hashed out, kind of like a legislature but under a different logic.

**MIKE
LIVERMORE:**

Yeah, and one of the things I do enjoy about this take, of course, is that amongst the arguments that you're resuscitating, this is along the lines that Dick Stewart argues in his very famous, I think 1971 paper, the "Reformation of American Administrative Law, so of agencies as sites of pluralistic bargaining.

So I guess I have two questions. Again, I'm super interested in all of this. I think it's a fascinating line of argument and good to keep it on the table. So the two things I think-- well, and this is especially in light of your recent time in the Biden administration. So one concern or question that I always have, even though I'm attracted to many of these ideas, is when you look at real regulations, I'm like, how the heck is anybody going to participate in this stuff? They're so complicated. There's so there's so much technical detail.

So as you note in the book and is, I think, very broadly accepted these days, there are value judgments, absolutely unquestionable value judgments, that are embedded in many, many, many agency decisions, from climate change to housing to education to immigration. Literally any issue that you might decide to pluck out of a hat, an agency is dealing with it, and there's likely to be value-laden decisions that the agency are making.

On the other hand, in order to even understand what the stakes of the value judgments are requires often enormous technical expertise. And they're often at a level of detail and granularity that most people don't have a sense about. Like I want clean air, and that's a very reasonable thing for someone to want. Does that mean 65 parts per million of particulate matter, or does that mean 35 parts per million particulate matter?

And literally, how does one translate that value judgment, I want clean air, which is really all you can expect a regular person walking around the street to have, into something that would get actually operationalized in a regulatory decision? So I'm curious what your reflections are on that, what I find personally to be a pretty substantial difficulty.

SABEEL

RAHMAN:

Yeah, that's great, and it is a challenge. So one way to think about that challenge is actually to take a few steps upstream from the parts per million point of the discussion and think, well, OK, that's not the only part of a broader clean air act regulation that's being formulated. As you were saying, which I agree with, there's a whole range of value judgments that have to be made.

So one way we might think about part of the regulatory design is, is it creating the right hooks and levers that enable impacted, affected interests, so on the philosophical principle that democracy is about enfranchising all affected interests and different interests are affected differently in different ways, does the regulatory apparatus create hooks and levers for affected interests to first have a seat at the table to begin with? And there are different ways you can institutionalize that that don't require sort of superhuman levels of outside reading and study by laypersons to then weigh in on the parts per million question.

And so in the book I talk about some of these. But the literature has really grown quite a bit since the book came out. There are models of interest representation in the regulatory state. So for example, I talk about the Consumer Financial Protection Bureau and how it has embedded in it offices whose job is actually to do proactive outreach to particular constituencies, veterans, student debt holders, and so forth, to understand what the needs and challenges are and help channel those or represent those within the administrative apparatus.

And you can imagine dialing that up. There's a proposal on the Hill that's been kicking around for a while-- I think it's in Senator Warren Bill and a Representative Jayapal bill that includes a proposal for an office of a public advocate to be created to serve as a similar function.

So one piece is helping channel a wider range of needs and voices and interests into the regulatory process with some help and support. Another piece is how we enable more democratic monitoring and responding to outcomes. So I talk a little bit in the book about the Community Reinvestment Act in its heyday allowed grassroots groups to register with federal financial regulators, whether banks in their area were, in fact, lending to those communities of color per the regulations, and where they weren't, that would weigh against those banks when they went up for seeking approval for a new merger, for example.

And so these are mechanisms which I find interesting, because they are ways of bringing communities into the decision-making process in a way that doesn't require everybody to be a top to bottom expert in all the ins and outs of the technical policy design but still very much gives them a meaningful, catalytic role in shaping and driving the direction of the policy. So that's all one set of stuff.

I think there's another set of stuff, which I didn't talk about in the book as much, but I think there's been a lot of really interesting experimentation on since the book came out on models like citizen assemblies and citizen juries, where you create a decision-making process that includes briefings from experts for a lay jury of sorts that then puts the technical expertise in its appropriate role as an input into an ultimately normative balancing of values judgment, as opposed to the other way around. And some of those experiments have, in other parts of the world, actually involved fairly high stakes and fairly complex matters. And it's an interesting question, could we start to adopt some more of those types of practices in our own regulatory practice going forward?

**MIKE
LIVERMORE:**

Yeah, it's super interesting. And again, there's lots of different ways we could go with this. I'll just note there was another podcast guest we had on, Alice Guerrero recently, who talks about liftocracy, which is not that far off of the citizen jury idea. One critique that folks sometimes raise against liftocracy, that I'd be curious if it resonates with you-- and there's a lot on the table, so I don't want to get too sidetracked on the liftocracy thing.

But one concern I think folks have is that there's a participatory element of what we mean by democracy. So it's not enough to have a body that is in some sense a representative sample of the population making decisions. It's we actually want the regular person walking down the street to have some element of power in a participatory way.

So I'm curious if that critique resonates with you. And then if so, how does that play into this problem of we still-- there's this hard thing, where a lot of the decisions are highly technical. Oscar Wilde famously said the problem with socialism is that it takes up too many evenings. We don't want everyone to have to become experts in the Clean Air Act and everything else. But we want them to exercise power.

So in any case, yeah, just the question about participation and liftocracy, and then how does that then complicate this issue of engaging regular folks?

**SABEEL
RAHMAN:**

Yeah, I mean I'm also fascinated by the liftocracy or sortition types of ideas that are kicking around. I think one response to that is that ultimately I think of democracy as a deeply associational and collective enterprise, not a highly individualistic one right. And so if your model of humans is they're out there as a collection of isolated individuals and we scoop up a couple of them and then we get a result, sure.

But if you actually think about flesh-and-blood humans and the ways we formulate our values and formulate our ideas and make decisions in the world, it's almost always socially embedded. We have some community, some familial or communal or collective formal or informal place where we develop our values, we sharpen them, and where we develop our learning. And we do it as a collective enterprise.

And I may not be the deep expert in x, y, or z, but as a group we might have enough collective resources and expertise to address the issue in ways that are enough for what my particular needs might be. It's how unions function. It's how tenant advocacy groups function, for example.

So the book doesn't talk as much about the associational side of things. But there's a way in which the missing complement to the parts that are in the book is actually a parallel story about why you need society association and organization to create the muscle, the capacity, and just the space for people to be able to exercise collective self-government.

MIKE
LIVERMORE: Yeah, great, and maybe we could talk about your time at Demos in a second, because obviously you were part of this effort to create these types of institutions. But a thought struck me, and I was curious, along these lines. I'd be curious your take on it.

So we were just talking about the Clean Air Act, so National Ambient Air Quality Standards are set by EPA under the Clean Air Act according to a pretty specific statutory standard, protection of Public Health with an adequate margin of safety. There's a lot of technical details that go into figuring out the parts per million. So that's one kind of decision that's embedded in the centerpiece of the Clean Air Act, these NAAQS.

But then you set the standards, and then there's decisions that are delegated to the states. So the states come up with state implementation. You know all this, but just to refresh for our listeners. The state implementation plans are developed by the states, and that's how states determine how they're going to comply with these standards.

And there's lots of different tools they can use. There's going to be lots of different distribution of the cost of compliance. And there's going to be distribution about the benefits as well in terms of the timeline, who gets the clean air first and that kind of thing.

So in a way, you could almost say there's something like the vision that you're offering here, which is to place a technical decision within a technical body. And of course, we could talk about the imperfections of that.

But then there's this allocation of a different set of decisions. And I don't know what the thinking was in Congress at the time. There was a variety of different reasons that Congress possibly decided that the states were the appropriate bodies for that.

But one kind of argument would be, what's more democratic? We're going to place these distributional and compliance decisions at the state level, where there's going to be a robust democratic conversation to develop these state implementation plans.

And so I guess the two questions are, one, do you think that that is attractive as a way of thinking about engaging people in regulatory decision making, is using the states? And then if we don't like the states-- and we were going to revise the Clean Air Act along the lines that you think would comport with your vision and put aside the setting of the standards, just focus on the compliance element of it. What would be better than the states, the state governments? Which are set up. They are political bodies. There is elections and democratic accountability and all of that.

SABEEL
RAHMAN: Yeah, yeah, that's great. I've been fascinated by the localism question, like what is the right-- if we think about decentralization as one flavor or one component men of democracy, how do we think about cities, states, counties, et cetera?

So there are some kinds of decisions that I think makes a lot of sense to really flow through a geographically rooted decision making apparatus. Where I think that challenge comes with the states is that it's not obvious to me that either states or, in some cases, nor cities are actually sort of the right boundaries of the relevant geographic community of interest.

So if you look at those maps of media markets, for example, where it maps out like the scope of a particular media market, I always find those maps interesting because it's one sociological slice into what is the greater New York area? It's not literally New York City. But it's also not New York State. But there is like an area that has enough of a shared, lived experience that there's a real "there" there, right?

So all of which is to say I think sort of place-based collective decision making is, I think, really important and interesting. It may or may not line up with our formal boundaries of states or cities or counties. And in fact, one of the ways in which political authority has often been gerrymandered is by fiddling around with the boundaries of the local, right?

Dan Farbman has written some great historical work, for example, about how Southern redemption after the War in part was operationalized through a rewriting of local jurisdictional boundaries as a way to reassert the planter class' control over freed persons. So I think this decentralization question is really important and interesting. But we should be open to and thoughtful about what is the right way to constitute the local region where decisions are made.

MIKE Right, we tend to default to the states, but there are lots of problems with states as political bodies.

LIVERMORE:

SABEEL Oh, totally, and not to get into constitutional text interpretation rabbit holes, but I always wondered as a tongue-in-cheek thought experiment, well, the Constitution talks about states and the importance of states and so forth, but if we understood state boundaries functionally rather than formally, what if by "state" we just simply mean a collection of people in a geographic community of interest, that is-- what was the population of a given state at the time of the founding? It was nowhere near the size of even a current House district, right? So it's not obvious that our fixation on the 50 states really is supposed to mean the 50 states.

MIKE It's an interesting originalist take on the idea of a state. So maybe we could talk a little bit about your time in the Biden administration, because you're not just a theorist. You put this stuff into practice.

LIVERMORE:

And so now that we've got a lot of ideas on the table about integrating democratic practice into regulatory decision making as a way of addressing some of the democratic failures or democratic critiques of agency decision making and the role of domination, both political and economic domination, what kinds of realistic opportunities for the kinds of democratic participation did you specifically see to the extent that there's things that you can talk about? So what were the promises that you saw once you got your hands on the actual mechanisms of power?

SABEEL Yeah, yeah, I appreciate the question a lot. So for folks tuning in, I served for two years in the Office of Information Regulatory Affairs, which is the regulatory hub office for the White House for a senior counselor and then as the acting administrator before a Senate confirmed administrator, who is fantastic, and also a law professor himself took over.

RAHMAN:

It was an incredible experience and a really fascinating time to be there. Of course, when you're serving, the role morality of the position is to serve the president's priorities and to serve the statutory directives and so on. So that said, some of the things I was most excited about to see as real opportunities and real areas of interest were along some of these lines.

So for example, thinking about the problems of economic domination, the president issued fairly early on in the administration an executive order on competition and on day one of the administration issued an executive order on equity. And when you stack those two together, in a sense what those two did were to point to two very different kinds of structural, systemic inequity in our political economy, one that was in terms of marginalized, exploited, excluded communities, one which was in terms of the concentration of economic control and power among dominant firms in particular markets, airfare, transit, broadband, et cetera.

And those executive orders had directives for the agencies to figure out a more holistic, big-picture way of tackling those challenges. That meant a lot of individual regulations that then came forth. The competition EO listed some 60 or 70 individual regs that started making their way through the OIRA review process. And we worked with the agencies to help them develop and sharpen those regs as they came up. The equity EO also, then, led to a bunch of regulatory action.

So one big bucket was-- I think it was really interesting and exciting to see-- agencies thinking about their existing authorities and directives from Congress with an eye towards these broader systemic inequities. I should also say that, in a lot of cases, that was a truer return to form to the original statutes that the agencies were operating under. In competition, a lot of those regulations are really revivals of old Progressive Era statutes that have been on the books for a long time but have not been front and center the way they are now.

So that's one big bucket on the substance of tackling concentrations of power that was really interesting. The second big bucket was on more the machinery of government. So this goes to some of our conversation about how should agencies be structured and how should they run.

If you look at things like the customer experience executive order, in the equity executive order, there are particular provisions around improving participation in the regulatory process. So there are a number of-- the National Open Government Plan I should mention, which comes out every two years. The Biden administration's first one came out in December '22, took a lot of old good governance ideas of transparency and so forth but really focused it much more on participation, equity, robust on-ramps for communities to have their voices heard.

So when you look at all of these things, you get an overall picture of some really interesting experimentation. The agencies that administer major social programs, for example, benefits programs, under the equity EO and the customer experience EO, one of the big initiatives that is now underway is an attempt to rethink the forms and enrollment processes with an eye towards making sure as many people who are eligible can actually get on access to government benefits, so a user-oriented design approach to those services, which among other things involves a lot of participatory dialogue, workshopping and focus-grouping and co-designing with representatives from the communities who are trying to access, say, disability benefits to design a better system around it.

It's a really interesting approach, kind of participatory in some ways. But it's like a new muscle that is being created. So all of that I thought was super exciting.

The last thing I'll say about this at a high level is it also gave me a really deep appreciation for the importance and skill of the Service and the ways in which, if we're serious about tackling structural inequality and if we're serious about democratic participation, you really need to resource that vision. So it takes person power and its own form of expertise to know how to design a good participatory community engagement, right? Not every agency has enough slots and people who can be on the ground organizers to do that well.

But that's a thing we could do if we really wanted to, right? I think agencies have done great with on a shoestring. But if we really resource this vision from the Congress, then I think you could actually see even more stuff happen.

MIKE
LIVERMORE: Yeah, it's really interesting. And the role of the Service I think is something, as outsiders, we underappreciate just the scale and the time and the expertise that the civil servants have.

So a lot of times I think there is a contrast just on this offer between civil servants and democracy. We want to take power away from civil servants and deliver it to-- in some ways, that's the contrast that would often be given in the way that you describe the managerial, technocratic view, is one where the civil servants are the central decision makers. And then the democratic one is where the people are the real decision makers.

So do you buy into that contrast? If not, how would you like to complicate it in your way of thinking about these issues?

SABEEL
RAHMAN: Yeah, it's such a good question, Mike, because I do think it's something that gets overlooked. And then that can create blind spots that are then dangerous. So I actually really believe that a well-resourced, protected civil service is essential to Democratic governance.

And by that what I mean is you need a professional civil service whose mission is to serve the public but who doesn't turn over every time the White House changes hands and whose loyalty is to the public writ large and not to the particular president that appointed them. That's really important.

And I think it's telling that in the same way that the nondelegation doctrine sort of masquerades as a democratic intervention but really operates to arrogate more power unto the few, I think you actually see a really troubling new consensus on the right around the idea of blowing up the civil service. The Trumpists are all about this. For people who followed it towards the end of his administration, Trump started a project on what's called Schedule F, which would have reclassified many, many, many servants to be directly fireable by the president.

If you look at some of the more weeds-y administrative law opinions that Roberts has authored of late, it seems to offer some constitutional foundations for the notion that the president ought to be able to hire and fire at will civil servants, even those who are deeper down in the ranks and not just the principal officers, right? And I think that's super dangerous, because what that enables is the Banana Republic-style partisan loyalist approach to governance. It's the spoils system that actually the independent civil service was supposed to get us away from.

So that's like the negative thing we want to prevent. In terms of an affirmative vision of democratic regulation and democratic administration, if you think about all the stuff we just talked about, the expertise we need around setting the parts per million level, but also the capacity and expertise we need around pulling together the citizens assembly or the right kinds of consultative and participatory spaces that empower meaningfully the people who really need a seat at the table, that takes staff, takes staff to do that. And you need people who are doing that day in and day out and who are really waking up every day thinking about how do I do this better. And to my mind, that is what a civil service at its highest form is really about.

MIKE
LIVERMORE: Yeah, it's really interesting. It's a really interesting tension, and you're absolutely right that this has become a real point of attack for folks who are skeptical of the administrative state.

So maybe we could just spend the last few minutes talking about this question of associational, because in a way this helps square the circle to a certain extent. We have very complex governance apparatus that we just cannot expect regular folks walking around to understand even a small part of it. I mean, I don't understand even a small part of it. It's like my whole career. [LAUGHS]

SABEEL
RAHMAN:

Right.

MIKE
LIVERMORE: And so that's not going to work. On the other hand, we want to have robust-- something that we can call democratic. And I think that's an interesting question. And you mentioned the associational as a possibility.

So maybe just a few questions about this. So one version of this could be something like corporatist, where EPA, when it does a rule-making pulls together environmental groups and business associations and the few other NGOs, interest group, trade organizations, and the like that could even have real power in the regulatory process. There's negotiated regulation and that whole kind of world.

One criticism of this, of course, is that the associations don't have democratic pedigree, that the environmentalists are just funded by wealthy foundations and that the consumer groups don't really represent consumer groups. They have an ideological ax to grind. One might not like that version, that critique of consumer groups, but then you can make the same critique of industry trade associations, that they're ideological and they don't really-- the Farm Bureau doesn't really represent the interests of many farmers.

So how do you how do you manage this? What would the associational vision look like? Is this a governmental process? Are we counting on, quote unquote, "civil society" to do this? How do you think this all could potentially work?

SABEEL
RAHMAN: Yeah, these are great questions and tensions. On some level, democracy is a fractal challenge, right? We don't solve it in one arena. We have to think about democracy in multiple nested spaces. And so I think when we were talking about the design of the regulatory process, we want that to be democratic, but then we also have real questions about what the interest group ecology looks like.

So I think those are fair critiques. I think as a general matter, what we ought to want is I think a robust, thick, civil society ecology where communities are able to organize and through that organization able to then have the ability to participate and shape the political process. There are going to be some organizations that are more rooted in community than others. There's a problem with astroturf groups and all of that.

So those are just endemic challenges. But I think as a matter of what our North Star is, I think we want for our democracy to thrive. I think we want lots of grassroots independent membership-based organizations that can empower those communities.

Now, in a non-ideal world, we bootstrap our way to that. We have some membership organizations, labor and other grassroots membership groups, of which there are many, and lots of great organizing work has been done over the last decade-plus to create the kind of ecology we have today.

For example, just take one example out of many, I don't think we get the policy attention on the child care and elder care crisis. That is one of the of domestic policy debates now, was not front of mind even three years ago in domestic policy. And I think we owe that a lot to the grassroots organizing of care workers and predominantly women of color care workers through formations like the National Domestic Workers Alliance and many, many others that put that issue on the table.

To my mind, that's democracy. You have a membership-based, grassroots, civil society organization that in coalition with others was able to build enough independent political power that it could set the agenda for the Democratic party in a really important way and thereby help address the issues of a huge swath of our country, what folks are struggling with.

All of which is to say need organization. You need civil society organizations. I think it is really hard from the regulators standpoint to figure out, well, who do I need to have at the table for the table to be balanced and inclusive? Because what if I miss somebody? What if I'm listening to a group I think is a real membership group but actually is an astroturf group?

Those are really tough questions. And that's part of the reason why I come back to this point about staffing, resourcing, and almost like expertise in democracy, so to speak.

When I think about some of the amazing organizers who I've met over the last few years of my career, they are very much experts, right? They are very much experts in their communities and how to organize their communities, how to effectively coalesce disparate voices into a shared vision. So you need that expertise, actually, to make a consultative, inclusive, participatory process actually genuine and meaningful in some form.

**MIKE
LIVERMORE:**

Yeah, it's really interesting. OK, I'm going to just have to ask one more question, and then I'll let you go. [LAUGHS]
I appreciate your indulgence.

So I think have in some ways a really interesting vision of democracy that is maybe in contrast to some pretty common ways of thinking about this stuff. And you talk about this a little bit in the book. You're critical of the deliberative democracy view that sees that we're going to all get together and be reasonable and, the quote from the book, "a genteel consensus amongst participants will emerge." OK, so you're skeptical of that.

There's another view, which is the aggregated view, which is that people vote. We aggregate people's preferences. So you have this really an older-fashioned vision in many ways, this associational view that we're part of groups and so on.

But ultimately, and you actually say in the book that your vision, as you describe it, is "a route towards the gradual emergence of considered judgments and common understandings through debate and experiment." And to be honest, that sounds a little bit like a genteel consensus.

SABEEL Yeah, yeah.

RAHMAN:

MIKE There is a-- and even what you were kind of just describing, it sounds very nice. But power is part of the story,
LIVERMORE: right?

SABEEL Totally.

RAHMAN:

MIKE Sometimes it's just about a majority or whoever can capture the organs of power having their say, and people
LIVERMORE: are going to very much disagree with whatever outcome you're going to arrive at. So in any case, and especially when we're structuring a democratic process, who do we bring to the table, is it balanced, there's always going to be this element of, well, who you bring to the table is going to really affect the outcome.

And there's a lot of power in that decision about who you bring to the table and then who oversees that and how is that democratic. And so there's a little bit of a recursive problem that I feel like is always kind of embedded in these institutional design questions.

SABEEL Yeah, totally, and I think there's a very real tension. But I completely agree with you that you have to contend
RAHMAN: with power. And it's where we started the discussion. If you frame our problem as the problem of domination, then of course you have to think about power.

So I think a couple of things about this. One is that I don't think we should expect any one participatory moment or episode or engagement to produce the Answer, capital A, right? Because there isn't an Answer to a lot of these contested, value-judgment questions. We disagree about stuff. And there are disparities of power in any space and process.

So in some ways, the best we can do is to try to approximate as best as we can a fair and equal process and then have that play out over time, right? We might reach a judgment, an approach today, and we might change our view about that tomorrow. And that's fine. I think that's what it means to live in a democracy.

But there are certain forms of power that becomes so concentrated and extreme that it's a threat to the democratic ideal itself. So it's OK to disagree and to keep contesting for a different way of doing things. That's what we signed up for.

But what's not OK, I don't think, is to use one's moment of power to permanently disenfranchise other constituencies. That's power, too, but that's a raw power politics that is fundamentally disloyal to the idea of democracy.

And so you can say, OK, coalition wins an election and then decides to engage in widespread voter suppression or gerrymandering. Is that democratic? Well, in a really kind of dumb, literalist sense, yeah, but in a real, deeper sense, of course not. Because that's domination. That's not democracy. That's using a moment of political control to permanently subjugate and insulate from their views, insulate yourself from the views of another constituency.

And so I think both things can be true at the same time, that you have to contend with power and power is irreducible, disagreement is irreducible, and there are certain types of power and disagreement that go way past that into something that is actually hostile to the democratic project.

MIKE Yeah. All right, well, we could probably keep talking about this for a long time. There's so many interesting issues
LIVERMORE: to discuss. And your interventions on all of these have been super interesting. And thanks for your great work at OIRA, great work at Demos. It's been a really wonderful conversation. I appreciate you joining me.

SABEEL Thanks so much, Mike. This was a blast.
RAHMAN:

MIKE And listeners, if you enjoyed this episode, let us know. You can give us a like, a rating, subscribe to the podcast,
LIVERMORE: and follow us on social media. It'd be great to hear from you. Till next time.

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