

STRUCTURAL CHANGE AND ADMINISTRATIVE PRACTICE

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From the COVID-19 pandemic to the racial justice movements of 2020 to the climate crisis, the last presidential election unleashed a host of ambitious and urgent policy demands. A growing body of legal scholarship has rightly highlighted the ambitions and urgency for transformative, structural change, and the role of social movements in advancing those critiques and visions for change. But a key component of translating demands for structural change into reality involves the innerworkings of government itself. How do bureaucratic practices and systems embed old presumptions about political economy? How might new ways of thinking about economic power, public provision, and equity be better institutionalized into new ways of organizing policy thought and action within the administrative state?

This paper focuses on this middle realm, in the challenge of translating demands for structural change on the one hand to the implementation and administration of those demands on the other. First, the paper makes the case that bureaucratic protocols represent an important site of reform and contestation to realize and institutionalize new, more inclusive, structural, and participatory approaches to governance. Second, the paper draws on the experience of the first few years of the Biden Administration to surface novel reforms that suggest the beginnings of an alternative, affirmative vision of administrative practice more oriented to structural questions of

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political economy, equity, and democracy.

This attention to the inner workings of the administrative state—and the ways in which new processes, analytical methods, and structures might advance a very different governance and political economic paradigm better aligned to the aspirations for egalitarian, equitable, and democratic change—fills an important gap in the literature. Scholars of law and political economy have highlighted how advancing more structural, transformative policy change will require not only political will but also a very different paradigm of political economic thought and a different approach to conceptualizing and analyzing policy action. This paper brings those arguments into the inner realm of administrative practice. At the same time, among scholars and practitioners of administration, there is a growing concern that existing administrative institutions are themselves straining to deliver policy change at the scale and speed needed. This paper suggests affirmative, constructive ways forward for imagining and institutionalize an alternative approach to administration.

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INTRODUCTION

The run-up to the 2020 presidential election represented an unusually dynamic and consequential moment for new policy ideas. The murder of George Floyd sparked the largest civil rights protests in recent American history, driving a central debate about racial justice, policing, and the broader challenges of systemic racial inequity. The unprecedented crisis of the COVID-19 pandemic not only forced radical changes to daily life; it also opened up a new set of demands for supports for essential workers and highlighted the critical role health and care infrastructures play in social and economic well-being. And the unique dynamics of the Democratic primary meant that all the candidates invested heavily in a contest of ideas and policy platforms, to better respond to the growing awareness of chronic and pervasive economic inequality, new concentrations of economic power, the long-running erosion of the social safety net, and the increasingly urgent climate crisis. As a candidate and then as President, Joe Biden explicitly linked the need for the federal government to deliver fast, tangible, meaningful progress on these crises as central to repairing the broader crisis of trust and legitimacy of democratic institutions.¹

For these public demands to translate into actual on-the-ground change, however, requires more than a winning electoral coalition and mandate. At the macro institutional level, there are obvious constraints and barriers: the early years of the Biden Administration were marked by a clash between ambitious policy demands and the constraints of countermajoritarian institutions exemplified by the Supreme Court striking down of the administration's headline student debt cancellation program,² and the Senate's refusal to pass proposed investments in childcare.³ But there are other more subtle challenges as well. Big new ideas about public policy, from the demand for greater focus on racial justice and equity to the emerging consensus around a greater need to expand public investment in the economy

¹ This was a consistent theme for Biden during the 2020 campaign, and throughout the first few years of the term. See e.g., Joseph Biden, Remarks at the Summit for Democracy Opening Session, December 9, 2021 (noting the erosion of faith in democracy, driven “most worrying of all, by increasing the dissatisfaction of people all around the world with democratic governments that they feel are failing to deliver for their needs.”) (available online at: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/12/09/remarks-by-president-biden-at-the-summit-for-democracy-opening-session/>)

² *Biden v. Neb.*, 600 U.S. 477 (2023) (holding that the 2003 HEROES Act does not authorize the Secretary to cancel about \$430 billion on student loans).

³ See e.g., Nicole Hsu & Aaron Loewenberg, *Shutdown Averted For Now, But the Future of Child Care Funding Remains Uncertain*, NEW AMERICA (Oct.2, 2023)

and curb corporate concentration, must also be made legible, tractable, and implementable in context of the existing administrative and governance machinery itself. Even after the passage of new legislation—including the major new bills investing in post-pandemic economic recovery, infrastructure, and clean energy—still need to be implemented through myriad administrative actions.

The Biden administration, particularly in its first few years, advanced a policy agenda that challenged a range of neoliberal presumptions, particularly in context of its approach to public investment and regulation of the market economy.⁴ But the success of these efforts depend crucially on administrative implementation of these policies. Indeed, it is possible that the headline efforts by the Biden Administration to, for example, build new clean energy industries and mitigate systemic racial inequities might well fail to deliver the urgently needed results on the ground. Take for example, the Biden Administration’s signature investment in new clean energy production in the United States. Some supporters of this new green “industrial policy” have already begun to critique the ways in which administrative implementation might stymie the ultimate goals of launching clean energy infrastructure at scale. In particular, these critics cite environmental review procedures, equitable investment requirements, or labor standards as risking a dangerous slow-down of the imperatives to build new clean energy infrastructure as quickly and dramatically as possible.⁵ At the same time, there is a very real worry that Black and brown communities in particular have already been

⁴ See e.g. Rebecca Traister, *Biden’s Big Left Gamble*, NEW YORK MAGAZINE, July 5, 2021 (documenting the behind-the-scenes transformation of economic policy thinking in the early Biden Administration) (available online at: <https://nymag.com/intelligencer/2021/07/biden-big-left-gamble.html>); Rana Foroohar, *The Great Reordering* WASHINGTON MONTHLY (Nov/Dec 2023) (available online at: <https://washingtonmonthly.com/2023/10/29/the-great-reordering/>) (describing the Biden Administration’s philosophical shift towards a post-neoliberal approach to political economy). See also Biden, Remarks on Bidenomics, June 28, 2023 (available online at: <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/28/remarks-by-president-biden-on-bidenomics-chicago-il/>) (describing his administration’s break from Reagonomics, shifting from “trickle-down” policies to a more direct focus on public investment, expanding worker power, and reining in corporate concentration); The Economics of Investing in America, Council of Economic Advisors, 2023 (<https://www.whitehouse.gov/wp-content/uploads/2023/07/Economics-of-Investing-in-America.pdf>) (describing the paradigm shift in economic policy from trickle-down to a focus on middle and working classes).

⁵ See e.g., EZRA KLEIN, *The Problem with Everything Bagel Liberalism*, NEW YORK TIMES (April 2, 2023) (<https://www.nytimes.com/2023/04/02/opinion/democrats-liberalism.html>); and KLEIN, *What America Needs Is a Liberalism That Builds*, NEW YORK TIMES, May 29, 2022 (<https://www.nytimes.com/2022/05/29/opinion/biden-liberalism-infrastructure-building.html>).

forgotten as this new industrial policy takes form.⁶ What these concerns share is an underlying skepticism of administration—and in particular, a worry that the administrative apparatus we have is straining to deliver, and may not be able to meet the mark absent more fulsome reimagining of those administrative systems.

This paper focuses on this middle realm, in the challenge of translating demands for structural change on the one hand to the *implementation and administration* of those demands on the other. A growing body of legal scholarship has rightly highlighted the ambitions and urgency for transformative, structural change,⁷ and the role of social movements in advancing those critiques and visions for change.⁸ Meanwhile, scholarship in administrative law has highlighted alternative, visions of administration that are more egalitarian and democratic,⁹ and less premised on racialized and gendered subordination.¹⁰ More broadly, there is a renewed contestation of the ideologies and paradigms that shape law and policy under “neoliberal” presumptions.¹¹ But as William Boyd has argued recently, such a “broad normative repurposing of the state toward care and human flourishing will depend fundamentally on revising and reorienting the everyday practices” within bureaucracies.¹² How we rewire bureaucratic practices and systems

⁶ See e.g. Rhiana Gunn-Wright, *Our Green Transition May Leave Black People Behind*, 2 HAMMER & HOPE (Summer 2023) (online at <https://hammerandhope.org/article/climate-green-new-deal>)

⁷ See Anna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L. J. 2497 (June 2023).

⁸ See Anna Akbar, Sameer Ashar, and Jocelyn Simonson, *Movement Law*, 73 STANFORD L. R. 821 (April 2021).

⁹ See e.g., K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016); WILLIAM J. NOVAK, *A NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* (2022); BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF A PROGRESSIVE DEMOCRACY* (2019)

¹⁰ See e.g., Bijal Shah, *Administrative Subordination*, UNIV. OF CHI. (forthcoming); Sophia Lee, *Racial Justice and Administrative Procedure* 97 CHI.-KENT L. REV. 161 (2022) (describing the tension between racial justice claims and the opportunities and constraints presented by administrative procedure).

¹¹ See e.g., Jedediah Britton-Purdy, David Grewal, Amy Kapczynski, and K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784 (2020).

¹² William Boyd, *With Regard for Persons*, 86 LAW AND CONTEMPORARY PROBLEMS 101 (2023), at 126. See also Julie Cohen and Ari Waldman, *Introduction: Framing Regulatory Managerialism as an Object of Study and Strategic Displacement*, 86 LAW AND CONTEMPORARY PROBLEMS i (2023), at ii (“[S]imply unwinding the changes and reverting to legacy regulatory models is not a realistic option. Regulators shackled by the assumptions of managerial regulatory models have been unable to develop new models, and legacy models’ evident inadequacies have reinforced the seeming inevitability of the managerial turn.”)

will play a big role in shaping the degree of success translating political moments and new legislation into policies that embody more democratic, egalitarian values and tackle structural challenges more directly.

This paper is about these inner bureaucratic practices and protocols. Part of the challenge of building a ‘post-neoliberal’ political economy and democracy requires rethinking our conceptual approaches to policymaking. This challenge points to a set of macro political economic institutional and structural change that are needed—but it also points to a complementary set of reforms to the micro and internal level of bureaucratic procedure, where concepts and frameworks are encoded into day-to-day practices of governance. This paper contends that such internal administrative process reform is an important component of political economic paradigm change in law and policy. To make this concrete, this paper also highlights and takes stock of some recent experiments in governance reforms both to surface them and to suggest more transformative future efforts that may be possible building upon these efforts.

The Biden administration developed a host of behind-the-scenes reforms to existing bureaucratic protocols, animated in part by a similar attention to concepts like equity or corporate power into procedures that would make those concepts tractable and administrable. It has, for example, charged agencies for the first time with revising their operations to center racial equity and the systematic overlooking of disadvantaged and vulnerable communities in policymaking.¹³ It has also attempted a renewed, and in some ways novel, approach to competition policy through more robust regulatory oversight.¹⁴ And it has revised a host of protocols that shape everything from data gathering to regulatory impact analysis to service delivery that collectively represent a very different conceptualization of policymaking and the role of the state in comparison to previous decades of administrative action.¹⁵ Where much of the social safety net has for decades been marked

¹³ See e.g., Advancing Racial Equity and Support for Underserved Communities, Exec. Order No. 13985, 86 C.F.R. §7009 (Jan. 25, 2021) (hereinafter EO 13985)

¹⁴ See e.g., Promoting Competition in the American Economy, Exec. Order No. 14036, 86 C.F.R. §36987 (July 14, 2021) (hereinafter EO 14036); Tim Wu, *The President’s Role in Antitrust Policy*, J. OF ANTITRUST ENF’T (2023) (available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4448227)

¹⁵ See e.g., *Recommendations from the Equitable Data Working Group*, OFFICE OF MANAGEMENT AND BUDGET (April 2022) (available online at: <https://www.whitehouse.gov/wp-content/uploads/2022/04/eo13985-vision-for-equitable-data.pdf>); Memorandum on Modernizing Regulatory Review, 2021 DAILY COMP. PRES DOC. 63 (Jan. 20, 2021); Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government, Exec. Order No. 14058, 86 C.F.R. §71357 (Dec. 16,

by systemic “administrative burdens”¹⁶ that disproportionately screen out working-class and people of color applicants under old notions of preventing ‘waste, fraud, and abuse,’ the Biden administration is starting to take an opposite tack of maximizing uptake and access to these services. Where attention to equity, distributional impacts, or hard-to-quantify impacts on climate or human dignity might ordinarily be overlooked in conventional, overly economic approaches to policy analysis, the new protocols suggest a more fulsome engagement with these important values.¹⁷

This is not to say these efforts have (as of yet) succeeded fully in producing new realities on the ground, or that they are universal across the cacophony of policy decisions and competing political imperatives. Many of the reforms that have taken place may yet be undone by a future administration, so they are far from entrenched. But they are notable and important shifts that point towards a more fulsome reimagining of administrative governance to come. Among those broadly sympathetic to the direction of these reforms, it will be essential to develop a more coherent theoretical and practical account of this approach to governance. Future efforts at progressive administration or regulatory reform—whether through administrative or legislative means—ought to build on lessons learned from these efforts, and the degree to which such “incremental but meaningful changes to the practices of public governance” might “empower both regulators and publics” to chart a different course towards a more inclusive and democratic political economy.¹⁸

In tackling these questions, this paper focuses in particular on three things. Part I provides a framework for conceptualizing the role that bureaucratic processes play in encoding paradigms of governance or of political economic thought—and the ways in which the task of developing a post-neoliberal, more inclusive egalitarian and democratic mode of governing will in some form require innovating different approaches to the internal protocols and processes of administration. This Part also briefly sketches some of the conceptual building blocks of what a post-neoliberal conception of governance might look like, in particular highlighting the importance of governance oriented towards systemic inequities, disparities in economic power, and governance that opens the aperture of participation and analysis to better encompass the wider range of constituency needs and public

2021) (hereinafter EO 14058).

¹⁶ See e.g., PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER Means* (2018)]

¹⁷ See Part II(C), *infra*.

¹⁸ Cohen and Waldman, at iii.

problems needing regulatory solutions.

Part II then identifies and explicates the Biden Administration's efforts to rewire regulatory governance from the inside out—from efforts to modernize cost-benefit analysis, to the attempt to develop protocols for tackling systemic issues like inequity or corporate concentration, to some newer experiments in participatory administrative governance. This part is primarily descriptive, but also provides some concrete instances of how internal administrative protocols might be adapted or leveraged to help advance an approach to governance that is more oriented to systemic inequities and disparities of economic power.

Part III articulates some lessons learned from these Biden era reforms and identifies frontiers of reform where more transformative efforts in the future might be particularly impactful for the broader agenda of building an alternative form of governance more in tune with democratic, egalitarian values and more adapted to the scale of structural change demands needed in this moment.

Before proceeding, I should offer three important caveats on what follows. First, the argument below draws on both my academic scholarship and my experience serving in government and in civil society. As the Associate Administrator of the Office of Information and Regulatory Affairs (delegated the duties of the Administrator), I was either responsible for driving or closely involved in many of the Administration efforts described below. I also had the unique experience of working on many of the same issues—such as broader questions of how public policy should evolve to think more deeply about racial equity or economic power or bottom-up democratic participation—from the social movement advocacy perspective as the head of a national think tank and advocacy organization in the years prior to joining the Biden Administration. This Article is based on my own academic views and publicly-available information and does not represent any official statement or position, nevertheless I am also informed by my own necessarily subjective and partial experience of these issues.

Second, while the broader need for theorizing and developing an alternative model of administration remains a central challenge for administrative law scholarship and for policy advocacy going forward, the ambitions of this particular Article are considerably more modest. This Article does not offer a comprehensive blue-sky theory of progressive

administration,¹⁹ nor is it meant to suggest that the reforms implemented in the first few years of the Biden Administration are necessarily the last word on how to improve administrative capacity and functioning going forward. There is much more work to be done on both the academic and policy fronts. The goals of this Article are more limited: to highlight the value of focusing on internal bureaucratic protocols and procedures for the broader efforts at reimagining administration to align better with values of equality and democracy, and to provide an initial accounting of the kinds of reforms attempted in recent years. This accounting, I hope, will help inform further efforts at developing further interventions and reform ideas and strategies.

Finally, this Article also does not address directly a very important and related set of questions, namely the external pressures and attacks on the administrative state itself. These attacks are increasingly central in both legal and political discourse. On the one hand, the current Supreme Court and judiciary writ large has continued its pattern of aggressive curtailing of administrative authorities, from the doctrinal deference of courts to agency interpretations of statutes,²⁰ to the scope of administrative enforcement powers,²¹ to the continued challenges to the scope of agency authority under the still-new ‘major questions doctrine’.²² Collectively, these cases—coming on the heels of recent efforts by the courts to block critical regulatory initiatives from pandemic-era protections against evictions and health and safety standards for workers to the effort to forgive federal student debt²³—represent the culmination of a decades-long effort to dismantle the kinds of administrative capacities central to managing a more equitable, ecologically-sustainable, and inclusive society.²⁴ At the same time, a second set of threats

¹⁹ Elsewhere, I have provided a more theoretical account of what democratic, egalitarian administration might look like. See RAHMAN, *DEMOCRACY AGAINST DOMINATION*; K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism*, 94 *UNIV. OF TEX. L. REV.* 1329 (2016).

²⁰ *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. Oct. 16, 2023)

²¹ *Sec. and Exch. Comm’n v. Jarkesy*, No. 22-859 (U.S. Nov. 13, 2023)

²² See e.g., Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 *UNIV. OF VA. L. REV.* 1009 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 *HARV. L. REV.* 262 (2022).

²³ See e.g., *Biden v. Neb.*, 600 U.S. 477 (2023); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety and Health Admin.*, 595 U.S. 109 (2022); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Serv.*, 141 S. Ct. 2485 (2021); *West Virginia v. EPA*, 142 S. Ct. 420.

²⁴ NOAH ROSENBLUM, *The Case that Could Destroy the Government*, *THE ATLANTIC* (Nov. 27, 2023), <https://www.theatlantic.com/ideas/archive/2023/11/securities-and-exchange-commission-v-jarkesy-supreme-court/676059/>; KATE SHAW, *This Quiet Blockbuster at the Supreme Court Could Affect All Americans*, *NYT* (Nov. 22, 2023),

to administrative agencies comes from electoral politics, as former (and potentially future) Trump Administration officials spell out in increasing detail their ambitions to eliminate civil service protections for most Federal agency employees and dismantle many of the internal checks and balances that characterize intra-agency procedures, as part of a broader agenda to dismantle critical labor, climate, and equity-oriented policies.²⁵ These pressures are arguably existential to the very survival of the modern administrative state itself, and could very well push administrative law and practice in directions inimical to the current reforms and possibilities sketched below. But the task for administrative law today cannot be solely defensive in rebutting these attacks; we must also imagine affirmative alternative institutional forms through which administrative agencies can constructively tackle the kinds of public challenges that will continue to be central in coming years. In that vein, the focus of this Article is more narrowly on the link between internal protocols and broader political economic paradigm change, accounting of recent reform efforts, and identifying lessons learned and possible frontlines for future reform.

I. GOVERNANCE PARADIGMS IN AND AFTER NEOLIBERALISM

The task of creating an effective and responsive regulatory system is often thought of in terms of questions of institutional design the balance of responsibilities between legislatures, agencies, and judges; how agencies should be structured; how agency heads should be appointed; how agencies can generate sufficient expertise to regulate effectively without falling prey to industry capture. But part of the challenge in ensuring effective and responsive regulation lies within the ways in which regulators structure their *internal* procedures and thinking about important public problems. However stringently we might read the external legal constraints on regulatory action—whether through judicial review or command—the fact of regulator discretion and judgment is inescapable.²⁶ Regulators and legislators are not

<https://www.nytimes.com/2023/11/22/opinion/blockbuster-supreme-court-administrative.html>; Gillian Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

²⁵JONATHAN SWAN ET AL., *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, NYT (July 18, 2023), <https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html>; DONALD MOYNIHAN, *Trump Has a Master Plan for Destroying the 'Deep State'*, NYT (Nov. 27, 2023) (available online at: <https://www.nytimes.com/2023/11/27/opinion/trump-deep-state-schedule-f.html>).

²⁶ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1104 (2009) (“At the heart of the system of administrative rules are law-free zones and

merely technical automatons executing the public will or legislative command. Nor can regulatory judgment be reduced to mere political ideology or partisan agendas.²⁷ Rather, policymakers are necessarily making decisions that involve degrees of subjective, normative, and policy judgments. The ways in which that judgment is structured and exercised has an impact on the dynamics of regulatory policy.

These underlying conceptions of the legitimate and likely forms of governmental action comprise an implicit *governance paradigm* – a set of views about *how* policies should be developed and implemented, what kinds of problems warrant policy action, what kinds of information and analysis is relevant, which stakeholders deserve a voice in the shaping of those policies. Governance paradigms do not necessarily map neatly on to particular policy outcomes or partisan positions. But they are not neutral; they have potentially far-reaching implications for what kinds of policies and outcomes are favored by policymakers. This insight about bureaucratic structure embedding conceptual paradigms is not novel – and indeed this has been a central feature of many important critical accounts of the ways in which these bureaucratic systems might institutionalize forms of dominant power or ideology.²⁸

As has been well-documented by now, much of late twentieth-century governance was shaped by neoliberal conceptions of economic policy: a preference for market orderings that implicitly favor concentrations of economic and political power, a skepticism of state action and democracy, an

open-ended standards”). As Vermeule argues, the complexity and diversity of both regulatory agencies and the issues they face necessarily means that there will be large gray zones of agency practice that are fundamentally not reviewable by the Administrative Procedure Act, judicial oversight, or *ex ante* legislative specificity. *Id.* at 1133-35, 1137-38.

²⁷ Recent calls for eliminating civil service protections for agency officials raises the specter of a civil service that could be much more defined by singular loyalty to an elected President rather than being committed to a broader set of principles of public service and good governance. An important implication of this paper’s argument is that while bureaucratic protocols need reforming to better enable more democratic and equitable policies to emerge, those reforms themselves need to be undertaken with care to preserve or build a new rule of law principles and the kinds of internal checks and balances that characterize effective, accountable, and non-coopted governance. See e.g. Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515(2015); Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227(2016).

²⁸ Governance paradigms may be seen as an instance of what Archon Fung has described as both the third and fourth face of power—a set of normative concepts that shape action, and in turn are instantiated in the structures of bureaucracies and policymaking. See Archon Fung, *Four Levels of Power: A Conception to Enable Liberation*, 28 J. OF POL. PHIL. 131 (2020).

implicit sidestepping and reinscribing of social hierarchies of race and gender.²⁹ At a macro level, neoliberal political economic conceptions constrained the realm of policy possibility, operating as background assumptions that eroded or made less likely responses to growing challenges of inequality or climate crisis. And indeed, these conceptions in turn helped promote policy shifts—like economic deregulation, patterns of privatization, pulling back from robust protections for labor, underinvesting in safety net programs—that fueled further inequality and concentrations of power.³⁰

In context of the administrative state, this influence was most pronounced in the growing institutionalization of conservative critiques of regulation culminating in the Reagan Administration’s formalization of a particular approach to presidential oversight. Starting with its Executive Order 12291, the Reagan Administration centralized presidential oversight of administrative agencies in ways purpose-built to tilt the scales against robust regulatory action of the kind associated with the New Deal and civil rights revolutions.³¹ This “deregulation without Congress”³² paralleled broader shifts in the Reagan era to gut government spending, erode safety net programs, with dramatic consequences for economic, racial, and gender inequalities.

But neoliberalism was not just a feature of the right; it also had its adherents during this late-century period on the left. Many governance reforms of the 1970s era, despite a liberal or progressive orientation on issues like nondiscrimination or the environment or governmental accountability, shared an underlying ethos of state skepticism, if not hostility, which helped animate the move to create procedural barriers and hurdles to governmental excesses.³³ Indeed, the left critique of corporate capture of the state and countercultural skepticism of power exemplified in movements like Ralph Nader’s brand of progressive consumer advocacy animated other efforts to

²⁹ See e.g. Purdy et. al., *Building a Law-and Political Economy Framework*; WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM* (2019).

³⁰ See e.g. JACOB HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016).

³¹ See e.g., Nicholas Bagley & Richard Revesz, *Centralized Oversight and the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

³² See Ashraf Ahmed, Lev Menand, and Noah Rosenblum, *The Tragedy of Presidential Administration*, CSAS WORKING PAPER (2021).

³³ See e.g. PAUL SABIN, *PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM* (1st ed., 2021), Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019); David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. OF PA. L. REV. 1097 (2017).

deregulate or otherwise limit state power.³⁴ Out of a very real concern of state capture by powerful interest groups, governance reform often would take the form of procedural requirements with litigation hooks, or broad requirements for transparency and public participation (reflected in landmark legislation like FOIA and FACA) that sought to limit governmental discretion. While liberal policymakers assuredly did *not* seek to undo labor or environmental regulations in the manner of Reaganite conservatives,³⁵ these orientations to state-skepticism nevertheless helped congeal a cross-partisan set of presumptions about *how* government should operate.

The combination of concerted conservative attacks on regulation, and a very real skepticism of state power on the left fused in the 1990s and 2000s into a revised consensus that we might consider a kind of *liberal minimalism*. This way of thinking about administrative authority shares some more progressive or meliorist orientations, but in different ways has metabolized and absorbed the most pressing critiques of progressive governance—as inefficient, costly, or dangerously radical—into a more modest, staid, and ultimately restrained vision of the state. The administrative state remained, in this vision, but with a more modest mission of mitigating and ameliorating gaps in an otherwise well-functioning market economy.³⁶ Thus, policymaking in this framework tended to take particular forms: preferences for public-private partnerships, contracting out or outsourcing in advancing government functions and objectives,³⁷ or the boom of interest in “libertarian paternalist” modes of policymaking built on “nudges”.³⁸

³⁴ See Reuel Schiller, *The Curious Origins of Airline Deregulation: Economic Deregulation and the American Left*, 93 *BUSINESS HISTORY REVIEW* 729-53 (2019).

³⁵ See e.g. Gabriel Levine, *Beyond Big Government: Towards New Legal Histories of the New Deal Order's End*, 121 *MICH. L. REV.* 1003 (noting that despite the critique of Sabin and others, liberal policymakers were very much still committed to an expanded role for government in economic regulation and safety net programs).

³⁶ See e.g. RAHMAN, *DEMOCRACY AGAINST DOMINATION* 31; Reuel Schiller, *The Administrative State, Front and Center: Studying Law and Administration in Postwar America*, 26 *L. & HIST. REV.* 415 (2008)

³⁷ For a good critique and overview of the role that privatization in its various forms played in displacing more democratic forms of governance, see e.g. JON D. MICHAELS, *CONSTITUTIONAL COUP* (2017); *GOVERNMENT BY CONTRACT* (Jody Freeman & Martha Minow eds., 2009).

³⁸ The canonical articulation of libertarian paternalism as a framework for policy can be seen in Richard Thaler & Cass Sunstein, *Libertarian Paternalism*, 93 *AM. ECON. REV.* 175 (2003), and THALER AND SUNSTEIN, *NUDGE* (2008). For many policymakers and scholars working in behavioral economics and ‘nudge’ style approaches to public policy, the virtue of these approaches lies precisely in the ways in which they might advance broader public-interested goals without triggering (neoliberal) fears of excessive state power or control. See also David Kasdan, *Nudging the Neoliberal Agenda: Administrative Opportunities in the Deregulated State*, 79 *PUBLIC ADMINISTRATION REVIEW* 439-442

Neoliberal governance had major implications not just for the scope of economic regulation; it also helped further entrench policies that either ignored or actively reasserted relations of racialized or gendered subordination. Consider, for example, the ways in which the nominal restraints on arbitrary administrative authority that is the hallmark of administrative law and good governance norms often tend to evaporate in context of the carceral apparatus, or immigration enforcement, or punitive approaches to penalizing welfare system beneficiaries who are predominantly women, working-class, and people of color.³⁹ Indeed, the discourse of safety net programs has, under neoliberal thought and practice, tended to overvalorize goals of limiting waste, fraud, and abuse—but in so doing, this orientation has fueled a compliance mindset that works to screen out beneficiaries, and exacerbates economic, racial, and gender inequality.⁴⁰ These accounts complement broader studies highlighting how the exercise of regulatory and administrative functions even in ordinary policymaking have often reinscribed and formalized subordinate status for marginalized and vulnerable communities.

At a day-to-day level, neoliberal governance operated through a set of

(2019). As a technique of policy design and governance, nudges have generated significant scholarly debate. See e.g. Nicolas Cornell, *The Aesthetic Toll of Nudging*, 14 GEO. J. L. & PUB. POL'Y 841 (highlighting the ways in which nudge-style policy design might undermine normative commitments to the dignity and rationality of individuals themselves) and Daniel Hausman and Bryann Welch, *To Nudge or Not to Nudge*, 18 J. OF POL. PHIL. 123 (2010) (noting the same). More recently, there has been a new debate over the degree to which nudge-style policy designs are in fact impactful in generating improved outcomes. See Maximilian Maier et al, *No evidence for nudging after adjusting for publication bias*, 119 PNAS (July 2022) (<https://www.pnas.org/doi/10.1073/pnas.2200300119>). But see Cass Sunstein, *Eight Misconceptions About Nudges*, Harvard Public Law Working Paper 23-20 (2023) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4357437) (arguing that nudges do not undermine the dignity or rationality of persons and are themselves transparent and modest interventions that do not claim to resolve other more structural issues while offering valuable policy benefits). While I don't necessarily disagree with the value of nudges as part of a larger policy toolkit, and as a potential tactical response to a political economic environment otherwise hostile to more direct regulatory approaches, I am more interested in how the broader background intellectual and political conditions facilitated an overemphasis on these techniques, and implicitly effaced other more structuralist modes governance.

³⁹ See Bijal Shah, *Administrative Subordination*, UNIV. OF CHI. (forthcoming); Emily Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. (forthcoming 2024)

⁴⁰ See MICHAEL KATZ, *THE UNDERSERVING POOR* (1st ed., 1989); Pamela Herd, Hilary Hoynes, Jamila Michener, Donald Moynihan, *Administrative Burden as a Mechanism of Inequality in Policy Implementation*, 9 RUSSEL SAGE FOUNDATION J. OF SOC. SCI. 1 (2023).

“upstream knowledge practices”⁴¹—systems of analysis and management and policy design—that implicitly privileged an overly economic models and tended to efface other values from anti-discrimination and equity to ecological sustainability. By privileging quantifiable, economic understandings of costs and benefits, this particular brand of technocratic governance also embedded a particular skepticism of some kinds of regulation—those that would address issues of justice, human dignity, ecological sustainability, and equity, for example.⁴² And by giving pride of place to market orderings, these approaches to policy often put the onus of justification on new government actions rather than on the background laws and policies that constructed the already-existing inequities that a new policy might seek to remedy.

These modes of governing were also sustained and fueled by various forms of external encouragement and pressure. While neoliberal conceptions of political economy and related modes of analysis had a strong intellectual and academic pedigree, they gained added force as in context of active pressure from interest groups who stood to benefit from policies shaped by neoliberal presumptions.⁴³ Through “cultural” or “ideological” capture, elite interests could socialize particular conceptions of ‘good government’ or ‘the public interest’ in ways that tilt in their favor, but without an overt appeal to raw power or quid-pro-quo influence. From this standpoint, policy outcomes can be skewed by administrative procedures that may reinforce shared sociological backgrounds and normative priors between regulated industries and regulators. Similarly, neoliberal approaches to policy design and analysis privilege forms of knowledge, analysis, and evidence in which well-resourced interest groups and particularly business interests are most adept at leveraging and engaging.⁴⁴ Regulated industries can, with the aid of more neutral-seeming favorable media coverage and favorable academic research, help reinforce ways of conceptualizing public policy that are more

⁴¹ See William Boyd, *With Regard for Persons*, 86 L. & CONTEMP. PROBS. 101 (2023); Julie Cohen & Ari Waldman, *Framing Regulatory Managerialism as an Object of Study and Strategic Displacement*, 86 L. & CONTEMP. PROBS. I (2023); Short, *Gaslighting government* 86 L. & CONTEMP. PROBS. 1(2023).

⁴² See e.g., ELIZABETH POPP BERMAN, *THINKING LIKE AN ECONOMIST* (Meagan Levinson & Jacqueline Delaney eds., 1st ed., 2022); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (1st ed., 2004); DOUGLAS KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* (1st ed., 2010)

⁴³ See e.g. JACOB HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER--AND TURNED ITS BACK ON THE MIDDLE CLASS* (1st ed., 2011)

⁴⁴ See Cohen and Waldman, at v.

systemically favorable to their worldviews and interests.⁴⁵ Meanwhile, external discipline—from courts in particular, but also from moderate and conservative voices in Congress who have adopted this default skepticism of government regulation—further incentivize these approaches. Indeed, arbitrary and capricious review has entrenched a particular emphasis on quantitative cost-benefit analysis and skepticism of high-monetary cost interventions, with disproportionate impacts undermining regulations that speak to systemic challenges like climate change or economic inequality.⁴⁶ Arbitrary and capricious review doctrine has also tended to bypass questions of anti-discrimination and agency obligations to advance civil rights in their regulatory actions.⁴⁷

Neoliberalism thus came to serve both as an internal paradigm for how governance ought to operate, and a set of external pressures and constraints where political actors privileged by neoliberal political economy were able to continue to discipline policymakers along these lines. Responding to public demands for more systemic and structural change on issues like racial justice, climate change, inequality, and more requires a different governance paradigm. This alternative governance paradigm requires three shifts.

First, in place of the neoliberal tendency to efface or submerge systemic inequities of various kinds, governance ought to be more directly oriented towards those systemic inequities, identifying them, analyzing them, and designing policies aimed at mitigating them. In place of the default presumptions for private ordering and skepticism of state capacity, an alternative approach to governance would take more seriously the ways in which private and market ordering might perpetuate problematic inequities, and how regulation or even direct public provision might mitigate or remedy such inequities. This shift would require a change in how policy is conceptualized, analyzed, and operationalized.

Second, a corollary to this greater willingness to contemplate state action of various kinds is an orientation to *action*: in place of layering additional procedures or review processes that might slow or suffocate government action particularly when urgent or timely, an alternative to neoliberal

⁴⁵ See e.g., Wendy Y Li, *Regulatory Capture's Third Face of Power*, 21 SOCIO-ECON. REV. 1217 (2023); James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71 (Daniel Carpenter & David Moss eds., 2014)

⁴⁶ *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302 (2014); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise* (August 2007).

⁴⁷ See e.g. Cristina Ceballos et. al., *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L. J. 370 (2021)

governance would seek forms of accountability or review that were built to move quickly and at scale.⁴⁸ We want government to act on public problems, recognizing how inertia and inaction can often perpetuate inequities.⁴⁹

Third, an alternative governance paradigm would take seriously the ways in default procedures and approaches to policy analysis and design might embed disparities in political power and influence, despite facially neutral procedures open to all.⁵⁰ Better resourced constituencies and organized interests have greater sway and more ready ability to navigate complex administrative processes.⁵¹ As a result, power disparities help drive changes to policy that favor the better resourced groups, thus exacerbating economic and political inequality.⁵² When it comes to administrative institutions, then, a central challenge is how to design policymaking procedures in ways that mitigate these disparities of power and influence.⁵³

⁴⁸ See e.g. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019)

⁴⁹ See e.g., Jane Mansbridge, *On the Importance of Getting Things Done*, 45 POL. SCI. & POLITICS 1 (January 2012); Hacker and Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC. 152, at 170-71 (2010) (describing how political strategies to stymie new policy causes “regulatory drift” in ways that can exacerbate inequality).

⁵⁰ As many scholars have noted, governance regimes encode and often launder background disparities of political and economic power. See e.g., Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016); Daryl Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016)

⁵¹ See e.g., Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. OF POL. SCI. 37 (2019). This challenge of elite or business interest capture of regulatory policy has long been a matter of central concern in administrative law scholarship and practice. See e.g. generally Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Thomas Merrill, *Capture Theory and the Courts*, 72 CHI.-KENT L. REV. 1039 (1997); PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., 2014)

⁵² See generally, JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER--AND TURNED ITS BACK ON THE MIDDLE CLASS (2011); Chris Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV (forthcoming 2023).

⁵³ See e.g., Kate Andrias and Ben Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L. J. 546 (2021); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315 (2018); Jocelyn Simonson & K. Sabeel Rahman, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 101 (2020); K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER (2019); ALEX HERTEL-FERNANDEZ, *How Policymakers Can Craft Measures that Endure and Build Political Power*, ROOSEVELT INSTITUTE (June 17, 2020), <https://rooseveltinstitute.org/publications/how-policymakers-can-craft-measures-that-endure-and-build-political-power/>

These building blocks of a more democratic and egalitarian governance paradigm—an orientation towards systemic and structural inequities; a greater interest in creative and energetic forms of governmental action tackling public needs; and a commitment to more inclusive processes—complement the broader account of a democratic political economy advanced by scholars recently.⁵⁴ This normative vision is very much part of a rich tradition of constitutionalism as aspirations for inclusive citizenship have played a large role in animating not just the constitutional political economy of Reconstruction, the New Deal, and the Second Reconstruction of the civil rights movement. This ethos applies just as much to the administrative state. Elsewhere, I have argued that the administrative state should be understood as part of a larger project of dismantling forms of economic and social domination, building the underlying infrastructure of public goods needed to sustain more inclusive citizenship; and institutionalizing more inclusive practices of participatory governance.⁵⁵ This vision for administration rests on a rich theoretical foundation that others have effectively surfaced.⁵⁶ It also tracks with historical excavations of the ways in which egalitarian social movements have engaged with and helped construct the modern administrative state—and how the administrative state is central to realizing deeper conceptions of citizenship, equality, and inclusion.⁵⁷

But what would such an alternative paradigm of governance look like as a matter of day-to-day administrative practice? Governance paradigms have force not just as a set of ideas and assumptions shaping policymakers' actions; they are also encoded and instantiated in institutional structures and

⁵⁴ See e.g. JOSEPH FISHKIN & WILLIAM FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* (2022).

⁵⁵ See e.g. RAHMAN, *DEMOCRACY AGAINST DOMINATION*; Rahman, *Constructing Citizenship*; Rahman, *Policymaking as Power-building*; Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447(2018). Other scholars have developed a rich normative foundation for these orientations to administration and governance.

⁵⁶ See e.g., EMERSON, *THE PUBLIC'S LAW*; Chris Havasy, *Radical Administrative State*, VAND. L. REV. (forthcoming); Samuel Bagg, *Fighting Power with Power: The Administrative State as a Weapon Against Private Power*, *Soc. Phil. And Pol'y* (2021).

⁵⁷ See e.g., Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671(2018); Karen Tani, *Welfare and Rights before the Movement: Rights as a Language of the State*, 122 YALE L. J. 314 (2012); Sophia Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013), DAVID BURTON SMITH, *THE POWER TO HEAL: CIVIL RIGHTS, MEDICARE, AND THE STRUGGLE TO TRANSFORM AMERICA'S HEALTH CARE SYSTEM* (2016)

protocols. These structures and protocols are not just a product of legislation; on a day-to-day level they are more directly a result of *internal* forms of intra- and inter-agency procedures and practices for policy development, discussion and debate, clearance, and alignment.⁵⁸ As Anya Bernstein and Cristina Rodriguez document in a recent article, the administrative state is characterized by overlapping layers of review, debate, and approval, resulting in decision-making marked by “broad participation, multifarious input, and ongoing reason-giving characterized as much by negotiation as by supervision.”⁵⁹ These dynamics include robust give-and-take between civil servants and political appointees, reflecting not a clash between a ‘deep state’ and an electorally-accountable appointee, but rather productive tensions between actors operating on different timescales and with different roles that provide a complementary balance between expertise and responsiveness to the public on the one hand, and channeling the normative vision of the sitting President on the other. Administrative and regulatory agencies are the primary sites where this kind of judgment, debate, and contestation can take place—in ways that are participatory and dynamic as well as expertise-informed.⁶⁰

An implication of this account is that there is significant ‘give in the joints’ to adapt internal protocols and procedures to enable agencies to better engage with new, more structural or urgent kinds of public problems. The

⁵⁸ A subset of administrative law scholarship has engaged with the inner workings of the administrative process and questions of internal agency dynamics and processes, most often to highlight those processes to suggest the ways in which they might shape or be the origins of a form of administrative law. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 126 YALE L. J. 2182 (2016); Lisa S. Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013); Anya Bernstein & Cristina Rodriguez, *The Accountable Bureaucrat*, 132 YALE L. J. 1600 (2023); Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227(2016); Alejandro Camacho & Robert Glickman, *Designing Regulation Across Organizations: Assessing the Functions and Dimensions of Governance*, 15 REGUL. AND GOVERNANCE S102(2021).

⁵⁹ Bernstein and Rodriguez, *The Accountable Bureaucrat*, 1607.

⁶⁰ See e.g. Rahman, *DEMOCRACY AGAINST DOMINATION*, at 22-25; See also Anya Bernstein and Glen Staszewski, *Populist Constitutionalism*, 101 NC L. REV. 1763 (2023), at 1778-1783 (describing the myriad of ways in which regulatory bodies are intrinsically pluralist, engaged with stakeholders, and built to manage complex value and policy judgments). See also Chris Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. (forthcoming 2023).

very structure of bureaucracy is itself a way in which we embed and institutionalize particular ways of thinking.⁶¹ If internal protocols and procedures operate to structure administrative action—making some ideas and issues easy to tackle, while others are more onerous to organize around and advance smoothly—then it is also possible to imagine a different configuration of internal processes that would facilitate other kinds of analysis or policy action than before. Indeed, bureaucratic institutions are themselves capable of evolution and socialization into new approaches—and arguably, the evolution and transformation of existing bureaucracies offers a faster path towards fusing new ideas with the effectuating power of the state.⁶² This is not to say that bureaucracies should be taken as they currently exist and that visions for structural change and an inclusive society should be tempered to meet the limitations of these institutions. Rather it is to say that those aspirations for social change themselves require a reimagining of bureaucratic institutions, with the goals not only of implementing new policies, but of institutionalizing the new ways of thinking and acting that those new policies augur. What we should aspire towards is an administrative structure that institutionalizes—in sticky and durable ways—modes of action and judgment that are not merely efficient and effective, but that are also fit for the broader purpose of building a more inclusive and egalitarian society.

II. BOOTSTRAPPING A DEMOCRATIC GOVERNANCE PARADIGM: REGULATORY REFORM FROM THE INSIDE OUT

A central, perhaps the central, task for government in the years ahead will be the need to tackle structural injustices and system-level challenges like climate, inequality, persisting hierarchies of status and relations subordination. But we need to build governance institutions and practices to enable and orient to this type of mission. In particular, advancing a democratic political economic vision will require governance that, in contrast to some of the tendencies of the last few decades, has four key characteristics: first, an orientation towards identifying and intervening at a broader system or structural level rather than looking at policy problems through the more narrow lenses of particular rules or agency jurisdictions; second, a rediscovery of direct public provision of goods and services and the direct

⁶¹ See e.g., EDWARD STIGLITZ, *THE REASONING STATE* (2022); See also Michaels, *Enduring, Evolving Separation of Powers*.

⁶² Goodman and Jinks make a version of this argument in context of global human rights regimes, suggesting that it may be more desirable and effective to first institutionalize transnational ways of operating and thinking about human rights, before evolving and deepening those commitments. See Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749(2003).

role the state can play in reshaping market dynamics; third, a different approach to analysis and data that better engaged systemic issues of economic power, racial injustice, or inequality in ways traditional policy analysis might efface; and finally, a more pluralized and participatory approach to governing that embeds more directly the voices of impacted communities in shared approaches to co-governance. As part of this larger project of reimagining democratic governance built for this moment, Part I makes the case for why *internal* processes and practices of policymaking are an important site for rethinking administrative functioning. These processes and practices of policymaking help construct and shape the tenor of regulatory judgment and action. By themselves, these internal dynamics do not amount to a transformation of governance—indeed, one could imagine much more structural transformations of administrative authority to further these dimensions of governance⁶³—but they an important internal component—and a valuable starting point—for building out a more fulsome administrative reform agenda.

This Part highlights some notable experiments with internal administrative procedure in the Biden administration. These experiments represent steps forward towards each of these dimensions of an alternative, more democratic and egalitarian approach to good governance. These experiments discussed below should be understood as a set of emergent practices that are notable first steps, offering potential for further learning and further institutional change in the future. Indeed, many of the reforms discussed below did not arise necessarily from an a priori comprehensive theory of governance developed by the President and then implemented across the administration. Rather, these reforms were largely innovated in real time, as policymakers across the Executive branch grappled with some of the very real demands for delivering policy results—in the midst of a pandemic and economic free-fall, and in response to demands for action on climate and racial justice. As such, they are necessarily partial, incomplete, and yet nevertheless point to the beginnings of a more coherent and comprehensive theory and vision for governance that can be informed by the learnings from these efforts.

A. System-level policy design and coordination

A central feature of neoliberal political economy is the way in which it

⁶³ Consider for example Camacho and Glickman, at p. S103 (noting the distinction between ‘structural governance’ changes at the level of core institutional design, and ‘procedural governance’ which contemplates changes at the level of internal administrative practices).

entrenches disparities of power and hierarchies of status, while simultaneously undermining or effacing systems of public, democratic control and contestation over those inequities.⁶⁴ By extension, a central feature for any attempt at post-neoliberal, equitable administration is the ability to focus on underlying structural and system-level interventions that attempt to remedy structural inequities and reshape the background conditions of political economy in more equitable, inclusive, and dynamic ways. Executing on these kinds of policies requires an administrative machinery that can make such structural interventions legible, tractable, and administrable.

This shift to a more systemic or structural lens on public problems is apparent in three of the Biden Administration's domestic initiatives: first, its revival of a more concerted form of industrial policy where public investments are strategically allocated to jumpstart new industries and remake underlying market dynamics; second, its attempt to revive concerted interest across agencies in tackling the problem of concentrated corporate power and foster greater competition; and third, its efforts to institutionalize a greater focus on equity as a central value in good governance. Abstracting away from individual policies that materialized out of each of these efforts, what is notable for present purposes is the ways in which these efforts also involved adapting new modes of *internal* administrative organization, in order to open up an alternative way of conceptualizing and designing policy interventions.

1. Coordinating industrial policy.

On industrial policy, the Administration's new internal protocols are perhaps the most straightforward. From 2021 to 2022, Congress passed a series of historic bills investing trillions of dollars in the economy: the American Rescue Plan⁶⁵ providing critical economic lifelines at the height of the COVID-19 pandemic, the Bipartisan Infrastructure Law,⁶⁶ the CHIPS and Science Act,⁶⁷ and the Inflation Reduction Act.⁶⁸ The net result has been a

⁶⁴ Purdy, et. al. *Building a Law and Political Economy Framework*; BROWN, IN THE RUINS OF NEOLIBERALISM; Felicia Wong, *Building Post-Neoliberal Institutions*, 53 DEMOCRACY: A J. OF IDEAS (2019); K. Sabeel Rahman, *Structural Justice and the Infrastructure of Inclusion*, in A POLITICAL ECONOMY OF JUSTICE (Danielle Alle et al. eds., 2002).

⁶⁵ American Rescue Plan Act of 2021, Pub. L. 117-2, 135 Stat. 4.

⁶⁶ Bipartisan Infrastructure Law, Pub. L. 117-58, 135 Stat. 429.

⁶⁷ CHIPS and Science Act, Pub. L. 117-167, 136 Stat. 1366.

⁶⁸ Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818.

dramatic surge of federal investment into physical infrastructure, clean energy industries, and localities, creating the very real potential for coordinating these investments strategically to catalyze a much bigger shift in the broader political economy.

From an administrative capacity standpoint, one immediate challenge these bills highlight is the lack of a national economic investment planning apparatus. As Saule Omarova⁶⁹ and Bob Hockett⁷⁰ have argued, such a centralized body would be essential for enabling a more holistic and effective effort to reshape our political economy and deliver fully on the promise of federal investment in key infrastructure and new economic sectors. Yet the legislation as passed by Congress has relatively little to say about new administrative structures or requirements. In the absence of such a body, it is interesting to see how the Executive branch has adapted conventional internal modes of administrative coordination to bootstrap a higher level of coordination and interlocking policy design across agencies.

The notion of centralized White House coordination of administrative agencies to advance broader policy objectives has been a long-standing feature of modern administrative governance.⁷¹ Traditionally, the task of policy coordination is managed by the policy councils—in particular, the National Security Council (NSC), the Domestic Policy Council (DPC), and the National Economic Council (NEC), with extensive coordination also provided by the Office of Management and Budget (OMB), including the Office of Information and Regulatory Affairs (OIRA). This coordination is not just a matter of ensuring Presidential priorities are met; it is also an essential way to adjudicate the often competing policy imperatives and authorities that different agencies possess. The coordination and synchronization of agency actions is even more essential in context of advancing complex, interlocking set of policy goals that might transect

⁶⁹ Saule T. Omarova, *Why We Need a National Investment Authority*, 20-34 CORNELL L. SCH. LEGAL STUD. RSCH. PAPER SERIES (2022).

⁷⁰ Robert Hockett, *An FSOC for Continuous Public Investment: The National Reconstruction and Development Council*, 10 MICH. BUS. & ENTREPRENEURIAL L. REV. 45 (2020).

⁷¹ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (describes OMB as a check on agency regulation and arguing for OMB to perform more centralized review); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 2 (1994) (defending the practice of White House coordination of administrative actions). See also Jim Rossi & Jody Freeman, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

different agencies and tools—like a broader effort at industrial policy and infrastructure investment. Indeed, despite the massive headline amounts attached to major new infrastructure or clean energy investments, the reality on the ground is that these huge dollar amounts are often implemented through hundreds of much smaller-scale grants, loans, and projects implemented by the agencies, each of which has its own process, protocol, data systems, reporting systems, and often subject to distinctive statutory or regulatory requirements. For these individual projects to ladder up into a coherent system-wide approach to new physical infrastructure or jump-starting whole new sectors in particular geographies requires a whole different level of coordination and facilitation.

This strategic coordination challenge prompted the creation of new hub offices in the Executive Office of the President (EOP), particularly the American Rescue Plan implementation team, the White House Infrastructure Implementation Team (WHIIT), and the Office of Clean Energy Innovation and Implementation (OCEII).⁷² These new bodies worked closely with existing EOP policy planning hubs like the DPC, the NEC, OMB, OIRA, and the Council on Economic Advisors (CEA).⁷³ These offices played a crucial role in driving the implementation of these big spending packages, and

⁷² Executive Order 14082, Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022 (September 12, 2022), 3 C.F.R. §430 (2022); Executive Order 14080, Implementation of the CHIPS Act of 2022, 3 C.F.R. §414 (2022). Note that the ARP implementation team was not created formally by Executive Order, but rather consisted of a Senior Advisor, Gene Sperling, brought into the White House, and staffed by a mix of appointees drawn from OMB, DPC, and NEC. This initial experience informed the move to formally create similar hub offices for the subsequent legislative packages as they passed Congress.

⁷³ The practice of designating senior White House officials as point persons for key presidential initiatives has sometimes been termed ‘czars’. See e.g. Justin S. Vaughn, *The Contemporary Presidency: Reconsidering Presidential Policy Czars*, 44 *PRESIDENTIAL STUD. Q.* 522 (2014); JUSTIN S. VAUGHN & JOSE D. VILLALOBOS, *CZARS IN THE WHITE HOUSE: THE RISE OF POLICY CZARS AS PRESIDENTIAL MANAGEMENT TOOLS* (2015). The proliferation of alternative hub offices in the Biden Administration extended beyond the task of implementing major spending bills. Consider for example the creation of the COVID-19 Response team (CRT) and the Climate Policy Office (CPO). It is worth considering the tradeoffs of proliferating EOP components more broadly. On the one hand, there is value to dedicating singular responsibility for a major administration priority that cuts across agency jurisdictions and exists apart from the day-to-day pressures of responding to headlines and other political fires of the moment that might preoccupy the NEC or the DPC. On the other hand, at a certain point too many components replicates the problem of interagency coordination within the EOP. Furthermore, these offices are often created without dedicated funding streams attached, which means they are necessarily thinly staffed, and dependent on NEC, DPC, OMB, or other agencies for detailing over personnel—which further creates a question of what the optimal number of hub offices might be.

helping weave together different funding interventions into a larger, more coherent strategy for clean energy transformation and for jumpstarting regional economic development where these investments might be going.

A second key function of these bodies—and a second key capacity for administering macro-level industrial policy and public investment at scale more generally—comes not from the coordination challenge but from the question of maximizing impact. For each of these major pieces of legislation, there are fundamental policy design tensions to navigate: balancing speed of implementation with the need to ensure both “program integrity”—the minimizing of potential for fraud or waste—and equitable impacts on the ground—the need to ensure the investments actually reach the workers and communities and regions most in need of the investment and best positioned to convert funding into real impact on the ground. The administration’s broader commitments to racial equity,⁷⁴ worker power,⁷⁵ and made-in-America manufacturing standards⁷⁶ have animated a self-conscious effort to link the major investments in infrastructure and new industries to mechanisms that will raise wages and worker power and channel investments into communities of color, rural communities, Tribal lands,⁷⁷ and constituencies that have been historically disadvantaged. The Administration’s Justice40 initiative commits 40 percent of infrastructure and related investments to go into underserved communities and in particular low-income regions and communities of color.⁷⁸

The weaving in of requirements for worker standards, high wages, and

⁷⁴ EO 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (2021), 3 C.F.R. §409 (2021); EO 14035, *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce*, 3 C.F.R. §597 (2021); EO 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 88 Fed. Reg. 10825 (2023).

⁷⁵ EO 14025, *Worker Organizing and Empowerment*, 3 C.F.R. §547 (2021). Lee Harris, *Biden Admin to Restore Labor Rule Gutted in 1980s*, THE AM. PROSPECT (Aug. 7, 2023) (available online at: <https://prospect.org/labor/2023-08-07-biden-admin-labor-rule-davis-bacon/>); Dee-Ann Durbin, *New Federal Rule Would Make It Easier for Millions to Unionize, but Businesses are Pushing Back*, NBC Washington (Nov. 13, 2023) (available online: <https://www.nbcwashington.com/news/national-international/new-federal-rule-would-make-it-easier-for-millions-to-unionize-but-businesses-are-pushing-back/3469046/>).

⁷⁶ EO 14005, *Ensuring the Future is Made in All of America*, 3 C.F.R. §469 (2021).

⁷⁷ Exec. Order No. 14112, *Reforming Federal Funding and Support for Tribal Nations*, 87 Fed. Reg. 86021 (Dec. 11, 2023).

⁷⁸ OFF. OF MGMT. & BUDGET, EXEC, OFF. OF THE PRESIDENT, M-21-28, *INTERIM IMPLEMENTATION GUIDANCE FOR THE JUSTICE40 INITIATIVE* (2021); OFF. OF MGMT. & BUDGET, EXEC, OFF. OF THE PRESIDENT, M-23-09, *ADDENDUM TO THE INTERIM IMPLEMENTATION GUIDANCE FOR THE JUSTICE40 INITIATIVE, M-21-28, ON USING THE CLIMATE AND ECONOMIC Justice Screening Tool* (2023).

equity into these investments requires another level of agency skill, expertise, and process. Navigating these tensions proved to be a central focus for these coordinating bodies and for the agencies they worked most closely with in designing and implementing different funding streams.⁷⁹ This effort is notable, as there is a growing debate about the value and implementation of these kinds of conditionalities.⁸⁰ But some of the early indicators are that while there are very real design and streamlining considerations here, integrating these kinds of requirements are essential to linking economic investments and activity to meaningful gains for workers, communities of color, and equity along racial, gender, economic, and geographic lines. Many of the grant programs and Notices of Funding Opportunity (NOFOs) are including requirements that applicants show high labor standards, partner with local organizations to facilitate equitable input and participation from grassroots communities, allocate particular amounts of investment for underserved communities in the region, and other similar conditionalities.⁸¹ These conditions have resulted in meaningful changes to the dynamics of

⁷⁹ See e.g., M-21-20 “Promoting Public Trust in the Federal Government Through Effective Implementation of the American Rescue Plan Act and Stewardship of Taxpayer Resources,” Office of Management and Budget (March 19, 2021) (outlining procedures for OMB and EOP review of agency actions implementing ARP funds, and calling out specifically the need to balance speed and equity and program integrity); M-21-24, “Promoting Public Trust in the Federal Government and Effective Policy Implementation Through Interagency Review and Coordination of the American Rescue Plan Act” Office of Management and Budget (April 26, 2021) (the same); M-22-12, “Advancing Effective Stewardship of Taxpayer Resources and Outcomes in the Implementation of the Infrastructure Investment and Jobs Act” Office of Management and Budget (April 29, 2022) (the same).

⁸⁰ See e.g., Ezra Klein, *The Problem With Everything-Bagel Liberalism*, N.Y. TIMES (Apr. 2, 2023) (available online at: <https://www.nytimes.com/2023/04/02/opinion/democrats-liberalism.html>); but see Isabel Estevez, *Multi-Solving, Trade-Offs, and Conditionalities in Industrial Policy*, ROOSEVELT INST. (Oct. 26, 2023) (available online at: <https://rooseveltinstitute.org/publications/multi-solving-trade-offs-and-conditionalities-in-industrial-policy/>) (arguing that industrial policies are best served by minimizing trade-offs and more ambitious multi-solving). See also K. Sabeel Rahman, *Industrial Policy Synergies: Industrial Policy and Inclusion Policy*, ROOSEVELT INST. (Apr. 25, 2023) (available online at: <https://rooseveltinstitute.org/publications/industrial-policy-synergies-industrial-policy-inclusion-policy/>), and Rahman, *Saving Bidenomics*, BOSTON REV. (Jan. 4, 2024) (available online at: <https://www.bostonreview.net/articles/saving-bidenomics/>).

⁸¹ See e.g., Nat’l Inst. of Standards and Tech., Notice of Funding Opportunity: CHIPS Incentive Program- Commercial Fabrication Facilities (2023) (an applicant requesting over \$150 million must provide a plan for access to childcare for workers); Prevailing Wage and Apprenticeship Initial Guidance under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions, 87 Fed. Reg. 73580 (Nov. 30, 2022) (taxpayers who satisfy the prevailing wage requirements and apprenticeship hours are eligible for increased credit and deductions)

public and private investment. For example, requirements on some big-ticket funding streams under the CHIPS Act and elsewhere for example to limit stock buybacks has helped reduce buybacks and spur real investment.⁸² Similarly, where requirements for fair wages or union labor are lacking, there is a clear tendency for bidding firms to default to low-wage and low-road production models.⁸³ By contrast, early reporting on investments where at least some of these requirements are present highlights benefits for workers.⁸⁴ For our purposes, the key lesson here is that the ambition of deploying federal dollars to drive a more inclusive and dynamic economy requires more than dollars; it also requires an internal process that frames policy design and objectives at this broader level, and enables the coordination and deconflicting and synchronizing of different interventions.

2. Tackling corporate concentration and market structure.

A second arena where this effort to recover and institutionalize a broader orientation to structural political economic challenges can be seen in the Administration's work on anti-monopoly.

More broadly, anti-monopoly and the problem of concentrated corporate power has been a notable battleground where older neoliberal conceptions of economic policy have increasingly been disrupted by a recovery of an earlier tradition of political economic policymaking that takes the problem of market dominance, market concentration, and corporate power more seriously. As a host of scholars and advocates have argued in recent years, the idea of antitrust law and anti-monopoly more broadly has long been a tradition in American political and economic thought, as part of a larger vision of political and economic democracy where checks and balances ought to apply

⁸² See e.g. Harold Meyerson, *Buybacks are down, production is up*, AMERICAN PROSPECT, August 7, 2023 (online at: <https://prospect.org/economy/2023-08-07-buybacks-are-down-production-is-up/>). On the importance of stock buybacks for more equitable and productive economic development, see Lenore Palladino & Isabel Estevez, *The Need for Corporate Guardrails in US industrial Policy*, ROOSEVELT INST. (Aug. 18, 2022) (available online at: <https://rooseveltinstitute.org/publications/the-need-for-corporate-guardrails-in-us-industrial-policy/>)

⁸³ See e.g., Lee Harris, *Chipmaker's scramble to build marred by mistakes and injuries* AMERICAN PROSPECT, June 22, 2023 (available online at: <https://prospect.org/labor/2023-06-22-tsmc-semiconductor-factory-phoenix-accidents/>).

⁸⁴ See e.g., Ramenda Cyrus, *The Small Town That's Connecting America*, THE AM. PROSPECT (Aug. 9, 2023), (available online at: <https://prospect.org/economy/2023-08-09-hickory-small-town-connecting-america/>); Luke Goldstein & Gautama Mehta, *Unionized Workers at Blue Bird Hit the Next Hurdle: A Contract*, THE AM. PROSPECT (July 13, 2023) (available online at: <https://prospect.org/labor/2023-07-13-unionized-workers-blue-bird-contract/>)

as much to concentrations of private power as to concentrations of public power.⁸⁵ This democratic ethos of curbing market concentration animated major early twentieth-century innovations from the Sherman Act to the creation of the Federal Trade Commission and the broader ethic of market-shaping regulatory policy.⁸⁶ Antitrust law and practice has also been a good example of a field of policymaking where neoliberal presumptions—towards the self-correcting nature of markets and against more structural forms of governmental regulation—have animated an approach to enforcement, doctrine, and policy that effectively erased from view many of the harms stemming from market concentration on innovation, production, workers and wages, and ultimately on the public.⁸⁷ These critiques have generated a very real alternative paradigm for law, policy, and enforcement strategy: a greater interest in antitrust enforcement; a broader orientation to a wider range of tools including public utility regulation, labor market regulation, and consumer protection regulation; an orientation to market, corporate, and industry structures rather than harmful outcomes as a way to prophylactically stem the proliferation of particularly exploitative or harmful practices that impact consumers, businesses, or workers.⁸⁸

The Biden Administration took this renewed critique of concentration and monopoly power as a central pillar of its economic agenda. Through key appointments to the FTC, DOJ, and NEC, and through the President’s own

⁸⁵ See e.g., TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018); Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL’Y (2014); BARRY C. LYNN, *LIBERTY FROM ALL MASTERS: THE NEW AMERICAN AUTOCRACY VS. THE WILL OF THE PEOPLE* (2020).

⁸⁶ Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L. J. 175 (2021); J K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* CH. 2 AT 54 (2016); Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WM & Mary L. Rev. 119 Online (2022); Sandeep Vaheesan, *Privileging Consolidation and Proscribing Cooperation: The Perversity of Contemporary Antitrust Law*, 1 BERKELEY J. L. AND POL. ECON. 28 (2020).

⁸⁷ Wu, 83-92. There is also a very rich scholarly literature fleshing out this critique and alternative conceptions of antitrust and anti-monopoly law and policy that need not be recounted here. For a sampling of this literature, see e.g., Jose Azar et al., *Labor Market Concentration*, NAT’L BUREAU OF ECON. RSCH. Working Paper 24147 (2017), <https://www.nber.org/papers/w24147>; Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard*, 87 U. CHI. L. REV. 595 (2020); Eric Posner et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 564 (2017); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020).

⁸⁸ See Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655(2020); Lina M. Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. L. & PRAC. 131(2018).

statements, this philosophical shift on competition policy was well-noted.⁸⁹ While the specifics of competition policy can be debated elsewhere, for present purposes what is particularly interesting about this effort is how the administration sought to institutionalize, through internal bureaucratic mechanisms, this renewed attention on antimonopoly and concentration. Agencies shift course all the time, particularly when party control of the Executive branch changes hands. But competition policy is somewhat different in that the shift was not a simple matter of flipping a switch; precisely because competition law and policy had operated under an old conventional wisdom for decades, this rediscovery of competition policy necessarily meant pushing agencies to rediscover authorities and tools that, while very well established in law, were not necessarily as well-established in day-to-day internal bureaucratic practice.

The centerpiece of this effort was the administration's Executive Order calling for a "whole of government" approach on competition.⁹⁰ The Executive Order called for a very long list of specific policy actions distributed across a large set of agencies. The FTC is of course front and center in this effort, launching potentially transformative new rulemakings tackling employee noncompete clauses⁹¹—a key source of disproportionate employer power and limitation on workers' ability to find better employment opportunities elsewhere—among other rules.⁹² The DOJ's antitrust division has also quietly dialed up enforcement of existing rules and regulations in ways that are starting to address concentration in a range of markets.⁹³

⁸⁹ See e.g. Joseph Biden, Remarks by President Biden at Signing of An Executive Order Promoting Competition in the American Economy" (July 9, 2021) (critiquing forty years of "misguided philosophy" on antitrust) and Biden, State of the Union Address, March 1, 2022 ("Capitalism without competition is exploitation.") See more generally, Wu, *The President's Role in Antitrust Policy*.

⁹⁰ EO 14036, Promoting Competition in the American Economy (2021); Wu, *The President's Role in Antitrust Policy*.

⁹¹ NON-COMPETE CLAUSE RULE, 88 FED. REG. 3482(proposed Jan. 19, 2023) (to be codified at 16 C.F.R. §910); See J.J MCCORVEY & SARA RUBERG, *Big Businesses Rally to Preserve Their Right to Limit Ex-Workers' Job Options*, NBC NEWS (Apr. 11, 2023) (available online at: <https://www.nbcnews.com/business/business-news/ftc-ban-noncompete-agreements-employers-lobbying-rcna77169>)

⁹² PREMERGER NOTIFICATION; REPORTING AND WAITING PERIOD REQUIREMENTS, 85 FED. REG. 77053(proposed Feb. 1, 2021)(to be codified at 16 C.F.R. §801-3); RULE CONCERNING THE USE OF PRENOTIFICATION NEGATIVE OPTION PLANS, 84 FED. REG. 52393(proposed Oct.2,2019)(to be codified at 16 C.F.R. §425)

⁹³ CHRIS ISIDORE, *US Justice Department Sues to Block Jetblue's Purchase of Spirit Airlines*, CNN (Mar. 7, 2023), <https://www.cnn.com/2023/03/07/business/justice-department-jetblue-spirit-antitrust/index.html>; DAVID DAYDEN, *Lawsuit Highlights Why Meat Has Been Overpriced for 40 Years*, THE AMERICAN PROSPECT(Oct. 3, 2023), <https://prospect.org/power/2023-10-03-lawsuit-highlights-why-meat-overpriced/>; DARA

Similarly, the FTC’s enforcement efforts have also spurred important shifts in key markets, from the “right to repair” to important salvos fired on data privacy.⁹⁴ But other agencies have also committed to a slew of specific new regulatory actions, including reviving long-dormant authorities under antitrust statutes, from the USDA’s authorities to regulate concentration in agriculture and meat production under the Packers and Stockyards Act,⁹⁵ to the DOT’s authorities to regulate concentration and market structure in airlines and transportation infrastructure.⁹⁶ By calling in these other agencies, the Executive Order put back on the front-burner often-overlooked agency authorities (for example, USDA’s authorities as a market regulator in food and livestock markets, or DOT’s role as a consumer protection and market competition regulator in airlines), and thereby helped spark a broader reorientation of these agencies’ sense of mission, mandate, and function.

The second key aspect of the Competition Executive Order was the creation of the Competition Council, as part of a larger effort to facilitate a shift in how agencies conceptualize and design policy. The White House has established a cabinet-level structure in the new Competition Council, where the heads of agencies with competition-related authorities meet directly with the President every quarter to share updates on progress and align on new initiatives. This level of Presidential engagement provides a critical spark and driver for agencies needing to adapt their processes and cultures to orient to this long-overlooked set of policy directions, while also providing for a deeper level of coordination across agencies.⁹⁷ At the same time, the Executive Order charged the agencies like OIRA and the DOJ to provide

KERR, *United States Takes on Google in Biggest Tech Monopoly Trial of 21st Century*, NPR (Sept. 12, 2023), <https://www.npr.org/2023/09/12/1198558372/doj-google-monopoly-antitrust-trial-search-engine>

⁹⁴ Press Release, Fed. Trade Comm’n, *FTC Takes Action Against Harley-Davidson and Westinghouse for Illegally Restricting Customers’ Right to Repair* (June 23, 2000) (available online at: <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-action-against-harley-davidson-westinghouse-illegally-restricting-customers-right-repair-0>); 16 C.F.R. §314(2022)

⁹⁵ Packers and Stockyards Act, Pub. L. No. 67-51, 42 Stat. 159.; David Shepardson & Diane Bartz, *Biden Seeks to Lift Limits on Farmer Deals with Meat Processors, Tractor Markers*, Reuters (July 6, 2021) (available online at: <https://www.reuters.com/world/us/exclusive-biden-sides-with-farmers-over-right-repair-tractor-software-battle-2021-07-06/>)

⁹⁶ See e.g., Marisa Garcia, *U.S. DOT Fines Southwest Airlines \$140 Million for 2022 Christmas Fail*, FORBES (Dec. 18, 2023) (on the precedent-breaking fine levied on Southwest Airlines); See more broadly Ganesh Sitaraman, *WHY FLYING IS MISERABLE: AND HOW TO FIX IT* (2023).

⁹⁷ David Dayen, *A Pitched Battle on Corporate Power*, THE AM. PROSPECT (Jan. 25, 2023); Wu, *The President’s Role in Antitrust Policy*.

additional guidance and support for agencies in how to analyze regulatory actions for their impacts on concentration and competition—a task that while well-known in some agencies like the FTC and DOJ Antitrust Division, represented a new skill set and muscle that other agencies were now having to learn anew.⁹⁸

As with industrial policy, these interventions are related to but extend beyond ordinary course presidential coordination of agency action. The internal processes made more salient and legible a different way of thinking about competition and concentration, and of how existing agency authorities might be deployed strategically to tackle these deeper imbalances in the larger political economy.

One way to see the implications of these efforts is in the administration’s subsequent effort to tackle so-called “junk fees.”⁹⁹ Junk fees—the proliferation of often hidden additional fees by companies with outsized bargaining or market power that extract more and more revenues from consumers and businesses—were not a central focus of the original list of policy actions in the Competition Executive Order. But the broader conceptual lens of looking at market and corporate power voiced by the Executive Order and the Competition Council created a greater openness to this initiative. Indeed, the same attention to market power dynamics animating the administration’s competition policy also motivates a greater concern with other forms of market unfairness—and a greater orientation to use existing consumer protection enforcement powers that protect

⁹⁸ For shifts to how agencies now should analyze competition effects, see e.g. OFF. INFO. & REGUL. AFF., GUIDANCE ON ACCOUNTING FOR COMPETITION EFFECTS WHEN DEVELOPING AND ANALYZING REGULATORY ACTIONS(2023); U.S DEP’T OF JUST.& FED. TRADE COMM’N, DRAFT MERGER GUIDELINES (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf; Press Release, Consumer Fed’n of Am. , The 2023 Revisions of the Merger Guidelines Proposed by the DOJ/FTC Point the Direction that Antitrust Enforcement Must Go to Restore Competition to the Core of the Uniquely Successful, American Model of Capitalism (Sep.18, 2023)(https://consumerfed.org/press_release/the-2023-revisions-of-the-merger-guidelines-proposed-by-the-doj-ftc-point-the-direction-that-antitrust-enforcement-must-go-to-restore-competition-to-the-core-of-the-uniquely-successful-american-model/); Nicole L. Castle et al., Proposed Merger Guidelines Outline Fundamental Change of Approach to Merger Investigation and Enforcement, MCDERMOTT WILL & EMERY (July 24, 2023), <https://www.mwe.com/insights/proposed-merger-guidelines-outline-fundamental-change-of-approach-to-merger-investigation-and-enforcement/>.

⁹⁹ Steve Holland & Andrea Shalal, *Biden Widens War on Junk Fees, Says US Consumers Tired of Being Treated as Suckers*, REUTERS (July 19, 2023) (available online at: <https://www.reuters.com/world/us/white-house-expands-war-junk-fees-rental-housing-unveils-new-merger-guidelines-2023-07-19/>).

consumers, drive changes to broader corporate practices, and help build in the long-term a political economy that takes more seriously the moral value of fairness.¹⁰⁰ Thus when the CFPB began to highlight the pervasive problem of junk fees,¹⁰¹ the idea for broader interagency efforts on this problem came up through Competition Council discussions and ultimately grew into a broader effort, culminating in President Biden’s more explicit mandate on junk fees in his 2023 State of the Union speech.¹⁰² What followed was a wider set of actions across the Competition Council agencies to tackle the issue.¹⁰³ The rise and success of the junk fees initiative highlights how shifts in the underlying worldview and internal processes around policy design and purpose opens up space for new ideas to more readily surface and gain traction across the Executive Branch, resulting in tangible policy changes.

3. Advancing equity through “whole-of-government”.

George Floyd’s murder in the Summer of 2020 sparked one of the largest waves of grassroots protest in modern American history, and profoundly shaped the 2020 election and its aftermath. One key result of the bottom-up demand for addressing structural racial injustices was a set of campaign commitments from then-candidate Biden, leading in turn to a series of

¹⁰⁰ For a compelling theorization of this link between anti-monopoly and consumer protection, see Luke Herrine, *Consumer Protection After Consumer Sovereignty*, U. ALA. LEGAL STUD. PAPER NO. 4530307 (2023).

¹⁰¹ Rohit Chopra, Director, Consumer Fin. Prot. Bureau, Prepared Remarks of CFPB Director Rohit Chopra on a Press Call on Junk Fees (Oct. 11, 2023); Diane Bartz et al., *Biden Administration Takes Aim at Junk Fees Across the Economy*, REUTERS (Oct. 11, 2023), <https://www.reuters.com/world/us/biden-administration-takes-aim-junk-fees-with-new-proposed-rule-guidance-2023-10-11/>; Consumer Fin. Prot. Bureau, Advisory Opinion: Consumer Information Requests to Large Banks and Credit Unions (Oct. 11, 2023) (https://files.consumerfinance.gov/f/documents/cfpb-1034c-advisory-opinion-2023_10.pdf) Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (proposed Oct. 31, 2023) (to be codified at 12 C.F.R. §1001)

¹⁰² Joseph Biden, ADDRESS BEFORE A JOINT SESSION OF THE CONGRESS ON THE STATE OF THE UNION, DAILY COMP. PRES. DOC, 2023 DCPD-202300096 (Feb. 7, 2023).

¹⁰³ See e.g., DAVID SHEPARDSON, *U.S Airlines Commit to Providing Meals, Hotel Rooms for Extended Delays They Caused*, REUTERS (Aug. 31, 2022) (online at: <https://www.reuters.com/business/aerospace-defense/us-airlines-commit-providing-meals-hotel-rooms-extended-delays-they-caused-2022-08-31/>); Press Release, Hous. & Urb. Dev., Biden-Harris Administration and Secretary Fudge Take on Junk Fees in Rental Housing (July 19, 2023) (available online at: https://www.hud.gov/press/press_releases_media_advisories/HUD_No_23_146); ANNE STEELE, *Ticketmaster, SeatGeek to Show Full Ticket Prices Up Front as Biden Targets ‘Junk Fees’*, WALL ST. J. (June 15, 2023) (available online at: <https://www.wsj.com/articles/ticketmaster-seatgeek-to-show-ticket-buyers-all-in-pricing-that-includes-fees-7c66f039>).

Executive Orders by the new Administration aimed at bringing into the forefront equity as a central concept and goal for the Executive Branch.¹⁰⁴ There is an essential broader account to be told about how this racial justice moment arose—and then quickly gave way to mobilized backlash in the form of right-wing pressure against ‘diversity, equity, and inclusion’ efforts, and judicial undercutting of Fourteenth Amendment bases for affirmative action, which in turn eroded much of the political will generated in that 2020 moment. Nevertheless, the equity Executive Orders represented a very real new experiment in rewiring the internal workings and orientation of administrative agencies to engage more deeply with equity as a value and concept. This in turn offers important lessons for the question of *how* such broad structural issues might be interpreted and engaged through the administrative state.

As with market concentration, the concept of equity is both familiar and novel. It is well-grounded in some traditions of constitutionalism and in existing statutory authorities from the Civil Rights Act and onwards. But the turn to equity also represents a real conceptual shift from decades of prior policymaking practice. A common throughline in many equity-informed critiques of public policy is how race-neutral or race-blind ways of designing policy often result in reifying or exacerbating preexisting disparities. Reorienting policymaking to center equity, to avoid these default tendencies, requires building an alternative conceptual apparatus and internal procedures that inject equity concepts and values into the policymaking process. The internal protocols developed under the various equity-related Executive Orders points to a distinctive approach to this challenge: creating new internal procedures and requirements that together operated as a larger organizational and change management strategy aimed at building up the capacity and muscle of agencies to engage with equity as a concept and a practice.¹⁰⁵

Under EO 13985 on advancing equity, agencies have been tasked with developing ‘equity action plans’, which are as much about the actual plans themselves as they are about developing an internal planning and strategy muscle within agencies to engage on issues of systemic inequity and develop sustained workstreams around these issues.¹⁰⁶ These efforts have been

¹⁰⁴ EO 13985; EO 14035; EO 14091.

¹⁰⁵ See e.g. Xavier de Souza Briggs and Jessika Sherman, What we can learn from the effort to implement Biden’s executive orders on advancing equity, Brookings Institution, June 16, 2023 (<https://www.brookings.edu/articles/what-we-can-learn-from-the-effort-to-implement-bidens-executive-orders-on-advancing-equity/>) (noting the change management component of the administration’s implementation of the equity Executive Orders).

¹⁰⁶ See EO 13985; see also agency equity action plans (online at <https://www.whitehouse.gov/equity/>).

extended in a subsequent Executive Order.¹⁰⁷ These Orders create a new EOP-driven process for building new capacity in the agencies and helping agencies navigate a path towards organizational and culture change aimed at reorienting the bureaucracies towards equity as a concept, a goal, and a process.¹⁰⁸ Indeed, the complexity of this effort is worth dwelling upon: the internal interagency equity infrastructure covers everything from prompting and supporting agency efforts at policy design and strategic planning culminating in annual equity action plans,¹⁰⁹ to bolstering the data-collection and evidence-building capacities of agencies to even identify and track systemic inequities that hit particular communities especially hard,¹¹⁰ to creating new supports and mandates for more pro-active engagement with impacted communities to improve their participation in regulatory policymaking.¹¹¹

B. Rediscovering Public Provision

In late 2023, a series of policy reversals highlighted urgent failures of the state's ability to directly provide needed public services, safety net programs, and other necessities. As the emergency policies put in place during the height of the COVID-19 pandemic have been dismantled at the Federal and state level, there has been a dramatic spike in Americans losing access to Medicaid as a result of the reimposition of murky enrollment procedures and bureaucratic requirements.¹¹² Similarly, many of the temporary expansions

¹⁰⁷ See EO 14091.

¹⁰⁸ Briggs and Sherman, *supra* Note 105; See also XAVIER DE SOUZA BRIGGS & RICHARD M. MCGAHEY, *Keeping Promises While Keeping Score: Gauging the Impacts of Policy Proposals on Racial Equity*, BROOKINGS (Oct. 11, 2022).

¹⁰⁹ *Advancing Equity and Racial Justice Through the Federal Government*, WHITE HOUSE, <https://www.whitehouse.gov/equity/>; *Assessment of Federal Equity Action Plans*, POLICYLINK (2023) (available online at: <https://www.policylink.org/resources-tools/assessment-of-federal-equity-action-plans>).

¹¹⁰ Press Release, Off. Sci. & Tech. Pol'y, The Release of the Equitable Data Working Group Report (2022); *Vision for Equitable Data: Recommendations from the Equitable Data Working Group*, WHITE HOUSE (2022) (available online at: <https://www.whitehouse.gov/wp-content/uploads/2022/04/eo13985-vision-for-equitable-data.pdf>).

¹¹¹ Exec. Order No. 13985, 3 C.F.R. §409(5)(2021); Exec. Order No. 14091, 88 Fed. Reg. 10825 §5 (Feb. 22, 2023).

¹¹² Amy Goldstein, *Nearly 4 Million in U.S Cut from Medicaid, Most for Paperwork Reasons*, WASHINGTON POST (July 28, 2023) (available online at: <https://www.washingtonpost.com/health/2023/07/28/medicaid-unwinding-pandemic/>); Nathaniel Weixel, *Officials Project Sharp Drop in Medicaid Enrollment Next Year as Unwinding Continues*, THE HILL (Nov. 14, 2023) (available online at: <https://thehill.com/policy/healthcare/4309364-drop-medicaid-enrollment/>).

of the safety net from food stamps to the brief experiment with the new Child Tax Credit (CTC) have put millions back in dire conditions of housing, food, and income insecurity.¹¹³ These reversals are all the more galling and challenging because they come on the heels of an entirely opposite, and equally transformative, *expansion* of efforts at public provision of various necessities from the safety net to the very production of essential goods and services during the pandemic. These experiments, at their height from the 2021-22 window, also represented critical moments of building new administrative protocols, capacities, and structures—experiments which highlight important lessons for the future of a more progressive, equitable, and effective administrative state. A more inclusive economy will ultimately require building on those experiments to institutionalize a more durable shift in the governance and administration of safety net programs.

Just as the move to reshaping the structural political economy represents a shift from previous paradigms of macroeconomic policy, the recent experiments with the pandemic-era social safety net and the Administration’s policies on service delivery represent a similarly critical paradigm shift away from neoliberal, racialized, and gendered conceptions of the safety net—with significant implications for the structure and operation of the administrative machinery itself.

A central feature of neoliberal political economy is the eroding or dismantling of the public governmental role in providing key goods and services. This ethos manifests in the tendencies toward deregulation and budget cuts that emaciate public provision. It also drives the tendency to impose additional hurdles and barriers to individuals accessing government benefits in the design and implementation of safety net programs. Paperwork burdens and an often-hostile or punitive approach to reviewing new enrollments or monitoring existing beneficiaries have far-reaching effects inhibiting access, disproportionately impacting low-income communities, women, and communities of color.¹¹⁴ This approach to safety net administration, legitimated as an effort to prevent ‘waste, fraud, and abuse,’ is itself a product of a set of normative and political presumptions borne of a historic unease (at best) and hostility (at worst) to the idea of public

¹¹³ Michael Sainato, *Low-Income Americans Face a “Hunger Cliff” as Snap Benefits are Cut*, THE GUARDIAN (Mar. 17, 2023) (available online at: <https://www.theguardian.com/society/2023/mar/17/snap-food-benefits-us-cuts-impact-families>); Tami Luhby, *Poverty Jumps in 2022 After End of Enhanced Child Tax Credit*, CNN (Sep. 12, 2023) (available online at: <https://www.cnn.com/2023/09/12/politics/2022-census-poverty-increase-child-tax-credit/index.html>)

¹¹⁴ See generally, HERD & MOYNIHAN, *ADMINISTRATIVE BURDENS*; Rahman, *Constructing Citizenship*.

provision of these benefits in the first place.¹¹⁵ This conceptualization of the safety net is encoded in law, in some cases by statutory mandates to prioritize fraud-prevention rather than accessibility, in other cases by regulatory requirements or simply bureaucratic inertia and culture. Scholars have long emphasized the value of more universal and simple designs to prioritize reach and uptake over such punitive measures.¹¹⁶

In recent years, there has been a broader trend in economic policy debates to revive a robust commitment to public provision of various kinds: through the creation of “public options” where government-provided services operate alongside private ones,¹¹⁷ or through the revival of interest in public utilities¹¹⁸ and in publicly-driven approaches to restructuring markets.¹¹⁹ These broader currents are also reflected in a series of reforms altering the internal protocols around service delivery within the administrative state. In its first two years, the Biden Administration’s approach to safety net systems, production, and service delivery represents a notable shift away from conventional emphases on waste, fraud, and abuse. Notably, these shifts were framed as much in terms of service delivery design best practices as they were about equity and impact. Extrapolating from these efforts points a way forward to a post-neoliberal, more equitable approach to service delivery and public provisioning more broadly.

1. Safety net programs and public production.

The brief experiment under COVID with a massively expanded safety net underscores the possibilities—and challenges—of this new direction. For the first time in decades, the state authorized broad-based direct supports for households through direct payments and the Child Tax Credit. Pandemic policies also temporarily boosted the dollar amounts going into key safety net programs while removing unnecessary barriers: for example, auto-renewing beneficiaries into Medicare, and expanding the scope of food stamps and housing rental assistance. These investments led to dramatic drops in child

¹¹⁵ See e.g. KATZ, *THE UNDESERVING POOR*.

¹¹⁶ For a critique of the very terminology of the “safety net” see Matthew Lawrence, *Against the ‘Safety Net’*, 72 FLA. L. REV. 1 (2020).

¹¹⁷ See e.g. GANESH SITARAMAN & ANNE L. ALSTOTT, *THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY* (2019).

¹¹⁸ See e.g., K. Sabeel Rahman, *The New Utilities: Private Power. Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2017).

¹¹⁹ See e.g., STEVEN K. VOGEL, *MARKETCRAFT: HOW GOVERNMENTS MAKE MARKETS WORK* (2018); Chris Hughes & Peter Spiegler, *Marketcrafting: A 21st-Century Industrial Policy*, ROOSEVELT INST. (May 31, 2023).

poverty, housing insecurity, and food insecurity. At the same time, this experiment highlighted how much of our machinery for safety net programs and benefits delivery remains not just outdated, but structurally hostile to such expansive goals. Emergency rental assistance, for example, was channeled through state and local governments rather than being provided directly to households, which meant that it took a massive effort¹²⁰ by advocates and Federal officials to cajole and persuade states and localities to get those dollars to those most in need. Similarly, the unemployment insurance system, critical in the midst of catastrophic pandemic job loss, remains a maddening mixture of decentralization, outdated software systems, and sclerotic delivery mechanisms that required superhuman efforts by government officials to get urgently needed supports to workers in the height of the pandemic. Some agencies have had to build entirely new capabilities. The IRS is now one of the biggest service provider agencies, thanks to the massive clean energy tax credits under IRA.

Another front line for building more direct public provision arises from the pandemic era efforts to rewire the foundational supply chains in critical industries.¹²¹

As the world economy sunk into a pandemic-driven deep freeze, global supply chains collapsed, causing shortages and price spikes across a range of goods—including critical products like masks. The Biden Administration quickly adapted to intervene directly in a host of vital supply chains, working directly with firms to reorient production to meet pandemic needs, and restart production where regular supply chains had fallen apart.¹²² These efforts highlighted a broader challenge for the future of market structure and political economic policy, where the intentional rewiring of supply chains—to bring more production of essential goods more resilient, reliable, and accessible—will necessarily be a central feature of economic governance going

¹²⁰ Jacob Leibenluft, *Emergency Rental Assistance; Supporting Renting Families Driving Lasting Reform*, DEP'T TREASURY (Mar, 22, 2023) (available online at: <https://home.treasury.gov/news/featured-stories/emergency-rental-assistance-supporting-renting-families-driving-lasting-reform>).

¹²¹ Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798. ; Todd N. Tucker, *Priorities and Allocations: How the Defense Production Act Allows Government to Mobilize Industry to Ensure Popular Well-Being*(2022)

¹²² John D. Porcari et al., *Improving and Tracking Supply Chains Link by Link*, WHITE HOUSE (Nov. 3, 2021) (available online at: <https://www.whitehouse.gov/briefing-room/blog/2021/11/03/improving-and-tracking-supply-chains-link-by-link/>); Katie Rogers & Brad Plumer, *Biden Administration Moves to Fix Supply Chain Bottlenecks*, N.Y. TIMES (Oct. 13, 2021) (available online at: <https://www.nytimes.com/2021/06/08/us/politics/biden-supply-chain.html>); Exec. Order No. 14017, 3 C.F.R. §521(2021).

forward.¹²³ These efforts dovetail with the rediscovery of policy levers around market structure, competition, and industrial policy noted above.

These various moments—the expansions of safety net programs, direct government engagement in restructuring supply chains—highlight a larger fault line for the future of economic governance. On the one hand, these efforts might prove to be momentary, transient, quickly relegated to the status of one-off pandemic-inspired emergency measures. On the other hand, these urgent responses highlight how a very different approach to economic governance and the deploying of administrative capacities could produce a radically different political economy, one where safety net programs are radically expanded and programs like the CTC can create an *de facto* income guarantee that can dramatically cut poverty and insecurity and power a strong bottom-up engine for economic growth with robust wage and job growth. In between lies a third potential path and a problematic one, where public investment and direction of productive capacities does indeed continue, but in ways that relegate the state, the importance of building public infrastructure, and the accessibility of essential goods to the backseat. On this approach, the state continues to help optimize production of critical goods and services, but in ways where the bulk of benefits flow to corporate producers with little obligations to serve the public cheaply and accessibly.¹²⁴ And indeed, if economic policymaking from the Executive branch were to focus on other critical industries like housing and care with the same attention as pandemic-era supply chain and safety net efforts,¹²⁵ we could see dramatic changes to some of the most urgent economic pain points that communities face today. As with the industrial policy debate above, these Biden-era experiments open up new possibilities but do not yet represent a consolidated new consensus approach.

2. Redesigning the service delivery bureaucracy.

Another key front for a revived approach to public provision lies not in

¹²³ See e.g. RANA FOROOHAR, *HOMECOMING: THE PATH TO PROSPERITY IN A POST-GLOBAL* (2022); Rana Foroohar, *Supply Chain Lessons from Long Beach*, *FIN. TIMES* (Oct. 17, 2021) (available online at: <https://www.ft.com/content/8eb4e20f-b436-4245-af92-74a8f3c9e3bc>)

¹²⁴ Amy Kapczynski and Gregg Gonsalves, *How Not to Do Industrial Policy*. *BOS. REVIEW* (Oct. 2, 2023).

¹²⁵ See Betsy Klein, *Biden Administration Taking New Acts to Boost Housing Affordability and Availability*, *CNN* (JULY 27, 2023, 11:32 AM) (available online at: <https://www.cnn.com/2023/07/27/politics/biden-administration-housing-moves/index.html>); Exec. Order No. 14095, 88 Fed. Reg. 24669 (Apr. 21, 2023).

the macro policies of safety net programs and direct public reshaping of production, but instead in the micro-design decisions behind the implementation of government services and supports. As noted above, the design and implementation of safety net programs has conventionally been animated by an over-emphasis on preventing waste, fraud, and abuse, and the predilection to impose punitive, challenging administrative burdens on enrollees. The result is a model of governmental service delivery that is built to exacerbate racial and gender disparities in access. By contrast, among former government officials and civic innovation practitioners, there has been a growing movement around user-oriented design, and service delivery optimization encompassing not just the technical details of data systems and enrollment processes, but also the growing practice of participatory design approaches engaging users and target constituencies.¹²⁶ Across a series of internal administrative reform efforts, the Biden Administration took some valuable first steps to reprogramming the philosophy and protocols of service delivery with a greater emphasis on serving constituencies in need, and on equity more broadly.

Take the eviction moratorium for example. As part of the COVID-19 pandemic response, the CDC issued a national eviction moratorium under its public health authorities. This action was ultimately ended following the Supreme Court's intervention, in one of the early 'major questions doctrine' cases arising in this Administration.¹²⁷ But in implementing the moratorium the Administration took a somewhat unusual step of redesigning the enrollment form and process through a series of focus groups, removing jargon and language more likely to deter or frighten potential enrollees.¹²⁸ In the implementation of the ARP pandemic response and economic recovery programs, the priority was placed on rapid implementation and transferring of funds, but even within those extremely tight time and political constraints, agencies put considerable effort in examining enrollment practices and considering modes of improving uptake and access to these programs.¹²⁹ In

¹²⁶ Tara McGuinness & Anne-Marie Slaughter, *The New Practice of Public Problem Solving*, STAN. SOC. INNOVATION REV., Spring 2019, at 26; TARA DAWSON MCGUINNESS, *POWER TO THE PUBLIC: THE PROMISE OF PUBLIC INTEREST TECHNOLOGY* (2021); JENNIFER PAHLKA, *RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER* (2023).

¹²⁷ See *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Serv.*, 141 S. Ct. 2485 (2021).

¹²⁸ See Quinn Hirsch and Dana Chisnell, *Equity by Design: 20 versions, 16 people, 8 agencies, 2 weeks, 1 form to prevent evictions*. US Digital Service, May 27, 2021 (available online at: <https://medium.com/the-u-s-digital-service/equity-by-design-20-versions-16-people-8-agencies-2-weeks-1-form-to-prevent-evictions-11334e1a59dc>)

¹²⁹ See *Advancing Equity Through the American Rescue Plan*, White House, May 2022 (available online at: <https://www.whitehouse.gov/wp->

the Administration’s high-profile effort to forgive student debt, significant effort was devoted to the design and simplicity of the enrollment and access system itself. While there is continued and rightful criticism about the challenges of means-tested safety net program and the value of more universal program designs, this attentiveness to getting as many eligible people signed up as possible is notable. Though the Supreme Court blocked the actual execution of the program,¹³⁰ early data indicated that the enrollment process and rollout was quite successful. Applicants from lower-income ZIP codes were overrepresented among the millions who applied for relief, suggesting the rollout did in fact reach those most in need—and that the enrollment process was streamlined enough to readily take in enrollees.¹³¹

These efforts are emblematic of a broader administration-wide push to rethink the underlying regulatory designs and conventional agency practices on service delivery, shifting the focus to user experience, direct engagement with impacted communities, and designing for uptake as a goal. This new approach to service delivery is most apparent in the “customer experience” Executive Order (EO 14058) which challenged the agencies, with OMB in the lead, to rethink how the most high-volume and high-impact service providers among federal programs approached their systems for enrollment, outreach, and implementation of benefits.¹³² In implementing this Executive Order, OMB has organized the agencies to focus on five central “life experiences” where individuals and communities are most in need of government support—like seeking relief after a natural disaster, or supports for mothers after childbirth—and working with agencies and the range of related assistance programs to integrate data systems, streamline enrollment procedures, and focus on getting more benefits to actual individuals in need.¹³³ These redesign efforts have involved significant deploying of

[content/uploads/2022/05/ADVANCING-EQUITY-THROUGH-THE-AMERICAN-RESCUE-PLAN.pdf](https://www.performance.gov/content/uploads/2022/05/ADVANCING-EQUITY-THROUGH-THE-AMERICAN-RESCUE-PLAN.pdf)

¹³⁰ See *Biden v. Neb.*, 600 U.S. 477 (2023).

¹³¹ Stratford et al., *What We Know About the 25M Americans Who Signed Up for Biden’s Student Debt Relief*, POLITICO (Feb. 16, 2023, 7:50 PM) (available online at: <https://www.politico.com/news/2023/02/16/joe-biden-student-debt-relief-00083243>); Maegan Vazquez, *Biden Administration Releases Data Breaking Down Student Loan Relief Applications by Congressional District*, CNN (Feb. 17, 2023, 5:28 PM) (available online at: <https://www.cnn.com/2023/02/17/politics/student-loan-forgiveness-congressional-districts/index.html>).

¹³² On the particular role and focus on high-impact service providers, see OMB Circular A-11. See also OFF. OF MGMT. & BUDGET, EXEC, OFF. OF THE PRESIDENT, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2023); *High Impact Service Providers*, PERFORMANCE, <https://www.performance.gov/cx/hisps/>.

¹³³ Performance.gov Team, *Reimagining Federal Service Design and Delivery through Life Experiences*, PERFORMANCE (Apr. 19, 2022), <https://www.performance.gov/blog/life->

internal expertise in stakeholder consultation, data systems, user-based design thinking, and more.

Meanwhile, the OMB has also launched a new effort specifically to reduce ‘administrative burdens’ and the ‘time-tax’ by pressing agencies to be more thoughtful about how they design forms and enrollment procedures across the board. Under the Paperwork Reduction Act (PRA), OIRA is charged with reviewing most governmental forms and ‘information collections’, and has a statutory mandate to minimize “burden” on end-users. Where that mandate has often been viewed in context of economic burdens on businesses, the new guidance makes clear the statutory mandate applies equally to the case of burdens imposed on individuals, particularly those seeking to access critical services and supports.¹³⁴ Through more expansive guidance and a suite of best-practice tools and trainings, OIRA has begun to push agencies to better take into account issues like how unnecessary documentation may require time and hassle that people may not be in position to take on board.¹³⁵

It is hard to overstate how potentially significant and impactful this shift is, as a matter of both protocol- and culture-change in the agencies. At the same time, these are still emergent efforts. The task of redesigning high-impact services and programs on public benefits will take years, and there are limits to how much can be done absent statutory changes to the mandates and operations of some of the most critical—and most onerous—benefits programs, like disability insurance. There are also very real skill gaps and capacity limitations in the agencies, that require expanded budgets and smart hiring as well as ongoing leadership and culture change efforts. And the old habits of kludgy service delivery persist across much of government. But as a marker of what a future administrative state that is committed to a robust—

[experiences/](#); Federal CX Team, *Six Month Update on CX EO*, PERFORMANCE(Aug. 1, 2022), <https://www.performance.gov/cx/blog/six-month-update-on-cx-EO/>.

¹³⁴ OMB M-22-10 Improving Access to Public Benefits Programs Through the Paperwork Reduction Act (April 13, 2022) (Available online at: <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf>); Sabeel Rahman, OMB Announces New Action to Improve Government Services, OMB Blog, April 13, 2022 (Available online at: <https://www.whitehouse.gov/omb/briefing-room/2022/04/13/omb-announces-new-action-to-improve-government-services/>).

¹³⁵ “Tackling the Time Tax”, OMB 2023 (<https://www.whitehouse.gov/wp-content/uploads/2023/07/OIRA-2023-Burden-Reduction-Report.pdf>); Strategies for Reducing Administrative Burden in Public Benefit and Service Programs, OMB-OIRA guidance, Dec 2022 (<https://www.whitehouse.gov/wp-content/uploads/2022/12/BurdenReductionStrategies.pdf>). See more generally, Burden Reduction Initiative, OMB-OIRA (<https://www.whitehouse.gov/omb/information-regulatory-affairs/burden-reduction-initiative/>)

and expanded—safety net might look like, these are important foundations to build on.

C. Data, analysis, and knowledge production

The previous sections outline some of the emergent possibilities for reimagined approaches to administration and governance, particularly in moving to a more concerted focus on system-level interventions, and public provision of various kinds. But all of these shifts also require a corresponding and complementary reimagining of the often-hidden “back-end” of governing. First, many administrative interventions require specified forms of analysis to be undertaken by agencies at the outset. These modes of analysis, while not exhaustive nor deterministic of all the considerations influencing policy design and implementation, nevertheless do act to channel, constrain, and shape the underlying reasoning animating policy design. Second, the evidence and data agencies have on hand is often limited or spotty in ways that might make some policy goals more difficult to cognize or target. Each of these elements can and should be reimagined in ways that enable and complement the new approaches to governance sketched above.

1. Analysis.

Policy analysis is often a central process step for many regulatory actions. Most famously, major rulemakings are subject to the requirements of Executive Order 12866, which calls for among other things a regulatory impact analysis to be developed by the issuing agency. This analysis must follow the requirements for impact analysis sketched out in OMB Circular A-4. Other actions also require analysis of various kinds. Some applicants for federal funding—for example for localities accessing disaster relief funds—must also undertake a form of cost-benefit analysis. Under the statutory and accompanying regulatory requirements arising from NEPA, federal actions that have significant environmental impacts must also develop an environmental impact statement.

The scholarly literature on cost-benefit analysis and how it structures administrative decision-making and policy judgment is vast.¹³⁶ Cost-benefit analysis, for many, promises to help rationalize policymaking, enhance transparency and accountability, reduce cognitive bias, and make policy

¹³⁶ See Robert Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 NYU L. REV. 1983, 1995-98 (2013) (describing the origins and evolution of cost-benefit analysis and summarizing scholarly literature).

outcomes more effective overall.¹³⁷ Much of the debate over cost-benefit analysis has focused on questions of whether it should be employed or not. Doctrinally, the debate over cost-benefit analysis has revolved around to what extent judicial review of agency action can and should require cost-benefit analysis as part of the “arbitrary and capricious” standard.¹³⁸

Scholars have surfaced very real challenges, particularly in the ways in which a narrow, overly-economistic approach too tethered to monetizable costs and benefits can significantly erase the space for consideration of more complex and less-quantifiable values: civil rights, civil liberties, human dignity, distributional impacts, climate and environmental justice impacts, and more.¹³⁹ Some of these gaps can be addressed through more sophisticated forms of quantitative analysis, for example by incorporating distributional impacts or by specifying more fulsome social welfare functions to be optimized through regulatory policy.¹⁴⁰ Other gaps, however, require entirely different registers of analysis and judgment—for example to grapple more fully with concepts of equity or dignity, or taking more dynamic approaches to designing policy in the face of highly uncertain and potentially devastating shocks. More sophisticated accounts of cost-benefit analysis concede the multifaceted nature of policymaking judgments, and suggest that cost-benefit analysis is a more fluid and capacious technique than simply computing dollar-figures and estimated impacts.¹⁴¹

¹³⁷ *Id.* at 2010-22. (Cost-benefit analysis serves efficiency functions such as leading to relatively better outcomes, reducing cognitive bias, and informing agencies where and when to regulate. It also has non-efficiency functions such as limiting regulation, enhancing overall well-being, increasing transparency, and facilitating more effective monitoring of agencies)

¹³⁸ See e.g. Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007). For recent cases interpreting arbitrary and capricious review as requiring cost-benefit analysis, see, e.g. *Business Roundtable v. S.E.C.*, 647 F.3d 1144, 1149-52 (2011); *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302 (2014); *Mich. V. E.P.A.*, 576 U.S. 743 (2015).

¹³⁹ DOUGLAS KYSAR, *REGULATING FROM NOWHERE* (2010); FRANK ACKERMAN AND LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING*, (2005); ELIZABETH POPP BERMAN, *THINKING LIKE AN ECONOMIST* (2022).

¹⁴⁰ Richard L. Revesz & Samantha Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T LAW 53 (2022); Zachary Liscow, *Redistribution for Realists*, 107 IOWA LAW REVIEW 495 (2022); Matthew D. Adler, *The Social Welfare Function: A New Tool for Regulatory Policy Analysis*, in *THEORIES OF CHOICE: THE SOCIAL SCIENCE AND THE LAW OF DECISION MAKING* 155 (Stefan Grundmann & Phillip Hacker eds., 2021); Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. OF CHI. L. REV. 649 (2021)

¹⁴¹ See, e.g., Ahdieh, at 2035-65 (outlining different types of cost-benefit analysis to be employed by agencies, based on examples in financial regulation); Cass R. Sunstein, *The*

One major challenge for reimagining administrative action is the need to develop new conceptual approaches to analyzing and approaching public problems. Here the focus is less on individual regulations and more on the analysis, information, and processes used to *develop* policies in the first place. Ultimately, a more holistic and flexible approach to analysis will be required to fully support and enable the kinds of structural, systemic, and public-serving interventions that future administrations will have to develop.¹⁴²

One of the headline governance reforms of the Biden Administration to-date has been the effort to revamp the requirements for regulatory impact analysis under EO 12866 and OMB Circular A-4. President Biden's Day One Memorandum called for modernizing cost-benefit analysis in context of OIRA review of regulations, particularly to address issues of climate change, human dignity, equity, and otherwise hard-to-quantify benefits.¹⁴³ These efforts have resulted in the release of the first-ever rewrite of OIRA's guidelines for regulatory impact analysis, OMB Circular A-4.¹⁴⁴ These analytic updates are not just about incorporating the latest best practices from social science and policy analysis; they also represent an attempt to reimagine analytical frameworks to better align with our contemporary understandings of economic and social policy.¹⁴⁵ In particular, the revised A-4 provides for

Real World of Cost-Benefit Analysis, COLUM. L. REV. (2016). For literature on cost-benefit analysis in context of policing, compare Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 NYU L. REV. 870, 901 (2015) (advocating more grounded understanding of costs and benefits in policing) with Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 432-33 (2018) (critiquing the use of cost-benefit analysis in criminal justice and more broadly).

¹⁴² It is worth noting that the influence of these analytical requirements on policy design and strategy can be overstated; analytical requirements can indeed incentivize certain kinds of logics and tradeoffs while undercutting other values and goals, but agencies are also subject to a host of political, normative, and other drivers which can lead to decision-making that may or may not track closely the fine-grain of the analyses that agencies produce in parallel. Indeed, some of the disciplining pressure of analysis comes not from the exercise of *ex ante* analysis, but rather from the threat of *ex post* judicial review—particularly in an era where courts have been increasingly aggressive about using judicial review to enforce a particular approach to evaluating costs and benefits.

¹⁴³ Memorandum on Modernizing Regulatory Review (January 21, 2021) (Available online at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/?s=03>)

¹⁴⁴ See OFF. MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-4, REGULATORY ANALYSIS (2023).

¹⁴⁵ For a more detailed account of the modernizing regulatory review proposals, see [blog symposia on LPE Blog and Notice and Comment Blog]. See also Rahman, *Modernizing Regulatory Review*, *The Regulatory Review*, May 15, 2023

a much more accurate (and lower) discount rate, which means future intergenerational and long-term impacts will weigh more heavily on present-day valuations—a shift especially critical for accurately showing the vast benefits of actions that mitigate the dangers of catastrophic climate change in the future. Similarly, the new A-4 also provides a thorough new approach for assessing distributional impacts, while also providing more detailed guidance for agencies to consider qualitative and hard-to-quantify impacts including matters of civil rights, equity, or dignity more fulsomely.

This revision of A-4 has also been complemented by a set of complementary analytical reforms. OMB Circular A-94, which governs the cost-benefit analysis requirements for applicants to certain federal funding programs, has also now been revised—including a greater attention to distributional analysis, a higher threshold exempting lower-dollar projects from the potentially burdensome analytical requirements, and other reforms.¹⁴⁶ The new A-4 also includes several changes to take more structural economic dynamics into account, including new language on analyzing market power and concentration, in light of Executive Order 14036 on competition, which included specific directives for OIRA to update its competition analysis guidelines.¹⁴⁷ That directive has resulted in a new stand-alone guidance from OIRA on how agencies should analyze competition, concentration, and market power.¹⁴⁸ On the climate front, the revisions to A-4 have been complemented by a new long-term strategy to develop statistics for environmental economics, to better account for the value of natural ecosystems and conservation.¹⁴⁹ Meanwhile, the EPA has released its own

(<https://www.theregreview.org/2023/05/15/rahman-modernizing-regulatory-review/>); Rahman, *Rewiring Regulation*, LPE Blog, May 1, 2023 (<https://lpeproject.org/blog/rewiring-regulatory-review/>); and Rahman, *Building the Administrative State We Need*, Notice and Comment Blog, June 29, 2023 (<https://www.yalejreg.com/nc/building-the-administrative-state-we-need-by-k-sabeel-rahman/>)

¹⁴⁶ See Zach Liscow and Cass Sunstein, *Efficiency vs. Welfare in Benefit-Cost Analysis: The Case of Government Funding* (2023) (available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4589563); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-94, GUIDELINES AND DISCOUNT RATES FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS (2023).

¹⁴⁷ This shift also echoes similar, and more potentially transformative, shifts in the merger guidelines newly updated by DOJ and FTC to shape future enforcement decisions on merger reviews. See U.S. DEP'T JUST. & FED. TRADE COMM'N, *MERGER GUIDELINES* (2023).

¹⁴⁸ See OFF. INFO. & REGUL. AFF., *GUIDANCE ON ACCOUNTING FOR COMPETITION EFFECTS WHEN DEVELOPING AND ANALYZING REGULATORY ACTIONS* (2023).

¹⁴⁹ See National Strategy to Develop Statistics for Environmental-Economic Decisions (January 2023) (<https://www.whitehouse.gov/wp-content/uploads/2023/01/Natural-Capital-Accounting-Strategy-final.pdf>).

revised figure for calculating the social cost of greenhouse gases (SC-GHG), raising the estimate to roughly \$190 per ton.¹⁵⁰ This revised estimate is also now being incorporated into Federal budgeting and procurement decisions through new guidance from OMB.¹⁵¹

More broadly, these interventions represent starting points for potentially more transformative changes that may be explored in future. We could imagine, for example, more systematic ways of documenting and analyzing inequities and driving regulatory agendas that tackle those inequities methodically. Indeed, the equity Executive Orders do push agencies to develop new approaches to identifying and analyzing systemic inequities, and having that analysis drive their equity action plans. This has been effective to some degree, but it remains somewhat unclear as a practical matter—and very unclear as a matter of formal Executive branch policy—how equity should be analyzed more broadly and effectively outside of the A-4 context.¹⁵² On the cost-benefit analysis reforms, there are very real critiques and concerns that a more wholesale reimagining of regulatory analysis, data collection, and policy design is needed.¹⁵³ Similarly, concerns about environmental review—both the analytical modes and time required—remain real, and ripe for future reform.¹⁵⁴ But wherever one lands on the questions of what kinds

¹⁵⁰ See ENV'T PROT. AGENCY, EPA-HQ-OAR-2021-0317, EPA EXTERNAL REVIEW DRAFT OF REPORT ON SOCIAL COST OF GREENHOUSE GASSES: ESTIMATES INCORPORATING RECENT SCIENTIFIC ADVANCES (2022).

¹⁵¹ See Coral Davenport, *White House directs agencies to account for climate change in budget*, N. Y. TIMES Sept 21, 2023 (available online at: <https://www.nytimes.com/2023/09/21/climate/biden-climate-change-economic-cost.html>)

¹⁵² In a recent analysis of the agency Equity Action Plans, racial justice groups have suggested that while the plans represent an important step forward, they have not yet resulted in methodical policy outcomes that tackle structural inequities in a systematic way. See e.g., RaceForward and PolicyLink, *Assessment of Federal Equity Action Plans* (2023) (available online at: <https://rfarchive.raceforward.org/system/files/pdf/reports/2023/AssessmentOfFederalEquityActionPlans-2023-v9.pdf>). There is a growing practice of equity policy analysis, though these practices do not align neatly with the conventional approaches to federal regulatory cost-benefit analysis. See e.g. GOV'T ALLIANCE ON RACE & EQUITY, RACIAL EQUITY TOOLKIT: AN OPPORTUNITY TO OPERATIONALIZE EQUITY; OTHERING & BELONGING INST. (available online at: <https://belonging.berkeley.edu/racial-equity-toolkit-opportunity-operationalize-equity>).

¹⁵³ See e.g. Luke Herrine, *Some Short Circuits in the Rewiring of Regulatory Review*, L. & POL. ECON. (May 8, 2023) (available online at: <https://lpeproject.org/blog/some-short-circuits-in-the-rewiring-of-regulatory-review/>); Frank Pasquale, *Power and Knowledge in Policy Evaluation: From Managing Budgets to Analyzing Scenarios*, 86 L. & CONTEMP. PROBS. 39 (2023); Symposium, *Cost Benefit Analysis*, L. & POL. ECON. (Oct. 2021); Symposium, *Racism in Administrative Law*, YALE J. ON REGUL. (2020).

¹⁵⁴ Ezra Klein, *Government is Failing, in Part Because Liberals Hobbled It*, N.Y. TIMES, Mar. 13, 2022 (available online at:

of analysis and planning agencies should undertake to more adequately tackle systemic inequities of power, opportunity, and wellbeing in our political economy, it seems clear that such a vision will require *some* form of encoding in the intellectual, analytical, and planning apparatus of the agencies through one or more of the levers identified above.

2. Data and evidence.

A second front for developing new conceptual approaches to policy analysis and design stems from the policies and processes around evidence and data.

Across a range of initiatives, particularly in context of the Administration's work on equity, there is a concerted effort to develop new forms of data collection and evidence building to help inform more accurate and sophisticated policies that can respond to, for example, more granular understandings of inequities that particular communities face. Thus, Executive Order 13985 on equity launched the Equitable Data Working Group, whose final report included calls for agencies to develop more disaggregated forms of data collection and building the capacity for agencies to conduct more robust equity analysis of programs and policies.¹⁵⁵ These efforts in turn have informed new efforts to update the Federal government's standard policies and recommended best practices for categorizing race and ethnicity,¹⁵⁶ and for tabulating sexual orientation and gender identity data. This attention to data as an input into policymaking was echoed in subsequent Executive Orders on sexual orientation and gender identity.¹⁵⁷ The

<https://www.nytimes.com/2022/03/13/opinion/berkeley-enrollment-climate-crisis.html>) (environmental review is now a barrier to building infrastructure); Johanna Bozuwa & Dustin Mulvaney, *A Progressive Take on Permitting Reform: Principles and Policies to Unleash a Faster, More Equitable Green Transition*, ROOSEVELT INSTITUTE (Aug. 22, 2023) (available online at: <https://rooseveltinstitute.org/publications/a-progressive-take-on-permitting-reform/>)

¹⁵⁵ See *Vision for Equitable Data: Recommendations from the Equitable Data Working Group*, WHITE HOUSE (2022) (available online at: <https://www.whitehouse.gov/wp-content/uploads/2022/04/eo13985-vision-for-equitable-data.pdf>)

¹⁵⁶ See Karin Orvis, Initial Proposals for Revising Federal Race and Ethnicity Standards, OMB Blog, January 26, 2023 (available online at <https://www.whitehouse.gov/omb/briefing-room/2023/01/26/initial-proposals-for-revising-the-federal-race-and-ethnicity-standards/>); Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards, 88 F.R. 5375 (available online at: <https://www.federalregister.gov/documents/2023/01/27/2023-01635/initial-proposals-for-updating-ombs-race-and-ethnicity-statistical-standards>); OMB working group on race and ethnicity standards (<https://spd15revision.gov/>).

¹⁵⁷ See Executive Order 14075.

Administration recently released an “evidence agenda” laying out a strategy by which agencies can develop more granular understanding of LGBTQI+ communities to inform improved policy design.¹⁵⁸ This emphasis on data policy is important and often overlooked; agencies collect data in a myriad of forms from surveys to administrative processes (e.g. enrollments in government programs). This data is not always fully leveraged to inform the kind of broad-based evidence base that more nuanced policymaking often requires. Under the Evidence Act of 2018 and more recent OMB guidance, agencies are tasked with developing long-term plans to deepen their evidence base and ability to learn about on-the-ground issues that can better inform regulatory policy going forward.¹⁵⁹ These efforts around data infrastructure represent a continuation of that trend.

Here too, these shifts could presage more wholesale changes that would better enable the kinds of systemic interventions described above. On the one hand, government agencies need greater information about critical areas of the economy. Despite the ramp up of state surveillance through the national security apparatus, it is surprising how much economic regulatory agencies from the SEC to the FTC to cabinet agencies continue to rely on public data to track trends in the economy, and “spot-checking” particular firms or industries through specific data inquiries. Similarly, a greater embeddedness particularly with vulnerable communities could provide more timely feedback and indicators of problems needing to be addressed. Thus, the CFPB for example, has continued to invest in its systems for receiving consumer complaints and pro-actively engaging consumer and advocacy groups to identify issues in need of attention.¹⁶⁰

A second front for developing new conceptual approaches to policy analysis and design stems from the policies and processes around evidence and data.

¹⁵⁸ *Federal Evidence Agenda on LGBTQI+ Equity*, WHITE HOUSE (2023) (available online at: <https://www.whitehouse.gov/wp-content/uploads/2023/01/Federal-Evidence-Agenda-on-LGBTQI-Equity.pdf>)

¹⁵⁹ Foundation for Evidence-Based Policymaking Act of 2018, Pub. L. 115-435,; OFF MGMT. & BUDGET, EXEC, OFF. OF THE PRESIDENT, M-21-27, EVIDENCE-BASED POLICYMAKING: LEARNING AGENDAS AND ANNUAL EVALUATION PLAN (2021).

¹⁶⁰ Press Release, Consumer Fin. Prot. Bureau., Consumer Financial Protection Bureau to Enhance Consumer Complaint Database (Sep. 19, 2019) (available online at: <https://www.consumerfinance.gov/about-us/newsroom/bureau-enhance-consumer-complaint-database/>); Consumer Fin. Prot. Bureau., The CFPB Language Access Plan for Consumers with Limited English Proficiency (Nov. 12, 2023) (available online at: https://files.consumerfinance.gov/f/documents/cfpb_language-access-plan_2023-11.pdf)

D. Participatory governance

As noted in Part I above, one of the central critiques of neoliberal administration stems from the disparities of power and influence in shaping the nature of regulatory action (or inaction). The disparities in who participates and how in regulatory policymaking is more than just a generic, neutral value of inclusion and participation. It is also normatively and substantively valenced. First, there is the problem of capture, as agencies tend to respond to the most well-resourced, sophisticated, and influential interest groups rather than to the public interest.¹⁶¹ Second, there is also the (related) problem of regulatory inaction. The proliferation of checks and balances and veto points creates a structural bias against new regulatory initiatives.¹⁶² Sophisticated players can help undercut needed new agency initiatives. The tendency towards inertia can also freeze regulatory policies in place, causing “regulatory drift” in ways that serve the interests of established players.¹⁶³

Thus, while it has been a commonplace critique from both left and right to warn against the dangers of an unaccountable, ‘black box’ regulatory state, it is also true that participation done right is not just about preventing government overreach but also about driving and enabling effective and public-serving governmental action. Indeed, as Bernstein and Rodriguez document, the career civil service is far from insulated from the broader public; rather the bureaucratic process is highly porous and attentive to a range of stakeholders from Congress to the media to regulated parties creating webs of informal responsiveness and accountability.¹⁶⁴ The task, then, is to reconfigure the array of participants, inputs, and political pressures conditioning and shaping administrative action. A more democratic, egalitarian, and equity-advancing administrative state necessarily must be one that is also more participatory and democratic in its structure.

There is a rich literature exploring the ways in which law and institutional design can catalyze more efficacious and bottom-up forms of participation in policymaking.¹⁶⁵ At a macro level, such participation should be thought of as

¹⁶¹ PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., 2014).

¹⁶² Jonathan Gould & David Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV 59 (2022).

¹⁶³ Hacker and Pierson, *Winner-Take-All Politics*, at 170-71 (2010).

¹⁶⁴ See Bernstein and Rodriguez, *The Accountable Bureaucrat*, 1637-1650.

¹⁶⁵ See e.g. RUSSON GILLMAN AND RAHMAN, CIVIC POWER; Rahman, *Policymaking as Power-building*; Simonson and Rahman, *Institutionalizing Community Power*; Andrias and Sachs, *Countervailing Power*; Havasy, *Relational Fairness*; Samuel Bagg, *Two Fallacies*

a larger shift in the balance of interest group power, as institutional structures can help catalyze a new steady state that expands the power of conventionally diffuse or disempowered constituencies to counteract the power of organized business or elite interests. For example, creating more simple, accessible, and universal versions of safety net programs and public services—as suggested above—can help institutionalize “feedback loops” where constituents come to expect those benefits and protections, and thermostatically mobilize against efforts to dismantle them.¹⁶⁶ Similarly, establishing new consolidated agencies with broad—and publicly-visible and comprehensible—jurisdictions can create a target or center of gravity that makes administrative politics more accessible for civil society groups lacking in the resources or sophistication to navigate a complex and fragmented landscape of multiple competing agencies with opaque jurisdictions and roles. Thus the creation of the CFPB, for example, helped create a new center of gravity for consumer interests and problems of financial exploitation—needs that prior to the 2008 financial crisis were covered by a confusing and under-powered array of ineffectual regulators.¹⁶⁷

This principle—of policy design catalyzing different power relationships and easing the ability of vulnerable groups to engage more readily in advocating for themselves—can be advanced through more micro or meso-level changes to internal administrative procedures and structures. Agencies in practice are often not the black boxes of caricature, but rather are highly porous, embedded in webs of input and influence from a range of stakeholders.¹⁶⁸ In many ways the central problem is not that agencies lack a tether to stakeholders; it’s that the existing web of participants, stakeholders, and those positioned to shape agency action does not necessarily reflect an equitable, inclusive, or responsive web of influences. Thus agencies might create dedicated offices tasked with representing the

of *Democratic Design*, LPE BLOG (July 13, 2023).

¹⁶⁶ SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENTS UNDERMINE AMERICAN DEMOCRACY* (2011); Alexander Hertel-Fernandez, *How Policy Makers Can Craft Measures that Endure and Build Political Power*, ROOSEVELT INSTITUTE (June 2020) (available online at: https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_How-Policymakers-Can-Craft-Measures-that-Endure-and-Build-Political-Power-Working-Paper-2020.pdf); Jamila Michener, *Policy Feedback in a Racialized Polity* 47 *POL’Y STUD. J.* 423 (2019); Andrea Louise Campbell, *Policy Makes Mass Politics*, 15 *ANN. REV. POL. SCI.* 333 (2012); Campbell, *Tax Designs and Tax Attitudes*, 16 *THE FORUM* 369 (October 2018) (available online at: <https://dspace.mit.edu/bitstream/handle/1721.1/125857/%5B15408884%20-%20The%20Forum%5D%20Tax%20Designs%20and%20Tax%20Attitudes.pdf?sequence=2&isAllowed=y>)(the way taxes are designed influences how the public views them).

¹⁶⁷ RAHMAN, *DEMOCRACY AGAINST DOMINATION*.

¹⁶⁸ See Bernstein and Rodriguez, *The Accountable Bureaucrat*, Part III.

public, or specific constituencies, in internal agency or Executive branch processes. Such “proxy advocacy” is already a feature of many agencies that have what Margo Schlanger calls “offices of goodness”—dedicated worker or consumer representatives, for example.¹⁶⁹ Alternatively, this goal might be achieved through other hooks and levers that give impacted but under-resourced groups a closer connection to policymaking, for example through participatory policy design processes or citizen audits and monitoring systems.¹⁷⁰

This participatory vision of administration remains a far cry from the day-to-day of regulatory governance. But one of the notable areas of administrative reform activity has been on bringing these concepts of participation into the new procedures and protocols that are being built.

First, as part of the Administration’s work on equity, Executive Order 13985 issued on day one of the Biden Administration includes a specific call for greater participation by vulnerable, marginalized, or historically disadvantaged communities in policymaking.¹⁷¹ The subsequent Executive Order 14091 provides an even more explicit and assertive mandate for agencies to engage in more “proactive” engagement with impacted communities.¹⁷² The Administration’s Executive Order on regulatory review includes a similarly assertive call for agencies to affirmatively promote inclusive regulatory policy by creating meaningful opportunities for participation, and in particular, by doing so earlier in the policy design process well before rules are finalized for notice and comment.¹⁷³ These mandates are echoed in more issue or constituency-specific directives such as the Executive Orders on environmental justice,¹⁷⁴ and service delivery,¹⁷⁵ and the various memos on consultation with Tribal nations.¹⁷⁶

Beyond these directives, the way participation is being conceptualized

¹⁶⁹ Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014).

¹⁷⁰ See Rahman, *Policymaking as power-building*.

¹⁷¹ EO 13985.

¹⁷² EO 14091, §5.

¹⁷³ See EO 14094, §2.

¹⁷⁴ EO 14096, Revitalizing our Nation’s Commitment to Environmental Justice for All (April 2023), 88 Fed. Reg. 25251, at §3(a)(vii).

¹⁷⁵ EO 14058.

¹⁷⁶ See Tribal Consultation and Strengthening Nation-to-Nation Relationships, Presidential Memorandum, January 26, 2021; and Uniform Standards for Tribal Consultation, Presidential Memorandum, November 30, 2022.

and operationalized in also notable. In context of the administration's efforts on equity, participation has been characterized not just in terms of passively taking input from vocal stakeholders, but instead as requiring pro-active affirmative engagement with those most impacted, and those who may not be resourced or built to lobby effectively for themselves. Participation was also explicitly cast as an "upstream" need: requiring meaningful engagement with impacted communities early in the policy design process, rather than waiting until a policy is already fully-baked before going out for public comment.¹⁷⁷ Recent guidance to agencies from OIRA emphasizes the inadequacy of notice and comment procedures and encourages agencies to develop more pro-active and early-stage modes of engagement.¹⁷⁸ This guidance also encourages agencies to plan participatory engagements in advance, and update their protocols on *ex parte* contacts and Paperwork Reduction Act clearances to better facilitate routine engagement with communities on the ground. Most of the agency-specific action plans developed under the auspices of the equity executive order include notable early-stage efforts at this kind of proactive consultation and engagement.¹⁷⁹

These are at best early signals of interest and possibility. But making these commitments real requires more significant efforts. This kind of pro-active outreach requires painstaking work of building trusting relationships with grassroots communities and curating spaces for meaningful engagement; this in turn requires dedicated financial resources and staffing.¹⁸⁰ Statutory changes could jumpstart these efforts too, modernizing inhibitory constraints of the protocols in the Federal Advisory Committee

¹⁷⁷ See e.g. Study to Identify Methods to Assess Equity: Report to the President, Office of Management and Budget, July 2021 (https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf), 30-35; see also Open Government National Action Plan (Dec 2022) (<https://open.usa.gov/national-action-plan/5/#increase-civic-space-to-engage-the-public>).

¹⁷⁸ Broadening Public Participation and Community Engagement in the Regulatory Process, Memorandum for Heads of Executive Departments and Agencies, July 19, 2023 (<https://www.whitehouse.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf>)

¹⁷⁹ See for e.g., agency equity action plans posted online (<https://www.whitehouse.gov/equity/>); PolicyLink and Race Forward, Assessment of Federal Equity Action Plans (Feb 2023) (assessing agency equity action plans and noting most of them provided some new steps on stakeholder engagement and participation).

¹⁸⁰ Both the OIRA guidance of July 2023 and the Administration's own self-assessment of its equity efforts under the American Rescue Plan were explicit in these needs. See Broadening Public Participation and Community Engagement in the Regulatory Process, Memorandum for Heads of Executive Departments and Agencies, July 19, 2023; Advancing Equity Through the American Rescue Plan, White House, May 2022.

Act, for example.¹⁸¹ It will also be important to imagine participation taking place in more structured settings at a sectoral, regional, or early-stage moment, rather than through individualized regulations, grants, or projects.

Getting participation right will be essential not only for the equitable aspirations of this new approach to administration, but also for the efficacy of the administrative state itself. Indeed, one of the central fault lines of debate at the moment revolves around questions of excessive procedural requirements and the ways in which community participation might, for some critics, choke off the space for rapid government action at scale.¹⁸² Yet these concerns are in some ways better cashed out not by stripping away participatory mechanisms, but redesigning them to be part and parcel with effective government action at scale.¹⁸³

III. IMPLICATIONS AND WAYS FORWARD

As suggested in Part I above, the limitations of conventional approaches to economic policy manifest not just in debates over macroeconomic fights over budgets, taxes, interest rates and big-ticket legislation. The same conceptual limits shaping economic policy over the past few decades have also shaped the prevailing paradigms of internal administrative governance. For those committed to a long-term vision of an inclusive, equitable polity that is capable of tackling and overcoming both inherited systems of inequality and subordination and emerging existential crises like climate change, it will be essential to develop an administrative apparatus that is aligned with that vision and that can operate at scale and with ambition.

This vision of administration will require the internal structures and processes that enable regulatory policymakers to orient towards system-level policy designs and interventions; to build effective infrastructures of public provision; to deploy approaches to analysis and evidence appropriate to understanding structural challenges and informing effective policies; and to

¹⁸¹ It is worth noting that FACA, like FOIA, reflects a particular era of good governance reform as much premised on a hostility towards government and desire to limit government's ability as on the notion of transparency and participation. See for example, David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U.PENN L. R. 1097 (2017) (on the 'reactionary transparency' ethos of FOIA).

¹⁸² See e.g. Bagley, *The Procedure Fetish*.

¹⁸³ On the possibilities of a democratic and participatory industrial policy, for example, see Amy Kapczynski & Joel Michaels, *Industrial Policy as Democratic Practice*, HARV. L. & POL'Y REV. (forthcoming).

embed participatory mechanisms that empower impacted and vulnerable communities to shape policy design and implementation. As described in Part II above, the Biden Administration has developed some new administrative reforms to push on each of these four dimensions of governance. These reform efforts, it is important to note, did not emerge wholly-formed as a singular vision from the White House on down. Rather, they emerged as a set of mid-level innovations by a combination of actors in the White House, the Executive Office of the President, and the agencies to attempt to respond to the very real policy demands and priorities to deliver results on issues like climate change or equity or inclusive economic recovery.

These efforts are only a starting point; internal procedural reforms do not by themselves kind of reimagining of administrative authorities and governance that will be needed to address structural inequities on a sustained basis. So what are we to make of these efforts in this larger context of where administrative reimagining might take us? The rest of this Part considers what these preliminary efforts might mean for future reform work going forward. First, the ways in which these reforms highlight the internal dynamics of bureaucratic organizations offers an important lesson for future policy change about the importance of tending to and drawing on organizational dynamics. Second, the recent reforms should also be understood in context of wider political pressure and constraint which limits the scope of administrative reform. Finally, these the discussion above points to several central frontlines for where future efforts might press for more ambitious changes to the administrative apparatus, building on but going beyond what has been developed thus far.

A. Regulatory reform as organizational change

A central implication of the efforts described above is the importance of internal organizational cultures and dynamics, both in conditioning administrative reform efforts, and in offering ways in which new ideas can be embedded and given life and energy as they are incorporated into agency functioning.

Internally, creative and successful administrative innovation depends on the confluence of personnel appointments and hires, with political support internal to the Executive branch, and with existing bureaucratic processes and capacities that are close enough to the goals at hand to make genuinely impactful innovation in administrative process possible. Much of the focus on policy change in new administrations tends to emphasize personnel

appointments and presidential vision. But personnel and top-down directives are only a part of the story. Reforming or evolving approaches to governance requires at times adapting and working through existing vehicles and process, at other times reprogramming and rewiring them. New ideas and policies may be most challenging to launch and embed where the new policies and concepts do not map neatly on to existing protocols. As a result, new policy directions, particularly when premised on underlying conceptual shifts (for example, bringing concepts like equity into the frame, or shifting focus to macro political economy questions like on market concentration and industrial policy) necessarily require thoughtful and effective approaches to organizational and cultural change management within the agencies and the Executive Branch themselves.

Indeed, some of the most interesting initiatives in the Biden Administration are notable for their approach to this challenge of organizational evolution and change management. The Executive Order on competition, for example, set forth not only a new policy direction and a list of specific regulations, but also created a structure for interagency accountability, peer learning, and positive reinforcement through the Competition Council, as a self-conscious effort in driving culture change in the agencies.¹⁸⁴ Similarly, the administration's work on equity took a deliberate change management approach focused on cultivating new thinking, learning, and modes of behavior within the agencies, as a way of building up capacity and an interagency community of practitioners capable of supporting one another and innovating new approaches going forward.¹⁸⁵

These intra-Executive branch efforts at organizational evolution and change share some common features.

First, they create (or revive) a new shared language around the key concepts animating these policy initiatives: “equity”, “competition” and the like. Through a combination of top-down directives such as the Executive Orders, and horizontal dialogue through interagency convenings and conversations, these concepts gradually gain a shared definition and facilitate mutual understanding across agencies and among career and appointee staff alike about the vision and direction of these initiatives.

¹⁸⁴ See e.g. Dayen, *The Pitched Battle on Corporate Power* (describing the change management strategy behind the Competition Council and the management of the competition work by the National Economic Council).

¹⁸⁵ See Briggs and Sherman, *What we can learn from the effort to implement Biden's executive orders on advancing equity* (noting the change management component of the administration's implementation of the equity Executive Orders).

Second, these efforts often create new processes—interagency policy committees, review and approval procedures, deliberate moments for agency leads to share updates with higher-ups—as well as particular products—papers, reports, public events which structure the day-to-day cadence of bureaucratic operations. Participating in these processes and producing these products are the day-to-day practice of administrative governance. Translating new concepts and initiatives into internal protocols is therefore a key way in which those new ideas gain traction and, over time, embeddedness into ordinary regulatory practice.

Third, these processes balance top-down and bottom-up aspects. Centralized bodies like the Competition Council or the coordinating role of the DPC in driving the implementation of the Equity Executive Order provide accountability and direction. But across each of the dimensions described in Part II, these new efforts were also very much embedded in agencies, activating and responding to agencies' own efforts at institutionalizing and implementing these approaches.

Fourth, these efforts also create, whether formally or informally, a community of practice that enables officials from different agencies and at different levels of positional authority to compare notes, learn from one another's efforts, and create the kind of social and relational cohorts that are often necessary to sustain efforts at organizational change or evolution.

New approaches can unlock real reservoirs of creativity, innovation, and even internal accountability from within agencies themselves. As with any instance of organizational change or evolution, such new approaches are at their best when they activate existing internal champions and catalyze new ideas from within the organization. Agency staff have tremendous expertise, dedication, and knowledge that give life to these efforts, from addressing equity or concentration to redesigning public service delivery to developing new modes of participation. At the same time, these internal dynamics operate at their best when embedded in a wider ecosystem. The more agency staff are in mutually-reinforcing dialogues with peers and colleagues both inside the government and in the wider ecosystem of scholars, researchers, advocates, and grassroots communities, the more these concepts and approaches become embedded and improved over time.

This attention to the internal realities of bureaucratic organizations is not just a second-best approach to policy change. All policy requires bureaucratic organization to function; and a major way in which we breathe life into policies is through the collective human effort of individuals organized

through institutions to implement and evolve those policies. As a result, internal administrative process, protocol, personnel, and culture are important aspects of any governance regime.

B. Regulatory reform under external constraint

At the same time, the attention to intra-Executive Branch efforts to drive reforms stems in large part from very real constraints and pressures that limit more transformative efforts. This reality of constraint is especially sharp in context of these kinds of efforts to tackle structural inequities and build a new more inclusive political economy.

Most front of mind are threats from mobilized political critics of the administrative state down to its foundations. These pressures come from a range of vectors: the House Republican caucus threatening budget cuts and government shut-downs, or the aggressively anti-regulatory crusade being waged by the courts, or the public media hostility to new regulatory efforts. The perpetual legislative controversy over basic funding and resourcing of government severely limits the ability of agencies not only to do their day-to-day work, but to imagine and implement new approaches, lacking the kinds of sustained funding streams and expanded budgets needed to hire permanent, career civil service staff with the necessary expertise and experience, and to embark on multi-year organizational change or development agendas.

On the judicial front, the Supreme Court's newfound interest in the "major questions doctrine" has helped shape a pervasive constricting of agency authority on climate, COVID, and economic policy.¹⁸⁶ The judicial attack on regulatory capacity manifests in other doctrinal battlegrounds as well, from the arguably off-the-wall attack on the CFPB's funding structure,¹⁸⁷ to the chipping away at civil service protections under the guise of a thin theory of presidentialist accountability,¹⁸⁸ and the frontal challenge on *Chevron* deference,¹⁸⁹ to more aggressive and economic demands for cost-benefit analysis under the APA's arbitrary and capricious review

¹⁸⁶ See e.g., *W. Va. vs. E.P.A.*, 577 U.S. 1126 (2016); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Serv.*, 141 S. Ct. 2485 (2021); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety and Health Admin.*, 595 U.S. 109 (2022).

¹⁸⁷ *Consumer Fin. Prot. Bureau v. Cmty. Fin. Services Ass'n Am., Ltd.*, No. 22-448 (U.S. Aug. 02, 2023).

¹⁸⁸ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2187(2020).

¹⁸⁹ *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. Jan. 24, 2023), *Relentless Inc. v. Dep't Commerce*, No. 22-1219 (U.S. Jan. 5, 2024).

standard.¹⁹⁰ Combined with the weaponization of district court injunctions from hostile judges, particularly in the Fifth Circuit, the scope for administrative creativity is perhaps even more curtailed at precisely the moment that creativity is most needed. The ability of the administration to make effective policy through grantmaking and disbursement of funds—as in the ARP or infrastructure context—has similarly been notably curtailed by doctrinal constraints especially around the limits of supposedly ‘coercive’ federal conditions on state and local grantee recipients under *NFIB v. Sibelius*.¹⁹¹

More broadly, the general ineffectualness and gridlock of Congress has meant that the legislative branch is largely unable to muster majorities to develop specific and dynamic new legislation tailored to the specific public problems of the day—despite the unusual burst of legislative action in 2021-22. The result is that agencies are operating under old statutes, rather than new authorities empower and expand their abilities and sharpen their mandates.¹⁹² Yet, agencies arguably already have robust statutory authorization for many of these new policy initiatives being undertaken¹⁹³—including, it must be noted, on the cases where the Court has opportunistically and aggressively sought to curtail policies the majority of Justices simply disapproved of. For example, in the competition context, agencies have had to revive long-dormant authorities for regulating competition under an array of decades-old statutes: DOT, USDA, and other Cabinet agencies relatively unused to robust market analysis and competition enforcement are now having to build those analytical and enforcement capabilities. Flagship competition authorities like the FTC are reviving under-utilized rulemaking and enforcement tools that reflect much more faithfully the original intent of the Sherman Act, and already-existing principles of antitrust law and doctrine. Similarly, the aspirations of the equity Executive Orders can find significant statutory foundations and tools in Title VI, as well as traditions of administrative constitutionalism under the Fourteenth Amendment.

Given these pressures, administrative reformers necessarily have to think about creative and adaptive approaches to building new forms of governance in ways that are likely to survive and be effective. These pressures also mean that the prospects for wholesale governance reform—either by revamping

¹⁹⁰ Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2 (2009); *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302 (2014).

¹⁹¹ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

¹⁹² See generally, Jody Freeman, *Old Statutes, New Problems*, 163 UNIV. PA. 1 (2014).

¹⁹³ Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, GEO. ENV'T L. REV. (forthcoming).

foundational statutes like the APA or by creating whole new agency authorities or other dramatic restructurings of agencies—are limited, leaving reformers in the posture of bootstrapping and creative reimagining within existing statutory and organizational forms.

C. Regulatory reform: future directions

In light of the external pressures, many of the internal reforms described may or may not prove long-lived. Between legislative or judicial attacks, and in light of potential future changes of administration, it is possible to imagine these reforms being pulled back. But it is also instructive to consider what these reforms show us about where future efforts might continue to press forward.

For all the scholarly and political attention on urgent, systemic policy needs to address issues of inequity, inequality, climate change, and the like, there is comparatively little attention paid to what kinds of instrumentalities and governing capacities are needed to address these issues. These efforts by the current administration shed light on some of the ways that new understandings of equity, economic power and concentration, climate change and the like might start to influence Executive branch policymaking. These emergent practices are also essential to the realization of other policy agendas that have not yet been legislated. For example, one of the central concerns for a more equitable and inclusive economy stems from the inadequacies of our social infrastructure for childcare and elder care. Should policies on this front pass in future legislative sessions, the lessons learned from ARP, or BIL and the service delivery revamp will be critical to successful implementation.

The emergent approaches to institutionalizing a very different ethos of governance mapped out above point to several key tensions and themes that future scholarship and reform efforts should take as matters of central concern.

1. Building truly public infrastructure and expanding administrative capacity: Despite the transformative and egalitarian possibilities of the new industrial policy moment and the new approaches to the safety net mapped out above, the reality is that these are only possibilities at this stage. Too much of the new legislation and new regulatory implementation efforts channel funds into private infrastructures of service delivery, economic development, and provision. There is a role of course for private actors in these efforts, but there is a big difference between the state contracting these efforts out, and the affirmative construction or deepening of a genuinely

public infrastructure for providing these critical functions and services.¹⁹⁴ Similarly, reforms should bring more functions in-house into agencies themselves, rather than being procured as services provided by contractors. As one recent study of procurement around road resurfacing projects highlights, greater investment in administrative agency's staff capacity meant more bidders for a contract, which led to significant cost-savings and efficiency gains for the construction work required.¹⁹⁵ More broadly, the ability to insource, rather than outsource, more critical governance functions—from data collection to community consultation to complex modeling and analysis needs—would expand the capacity of state institutions to do the kind of efficient, equitable operations described above.¹⁹⁶ Even much of the data and technological tools needed to drive effective policy continue to often be held in private hands.¹⁹⁷

These efforts also require government agencies to have staffing and capacity internally. This means not only expanding the workforce to increase staffing and make agency budgets more firm and less susceptible to legislators seeking to score political points. It also means broadening the kinds of personnel and expertise agencies have in-house. Some of this shift comes down to recruiting and the career civil service pipeline. Thus the Administration's efforts to expand diversity in the federal workforce and streamline the often labyrinthine hiring procedures and authorities agencies have are critical to enabling a more dynamic and effective administrative state.¹⁹⁸ But this effort also requires firming up the protections for career civil service staff themselves,¹⁹⁹ particularly at a time where the increasingly prevalent position among far-right candidates for office is to call for

¹⁹⁴ See e.g. *supra* Note 37.

¹⁹⁵ See e.g. Zach Liscow, et. al., *Procurement and Infrastructure Costs*, YALE LAW & ECON. RESEARCH PAPER (forthcoming).

¹⁹⁶ OFF. OF MGMT. & BUDGET, EXEC, OFF. OF THE PRESIDENT, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). See also Bridget C.E. Dooling & Rachel Augustine Potter, *Contractors in Rulemaking*, DRAFT REPORT FOR THE ADMIN. CONF. OF THE U.S (Mar. 8, 2022); Rachel Augustine Potter, *Privatizing Personnel: Bureaucratic Outsourcing & the Administrative Presidency* (working paper).

¹⁹⁷ See e.g. Madison Condon, *Climate Service: The Business of Physical Risk*, 55 ARIZ. STATE L. J. 147 (2023).

¹⁹⁸ Exec. Order No. 14035, 86 Fed. Reg. 34593 (June 25, 2021); Press Release, OPM, OPM FEVS Adds Key Metrics for DEIA and Innovation Within Federal Agencies (Oct. 20, 2022) (<https://www.opm.gov/news/releases/2022/10/release-federal-workforce-remains-resilient-and-engaged-according-to-2022-opm-federal-employee-viewpoint-survey-fevs/>)

¹⁹⁹ Upholding Civil Service Protections and Merit System Principles, 88 Fed. Reg. 63862 (proposed Sept. 18, 2023) (to be codified at 5 C.F.R. §210, 212, 213, 302, 432, 451, 752)

eliminating civil service protections in an effort to make career staff more susceptible to political interference and control.²⁰⁰

2. Anti-subordinating administration: The various efforts at advancing equity and shifting the balance of power in administrative policymaking point to the need for a much more robust approach to a more fulsome approach to administration as part of a larger agenda of anti-subordination and genuinely equitable governance. As noted above, the equity action plans developed by agencies under the equity Executive Orders are a start and have helped drive a wide range of valuable new policies. But the impact on the ground, particularly around more high-profile and high-impact measures are mixed.²⁰¹ A more concentrated effort might build on this progress to commit the Executive branch to deliver on particular equity-advancing targets: for example, pushing to specific benchmarks on key indicators of health inequities (such as the racial gap in maternal mortality), or specific targets on the racial wealth gap. A fuller agenda of equitable administration would also have to reckon much more seriously than the Biden Administration has thus far with the ways in which administrative agencies actively construct and entrench relations of subordination.²⁰² This means in particular grappling with the administrative apparatus around immigration, incarceration, and enforcement disproportionately targeting communities of color—and contemplating the dismantling of those infrastructures altogether.

3. Balancing procedure and efficacy: A central theme in Part II has been the ways in which agency procedures can either slow down important initiatives or otherwise sterilize policy judgments of important nuance. A next frontier of reform should continue to press on how procedures—and the statutory or doctrinal underpinnings that keep those procedures in place—can be shifted to allow for more effective policies that target structural challenges. On issues like industrial policy, there are useful proposals that seek to be better balance goals like environmental review and public participation with

²⁰⁰ See Spencer Chretien, *Project 2025*, Heritage Foundation (Jan. 21, 2023) (available online at <https://www.heritage.org/conservatism/commentary/project-2025>); Mike Gonzalez, *The Left is Right to Fear Our Plan to Gut the Federal Bureaucracy* (Sep. 27, 2023), (Available online at: <https://www.heritage.org/progressivism/commentary/the-left-right-fear-our-plan-gut-the-federal-bureaucracy>). See also Exec Order 13957, Creating Schedule F in the Excepted Service, 85 Fed. Reg. 67,631 (Oct. 26, 2020).

²⁰¹ See for example Yonah Freemark et al., *Is Federal Infrastructure Investment Advancing Equity Goals?*, URB. INST. (2023) (available online at: <https://www.urban.org/research/publication/is-federal-infrastructure-investment-advancing-equity-goals>) (assessing the mixed equity impacts of infrastructure spending implementation thus far).

²⁰² See Bijal Shah, *Administrative Subordination*; Emily Chertoff, *Domain of Violence*.

the need for agencies to move much more quickly in building new infrastructure.²⁰³ Similarly, some proposals also have suggested that agencies might better focus their analytical and internal review efforts not on regulation-by-regulation assessments of costs and benefits, but rather by moving to a greater focus on unpredictable risks and shocks, through techniques like scenario analysis,²⁰⁴ or on how risks might be particularly concentrated geographically or demographically in ways that speak directly to concerns about equity.²⁰⁵

4. Relocating the locus of governance: A related design question going forward will be the need to shift. One of the reasons why the apparent tension between building fast and equity or participation processes arises in the first place is that too many policies have to be decided project-by-project, site-by-site, or regulation-by-regulation. Arguably, policymaking could be much more efficient and ultimately much more effective if more of the decision-making were located at different sites than our current status quo.

Consider for example the range of physical infrastructure investments made possible by the Bipartisan Infrastructure Law and the Inflation Reduction Act. Some localities may receive grants for new roads, bridges, or transit investments. Others may receive grants or have already-in-motion plans for new housing construction. But a next level of impact would be possible if these investments were coordinated at a regional level, considering the interplay of housing, transportation, transit, and energy infrastructures. Moving to such a regional level would also allow for a more effective and thoughtful consideration of equity impacts, considering how the placement of affordable housing alongside access to mass transit might make economic opportunity more meaningful; or looking at the siting decisions for energy investments in context of both energy production and the risks of environmental harms being concentrated in particular communities. This kind of regional lens is nothing new in development and planning circles,²⁰⁶

²⁰³ Rhiana Gunn-Wright & Kristina Karlsson, *What the NEPA Data Actually Shows, and the Case for Progressive Permitting Reform*, ROOSEVELT INST.(July 21, 2023) (available online at: <https://rooseveltinstitute.org/2023/07/21/what-the-nepa-data-actually-shows-and-the-case-for-progressive-permitting-reform/>); Abigail Dillen & Rhiana Gunn-Wright, *America's Clean Energy Transition Needs Federal Action-Not Rollbacks*, ROOSEVELT INST. (July 7, 2023) (available online at: <https://rooseveltinstitute.org/2023/07/07/americas-clean-energy-transition-needs-federal-action-not-rollbacks/>)

²⁰⁴ See e.g. Pasquale; see also Michael Livermore, *Catastrophic Risk Review*, Legal Priorities Project Working Paper 3-2022 (2022).

²⁰⁵ See e.g., Daniel Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, 3 AM. J. L. AND EQUALITY 50 (2023).

²⁰⁶ See e.g. GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE*

but it remains an under-leveraged approach to governing and implementing the investments made possible by new federal legislation. Administration officials have in some ways reverse-engineered some degree of regional planning through the coordination efforts around the implementation of BIL and the IRA, but ultimately governing a long-term project of industrial policy and renewed infrastructure investment should consider the possibility of more formalized regional governance.

A similar argument can be made at the sectoral level. Often, requirements for high-quality jobs and working conditions and equitable investments in underserved communities operate on a project-by-project basis. But we could instead create a form of sectoral coordination where workers and impacted communities have a seat at the table alongside firms and those receiving government funds or tax breaks to develop new plants or new industries. This approach would unlock both greater voice and inclusion for workers and communities, and greater efficiency of negotiations taking place at a sectoral level.

5. Consolidating agency jurisdictions and creating new agencies: A related design shift would be to consolidate and reshuffle the current division of labor (or in many cases, overlapping jurisdictions) among Executive branch agencies in ways that enable more effective system-level policymaking. Thus, instead of relying on new forms of interagency coordination by the President, might we imagine combining agencies outright in creative ways? Consider the discussion of infrastructure and climate industrial policy noted above. How different might our implementation of trillions of infrastructure investments look, for example, if there were a single agency that was tasked with considering infrastructure investments and the ways in which transit, housing, and energy infrastructure all interacted from a climate change and equity standpoint? Similarly, our ability to drive clean energy and semiconductor funding to jumpstart new manufacturing and industrial jobs would also be more effective with a formally institutionalized and well-resourced administrative apparatus that fused funding decisions across DOE, EPA, DOC and others. In the climate change arena, the authorities currently divided among EPA, DOE, and the animal conservation authorities in NOAA or DOI would similarly benefit from more integrated institutionalization. While such far-reaching regulatory reorganization may be difficult to imagine as a political possibility, we do have historical experience (of varying degrees of success) in this vein, often in moments of

emergency and crisis response: the creation of the Department of Homeland Security after 9/11, or the creation of the Consumer Financial Protection Bureau (CFPB) and the Financial Stability Oversight Council (FSOC) after the 2008 financial crash. Most ambitiously, as Saule Omarova²⁰⁷ and Bob Hockett²⁰⁸ have argued, perhaps a more effective future approach to a system-wide reshaping the political economy would be some form of national planning apparatus.

CONCLUSION

Increasingly, our aspirations for a more inclusive, sustainable, and equitable democracy require policies that can tackle structural and systemic challenges, from climate change to persisting inequities. To address those challenges, we need to rethink much of how government itself operates and is structured. This paper explores one modest but important aspect of this rethinking: how internal processes and protocols might be reimagined to orient administrative agencies to these kinds of structural questions more effectively. This reorientation is as much about a change in underlying conceptions of governance—what this paper has characterized as governance paradigms—as about specific policies or internal procedures. For much of the last forty years, a prevailing set of assumptions and protocols have shaped administrative governance. This neoliberal governance paradigm has tended to deemphasize issues of equity and inequality, while orienting policymakers towards privatization and non-state mechanisms, and more technocratic and managerial models of policymaking. By contrast, an alternative governance paradigm would push in a different direction, focusing administrative policy on structural questions at the outset, emphasizing a greater role for public provision and public infrastructure, and seeking modes of participatory, inclusive policymaking that take better heed of the fuller range of needs and values that might otherwise be overlooked.

As this paper has showcased, institutionalizing an alternative governance paradigm necessarily requires rethinking some of the internal practices, protocols, and procedures of how agencies function. The paper highlights several reform efforts undertaken in recent years to begin developing the kind of muscle and internal processes more oriented towards structural policymaking: first, cultivating a systemic lens on policy development with a particular focus on industrial policy, market power, and equity; second, reviving commitments to and capacities for public provision of various goods

²⁰⁷ Omarova, *Why We Need a National Investment Authority*.

²⁰⁸ Hockett, *An FSOC for Continuous Public Investment*.

and services; third, moving to a more holistic approach to the data and analysis that informs administrative policymaking; and fourth, experimenting with more inclusive, participatory approaches to policymaking. These efforts are, as discussed in Part III, necessarily limited and constrained by external and internal pressures, but they also point the way towards more fulsome regulatory reforms that might be developed in future. A central task for administrative law scholars and practitioners in the coming years will be precisely this kind of broader reimagining of administrative authorities and systems in ways that take seriously the critiques of regulation and governance, but look towards what affirmative alternative systems can and should be built.

This constructive project is all the more urgent, as they must take place in context of active efforts to undercut and dismantle precisely those aspects of the administrative state most likely to be used to address systemic crises of inequality, inequity, injustice, climate change, and the like.²⁰⁹ There is also a growing strain of policy discussion envisioning in increasingly explicit ways the seizing and *weaponizing* the tools of the state in explicitly ethnonationalist, autocratic, and anti-egalitarian ways. This increasingly coherent—and dangerous—vision represents a new threat: not the familiar libertarian and big business critique of progressive governance, but rather the rise of what we might call *reactionary administration*, emerging from the fusion of familiar conservative critiques of progressive administration with the more recent emergence (or some might say, reemergence) of a distinctly ethnonationalist and reactionary politics of the Trump and Tea Party eras. As Mila Sohoni has argued, the Trump Administration’s vision of administrative authority was not simply an expression of conventional tropes of libertarian deregulation.²¹⁰ It instead reflected a broader worldview that combined a move towards private ordering of markets, with an expansive view of protections for certain kinds of speech and religious rights (particularly as ways to defuse claims of antidiscrimination protections or protections for reproductive rights), and an aggressive weaponization of state power on areas of ethnonationalist concern, like immigration enforcement. These commitments add up to a coherent approach to statecraft that is not readily captured by conventional tropes of ‘deregulation’; state power is very much present and being adapted, reformulated, and deployed on this approach. But what is distinctive is how this vision of state power advances what should be understood as a reactionary vision of the ends to which such state power is directed: the (re)assertion of existing hierarchies of class, race, gender, and

²⁰⁹ See e.g. Rahman, *Reconstructing the Administrative State*.

²¹⁰ See Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEORGETOWN L.J. 1323 (2019).

sexual orientation, and the deliberate dismantling of past efforts at securing protections for those communities cut out of this narrow view of the polity. Furthermore, what makes this more than just a collection of policies that a particular electoral coalition might advance is the ways in which the Trump Administration and its leading policy thinkers sought to build (or dismantle) durable, lasting institutions of governance to embed these principles.²¹¹

In light of these developments, any successful and effective vision of Progressive administration will necessarily have to be about much more than technocratic policy design. First, the fault line for debates over the future of the administrative state need to be seen not in terms of conventional doctrinal debates over administrative discretion or the role of presidential versus judicial or legislative oversight of administration. Rather, a future administrative apparatus must necessarily have a normative directionality, geared specifically towards dismantling relations of subordination, and towards rebalancing economic power to make possible a more equitable and inclusive vision of democratic membership. This normative vision is very much part of a rich tradition of constitutionalism and specifically administrative constitutionalism, as aspirations for inclusive citizenship have played a large role in animating not just the constitutional political economy of Reconstruction, the New Deal, and the Second Reconstruction of the civil rights movement,²¹² but also the efforts by social movements and bureaucrats alike to leverage administrative processes and structures in advancing this vision. Administration, in this vision is not merely about a slavish responsiveness to the President, but rather the institutionalization of our higher aspirations for democracy and equity into the structure of bureaucracy itself.²¹³ Continuing this line of inquiry to develop affirmative accounts of regulatory structure and functioning will be essential to building the administrative state we need to build the kind of democracy and economy we need.

²¹¹ See e.g., Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021); Metzger, *supra* note 24. For an earlier version of this argument, see Rahman, *Reconstructing the Administrative State*, *supra* note 56.

²¹² See e.g. RAHMAN, *supra* note 8; FISHKIN & FORBATH, *supra* note 5.

²¹³ On the critique of presidentialism and its unitary forms, see e.g. Noah A. Rosenbum, *The Antifacist Roots of Administration*, 122 COLUM. L. REV. 1 (2022); Blake Emerson and Jon Michaels, *Abandoning Presidential Administration*, 68 UCLA L. REV. 104 (2021).