ANTI-DOMINATION AND ADMINISTRATION

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The foundations of the administrative state are being reshaped, both by the continuing transformations of administrative law doctrine by the courts and by the ambitions for restructuring the executive branch among the current presidential administration. But at the same time, a defense of existing administrative structures seems inadequate. There are very real questions about the degree to which our current administrative institutions can be repurposed or leveraged toward urgent egalitarian and democratic goals of racial and gender equity, combatting concentrations of economic power, and dealing with the accelerating pressures of the climate crisis, among other priorities. How then should we conceptualize at a foundational level a response to the troubling challenges to administrative power ascendant today, while also motivating a broader reimagining of more progressive administrative power going forward?

This Article offers a novel theorization of the administrative state, which helps crystallize the nature of the far right's vision of administration as well as the contours of a potential progressive counter vision. The central argument of the Article is that we should understand fights over administrative capacity as fundamentally intertwined with the commitment to and possibility of a more inclusive vision of citizenship. Administrative institutions are central to counteracting domination—the concentration of unaccountable power among both state entities and private actors. The construction (or deconstruction) of administrative capacities are thus backdoor ways to dial up or dial down the possibilities for inclusive citizenship, whether through the creation (or destruction) of affirmative state protections against discrimination, economic exploitation, or proactive provision (or dismantling) of freedom- and equality-enhancing benefits programs. Similarly, the reality of inclusive citizenship turns in large part on the presence (or dismantling) of those administrative capacities premised on perpetuating relations of domination or subordination—such as through the unchecked application of immigration enforcement powers.

Highlighting the link between capacity and citizenship yields two important payoffs. First, this approach clarifies the nature of the threats to the administrative state ascendant today from what the Article terms "reactionary administration." This emergent consensus on the right is not simply about "free markets"; rather, it is about a combination of dismantling and strengthening different administrative capacities

 This Article draws on insights from my previous roles running OIRA for the Biden-Harris Administration and before then at Demos. In those capacities I participated in some of the negotiations and administrative actions discussed in this Article. However, the discussion below reflects my own academic and personal views and publicly available materials. Special thanks to Alex Hertel-Fernandez, Ganesh Sitaraman, Noah Rosenblum, Blake Emerson, Josh Macey, Jodi Short, and Dimple Chaudhry for excellent comments and suggestions.

to reassert unequal economic and social relations. Second, this emphasis on the relationship between capacity and citizenship also helps provide a clear normative framework for reimagining how administrative power and structure ought to be reconfigured going forward for more egalitarian and democratic ends.

This theorization helps reorient our broader debates in administrative law scholarship and advocacy for the current moment. We are no longer in the realm of the conventional clash between "big government" and "free markets"; rather the debate is a deeper one over what configurations of administrative power are needed to advance particular visions of social and economic inclusion or exclusion. This fault line runs through discrete debates over particular doctrinal shifts and policy initiatives. Indeed, as this Article will also suggest, while it may be tempting to default to familiar administrative law values of procedural neutrality and "checks and balances" to push back against the likely excesses of reactionary administration, these discourses are insufficient to address the very real limitations of our current administrative infrastructure from a progressive viewpoint—and these conventional frames cannot rebuild the broader legitimacy of the administrative state in this moment of extreme polarization and attack. Instead, administrative law scholars and reformers must offer an affirmative, alternative moral vision of the administrative state—a vision to which this Article contributes a framework and starting point.

INTRODUCTION

It is increasingly clear that the administrative state is in the midst of a dramatic transformation. The Supreme Court has issued a barrage of administrative law rulings that promise to dramatically alter the powers and processes of administrative agencies.[1] At the same time, the unprecedented upheaval of the second Trump Administration has centered in its early months around a forceful—and, across many fronts, legally dubious—attempt to remake the foundational structure and operation of the administrative state itself, from shutting down agencies wholesale to massive reductions of staffing and budgets, to the aggressive weaponizing of enforcement powers.[2]

But at the same time, even as these efforts to remake administrative structure and capacity are litigated through conventional administrative law principles of procedure and the rule of law, it is also the case that simply restoring the status quo ante is not necessarily desirable (even if it were possible). Scholars, advocates, and policymakers from left and center have also increasingly begun to engage in a rich and critical discussion about the nature of administrative authority and how it ought to be imagined.[3] For some, the challenge is an administrative state that

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[1] *See infra* Section I.A.2.

[2] *See infra* Section I.A.1.

[3] There is a rich literature in this vein that need not be summarized here. Consider, for example, scholars offering an affirmative normative vision for a democratic, egalitarian administrative state. *See, e.g.*, Blake Emerson, *Vindicating Public Rights*, 26 U. PA. J. CONST. L. 1424, 1430 (2024) (providing the "affirmative constitutional reasons" why administrative law should be mobilized and the "basic normative logic" supporting it); Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647, 652–54 (2024) (explaining how embracing the radical administrative tradition and its framework creates a more democratic and egalitarian government); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION, at xi (2016) (describing the normative and institutional design principles of an egalitarian, democratic political economy); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1922–23 (2013) (arguing the virtues of administrative constitutionalism,

institutionalizes and exacerbates systemic inequities along lines of race, gender, and class. For others, the central challenge is one of efficacy: The state, on this view, is unable to execute urgent public projects at speed and scale because it is too burdened by excessive procedure and legalism.

This Article analyzes the current attempt to remake administrative power and argues for a possible alternative vision of administration in response. Specifically, it argues that we should understand the fights over the administrative state not so much as familiar fights over procedure and appropriate scope of authority, but rather as institutional fights inextricably bound up in a deeper disagreement about the scope and substance of citizenship. The expansion or dismantling of administrative capacity—as advanced by both the Trump Administration and the Court—represents a backdoor and hard-to-reverse route to disabling policies that would otherwise mitigate existing economic and social disparities of power, position, and privilege. Conversely, this Article argues that a progressive vision of administration should take as its central focus the creation and/or dismantling of state capacities in order to advance a more egalitarian social, economic, and political order.

Indeed, the project of building up or drawing down administrative capacity alters the socioeconomic balance of power in real ways that contribute directly to the degree to which individuals and communities actually experience democratic equality of citizenship—or not. Workers

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including agencies' abilities to approach normative issues from a background of expertise to better integrate constitutional concerns); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 14 (2022) (advancing agonistic democratic theory as a more democratic basis for the administrative state, in which political conflict is fostered and democracy is "forged around a commitment to live together despite (or even because of) our irreconcilable conflicts"); Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1818 (2023) (arguing that administrative action should support the democratic potential of the government); Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 12 (2024) (highlighting the moral limitations of recent Supreme Court jurisprudence and suggesting alternative approaches that center concerns of domination). Other scholars have sought to envision these values in context of particular domains of regulatory policy. *See, e.g.*, Amy Kapczynski & Joel Michaels, *Administering a Democratic Industrial Policy*, 18 HARV. L. & POL'Y REV. 279, 282–84 (2024) (arguing for creating industrial policy on elements of effective governance of the economy and countervailing power to allow marginalized groups to exercise influence over the government and the recipients of government subsidies); Saule T. Omarova & Brian Richardson, *Public Investment as Constitutional Power and Accountability Challenge*, 92 U. CHI. L. REV. 461, 464–66 (2025) (advocating for a mechanism to ensure democratic accountability for public-investment institutions grounded in the consideration of the goals and tools of public investment as a legitimate sovereign activity); Luke Herrine, *Unfairness, Reconstructed*, 42 YALE J. ON REGUL. 95, 101 (2025) (presenting an "antidomination framework" as a way to correct power asymmetries in imperfect markets).

stripped of protections in the workplace are not, in any meaningful sense, fully co-equal members of the polity on equal footing with executives, owners, or investors. Similarly, communities of color subject to the unchecked repressive powers of the immigration and carceral apparatus are not, despite whatever political status they may enjoy, co-equal citizens of the same polity. Individuals unable to access vital safety net benefits due to bureaucratic delays and hurdles are left in conditions of deep structural unfreedom, in large part due to the operation and structure of certain administrative functions.

The capacities of the administrative state—the issues on which state capacities are strong, and the ways in which that capacity is constructed, constituted, and deployed—thus condition and shape the functional experience of citizenship. The realities of bureaucratic power and institutional structure are arguably even *more* central to the lived experience of citizenship and freedom than the "high politics" of constitutional discourse.[4] Historians of the administrative state have rightly highlighted the ways in which social movements seeking to advance more egalitarian visions of socioeconomic inclusion had as part of their project the construction of new (or repurposing of old) administrative institutions to realize these aspirations.[5] By the same

[4] This Article builds on and extends arguments raised initially in some of my earlier work, including K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2451 (2018) [hereinafter Rahman, *Constructing Citizenship*] (arguing that regulation of public goods can effectively construct citizenship—which should be understood "not as a matter of constitutional doctrine but as a matter of lived reality"—by excluding or including certain individuals); K. Sabeel Rahman, *Structural Justice and the Infrastructure of Inclusion*, *in* A POLITICAL ECONOMY OF JUSTICE 313, 315 (Danielle Allen, Yochai Benkler, Leah Downey, Rebecca Henderson & Josh Simons eds., 2022) [hereinafter Rahman, *Structural Justice*] ("The administrative apparatus . . . represent[s] one of the key underlying political infrastructures needed to realize justice. But . . . the goal for a project of justice must be more than simply 'restoring' or 'defending' the idea of good government; it must be instead to build a specifically democratic conception of government . . . .").

[5] For broader discussions of the subfield of administrative constitutionalism see, for example, Metzger, *supra* note 3, at 1900–02 (identifying the various forms and virtues of administrative constitutionalism to argue that administrative constitutionalism represents "a particularly legitimate form of constitutional development"); Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1706 (2019) ("[T]his Article argues that historians' case studies of administrative constitutionalism suggest that administrative agencies have been the primary interpreters and implementers of the federal Constitution throughout the history of the United States . . . ."); Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1606 (2019) (exploring historians' roles in documenting administrative constitutionalism in action and placing it in conversation with legal scholarship on administrative constitutionalism's meaning for law and government). For excellent examples of particular studies exploring how social movements and administrative agencies—both together and often in conflict—helped produce new policies and discourses as part of a broader struggle for greater social

token, aspirations for democratic equality have been frustrated precisely by the failures of or attacks against the administrative institutions most centrally tasked with addressing socioeconomic inequities.[6] This administrative capacity is, meanwhile, not merely a product of secular changes in technology or institutional inertia; rather these configurations and shifts in administrative capacity are fundamentally *endogenous* to politics. Political coalitions and elites manipulate capacity to frustrate provision of services and protections for communities to which they are hostile, or to magnify gains for communities for which they are supportive.[7]

This Article recasts our national battles over the administrative state in terms of this fundamental relationship between administrative capacity and citizenship. First, the Article uses this lens to theorize the underlying vision of administration ascendant in the second Trump Administration's regulatory policy agenda, which is shaped by two seemingly contradictory competing tendencies. In one, the central focus is deregulatory: the familiar effort to dismantle regulatory agencies, capacities, and resources.[8] In the other, the central focus is, arguably, the reverse: not the dismantling but rather the *unshackling* of administrative power, an ambition to leverage and weaponize administrative authorities to accomplish major social change, whether through mass deportation, crackdowns on reproductive rights, or assertive agendas on particular visions of gender roles and diversity programs.[9]

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and economic inclusion, see, for example, Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 Va. L. Rev. 799, 808 (2010) (exploring the interactions between movements and the administrative state in context of workplace regulations); Karen M. Tani, States of Dependency: Welfare, Rights, and American Governance, 1935–1972, at 7 (2016) (tracing how "diverse groups of Americans," including activists and administrators, explored questions of governance); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 Yale L.J. 314, 324 (2012) (documenting the ways in which federal administrators and local welfare workers engaged in welfare rights discourse); David B. Smith, The Power to Heal: Civil Rights, Medicare, and the Struggle to Transform America's Healthcare System 25–26 (2016) (documenting the Truman Administration's enrollment in voluntary Blue Cross-Blue Shield programs that largely excluded marginalized groups, the role of medicine and healthcare in promoting narratives contrasting voluntary hospital efforts with "totalitarian government control of socialized medicine," and the leadership of Black medical professionals in rebellions against "pathologies produced in the American health system's formative years").

[6] *See, e.g.*, Dale Kretz, Administering Freedom: The State of Emancipation After the Freedmen's Bureau 24–25 (2022) (describing the ways in which the Freedmen's Bureau frustrated the ambitions of emancipation after the Civil War).

[7] *See, e.g.*, Pavithra Suryanarayan, *Endogenous State Capacity*, 27 Ann. Rev. Pol. Sci. 223, 224–25 (2024) ("Scholars have begun to study the historical development of state capacity as an endogenous and dynamic political process shaped by self-interested agents.").

[8] *See infra* Section I.A.

[9] *See infra* Section I.B.

In our conventional framework pitting "big government" liberalism against "free market" conservatism, these two impulses appear to be in tension and irreconcilable.[10] But viewed from the standpoint of administrative capacity and citizenship, these dual drives are two sides of the same coin. In the deregulatory vision, the dismantling of state capacities serves effectively to reassert *private and systemic* hierarchies, by removing the governmental constraints that might otherwise rein in private power and bolster vulnerable constituencies. So the deregulation of worker, consumer, and environmental protections (or the outright dismantling of agencies responsible for these policies) operates to unshackle the private power of firms and the market and increase the vulnerability of workers, consumers, and the general public. The dismantling of safety net programs removes a freedom-enhancing floor, leaving individuals at the mercy of an unequal, racialized, and gendered political economy. In the repressive vision, this dynamic operates through an inverse pathway: By dialing up the repressive coercive powers of the state, unshackled from internal checks and balances, measures like increased deportation efforts or attacks on LGBTQ communities and reproductive freedoms use the direct power of the state to enforce a social hierarchy. Indeed, it is notable that the repressive focus of many of the proposed policies are on historically non-dominant groups, from immigrants to women to trans individuals. In essence, these twin imperatives of deregulation and repression operate in tandem to accomplish a shared outcome: *the restoration of social and economic hierarchy*.[11] We can call this "reactionary administration."

Nor is reactionary administration purely a creature of the executive branch. Indeed, the administrative law jurisprudence of the Roberts Court has in recent years laid the doctrinal groundwork for both visions: undergirding a deregulatory vision with the increased scrutiny of social and economic regulations through the major questions doctrine[12]

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[10] Of course this conventional framing has long been disputed by the academic literature, which has increasingly highlighted the ways in which the purported move to "free markets" rests on a particular exercise of state power—an insight highlighted by the legal realists of a century ago, as well as more contemporary scholars of neoliberalism. *See, e.g.*, Quinn Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism 2 (2018) (arguing that the characterization of neoliberalism needs to be corrected and showing that "self-described neoliberals did not believe in self-regulating markets as autonomous entities"). Nevertheless, this duality continues to dominate much of the popular and political discourse framing the disagreements between left and right.

[11] *See infra* Section I.C.

[12] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) ("[T]he Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023) (stating the applicability of the major questions doctrine and the development of the doctrine through significant cases in the past decade).

and the overruling of *Chevron* deference,[13] while also facilitating the unshackled vision of administrative authority through theories of the unitary executive and assertive positions on the centrality of Presidential appointment and removal powers.[14] Reactionary administration—and the desire to remake state capacities in ways that reassert unequal bases of citizenship and membership—should thus be understood not just as a political program championed by specific policymakers, but also as a wider worldview and approach to questions of regulatory policy writ large.

This relationship between capacity and citizenship—and the specific vision of (remade) administrative capacity and (limited) citizenship arising in context of the current Court and Administration—also suggests a starting point for the development of an alternative, democratic, egalitarian vision of administration. For those seeking to defend the administrative state against the dismantlings and repurposings that reactionary administration proposes, there will be a natural desire to default to familiar public law tropes: emphasizing the rule of law, proper procedure, and neutral principles of proper administration. These are no doubt important values, but they cannot provide the kind of robust, morally grounded alternative vision that is needed to counteract reactionary administration. In theorizing the relationship between capacity and citizenship, this Article provides a different basis for an alternative, more democratic vision of administration. On this account, the foundational legitimacy of the administrative state is *not* premised on proceduralism or neutrality, but rather on the affirmative project of *anti-domination*—the constraining and defusing of *dominating power relations*. Where democratic communities are vulnerable to private and systemic domination in the marketplace or in society, strong administrative capacities are needed to shield them. Where democratic communities are vulnerable to the public domination of an unchecked state apparatus, restraints on that state apparatus are needed. It is in the mixture of strong administrative capacities and forms of restraint and accountability that we achieve the institutional mix needed to realize normative aspirations for democratic equality.

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[13] *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron* and holding that "courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . .").

[14] *See, e.g.*, Seila Law v. CFPB, 140 S. Ct. 2183, 2211 (2020) (declining to limit the President's removal authority for principal officers who wield significant executive power and holding that "the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead").

This anti-domination approach takes seriously the threat of unaccountable state power—the very state power that concerns libertarian critics of the administrative state, and that increasingly concerns all of us witnessing the increasingly aggressive attempts by the new administration to use the state to intimidate critics and express the singular will of the President. But this approach also takes seriously the *private* forms of domination that, absent a robust administrative state, are left unchecked.

Further, an anti-domination approach does not ignore entirely familiar administrative law frames of process or checks and balances. But it does move these questions to a secondary place and instead foregrounds as a matter of first principles the moral vision of what the administrative state ought to be for. This in turn provides a way to begin the work of reimagining our existing administrative institutions: Anti-dominating administration is emphatically *not* a call for preserving the administrative state as it is today; it is, rather, a call for building the kind of administrative state needed to reject *both* reactionary administration *and* the limitations of our current political economy.

In so doing, this Article seeks to advance the existing literature in several respects. First, while the Article provides a theorization and analysis of the coming attacks on the administrative state, it is primarily oriented toward a longer-term *constructive* project of envisioning a framework for what kind of administrative transformations we ought to seek in an egalitarian, democratic direction going forward. To this end, the Article seeks to build on the rich literature critiquing contemporary institutionalizations of administrative power. Second, the Article takes a broad normative approach rather than a doctrinal one. While doctrinal analysis of recent judicial rulings and their implications for administrative law are of course important, in the effort to build an alternative administrative law doctrine, it will be important to also fill in the normative principles and foundations that doctrinal alternatives, whatever they might be, ought to be rooted in. Finally, this Article follows a broader pattern of recent scholarship in law and political economy, and in more explicit normative theorizing about public law institutions. As with scholars operating in the vein of "law and political economy," this Article takes both a critical look at how law constructs relations of economic power and social subordination, while also seeking to advance a concrete-but-ambitious alternative agenda for a more egalitarian, social democratic order.[15]

[15] For a discussion of law and political economy as an approach, see generally Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis*, 129 YALE L.J. 1784 (2020).

And to do so, this Article integrates a normative political theoretical approach into its analysis, following alongside other theorists and administrative law scholars.[16]

The rest of the Article proceeds as follows:

First, the Article provides a brief analysis of the deregulatory and repressive visions ascendant in both the Trump Administration's regulatory policy agenda and the Roberts Court's recent administrative law jurisprudence (Sections I.A and I.B). The upshot of this analysis is to highlight the relationship between administrative capacities and structures on the one hand and the lived reality of citizenship and inclusion on the other. We should understand the manipulations of administrative capacities in context of how these alterations—deregulatory and repressive—combine to police the scope and substance of citizenship, effectively dialing up or down the protections and vulnerabilities that particular communities face (Section I.C).

Second, the Article offers the beginnings of an alternative normative vision of administration that would advance a more egalitarian, democratic vision of citizenship (Part II). The Article provides a brief primer on theories of domination and anti-domination as a normative foundation for theorizing the purposes and structure of administrative authority—and the pathologies of reactionary administration (Section II.A). Indeed, the response to the deregulatory and repressive visions cannot simply be a defense of the status quo ante of the 2020s or even the 2010s—or any particular prior era of administrative law—for too many of the normatively troubling dynamics in the deregulatory and repressive

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[16] *See* Jodi L. Short, The Moral Turn in Administrative Law 4–5 (July 26, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4909394 [https://perma.cc/PN7T-VW4N] (developing moral discourse in administrative law scholarship). In administrative law and public law, this orientation is visible in a range of scholars working in normative, political, theoretical, and critical veins. Examples include, Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy 11 (2019) (reconstructing "a normative vision of the administrative state from theoretical, institutional, and historical fragments"); K. Sabeel Rahman, Democracy Against Domination 9 (2016) (emphasizing the role moral judgments play in policymaking); Samuel Bagg, The Dispersion of Power 5 (2024) (synthesizing critical perspectives on democracy); Samuel Bagg, *Fighting Power with Power: The Administrative State as a Weapon Against Concentrated Private Power*, 38 Soc. Phil. & Pol'y 220, 221 (2021) [hereinafter Bagg, *Fighting Power*] (establishing heuristics for administrative institutional design); Havasy, *supra* note 3 (recovering radical historical approaches to administrative governance); Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 Yale L.J. 78, 86–87 (2021) (centering harms to marginalized groups in descriptive analysis of separation of powers); Bijal Shah, *Administrative Subordination*, 91 U. Chi. L. Rev. 1603, 1613–14 (2024) (arguing that administrative efforts disadvantage minorities in pursuit of bureaucratic values); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 Yale L.J. 1, 14 (2022) (conceptualizing democratic legitimacy around political conflict).

visions are *continuous* with existing failures of the administrative state, be they inertia, sclerosis, overly suffocating proceduralism,[17] or baked-in practices of "administrative subordination"[18] (Section II.B).

Third, if reactionary administration raises the specter of increased social and economic domination, what then would it look like to imagine an administrative state premised on *anti*-domination? While a precise blueprint is beyond our current scope, the Article nevertheless highlights several key domains of action in which to reconsider some of our foundational approaches to administrative agency structure and process (Part III). If the analysis of the threats to inclusive democratic citizenship from the administrative state's dismantling and unshackling is correct, then the natural implication is that the *protection* of communities from public and private domination—and the affirmative empowerment of democratic communities in economic, social, and political life—requires a particular approach to the construction of some new administrative authorities and the dismantling of others. This orientation provides a map to the kinds of debates that reformers ought to focus on in the coming years—and helps situate some important (though still insufficient) recent reform efforts in progressive regulatory policy.

The Article concludes with some reflections on how this approach to a progressive, democratic administrative state departs in critical ways from some more familiar proceduralist, participatory, and presidentialist accounts of democracy and administration.

I
Reactionary Administration

From both the Court and the Trump Administration, we can see the beginnings of a coherent vision of the administrative state on the far right, one that, I argue here, is premised not just on the familiar "big government" versus "free markets" formulation, but instead on something else: the strategic combination of both deregulation and state repression to police the scope and substance of citizenship. This vision of administrative authority is one I term "reactionary administration."[19]

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[17] *See* Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345, 349 (2019) (arguing that proceduralism may exacerbate problems of legitimacy and capture).

[18] *See* Shah, *supra* note 16, at 1637–43 (describing how the day-to-day practices of bureaucratic functioning reinscribe and exacerbate relations of subordination).

[19] In this terminology I follow Corey Robin's account of political counterreactions as rooted in an effort to reassert traditional hierarchies of race, gender, and class. *See* Corey Robin, The Reactionary Mind 5–19 (2011). This vision of reactionary administration is not a new creation of the current moment; it has deep roots in the approach to statecraft pioneered by, for example, neo-Confederates driving the backlash against Reconstruction

The throughline in this vision of reactionary administration is not about government's size or powers per se. Rather it is about the strategic use and disuse of administrative power to advance a particular vision of socioeconomic subordination. In this vision, where government threatens pre-existing economic, racial, and social inequities, those powers are curtailed. And where government can be leveraged to proactively police the boundaries of the polity and the tiering of citizenship, those powers are permitted and increasingly unshackled. Reactionary administration is thus not about simply dismantling government power. Rather, it is about a reconstituting and reconfiguring of administrative authority in ways built to effectuate a downstream vision of fundamental socioeconomic inequity.

The twin elements of deregulation and repression are apparent both in the regulatory proposals of the Trump Administration as well as in the jurisprudential vision emanating from the current Court. This is not to say that all these elements are moving in lockstep or as the product of some grand intentional conspiracy. Rather, the fact that we can see a consistent throughline of a deregulatory view of administration alongside a repressive view of administration among both judicial and executive branch actors speaks to the ways in which these currents reflect a deeper, shared *worldview* on the part of a wide range of actors, even where there may be more intramural and smaller-scale disputes about particular policies.[20] Understanding this overarching conceptual framework is essential both for informing critique and response to these efforts, and to shaping the development of a normative, legal,

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and the rise of Jim Crow, as well as the backlash to the New Deal and to the Civil Rights movement. *See, e.g.*, Jefferson Cowie, Freedom's Dominion: A Saga of White Resistance to Federal Power (2022); Lawrence B. Glickman, Free Enterprise: An American History 12–15 (2019) (exploring the history of the phrase in context of its use by conservatives to combat the New Deal and Civil Rights movements); Rick Perlstein, Nixonland: The Rise of a President and the Fracturing of America 11–17 (2008) (describing political backlash to the Civil Rights movement).

[20] There have, of course, been theorists who have explored some of these alternative visions of administrative law from a conservative viewpoint, generating widespread scholarly debate. *See, e.g.*, Philip Hamburger, Is Administrative Law Unlawful? 8 (2014) (arguing that administrative law is unlawful and runs contrary to constitutional law); Adrian Vermeule, Common Good Constitutionalism 1 (2022) (articulating theory of common good constitutionalism, in which officials embrace natural law and have a duty to promote the common good as opposed to individual rights, as an alternative to progressivist and originalist interpretations of the Constitution, statutes, and administrative law). But my interest here is less the intellectual scholarly discussion, and more the emergent consensus among political actors in both judicial and political positions. These political views are in many ways connected to (and distinct from) the rich scholarly ferment on the scope of administrative authority, but tracing these linkages and tensions is beyond the scope of this Part.

and institutional alternative vision of a more democratic, egalitarian approach to the administrative state.

A. Deregulatory Components

The first dimension of this overarching vision of reactionary administration lies in the continued prominence of the familiar effort to *deregulate* many aspects of the economy and society. In this, conservative judges and the policy agenda of the second Trump Administration both reflect an accentuation of the ideas that Gillian Metzger termed as "anti-administrativism" at the start of the first Trump Administration.[21]

As Metzger describes, anti-administrativism is a longstanding tradition in American law and politics rooted in the mobilized opposition to the New Deal. It consists of multifaceted attacks on the administrative state from different domains: scholarship, legal doctrine, executive branch policy decisions, and proposed legislation. Thus, congressional Republicans continue to be interested in measures that seek to impose additional procedural requirements on regulations deemed to be overly impactful on economy and society—see, for example, the REINS Act, which would require Congress to proactively approve any regulation with a monetized impact of $100 million or more.[22] Meanwhile, scholars and conservative judges continued to build a broader skeptical case of the practice of judicial deference to agency interpretations of law, among other doctrines. This anti-administrativist frame captures well the deregulatory elements that are now even more prominent in both judicial and executive arenas.

1. Deregulation Through Executive Action

From the Administration's own end, the new Trump team has been vocal and explicit about focusing on aggressive efforts to deregulate major aspects of the economy and society—and wherever possible to structurally reduce the funding and staffing available to agencies to pursue their missions.

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[21] Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 3–4 (2017) (describing the key shared characteristics of the judicial attacks on administrative governance and typifying them as "contemporary anti-administrativism").

[22] *See* Regulations from the Executive in Need of Scrutiny Act, H.R. 277, 118th Cong. (2023) (establishing congressional approval procedures for major rules and defining major rules as one with "an annual effect on the economy of $100 million or more"). It is notable that a version of this proposal has been introduced in the 2025 Congressional reconciliation package. *See* Andres Picon, *GOP May Be Closer than Ever to Enacting a Massive Rule-Busting Bill*, Politico (May 5, 2025, 4:45 AM), https://www.politico.com/news/2025/05/05/conservative-republicans-reins-act-budget-reconciliation-00319030 [https://perma.cc/4F3T-B9Q2] (identifying the REINS Act as the basis for the reconciliation package's language).

First, President Trump elevated Tesla and X CEO Elon Musk to drive the so-called Department of Governmental Efficiency (DOGE).[23] Upon inauguration, DOGE was institutionalized as an initiative housed within the U.S. Digital Service, with a broad mission to aggressively cut down on agency staff and programs in the name of efficiency.[24] DOGE is empowered to establish implementation teams within each agency and is given extensive access to agency records, files, and software systems.[25] While the scope of this authority remains legally contested,[26] Musk had significant access to and influence over Trump in the early months of the Administration, functioning in many ways as a de facto source of administration policy.[27] From this perch, DOGE has pursued efforts to gut the federal workforce through mass firings, while eliminating the budget for major regulatory initiatives and agencies. These proposals represent a more extreme version of familiar efforts to structurally deregulate administrative agencies by eliminating their staff and budgets.[28] Relatedly, the second Trump Administration has placed command of many agencies in heads committed to the dismantling or neutralizing of the agencies which they are charged to lead.

Second, the actual regulatory policy agenda of the Trump team is already moving to enact a host of deregulatory actions across agencies. Many of these proposals are documented in the Heritage Foundation's *Mandate for Leadership*, also called "Project 2025," which was organized by the Office of Management and Budget Director Russell Vought.[29]

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[23] *See* Elon Musk & Vivek Ramaswamy, *Elon Musk and Vivek Ramaswamy: The DOGE Plan to Reform Government*, Wall St. J. (Nov. 20, 2024, 12:33 PM), https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020 [https://perma.cc/L2LR-C3SF] ("President Trump has asked the two of us to lead a newly formed Department of Government Efficiency, or DOGE, to cut the federal government down to size.").

[24] Exec. Order No. 14, 158, 90 Fed. Reg. 8441 (Jan. 20, 2025) (establishing the organization and structure of DOGE).

[25] *Id.*

[26] *See, e.g.*, New Mexico v. Musk, No. 25-CV-429, 2025 WL 1502747, *16 (D.D.C. May 27, 2025) (examining *ultra vires* claim that Musk and DOGE engaged in conduct in excess of statutory authority).

[27] It is perhaps worth noting that these activities might themselves raise a whole other host of administrative law questions around the intermixing of public and private functions and powers in ways that bypass the processes and perhaps even constitutional requirements for executive branch officers and for state action more broadly.

[28] *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 Harv. L. Rev. 585, 588 (2021) (distinguishing structural deregulation from substantive deregulation and defining structural deregulation as actions that "tear[] at an agency's foundation . . . largely out of view and beyond legal redress, causing potentially enduring harm").

[29] Heritage Found., Mandate for Leadership: The Conservative Promise (Paul Dans & Steven Groves eds., 2023) [hereinafter Mandate for Leadership], https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf [https://perma.cc/C79Q-FEMJ].

There are hundreds of regulatory proposals outlined in the *Mandate for Leadership*, and many of them exemplify the anti-administrativist deregulatory ethos.[30] One set of proposals, for example, would undo a host of worker protections, including pulling back the Biden Department of Labor's rulemaking on overtime pay[31] and revising workplace safety regulations to make it easier for firms to place young people in hazardous conditions.[32] Climate policies propose to rollback greenhouse gas regulations to help unshackle fossil fuel companies.[33] Other proposals introduce familiar shifts to safety net programs, including reintroducing work requirements and onerous enrollment burdens designed to make it harder for vulnerable Americans to gain access to benefits like food stamps.[34] These proposals have already been taken up in the early barrage of Trump executive orders and actions.[35] In addition to direct

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[30] For a critique of Project 2025, see, for example, Democracy Forward, The People's Guide to Project 2025 (2024), https://democracyforward.org/wp-content/uploads/2024/06/2024-05_Peoples-Guide-Pro-2025.pdf [https://perma.cc/9DWF-DAZ6].

[31] *See* Mandate for Leadership, *supra* note 29, at 592; *see also* Democracy Forward, *supra* note 30, at 8 (finding that Project 2025 attempts to take away overtime eligibility for millions of workers).

[32] Mandate for Leadership, *supra* note 29, at 595 (recommending the Department of Labor amend its hazard-order regulations to allow young adults to work dangerous jobs because "[s]ome young adults show an interest in inherently dangerous jobs"); *see* Democracy Forward, *supra* note 30, at 10 ("Project 2025 would change DOL policies and allow America's youth to work [hazardous] jobs . . . .").

[33] Mandate for Leadership, *supra* note 29, at 425 (proposing to reverse EPA's endangerment finding, a key building block of Clean Air Act-related greenhouse gas regulations); *see* Democracy Forward, *supra* note 30, at 33 (arguing that the Project 2025 proposal to update the 2009 Endangerment Finding would make it more difficult for the EPA to combat climate change). As of this writing, this effort is now well under way. *See* Lisa Friedman, *E.P.A. Is Said to Draft a Plan to End Its Ability to Fight Climate Change*, N.Y. Times (July 22, 2025), https://www.nytimes.com/2025/07/22/climate/epa-endangerment-finding-rescind.html [https://perma.cc/EL9Q-G8LV].

[34] Mandate for Leadership, *supra* note 29, at 299–300 (proposing restoration of work requirements on accessing Supplemental Nutritional Assistance Program (SNAP)); *see* Democracy Forward, *supra* note 30, at 13 ("Project 2025 wants to reverse course and reimpose ineffective work requirements . . . onto SNAP and reevaluate the Thrifty Food Plan.").

[35] *See, e.g.*, Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 20, 2025) (revoking executive orders that advanced racial and gender equity, supported underserved communities, addressed the climate crisis, supported public health initiatives, among other actions to support vulnerable Americans); Exec. Order No. 14,236, 90 Fed. Reg. 13037 (Mar. 14, 2025) (revoking additional executive orders, memoranda, and proclamations); Affirmatively Furthering Fair Housing Revisions, 90 Fed. Reg. 11020 (Mar. 3, 2025) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (interim final rule reversing Biden and Obama Administration changes to the Department of Housing and Urban Development's (HUD) Affirmatively Furthering Fair Housing program); Coral Davenport, *Inside Trump's Plan to Halt Hundreds of Regulations*, N.Y. Times (Apr. 15, 2025), https://www.nytimes.com/2025/04/15/us/politics/trump-doge-regulations.html [https://perma.cc/NW3C-2LZ4] (describing the implementation of an administration-wide effort to dismantle major regulations); *Climate Deregulation Tracker*, Sabin Ctr. for Climate Change L., https://climate.law.columbia.edu/

rollbacks of regulations, the Administration has deployed its strategy of mass firings and unilateral budget cuts to suffocate programs they disfavor.[36] Many of these policies have now been further amplified by the budget cuts passed by the GOP-controlled Congress, implementing the Administration's proposed cuts.[37]

2. Deregulation Through Judicial Action

The second vector for the anti-administrativist, deregulatory view comes not from the Administration but from the judiciary. Judges have accelerated their hostility toward economic and social regulations, particularly as the conservative 6-3 majority on the Supreme Court has consolidated its hold on legal doctrine. In the last three years, the Supreme Court issued a series of blockbuster administrative law rulings: further establishing the "major questions doctrine" as a structural limit on the scope of agencies' policymaking powers under extant statutes;[38] formally overturning the principle of judicial deference to agency interpretations of law;[39] narrowing the scope of agency enforcement powers;[40] dialing up the scrutiny of agency rulemakings and their

climate-deregulation-tracker [https://perma.cc/AF5F-S6X4] ("The Climate Deregulation Tracker identified steps taken by the Trump Administration and Congress to scale back or wholly eliminate federal climate mitigation and adaptation measures.").

[36] *See, e.g.*, Amara Omeokwe, *Trump Cuts Threaten Americans' Safety Net Just as More Are Expected To Need It*, Fin. Post (Apr. 28, 2025), https://financialpost.com/news/trump-cuts-threaten-americans-safety-net [https://perma.cc/HU6Z-8PMK] (discussing the Trump Administration's efforts to curtail federal spending through steep cuts to federal funding and staffing).

[37] The budget bill passed in July 2025 offers an example. That legislation not only cut federal funding for SNAP benefits dramatically; it also imposed significant new enrollment procedures and burdens designed to make it harder for individuals to gain access to these benefits. *See* Katie Bergh, Dottie Rosenbaum & Wesley Tharpe, Ctr. on Budget & Pol'y Priorities, House Reconciliation Bill Proposes Deepest SNAP Cut in History, Would Take Food Assistance Away from Millions of Low-Income Families (2025), https://www.cbpp.org/research/food-assistance/house-reconciliation-bill-proposes-deepest-snap-cut-in-history-would-take [https://perma.cc/R7FD-B3AM]; Sam Berger, Ctr. on Budget & Pol'y Priorities, House Republican Tax Bill Would Create Costly Red Tape for Millions of Families (2025), https://www.cbpp.org/research/federal-budget/house-republican-tax-bill-would-create-costly-red-tape-for-millions-of [https://perma.cc/FU58-A3BY].

[38] *See supra* note 12 and accompanying text.

[39] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("[C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.").

[40] SEC v. Jarkesy, 144 S. Ct. 2117, 2139 (2024) (holding that the separation of powers does not permit Congress to concentrate the enforcement in the Executive branch, and defendants "facing a fraud suit [have] the right to be tried by a jury of [their] peers before a neutral adjudicator").

responses to public comments;[41] and opening the door to relitigation of long-standing judicial and regulatory precedents.[42]

On one level, it is of course true that these decisions are not totalizing. There remains a variety of tacks that agencies might take to continue to develop public-interested regulations in light of these requirements to, for example, hew more closely to their statutory frameworks, or by adopting different internal procedures around rulemaking or enforcement actions.[43] But the political and structural reality is that the combination of these multiple doctrinal interventions—particularly in context of entrepreneurial and aggressive far-right litigants in, for example, the Texas Office of the Solicitor General, and far-right judges in district and circuit courts—will more likely produce what Steve Vladeck has called a "destabilization of administrative regulatory regimes."[44] Any particular rule or action *might* make it through the judicial review gauntlet—the doctrines described are so incredibly vague and malleable—but so too might any given action, however well-conceived and founded, be thrown out by an opportunistic judge.[45] This instability is precisely the point: It shifts power away from both

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[41] *See* Ohio v. EPA, 144 S. Ct. 2040, 2053 (2024) (holding that the EPA's methodology may have been arbitrary or capricious and that the EPA failed to provide a satisfactory explanation for its actions).

[42] *See* Corner Post, Inc. v. Bd. of Governors, 144 S. Ct. 2440, 2460 (2024) (holding that APA claim did not accrue for purposes of six-year statute of limitations until the plaintiff is injured by a final agency action, so the plaintiff was not barred from its challenge).

[43] *See, e.g.*, Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 36 Geo. Env't L. Rev. 1, 4–5 (2022) ("An agency can . . . defend a policy against major questions challenges . . . [by] identif[ying] relevant antecedents at the proposal stage . . . .").

[44] *See* Steve Vladeck, *89. Destabilizing the Administrative State*, One First (July 8, 2024), https://www.stevevladeck.com/p/89-destabilizing-the-administrative [https://perma.cc/MCS6-YZDE].

[45] It may be worth noting that the Supreme Court *claims* to have narrowed the unilateral powers of lower court judges to disrupt national policies through nationwide injunctions in the recent *Trump v. CASA* case. 145 S. Ct. 2540, 2548 (2025) (limiting initial relief to plaintiff parties in the litigation over Trump's birthright citizenship Executive Order). However, to accept that the ruling truly narrows lower court powers to block regulations would be a misunderstanding of the ruling in its broader political context—and a misunderstanding of how the shifts in administrative law doctrine actually operate. On the latter point, the introduction of major questions doctrine, *Loper Bright*, and the other doctrines discussed here provide multiple rationales by which judges can act opportunistically and politically to stop social and economic regulations that they disapprove of on political grounds *without even resorting to nationwide injunctions* and instead offering merits rulings or other mechanisms. On the former point, it is not even clear that *CASA* itself will produce a good faith limiting of nationwide injunctions against presidents of either party. As the dissenters in *CASA* have noted, the case itself is better understood as an attempt to continue providing legal safe harbor to the otherwise straightforwardly unconstitutional and illiberal actions of the Administration. *Id.* at 2573 (Sotomayor, J., dissenting).

Congress and the Executive to the Judiciary—the least accountable and democratic of the branches.

This assertion of judicial power also represents a shift in power toward economically dominant interests, like corporations and the wealthy. As well-resourced repeat players, these economically dominant actors are the most adept and most empowered to leverage the courts in general,[46] and these new decisions in particular.[47] There is, furthermore, a strategic advantage for these interest groups to focus their policy advocacy through the courts and use of technical and jargon-laden doctrines of administrative law: It fundamentally obscures campaigns for policy changes that are both unpopular and unjust.

It is also telling that these doctrinal interventions are taking place primarily as efforts to rein in a specific set of regulatory agencies: those whose policies alter the balance of economic power. Thus, it is the DOL, the EPA, and the economic regulatory agencies like the SEC that are most in the crosshairs.[48] And many of these agencies are facing a proliferation of frontal legal challenges to their very constitutionality on both structure and nondelegation grounds.[49] This reality further underscores how the deregulatory push is at its fiercest for those agencies most central to addressing inequities of economic power and security.[50]

B. Repressive Administration

The moves and dangers of anti-administrativist deregulation are familiar to administrative law and policy debates. But the emerging

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[46] *See* K. Sabeel Rahman & Kathleen Thelen, *The Role of Law in the American Political Economy*, *in* The American Political Economy: Politics, Markets, and Power 81 (Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2021) (describing how the court system and in particular doctrines of administrative law systematically preference well-resourced repeat players like organized business interests to manipulate public policy outside of the glare of public attention or electoral campaigns).

[47] *See, e.g.*, Nicholas Bagley, *The Big Winners of This Supreme Court Term*, The Atlantic (June 29, 2024), https://www.theatlantic.com/ideas/archive/2024/06/big-winners-supreme-court-term/678845 [https://perma.cc/82M6-E6T2].

[48] *See, e.g.*, NFIB v. OSHA, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (challenging DOL COVID-19 regulations under the major questions doctrine); West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (challenging EPA regulatory authorities under the major questions doctrine); SEC v. Jarkesy, 144 S. Ct. 2117, 2121 (2024) (challenging enforcement powers of the SEC).

[49] *See, e.g.*, Space Expl. Tech. Corp. v. NLRB, 129 F.4th 906, 908 (5th Cir. 2025) (raising a constitutional challenge to the NLRB).

[50] This push is both a function of a judiciary and legal doctrine favorable to deregulatory arguments, and the presence of well-resourced, sophisticated litigants bringing strategic suits to undo these regulatory powers. *See* Rahman & Thelen, *supra* note 46, at 77 (describing how business interests are repeat players in litigation, leveraging courts to advance deregulatory policies).

vision of reactionary administration encompasses a second dimension as well. In this second dimension, the focus is not on the dismantling of state capacities and powers, but rather on the *dialing up* and *unshackling* of the repressive capacities of the state in specific domains. As with the deregulatory ethos, these elements of repressive administration are manifest in the administrative proposals and actions of the second Trump Administration *and* in a series of nominally neutral but troubling doctrinal precedents stemming from the Roberts Court. While there is some question about how far these policies will be taken and how much will survive legal dispute, what is essential for our purposes is not the implementation of these proposals so much as what their articulation in the first place reflects about an underlying vision of administrative authority that is animating a growing set of actors in positions of political and legal authority.

1. Repression Through Executive Action

The repressive approach to administration is most apparent across a host of proposed policies that the Trump Administration has emphasized. The most glaring and obvious exemplar of repressive administration is the severe and increasingly lawless immigration crackdown and deportation campaign. The initial wave of executive orders signed by Trump upon his second inauguration includes a number of measures establishing the foundations for these efforts, including through a declaration of emergency over the border "invasion" and calling for the establishment of new vetting procedures.[51] In the following months, the Administration has, for example, sought to mass expel hundreds of immigrants, without due process, including the renditioning of several to an infamous maximum security prison in El Salvador.[52] These actions are the most visible of a wider campaign designed to intimidate immigrant communities with highly visible enforcement raids on immigrants, workers, and students.[53] These early actions have only accelerated, with the massive influx of billions of dollars of congressional funding for

[51] *See, e.g.*, Exec. Order No. 14,159, 90 Fed. Reg. 8443 (Jan. 20, 2025); Exec. Order No. 14,161, 90 Fed. Reg. 8451 (Jan. 20, 2025); Proclamation No. 10,888, 90 Fed. Reg. 8333 (Jan. 20, 2025).

[52] *See, e.g.*, Noem v. Abrego Garcia, 145 S. Ct. 1017 (2025) (requiring additional procedural protections in the case of a person renditioned to El Salvador); J.A.V. v. Trump, No. 1:25-CV-072, 2025 WL 1064009 (S.D. Tex., Apr. 9, 2025) (granting writ of habeas corpus and blocking continued use of the Alien Enemies Act to remove individuals).

[53] *See, e.g.*, Emelynn Arroyave & Oprah Cunningham, *The Human Costs of Trump's Immigration Crackdown*, Leadership Conf. on Civ. & Hum. Rts. (Feb. 14, 2025), https://civilrights.org/blog/the-human-costs-of-trumps-immigration-crackdown [https://perma.cc/H6MZ-BY76] (describing immigration enforcement efforts); Joanna Walters, *Denied, Detained, Deported: The Faces of Trump's Immigration Crackdown*, The Guardian (Apr. 18,

ICE and the proliferation of new detention centers for the thousands of residents caught in the dragnet.[54]

But such repressive administration extends beyond immigration. Consider, for example, the Administration's proposals to leverage executive power to further crack down on access to abortion and reproductive care—whether by criminalizing mail delivery of abortion medications through a stretched reading of the Comstock Act[55] or by reversing FDA approval of abortion medications.[56] Other proposals seek to dismantle civil rights protections by, for example, undoing the disparate impact standard on racial inequity in regulatory policy and environmental justice programs,[57] rolling back anti-discrimination protections for LGBTQ communities embedded in regulation,[58] or changing Department of Education and Title IX policies to remove similar protections in public schools.[59]

What these proposals share is a common commitment to preexisting social hierarchies—of race, gender, and sexual orientation. The underlying view of administration is one that either weaponizes state powers or dismantles state protections so as to restore the

2025), https://www.theguardian.com/us-news/2025/apr/28/trump-immigration-people-detained-deported-cases [https://perma.cc/QKA8-L8PU] (same).

54 *See* Lauren-Brooke Eisen, *Budget Bill Massively Increases Funding for Immigration Detention*, Brennan Ctr. for Just. (July 3, 2025), https://www.brennancenter.org/our-work/analysis-opinion/budget-bill-massively-increases-funding-immigration-detention [https://perma.cc/YF9K-SQTW] (describing the allocation of billions of dollars for establishing new detention centers and deportation operations).

55 *See* Mandate for Leadership, *supra* note 29, at 562; Democracy Forward, *supra* note 30, at 20. On the dispute over whether the Comstock Act can be read in this way or not, see, for example, Cary Franklin, Melissa Goodman & Amanda Barrow, UCLA Ctr. on Reprod. Health, L., & Pol'y, How a National Abortion Ban Is at Stake in This Election (2024), https://law.ucla.edu/sites/default/files/PDFs/Center_on_Reproductive_Health/2410%20National%20Abortion%20Ban%20DESIGN.pdf [https://perma.cc/ES4A-MW7F].

56 *See* Mandate for Leadership, *supra* note 29, at 458–59; Democracy Forward, *supra* note 30, at 21. At the time of this writing, these proposals have not yet been implemented.

57 *See* Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025) (cutting supposed "DEI" programs within and funded by administrative agencies); Exec. Order No. 14,281, 90 Fed. Reg. 17537 (Apr. 23, 2025) (unilaterally ending use of the disparate impact standard); *see also* Mandate for Leadership, *supra* note 29, at 72, 583; Democracy Forward, *supra* note 30, at 26 (describing pre-election proposals on this issue).

58 *See* Mandate for Leadership, *supra* note 29, at 584, 586; Democracy Forward, *supra* note 30, at 30; *see also* Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025) (implementing anti-transgender policies).

59 *See* Craig Trainor, Acting Sec'y For C.R., U.S. Dep't of Educ., Dear Colleague Letter (Feb. 4, 2025) (declaring Department of Education will enforce 2020 Title IX rule rather than the 2024 rule issued by the Biden Administration); *see also* Mandate for Leadership, *supra* note 29, at 333–34; Democracy Forward, *supra* note 30, at 38–39 (describing pre-election proposals for Title IX).

subordinated position of women, LGBTQ communities, communities of color, immigrants, and other disfavored groups.[60]

2. *Repressive Administration and Its Doctrinal Foundations*

It is certainly possible that these policies will run into a variety of legal constraints in the years ahead. As some scholars have already noted, it is possible that the very decisions accelerating the deregulatory turn in administration might make it that much harder for the Trump administration's agencies to abruptly switch policy positions, or to propose major new policies causing significant social and economic costs in the absence of new or explicit statutory authorizations.[61] But as even these suggestions note, there is also a consistent pattern of increased judicial polarization that suggests greater intra-party alignment on policy preferences among judges and elected officials of the same party.[62] Yet it is also crucial to note just how much already-existing administrative law doctrine has established many of the doctrinal foundations and precedents needed to construct a broader legal sanction for the kinds of repressive executive actions noted above. This is *not* to say these actions' legality are a foregone conclusion or uncontested—but it is to recognize the ways in which nominally conventional administrative law rulings have already incorporated a fair degree of deference to these problematic modes of state action.

The most general form of this doctrinal foundation lies in the widespread, cross-partisan pattern of judicial deference to expansive executive power and executive judgment when it comes to matters

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[60] This Article uses the term "disfavored groups" to refer to constituencies facing various forms of social, economic, or political subordination. This subordination might be structural and implicit, as in some forms of structural racial or gender bias, or it may be a more explicit and visible outright targeting of the group, as in the case of the attacks on trans individuals' human rights or the attacks on immigrant communities in the current moment. There is a broader tradition of recognizing such subordinate status as a central feature for anti-discrimination and equality analysis. *See generally*, Joy Milligan, *Protecting Disfavored Minorities: Toward Institutional Realism*, 63 UCLA L. Rev. 894 (2016) (discussing "disfavored minorities" as the relevant category in anti-discrimination analysis); Exec. Order No. 13,985, 86 Fed. Reg. 7009 § 2 (Jan. 20, 2021) (defining "equity" and "underserved communities" to include a range of communities across race, sexual orientation, disability, geographic, or economic subordination).

[61] *See, e.g.*, Cass R. Sunstein, *Trump Initiatives Might Be Foiled by the Right's Defeat of* Chevron, Wash. Post (Nov. 25, 2024), https://www.washingtonpost.com/opinions/2024/11/25/chevron-right-supreme-court-trump [https://perma.cc/L2T3-RUS8].

[62] *See, e.g.*, Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. Econ. Persps. 97 (2021) (defining a new measure of judicial ideology and showing increased partisan polarization of judges); Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows That the Supreme Court Is Now Much More Conservative Than the Public*, 119 Proc. Nat'l. Acad. Scis. 24 (2022) (describing polarization and increasing conservative bent of judges).

of national security.[63] Claims of national security in turn have also been used to effectively protect otherwise seemingly discriminatory administrative actions from judicial scrutiny—as in the Supreme Court's ultimate upholding of the first Trump Administration's travel ban.[64] In that case, the Court was persuaded that the travel ban was facially neutral and not motivated by discriminatory animus, despite the extensive record and explicit statements by President Trump grounding the policy in his hostility to Muslim immigrants.[65] Recent immigration cases continue this pattern. Consider *Department of State v. Munoz*,[66] decided the same term as *Loper Bright*, where the Court held there was no fundamental liberty interest in a person securing immigration status for their spouse. This precedent leaves significant running room for individual immigration officers to make determinations which are then backed by judicial deference.[67] More broadly, immigration policy has consistently been treated as a distinct doctrinal domain across different public law disciplines in ways that create a fundamentally different arena of law and practice from the conventional norms of administrative procedure.[68]

A second set of doctrinal foundations for repressive administration come from an entirely different arena of law: the Supreme Court's

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[63] *See* Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063 (2019) (describing jurisprudence allowing expansion of national security state); *see also* Emily R. Chertoff & Jessica Bulman-Pozen, *The Administrative State's Second Face*, 100 N.Y.U. L. REV. 727 (2025) (comparing deference to national security agencies with deference to regulatory and redistributive agencies).

[64] *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[65] *See id.* at 2435–38 (Sotomayor, J., dissenting).

[66] 144 S. Ct. 1812 (2024).

[67] Indeed, while defenders of the result in this case might point to the allegations that Munoz's spouse was supposedly a member of the infamous MS-13 gang, Munoz's spouse denied these allegations. This fact pattern presaged the highly disturbing way in which the Trump Administration has since used the allegations of gang membership to justify the extraordinary seizure and rendition of immigrants with little formal proof or due process. *See, e.g.*, Noem v. Abrego Garcia, 145 S. Ct. 1017 (2025) (requiring minimum standards of due process for an individual renditioned to El Salvador on the unsubstantiated claim of membership in MS-13).

[68] *See, e.g.*, David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 583–84 (2017); Emily R. Chertoff, *Violence in the Administrative State*, 122 CALIF. L. REV. 1941, 1971 (2024) ("[B]ureaucratic administrative law is made for bureaucracies whose goal is to implement programs, and for bureaucrats who analyze evidence in accordance with standardized policies. But force agencies are not bureaucracies, and many of their administrators are not bureaucrats."); Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 334 (2024) (conceding that at "the start of the Cold War, in the span of a few years, immigration cases went from being treated mostly as ordinary administrative law cases to being treated as something very different"); Chertoff & Bulman-Pozen, *supra* note 63, at 737–44 (arguing a second face of administrative law, including immigration enforcement agencies, complicates the story of progressive New Deal statebuilding).

growing fascination with "unitary" theories of executive power. Across a host of appointments and removals cases, the Court has gradually built an increasingly strident position that the President must be empowered to remove agency heads at will, in order to preserve the meaning of Article II and of a particular kind of democratic accountability.[69] These decisions are certainly contestable even as a historical and conceptual matter on the proper understanding of the removal power.[70] But what is especially troubling about these decisions is the ways in which they all but stack the deck for possible judicial deference to policies like "Schedule F" and other similar efforts by the current administration to remove career civil service officials who would otherwise be insulated from direct Presidential control.[71] In context of the Administration's arguably unlawful efforts to mass fire thousands of career civil servants,[72] reclassify others,[73] impose loyalty tests on new applicants,[74] and generally seize more personalized and direct control of the federal bureaucracy, these doctrinal foundations suggest an openness (or at least, neutrality) from the Court with respect to such efforts to consolidate control. That control in turn increases the likelihood that the Administration will be able to pursue more of its extreme policies. Indeed, these efforts have thus far been challenged extensively in the lower courts, leading to a

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[69] *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (expanding unitary executive theory and presidential removal power); Seila Law v. CFPB, 140 S. Ct. 2183, 2211 (2020) (same).

[70] *See, e.g.*, Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 Colum. L. Rev. 1, 1 (2022) (utilizing "original archival research and new contextualization" to argue presidential administration is intentionally antifascist); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019) (asserting that the "'Vesting Clause Thesis' . . . is demonstrably wrong").

[71] For the initial set of policies seeking to exploit these possibilities, see, for example, Exec. Order No. 14,171, 90 Fed. Reg. 8625 (Jan. 20, 2025) (implementing Schedule F); Memorandum on Restoring Accountability for Career Senior Executives, 90 Fed. Reg. 8481 (Jan. 20, 2025) (implementing policies to encourage termination of administration officials). It is worth noting that this result realizes the more dire warnings about a politicized civil service that accompanied earlier Roberts Court rulings expanding presidential removal powers. *See Free Enter. Fund*, 561 U.S. at 516 (Breyer, J., dissenting); *Seila Law*, 140 S. Ct. at 2217 (Kagan, J., dissenting).

[72] *See* Sam Berger & Jacob Leibenluft, *Trump Administration's Mass Layoffs of Federal Workers Are Illegal*, Ctr. on Budget & Pol'y Priorities (May 2, 2025), https://www.cbpp.org/research/federal-budget/trump-administrations-mass-layoffs-of-federal-workers-are-illegal [https://perma.cc/X79D-JUJ7] (describing the Administration's mass firing policies and analyzing their lack of legal basis).

[73] *See* Improving Performance, Accountability, and Responsiveness in the Civil Service, 90 Fed. Reg. 17182 (proposed Apr. 23, 2025) (to be codified at 5 C.F.R. pts. 210, 212, 213, 302, 432, 451, 752).

[74] Ellen Nakashima & Warren P. Strobel, *US Intelligence, Law Enforcement Candidates Face Trump Loyalty Test*, Wash. Post (Feb. 9, 2025), https://www.washingtonpost.com/national-security/2025/02/08/trump-administration-job-candidates-loyalty-screening [https://perma.cc/9ZXZ-RVVQ].

whiplash of rulings that have blocked some firings and restored others.[75] The net result is that the Administration has been able to proceed with a massive assault on the federal civil service, even amidst some lower court losses, while awaiting an eventual Supreme Court intervention on these questions.

Third, it must be acknowledged that there is a likelihood not just of doctrinal support, but of opportunistic political collaboration on the part of judges sharing the repressive view of administration. As an empirical reality, judges, particularly on high-profile cases, follow the policy preferences of the parties that appointed them.[76] In an era where Republican appointees make up a 6-3 majority on the Supreme Court, and where Trump appointees in particular already make up half of that Supreme Court majority, alongside a large cadre of vocal and agenda-setting judges in the district and circuit courts,[77] we cannot discount the possibility of doctrinal manipulation to stave off embarrassing legal defeats for the new administration. This is not to say that we should expect the second Trump Administration to run the table on legal challenges—indeed the first Trump Administration had an abysmal loss rate on legal challenges to its actions.[78] But we have to reckon with the realities that, first, the federal judiciary is significantly different now, in composition and culture, than it was going into the first Trump Administration; second, the Court has already established its disdain for precedent and willingness to establish whole new doctrinal frameworks despite significant historical, legal, and practical evidence to the contrary;[79] and third, it would not take much more than a slightly

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[75] *See, e.g.*, Wilcox v. Trump, 775 F.Supp.3d 215, 219–20 (D.D.C. Mar. 6, 2025) (challenging Trump's firing of NLRB commissioner Gwynne Wilcox); Complaint, Slaughter v. Trump, No. 1:25-CV-00909 (D.D.C. Mar. 27, 2025) (challenging Trump's firing of FTC Commissioners Slaughter and Bedoya); Mot. for Emergency Temp. Restraining Ord., Dellinger v. Bessent, No. 1:25-CV-00385 (D.D.C. Feb. 10, 2025) (challenging the firing of the Special Counsel; this case has now been dropped, but during its run the back-and-forth court orders led to the alternating reinstatement and then re-firing of many career officials); Complaint, Am. Fed. Gov't Emps. v. Off. Pers. Mgmt. & Budget, No. 3:25-CV-01780 (N.D. Cal. Feb. 19, 2025) (challenging mass reductions in force, now appealed to the Ninth Circuit).

[76] *See, e.g.*, Bonica & Sen, *supra* note 62, at 110–16 (providing an empirical overview of increased polarization of judicial partisanship and ideology over time).

[77] *See, e.g.*, Ian Millihiser, *How an Obscure Christian Right Activist Became One of the Most Powerful Men in America*, Vox (Dec. 17, 2022), https://www.vox.com/policy-and-politics/2022/12/17/23512766/supreme-court-matthew-kacsmaryk-judge-trump-abortion-immigration-birth-control [https://perma.cc/CH6U-BTBH] (describing the outsized influence of judge Matthew Kacsmaryk).

[78] *See* Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 Admin. L. Rev. 353, 357 (2021) (noting that during his first term, Trump's Administration won only twenty-three percent of challenges to agency actions).

[79] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see also* Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. Am. Const. Hist. 171, 179–83 (2024).

different plausible reading of various precedents and statutes to launder the legality of many of the most problematic of repressive executive actions proposed.

C. *Policing the Scope and Substance of Citizenship*

These currents of deregulatory and repressive approaches to administrative authority, each manifested in a host of major executive actions and backed by plausibly validating doctrinal foundations, point to a coherent and normatively troubling vision of administrative authority: *reactionary administration*. Reactionary administration is an institutional expression of the broader form of reactionary politics we see ascendant on the modern American far right and which has its roots in various anti-egalitarian reactionary movements from the opposition to Reconstruction, to the hostility to the New Deal, to the backlash against the civil rights movement.[80]

It is this opposition to the equalizing force of law and institutions that links together in a coherent form the twin ethics of deregulation and repression. The deregulatory components of reactionary administration described above amount to an effort to reassert the dominance of *private power*: putting individuals and communities at the mercy of powerful economic actors from bosses to investors to monopolists.[81] This is a form of "private government" that is enabled by the active dismantling of economic and social regulations aimed at limiting such exercises of economic power, whether through labor regulations, consumer protections, or anti-monopoly enforcement actions. The repressive components of this administrative vision, on the other hand, assert *governmental power*: leveraging the coercive capacities of the state to (re)impose social hierarchies, whether by removing anti-discriminatory protections or by actively enforcing policies designed to criminalize or render increasingly difficult the day-to-day lives of disfavored groups.

This weaving together of deregulatory moves with aggressive assertions of state power accentuates an orientation from the first Trump Administration. As Mila Sohoni argued then, the first Trump Administration's vision of administrative power was not simply an

[80] For a broader discussion of reactionary politics, see Robin, *supra* note 19; Albert O. Hirschman, The Rhetoric of Reaction: Perversity, Futility, Jeopardy (1991). For a historically rooted discussion of the anti-Reconstruction reactionary moment and its implications for the long arc of conservative politics, see, for example, Cowie, *supra* note 19. For a similar account of the hostility to the New Deal and its long influence on conservative reactionary politics, see Glickman, *supra* note 19.

[81] *See, e.g.*, Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It) (2017).

expression of conventional tropes of libertarian deregulation.[82] It instead reflected a broader worldview that combined a move toward the private ordering of markets with an expansive view of speech and religious protections particularly leveraged to defuse the claims of antidiscrimination protections and reproductive rights.[83] And it combined these strains as well with an aggressive weaponization of state power against immigrants.[84]

Understanding the deregulatory and repressive components as co-equal parts of a broader theory of the administrative state is crucial, because our conventional administrative law frames simply do not capture these dynamics accurately. Rather, what we see is an opportunistic borrowing of *both* big and small government, the language of *both* checks and balances and unitary executive in ways that combine to drive a specific and clear vision of social ordering. State authorities that advance economic, gender, and racial hierarchies are validated and increasingly empowered, while state authorities that operate to mitigate against those inequities are the ones most vociferously targeted as "overreaching" and are in line for dismantling.

Crucially, this vision is not just a normative one about the proper mode of social ordering; it is also tied to a particular view of statecraft. These are policies and proposals that endeavor to build a different administrative apparatus—by weakening some capacities, and by actively building and unshackling others.

It is worth noting as well that this fusion of deregulatory and repressive elements into a broader vision of reactionary administration is not wholly a novel creation particular to the Trump Administrations or to the Roberts Court. In many ways, this vision of administration represents an exacerbation of currents that have already had a long-standing presence in the theory and practice of modern constitutional law and the modern administrative state, particularly since the neoliberal turn beginning in the 1970s. Indeed, we can understand the "Twentieth-Century Synthesis" of neoliberalism in law as a variation on these currents.[85] We can see this, for example, in how public law doctrines particularly beginning in the 1970s began to blunt the reach and force of legal regimes aimed at remedying systematic racial and economic inequities, whether through the imposition of intent standards in equal

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[82] *See* Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323 (2019).

[83] *Id.* at 1351–60.

[84] *Id.* at 1375–80.

[85] Britton-Purdy et al., *supra* note 15, at 1833.

protection,[86] the narrowing of constitutional cognizing of systemic racial disparities,[87] the move away from economic rights under the Fourteenth Amendment,[88] or the extensive institutional warfare over the administration and resourcing of reproductive rights.[89]

In administrative law and institutional design, we can see this unease with expansive economic protections manifest in the statutory and regulatory provisions that, in the name of fraud-prevention, impose racialized and gendered burdens making it supremely difficult for vulnerable Americans to access safety net programs.[90] Meanwhile, the racialized and gendered conceptions of social hierarchy coexisted alongside the economic deregulatory elements of neoliberalism long before the Trump era.[91] And we see the openness to a repressive administrative state in the doctrinal and institutional consolidation of support around what Emily Chertoff has termed the "domain of violence"[92]—the institutionalized protection for violent practices of immigration enforcement and other modes of administrative authority policing Black and Brown bodies.[93] Indeed, it is notable how much these administrative institutions are simply read out of most conventional accounts of administrative law doctrine and discourse.[94] The widespread

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[86] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239–41 (1976) (introducing intent requirement for equal protection analysis).

[87] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (holding unconstitutional race-conscious school districting to address problems in racial composition of districts); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (striking down preclearance of voting districts based on past race-based discrimination).

[88] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting equal protection claim based on wealth-based discrimination); Lindsey v. Normet, 405 U.S. 56 (1972) (rejecting equal protection and due process challenge to eviction laws).

[89] *See, e.g.*, Cary Franklin, Infrastructures of Provision 31 (2025) (unpublished manuscript) (on file with author) (describing deprivation of funding as a means of attacking rights to abortion); *see also* Whole Women's Health v. Hellerstedt, 579 U.S. 582, 588–91 (2016) (describing many undue burdens on the abortion right).

[90] *See, e.g.*, Pamela Herd, Hilary Hoynes, Jamila Michener & Donald Moynihan, *Introduction: Administrative Burden as a Mechanism of Inequality in Policy Implementation*, 9 Russell Sage Found. J. Soc. Scis. 1, 8–12 (2023).

[91] *See, e.g.*, Melinda Cooper, Family Values (2017); Wendy Brown, In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West (2019).

[92] Chertoff, *supra* note 68, at 1947.

[93] This critique links closely to the broader rise of abolitionist scholarship focused on the criminal law system. *See, e.g.*, Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. Chi. L. Rev. 525 (2022) (describing structures of violence in the legal system); Angela Davis, Abolition: Politics, Practices, Promises (2024) (tracing the history of racialized violence in the carceral system); India Thusi, *Policing Is Not a Good*, 110 Geo. L.J. 226 (2022) (making abolitionist argument against policing).

[94] *See, e.g.*, Chertoff, *supra* note 68, at 1948–53 (suggesting that administrative law scholars have focused on "top-down" legal interventions and ignored administrative laws' effects on low-income people and people of color, who come into contact with more violent parts of the administrative state); *see also* Vesla M. Weaver & Gwen Prowse, *Racial Authoritarianism*

institutionalization of forms of what Bijal Shah terms "administrative subordination" cuts across nearly every agency and issue area—and predates the shifts of the Trump Administration.[95]

D. Theorizing—and Countering—Reaction

The above account of reactionary administration highlights the continuity between familiar conservative critiques of the administrative state and the more vociferous form that both deregulation and repression are taking in the Trump era. None of the discussion above is to say that the reactionary vision is a totalizing one or without its own internal contradictions. There remain, of course, significant political differences between the libertarian desires of some organized business interests and the statist ambitions of some forms of social conservatism. But what is interesting and important today is how this particular *reactionary* spirit—the reaction against efforts to institutionalize economic, gender, or racial equity through law, institutions, and public policy—offers a surprisingly powerful and cohesive binding agent across these many different policy objectives.[96]

Nor is this emphasis on continuity meant to suggest there is no room for reasonable disagreement over the purposes and structures of the administrative state. Indeed, in an ideal world, we could continue to debate the proper structure and design of agencies *without* jeopardizing the foundational safety and well-being of millions of Americans.[97]

Rather, by characterizing reactionary administration so starkly, this Article seeks to take seriously the collapse of widespread consensus around basic norms and structures of public law and public institutions. Arguably, we have been for several years already in a world of scorched earth and asymmetric hardball—both in constitutional law

in U.S. Democracy, 369 Sci. 1176, 1176–77 (2020) (noting the administrative state's role in generating "racial authoritarianism," which has been overlooked in other studies).

95 Shah, *supra* note 16, at 1614.

96 There is now a rich literature on the modern illiberal forms of conservatism as representing a fusion of libertarian and social conservative goals in a larger illiberal and reactionary frame. *See, e.g.*, Corey Robin, The Reactionary Mind (2d ed. 2018); Melinda Cooper, *The Alt-Right: Libertarianism and the Fascist Temptation*, 38 Theory, Culture & Soc'y 29, 29 (2021); David Austin Walsh, Taking America Back: The Conservative Movement and the Far-Right (2024) (tracing the history of a broader conservative coalition encompassing business interests, social conservatives, and more extreme far-right formations).

97 For more on the implications of taking a moralized approach to questions often addressed in more self-consciously proceduralist and substance-neutral stances, see the discussion in Conclusion, *infra*.

and administrative law.[98] We might have previously understood debates between liberal and conservative views on law and administrative policy as operating within a fairly well-defined arena of legal discourse and institutional structures. Agencies, by and large, had the ability to exercise broad delegated powers, subject to varying degrees of internal procedures and checks and balances, and subject to varying levels of judicial skepticism and scrutiny. This consistency enabled plausible registers of institutional design and doctrinal debate that sought overarching, all-things-considered best practices for the constitution and exercise of agency authority, in ways that need not depend entirely on substantive commitments to a particular vision of a good society. But regardless of whether one believes such a liberal consensus operated as more than a surface level agreement, it seems undeniable that the era of such consensus is over. In a world where administrative authorities are contemplating the wholesale rounding up and deportation of millions of Americans and the complete dismantling of entire agencies committed to the oversight of particular industries, or the active state-sponsored suppression of some gender identities and basic protections for women's reproductive health, it seems Panglossian to pretend we still operate within such a liberal (or neoliberal) consensus.

The conventions of administrative law still matter. It is likely that at least some of the attempts to realize this vision of reactionary administration will run into various legal and political impediments. Many of the proposals on offer raise basic questions of administrative and constitutional law, from the role of private actors in driving a deregulatory agenda through DOGE to the potential overreach of administrative authorities in a crackdown on immigration, reproductive rights, and LGBTQ rights.

But these arguments matter as near-term legal and public arguments against the moves of reactionary administration. They cannot provide a real foundation for an alternative to reactionary administration *as a vision and theory of statecraft and society*. As described above, reactionary administration is, at its core, animated by a coherent vision of social and economic ordering, and a willingness to build and

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[98] *See, e.g.*, Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. Rev. 59, 76 (2022) (describing political struggle to create "structural biases" in the constitutional framework); Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 Nw. U. L. Rev. 1099, 1132–71 (2023) (describing constitutional jurisprudence, especially under the Roberts Court, as entrenching racial and economic inequality); Mark Tushnet, *Constitutional Hardball*, *in* Cambridge Handbook of Constitutional Theory 1070, 1070–71 (Richard Bellamy & Jeff King eds., 2025) (defining constitutional hardball as "means consistent with the formal requirements of constitutional democracy but that destabilize and potentially transform it").

dismantle state powers to effectuate that vision. In a world where law and institutions lack widespread public trust and where our policy debates are increasingly scorched-earth fights, the task of countering a coherent and powerful vision such as reactionary administration simply cannot be borne by traditional proceduralist, neutral accounts of administrative law. There is simply no escaping the first-order question of what an administrative state ought to be for.[99] What then would be an alternative vision of the administrative state?

II
Anti-Domination and Administration

To counter reactionary administration, we need a rival vision of the administrative state that operates at a level deeper than the familiar reassertion of conventional legal norms and institutional checks and balances. Those checks are important, to be sure, but they do not really respond to the broader normative vision and argument being advanced by the vision of reactionary administration—the vision of a government whose powers are actively built up and dismantled to ensure the reassertion of economic, gender, and racial hierarchy. To adequately contest this vision of reactionary administration requires a more openly normative account of both the ends and means of administrative authority.

This Part offers an account of what an alternative such vision might look like, sketching an approach to reconstructing the capacities of the administrative state in ways built to advance a more egalitarian vision of membership and inclusion. To build out this argument, this Part foregrounds the animating concepts of domination, anti-domination, and their implications for the design of state institutions.[100] First, I suggest that normative theories of domination offer a compelling way to theorize the nature of administrative power and help sharpen our normative assessment of reactionary administration across both its dimensions of deregulation and repression (Section II.A). Second, I suggest that such a theory of domination *also* provides a critique of the already-existing structure of administrative authority in ways that weave together into a

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[99] See discussion in Conclusion, *infra*, about the broader departure from familiar postures of procedural neutrality in administrative law.

[100] Domination and anti-domination offer frameworks not just for reimagining the administrative state. These concepts might also help inform a different vision of jurisprudence. *See* Karen M. Tani, *Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 Harv. L. Rev. 1, 28–42 (2024) (imagining a Supreme Court "domination docket"). These concepts might also animate a broader constitutional political economy. *See* Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy (2022).

more coherent account several of the current disparate critiques of the failures of current bureaucratic institutions to act effectively, equitably, and to resist capture (Section II.B). This account then motivates a sketch of institutional design considerations that come to the fore in an anti-dominating approach to administrative capacity and social citizenship (Part III).

A. Domination and the Structure of State Power: A Primer

Domination as a theoretical framework offers a way of conceptualizing the limits both of reactionary administration and of the contemporary structure and exercise of administrative authority. Domination has been a central focus for a wide range of thinkers theorizing power and freedom, sometimes in an explicitly neo-republican vein, other times through the lenses of race, gender, and economic power.[101] While a full accounting of these literatures and theorizations is beyond the scope of this Article, we can glean from these discussions a simple and useful theoretical foundation for understanding the dangers of reactionary administration and evaluating alternatives.[102]

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[101] There is a rich political theory literature on domination-based theories of republicanism and their connection to more egalitarian and inclusive conceptions of contemporary democratic freedom. *See, e.g.*, Aziz Rana, *A Different Freedom*, Bos. Rev., Fall 2023, at 10 (describing reactionary politics of the U.S. imperial republic and imagining new forms of collective agency and self-rule); Aziz Rana, Two Faces of American Freedom (2010) (recasting U.S. history and conception of freedom in the context of settler empire); Philip Pettit, Republicanism: A Theory of Freedom and Government (1997) (articulating a republican theory of freedom); John McCormick, Machiavellian Democracy (2011) (proposing an account of democracy focused on neutralizing the power of socioeconomic and political elites); Danielle Allen, Justice by Means of Democracy (2023) (articulating a theory of democracy and justice that counters domination); Lida Maxwell, *Democratic Dependency: A Feminist Critique of Nondomination as Independence*, *in* Republicanism and the Future of Democracy 77 (Yiftah Elazar & Geneviève Rousselière eds., 2019) (providing a feminist account of anti-domination); Michael Gorup, *Not Subjects of the Market, but Subject to the Market: Capitalist Slavery as Expropriation*, 51 Pol. Theory 981 (2023) (theorizing work in a capitalist market as "slavery-as-expropriation"); Sharon R. Krause, *Beyond Non-Domination: Agency, Inequality, and the Meaning of Freedom*, 39 Phil. & Soc. Criticism 187 (2013) (theorizing non-sovereign social forces such as racism and sexism as barriers to freedom); Michael J. Thompson, *The Two Faces of Domination in Republican Political Theory*, 17 Eur. J. Pol. Theory 44 (2015) (conceiving of extraction and social relations as two elements of domination); Steven Klein, *Fictitious Freedom: A Polanyian Critique of the Republican Revival*, 61 Am. J. Pol. Sci. 852, 861 (2017) (arguing that a more compelling republicanism rooted in Karl Polanyi's critique of capitalist political economy would focus not just on regulations that improve market functioning, but on "how such policies organize or undermine the collective agents who could pursue non-domination").

[102] This Section draws upon and extends some of my own previous work on theories of domination, including: Rahman, *supra* note 3; K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 Contemp. Pol. Theory 41 (2016); Rahman, *Structural Justice*, *supra* note 4, at 315 ("I begin with a conceptual foundation for the argument, suggesting that today's inequality

At its core, domination refers to the problem of arbitrary, unaccountable power. The most straightforward example is perhaps the political domination of a tyrannical monarch: a ruler with absolute and unchecked power over their subjects. Such a ruler might not always cause harm: They may prove to be a benevolent ruler who serves the common good; but even if that were the case, such benevolence is fundamentally a product of the arbitrary and changeable whim of the ruler themself, rather than a result of some fundamental equality or agency on the part of the ruled. Domination, then, as a concept, orients us toward concentrations of power—including those very forms of state power that have traditionally troubled liberal and libertarian theorists. Sometimes that power may be wielded to great harm; other times the harm may be unrealized and the power dormant. But so long as there is the fact of concentrated, unaccountable power over our lives, we would be fundamentally *unfree*.

The converse to domination is agency: the ability to hold accountable the exercise of power and more broadly the freedom to live lives and forge societies and social orderings that we have reason to value. If domination is about the concentration of unchecked power, anti-domination, then, is about both the structures of accountability or guardrails that *limit* the potential for such concentrated power and the institutional structures that affirmatively enable the agency and freedom of individuals and communities alike.

These concepts of domination and agency are normatively valuable for a few reasons. First, these concepts help account for the ways in which problematic concentrations of power may often be hidden from view. Sometimes domination is readily visible. Consider, for example, the unaccountable authoritarian regime. But sometimes the power imbalance is lurking behind an otherwise congenial state of affairs in which one's well-being depends on the benevolence and whims of the powerful. An example might be how existing laws and the physical realities of urban design combine to create systemic inequities of housing precarity and therefore intergenerational inequities in economic opportunity, health, and well-being—even in the absence of intentional malfeasance by landlords, employers, or city officials.[103]

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crisis should be understood as a problem of *domination*—the concentration of arbitrary, unaccountable power.").

[103] For classic discussions of this, see, for example, Iris Marion Young, Responsibility for Justice 52 (2011) ("The process [of public and private individual and institutional actors pursuing their own interests] nevertheless should be described as producing structural injustice, because in it some people's options are unfairly constrained and they are threatened with deprivation, while others derive significant benefits."); Patrick Sharkey, Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality 13 (2013) ("The

Another example might be the worker who is treated well for the time being but lacks legal protections or power within the firm. They are fundamentally dependent on the benevolence of firm management for their well-being and survival. These settings are still, from a domination standpoint, normatively troubling, even if they seem in the near term to be unproblematic states of affairs. The concentration of arbitrary unaccountable power is per se a problem for societies to protect against, even if they produce momentary spurts of progress or well-being.[104]

Second, theories of domination—unlike, say, some libertarian theories of freedom—account for valid freedom-enhancing exercises of power. One mode of legitimate power stems from substantive ends: Power that is exercised to *limit* arbitrary power of other actors is, in this view, freedom-enhancing. So a state could legitimately restrict, say, the freedom of individuals to discriminate, or the "freedom" of firms to exploit workers, as these constraints on some actors operate to essentially limit their ability to dominate others. A second mode of legitimate power stems from institutional structures and process. If domination is about *arbitrary* exercises of power, it follows that *non-arbitrary* exercises of power are acceptable. By non-arbitrary we mean characterized by constraints and interferences that arise from legitimate procedures and institutions in which the exercise of power is fundamentally accountable and contestable. In other words, so long as exercises of power come from some process by which those affected are able to freely and equally contest the policy and retain the ability to hold power-wielders accountable in the future, such exercises of power are valid.

We need not explore here all the different normative implications and variations on these core concepts. But we can, with these basic building blocks, surface a number of important implications for our understanding of the administrative state and its different potential forms in this moment.

First, domination provides a normative framework for diagnosing dangerous forms of public power and for motivating the importance

ghetto is the result of [the spatial expression of social] processes, an area characterized by racial and economic segregation and lacking the basic institutional, economic, and political resources that foster healthy and successful development in childhood and economic and social mobility in adulthood.").

104 For purposes of simplicity, this Article will shorthand these different forms of socioeconomic domination as domination by "private power." However, in the philosophical literature on domination there is a distinction between domination by discrete, intentional private actors (like firms, managers, landlords, and the like) and the kind of accumulated, systemic domination that arises from the combination of a host of laws, policies, and actions. For a deeper discussion of this distinction, see generally K. Sabeel Rahman, *Constructing and Contesting Structural Inequality*, 5 Critical Analysis L. 99 (2018).

of checks and balances and structures of democratic accountability. These are perhaps familiar public and administrative law concerns. But, crucially, these concerns for accountability have to be tempered by equally important commitments to affirmative administrative action.

Thus, a second implication of domination theory is that it offers a way to make more clearly visible the problem of *private* power. Just as we rightly fear the domination of an unaccountable state, we ought to equally fear the domination of private actors. Indeed, much of the unfreedom that many of us experience in the modern era stems from concentrations of private power and limitations on agency in the economic and social (rather than political) arenas. Thus, workers at the mercy of their bosses are effectively unfree subjects to the "private government" of the firm.[105] Similarly, in markets dominated by monopolistic firms or dominant wealthy interests, businesses, individuals, and communities are dependent on the benevolence of these market-dominant actors for setting prices and providing access to markets or other common needs.[106] Other private threats to freedom stemming from individual discrimination exemplify another form of domination—the unchecked ability of a business to deny service to a disfavored group or of a hiring manager to systematically disfavor particular applicants on account of their race, gender, disability, or other arbitrary characteristics. Indeed, a central feature of the neoliberal political economy of recent decades is the way in which it entrenches disparities of power and hierarchies of status, while simultaneously undermining or effacing systems of public, democratic control and contestation over those inequities.[107] Domination as a framework helps make these dangers clear.

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[105] Anderson, *supra* note 81, at 41 (defining modern workplaces as "private governments" where subjects are unfree).

[106] *See, e.g.*, Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 29 (2018) ("[A worthy nation] also meant freedom from industrial domination, exploitation, or so much economic insecurity that one could not really live without fear of unemployment and poverty."); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 Duke J. Const. L. & Pub. Pol'y 37, 41 (2014) (describing how large companies in uncompetitive markets exhibit the power to set policy, regulate, and tax); Zephyr Teachout, *Monopoly Versus Democracy: How to End a Gilded Age*, 100 Foreign Affs. 52, 54 (2021) (comparing the robber barons of the Gilded Age with today's high-tech monopolists); Barry C. Lynn, Liberty from All Masters: The New American Autocracy vs. the Will of the People 39 (2020) ("Americans came to understand that the [monopolists] had captured control over the state and were now able to use the state to serve their own private purposes, by shifting tax monies from working people to themselves, or by buttressing their own power over some particular industrial activity or other.").

[107] *See, e.g.*, Britton-Purdy et al., *supra* note 15, at 1790–91 (arguing some legal subfields have come to concern economic efficiency while others have come to concern non-economic coercion and legitimacy, with none concerning structural economic inequality); Brown, *supra* note 91, at 13 ("Hayekian neoliberalism is a moral-political project that aims to protect traditional hierarchies by negating the very idea of the social and radically restricting

Third, this sharper identification of various forms of unchecked power allows domination theories to motivate the normative need for various forms of public power: rules and regulations that restrain the ability of private actors to dominate others (such as through antitrust laws, consumer protection laws, worker safety standards, or anti-discrimination laws) and institutions that systematically empower individuals and immunize them from other forms of domination (such as through guaranteed access to basic goods like healthcare, housing, or basic income, rendering individuals less vulnerable to exploitation in the marketplace).

These principles provide a way to theorize the modern administrative state. In designing the scope, structure, and internal processes of administrative authority, an anti-domination perspective would call for a balancing of two principles. First, state authorities must be built, empowered, and made more effective in imposing limits on the various forms of private domination and private power: for example, in limiting the exploitative potential of private power in the marketplace, or in mitigating social inequities. Second, state authorities must themselves be anti-dominating in their exercise of authority: They must be subject to checks and balances, to forms of democratic accountability, and, where such accountability is unable to restrain arbitrary forms of state power, those forms of state power ought to be dismantled entirely.

These principles crystallize what is troubling about reactionary administration. The deregulatory components of reactionary administration remove the freedom-enhancing, domination-preventing forms of state power needed to protect us from exercises of unchecked private power in the socioeconomic realm. Meanwhile, the repressive elements of reactionary administration violate the second principle: offering an approach to administrative authority that outstrips institutional checks and balances, and which deploys the state *itself* as a dominating actor imposing unfreedom on vulnerable individuals and communities.

In many ways, these principles also speak to some of the core commitments of administrative law—at least insofar as administrative law values internal checks and balances on the exercise of state

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the reach of democratic political power in nation-states."); Felicia Wong, *Building Post-Neoliberal Institutions*, 53 Democracy J. (2019) (arguing neoliberalism considers the market its prime organizing mechanism, with the state designed to protect the market); Rahman, *Structural Justice*, *supra* note 4, at 314, 316 (arguing that current neoliberal economic and political institutions "produce disparities of power, wealth, opportunity, and position," which can only be overcome with "new forms of public, democratic power capable of remaking background rules of our economy and society").

power[108]—*and* the efficacy of state power in protecting freedom against various private and social harms.[109] But as we will see in the next Section, domination and anti-domination also provide a way to theorize the limits to the current administrative apparatus and to inform an affirmative alternative vision of the administrative state that better realizes these principles of anti-domination beyond the status quo.

B. Domination and the Limits of Existing Administrative Institutions

While reactionary administration exemplifies a particularly troubling and extreme form of dominating state power—both through its deregulatory and repressive elements—it does not necessarily follow that the mere absence of reactionary administration is sufficient to avoid the problems of domination. Indeed, domination as a conceptual framework is useful in part because it also helps sharpen and synthesize an analysis of the normative failures of *current* administrative institutions.

First, from a domination standpoint, the reality is that many of the normative failures of reactionary administration have their roots in already-existing institutional forms and practices. As many scholars have noted, the dangers of repressive administration are very much already present throughout the modern administrative state. The coercive and often arbitrary deployment of state power to police immigration, for example, is institutionalized in law and agency practice in ways that depart significantly from the conventional image of bureaucratic rationality and administrative law checks and balances.[110] Patterns of

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[108] *See, e.g.*, Jon D. Michaels, Constitutional Coup: Privatization's Threat to the American Republic 57–58 (2017) (describing how the fundamental value of checks and balances animates the inner process and structure of administrative agencies).

[109] *See, e.g.*, Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836, 1918 (2015) (arguing administrative law provides the best mechanism to enforce constitutional protections); Jane Mansbridge, *On the Importance of Getting Things Done*, 45 PS: Pol. Sci. & Pol. 1, 5 (2012) ("[A] democracy can organize itself to make the power that surges through the system more likely to promote the common good."). This general linkage between the state's administrative capacity and substantive aspirations for democratic equality has also been an underappreciated throughline in sociological accounts of democratic consolidation, breakdown, and legitimacy. *See, e.g.*, Charles Tilly, Democracy 58 (2007) ("Without significant state capacity, citizens' expressed collective demands cannot translate into transformations of social life."); Juan J. Linz, The Breakdown of Democratic Regimes: Crisis, Breakdown, and Reequilibration 20–22 (1978) (describing how the durability and legitimacy of democracy requires state institutions that have both theoretical "efficacy," the ability to devise solutions for controversial and complex social problems, and empirical "efficacy," the capacity to implement those solutions).

[110] *See* Chertoff, *supra* note 68, at 1983–85, 1987 (describing how Immigration and Customs Enforcement administration often veers from expected hierarchical control, does not follow guidance, and is subject to little quality control).

racial and gender subordination have often been baked into ordinary administrative practices, like the overlooking of environmental justice impacts in energy permit approvals and the disparities in access to disaster recovery aid.[111] Meanwhile, the deregulatory ethos can also be found in a more subtle form. For example, policies that alter the balance of economic power or address social inequities have faced increased skepticism under judicial review, and racialized and gendered administrative burdens have been imposed on those seeking access to safety net programs.[112]

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, and an implicit sidestepping and reinscribing of social hierarchies of race and gender.[113] 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 the growing challenges of inequality or climate crisis. And indeed, these conceptions in turn helped promote policy shifts—like economic deregulation, patterns of privatization, scaled-back labor protections, and underinvestment in safety net programs—that fueled further inequality and concentrations of power.[114] 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.[115]

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111 *See, e.g.*, Shah, *supra* note 16, at 1641, 1643 (arguing administrative procedure systematically disadvantages marginalized groups, leading to environmental injustice and disparate impact from natural disasters such as Hurricane Katrina).

112 *See, e.g.*, Herd et al., *supra* note 90, at 6–12 (describing how administrative burdens facilitate social control, burden access to rights, and perpetuate inequality).

113 *See, e.g.*, Britton-Purdy et al., *supra* note 15, at 1791 (describing how reanalysis of legal fields in the twentieth century has muted problems of distribution and power); Brown, *supra* note 91, at 13 ("The founding texts rarely mentioned it, but white and male superordination are easily tucked into the neoliberal markets-and-morals project.").

114 *See generally* Jacob S. Hacker & Paul Pierson, American Amnesia: How the War on Government Led Us to Forget What Made America Prosper (2016) (arguing that markets benefitted from effective governance until the mid-twentieth century before succumbing to conservative politics and parochial business leadership, leading to widespread distrust in the government).

115 *See, e.g.*, Rahman, *supra* note 3, at 31 (describing the debate between laissez-faire, managerial, and democratic visions of economic governance following the financial crisis of 2008); Reuel E. Schiller, *The Administrative State, Front and Center: Studying Law and Administration in Postwar America*, 26 L. & Hist. Rev. 415, 423 (2008) (showing how the FCC, and perhaps other agencies, moved toward market driven conceptions of administrative law).

More broadly, we can see in recent years the emergence of three distinct critiques of the current administrative state, from advocates and scholars alike. These critiques are often presented as distinct from or even in some tension with one another, but viewed through the lens of domination and anti-domination, we can synthesize the commitments of each of these three viewpoints into a broader, progressive vision for the future of the administrative state.

1. Economic Power and Capture

In recent years, a growing number of scholars have revived a focus on the ways in which economic power shapes the nature of law and institutions. In this critique, a central feature of public law institutions—including administrative ones—is the way in which they launder, ratify, and magnify background disparities of political and economic power.[116] Better resourced constituencies and organized interests have greater sway and more ready ability to navigate complex administrative processes.[117] As a result, power disparities help drive changes to policy

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116 *See, e.g.*, Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 Cornell L. Rev. 1445, 1456 (2016) (finding economic elites influence politics and policymaking effectively to the exclusion of non-elites' preferences); Daryl J. Levinson, *Looking for Power in Public Law*, 130 Harv. L. Rev. 31, 38 (2016) (emphasizing constitutional law's lack of acknowledgement of increasing concentration of economic and political power in the hands of the rich); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 Pol. & Soc'y 152, 170–71 (2010) (describing how political strategies to stymie new policy cause regulatory "drift" in ways that can exacerbate inequality); *see also* Bagg, *Fighting Power*, *supra* note 16, at 227 ("[E]lectoral democracy cannot . . . enable genuine collective self-rule."); Fishkin & Forbath, *supra* note 100, at 326–29 (describing how Dixiecrats and anti-New Deal Republicans formed an alliance to counteract the New Deal, defeating the executive branch's efforts to build new administrative capacities); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 Yale L.J. 546, 572 (2021) ("[T]he current U.S. government . . . is one defined, quite simply, by *mis*alignment and *un*responsiveness . . . .").

117 *See, e.g.*, Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 Ann. Rev. Pol. Sci. 37, 46–47 (2019) (explaining how interest groups, particularly business interests, are more likely to participate in public comment and influence policy than citizens at large). 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.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1685–86 (1975) (arguing business interests disproportionately influence agencies because administrators rely on industry cooperation, agencies' limited resources buttress established firms and limit capacity, and businesses have more access to information); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 Chi.-Kent L. Rev. 1039, 1043 (1997) ("Starting in the late 1960s, many federal judges became convinced that agencies were prone to capture and related defects and—more importantly—that they were in a position to do something about it."); Nolan McCarty, *Complexity, Capacity, and Capture*, *in* Preventing Regulatory Capture: Special Interest Influence and How to Limit It 99, 100 (Daniel Carpenter & David A. Moss eds., 2014) (arguing the financial sector has

that favor the better-resourced groups, thus exacerbating economic and political inequality.[118] 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.[119]

2. *Equity and Subordination*

A second line of critique has emphasized the ways in which administrative structures and processes raise concerns of racial and gender equity and of anti-subordination. For scholars operating in this vein, a central challenge with contemporary administrative law practice and discourse stems from the ways in which they often operate in a color-blind, proceduralist frame that erases many of the deeper systemic inequities that shape the experience of specific communities with the administrative state.[120] As Sophia Lee has argued, the Administrative

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captured the government, escaping regulation, because of its complex markets and products and regulators' dependence on its information, expertise, and talent).

[118] *See, e.g.*, Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics: How Washington Made the Rich Richer—And Turned Its Back on the Middle Class 102–04 (2010) (describing the empirical disparity in how public policy responds more effectively to elite, organized, and wealthy interests); Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 Va. L. Rev. 749, 791–92 (2023) (describing the normative dimensions of the disparity in voice and influence).

[119] *See, e.g.*, Andrias & Sachs, *supra* note 116, at 575 ("What we propose are legal interventions of a different sort but with the related goal of rebalancing political power in the direction of political equality."); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. Cal. Interdisc. L.J. 315, 351 (2018) [hereinafter Rahman, *Policymaking*] ("In addressing the problem of disparate power, institutional design of administrative agencies and processes can play a major role. Such power-shifting institutional design can forge the kinds of linkages between constituencies and institutions that can reshape the distribution of power and influence."); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 Calif. L. Rev. 670, 698 (2020) ("The dialectical relationship between structural inequalities and political power compounds this difficulty: multiple layers of democratic and structural exclusion reinforce each other, reproducing unequal, racialized systems of justice and of governance."); K. Sabeel Rahman & Hollie Russon Gilman, Civic Power: Rebuilding American Democracy in an Era of Crisis (2019) (contending that deep, structural crises of exclusion and inequality can be realized through organizing and governance reform); Alexander Hertel-Fernandez, Roosevelt Inst., How Policymakers Can Craft Measures That Endure and Build Political Power 7 (June 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_How-Policymakers-Can-Craft-Measures-that-Endure-and-Build-Political-Power-Working-Paper-2020.pdf [https://perma.cc/A8YC-8TDD] ("Unlike wealthy individuals or business leaders who can count on outsized economic resources, connections, and political clout, historically marginalized people derive their strength from numbers—channeled through social movements, grassroots organizations, and advocacy groups.").

[120] *See* Bernard Bell, *Race and Administrative Law*, Yale J. on Reg. (Aug. 10, 2020), https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell [https://perma.cc/8FJ6-HQSD] (arguing that administrative law scholarship does not contend with race because critical race theorists focus on substance over procedure, which is necessary to unmask discriminatory actions; that administrative law does not focus on state and local law;

Procedure Act, for example, was not designed with considerations of equity in mind, and in some sense this reality served to insulate many of the structural racial inequities of society from the kinds of legal and regulatory challenges that might have otherwise engaged those realities.[121]

At the same time, the imperative to construct legal and policy levers through which racialized and gendered inequities can be contested and mitigated has also driven many of the most compelling evolutions of administrative law procedures, including, for example, efforts to innovate new forms of stakeholder participation and representation in rulemaking.[122] In recent years, this emphasis on both the priorities that agencies take on as well as the processes they use to formulate policies has been a central focus for many scholars and advocates of racial justice.[123]

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and that some official actions, like policing, often violate the constraints of administrative law); Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, Yale J. on Reg. (Sept. 16, 2020), https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani [https://perma.cc/2T4H-L89Y] (contending that administrative law is disconnected from the practical reality of racial discrimination because it is trans-substantive and legitimacy concerns are realized through procedural safeguards).

121 Sophia Z. Lee, *Racial Justice and Administrative Procedure*, 97 Chi.-Kent L. Rev. 161 (2022).

122 Lee suggests this reading of the various attempts to incorporate greater interest representation and participation into the regulatory process. *See id.* at 184 ("[C]ivil rights advocates' standing to intervene . . . helped open administrative procedures that had been cozy affairs between industry and regulators to public participation and judicial scrutiny."). For the canonical statement of this representational turn in administrative law, see, for example, Stewart, *supra* note 117.

123 Consider, for example, the various efforts to center race and environmental justice in recent regulatory debates over climate policy. *See, e.g.*, Rhiana Gunn-Wright, *Our Green Transition May Leave Black People Behind*, Hammer & Hope, Summer 2023, https://hammerandhope.org/article/climate-green-new-deal [https://perma.cc/ZB2Y-PG9C] (asserting that the Inflation Reduction Act and negotiations surrounding it reinforced white supremacy, and that climate policy going forward should prioritize Black people); Rhiana Gunn-Wright & Kristina Karlsson, *What the NEPA Data Actually Shows, and the Case for Progressive Permitting Reform*, Roosevelt Inst. (July 21, 2023), https://rooseveltinstitute.org/2023/07/21/what-the-nepa-data-actually-shows-and-the-case-for-progressive-permitting-reform [https://perma.cc/7DAG-6R7A] (arguing that reforms permitted by the National Environmental Policy Act should improve democratic participation by providing special protections for frontline communities); Abigail Dillen & Rhiana Gunn-Wright, *America's Clean Energy Transition Needs Federal Action—Not Rollbacks*, Roosevelt Inst. (July 7, 2023), https://rooseveltinstitute.org/2023/07/07/americas-clean-energy-transition-needs-federal-action-not-rollbacks [https://perma.cc/KC7W-JEGV] (supporting proposals to streamline the development of renewable energy projects while maintaining or improving democratic participation). More broadly, see Executive Order No. 13,985, 86 Fed. Reg. 7009 (2021), and related efforts by the Biden Administration to mainstream considerations of equity in regulatory policy.

The equity critique can also be seen not just in the surfacing of inequities lurking beneath nominally neutral procedures, but also in the more brazen and unchecked exercises of state power, particularly against immigrants and communities of color. Thus, what Chertoff terms the "domain of violence"[124] includes agencies like Immigration and Customs Enforcement where the norms and processes are built around unchecked and often arbitrary violent agency discretion to police the conduct of Black and Brown bodies. And similarly, scholars of race and abolition have noted the curious ways in which administrative law often leaves *out* of its frame the more naked exercises of administrative power in the form of policing and racialized enforcement actions against communities of color.[125]

3. Bureaucratic Constraints and State Capacity

A third line of critique of contemporary administrative institutions focuses on a different theme: the role of bureaucratic procedures, inertia, and risk-aversion in suffocating the core capacity of agencies to act with alacrity and innovation and to make policy changes at scale. The modal examples for advocates in this vein are the problems surrounding the building of physical infrastructure, from housing to highways. The problem is that there are simply too many administrative procedures that are time-consuming, onerous, and often the product of flawed systems of participation in and litigation over issues like environmental reviews and community board approvals for housing construction.[126]

There is a historical root here not just in conservative hostility to regulation, but also in *liberal* skepticism of the state. Many governance reforms of the 1970s era, despite a liberal or progressive orientation

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124 Chertoff, *supra* note 68, at 1947.

125 *See, e.g.*, Weaver & Prowse, *supra* note 94 (describing the ways in which policing and often violent coercive enforcement agencies represent the primary mode of interaction between many communities of color and the state).

126 *See, e.g.*, Ezra Klein, Opinion, *The Problem with Everything-Bagel Liberalism*, N.Y. Times (Apr. 2, 2023), https://www.nytimes.com/2023/04/02/opinion/democrats-liberalism.html [https://perma.cc/4LK7-FWUR] (arguing that well-intentioned regulations can be excessive, stymieing even beneficial projects like renewable energy, semiconductor factories, and housing); Ezra Klein, Opinion, *What America Needs Is a Liberalism That Builds*, N.Y. Times (May 29, 2022), https://www.nytimes.com/2022/05/29/opinion/biden-liberalism-infrastructure-building.html [https://perma.cc/F4A7-G7DJ] ("We need to build more homes, trains, clean energy, research centers, disease surveillance. And we need to do it faster and cheaper."); *see also* Bagley, *supra* note 17, at 380 ("[L]awyers, not managers, have assumed primary responsibility for shaping administrative law in the United States. And if all you've got is a lawyer, everything looks like a procedural problem." (citation omitted)).

on issues like nondiscrimination, 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.[127] 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 deregulate or otherwise limit state power.[128] Out of real concern about state capture by powerful interest groups, governance reforms often took the form of procedural requirements with litigation hooks, or broad requirements for transparency and public participation (reflected in landmark legislation like the Freedom of Information Act and the Federal Advisory Committee Act) that sought to limit governmental discretion.[129] While liberal policymakers assuredly did *not* seek to undo labor or environmental regulations in the manner of Reaganite conservatives,[130] these orientations to state-skepticism nevertheless helped congeal a cross-partisan set of presumptions about *how* government should operate.

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[127] *See, e.g.*, Paul Sabin, Public Citizens: The Attack on Big Government and the Remaking of American Liberalism 115 (2021) ("The public interest movement also started pushing beyond specific issues, such as clean air and clean water, into the structure of US political institutions. The broadening critique of American politics would deepen potential areas of conflict with the Democratic Party."); Bagley, *supra* note 17, at 353 ("Liberal lawyers in the 1960s and 1970s . . . grew increasingly disenchanted with the idea that agencies could act as disinterested experts. They likewise grew attuned to the risk of agency capture, and came to believe that judicial participation in the agency process was necessary . . . to protect individual rights."); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097, 1123–29 (2017) ("[T]he costs that FOIA piles on agencies are thought to reduce agency costs for Congress and the American people by helping to keep executive branch officials on the straight and narrow.").

[128] *See, e.g.*, Reuel Schiller, *The Curious Origins of Airline Deregulation: Economic Deregulation and the American Left*, 93 Bus. Hist. Rev. 729 (2019) (arguing left-wing subcultures of the 1960s led to antibureaucratic, antiregulatory policies in the 1970s).

[129] *See* Sabin, *supra* note 127, at 59 ("[Ralph] Nader argued instead that power in the American system could be kept 'insecure' through the creation of independent, nonbureaucratic, citizen-led organizations that existed somewhat outside the traditional American power structure. He also believed that traditional institutions, including government agencies, needed internal mechanisms that facilitated accountability and participation."); Bagley, *supra* note 17, at 355–56 (reporting how Congress adopted "procedure after procedure," including the Freedom of Information Act and the Federal Advisory Committee Act, "to soothe an ever-present (indeed, ever-increasing) anxiety about the state"); Pozen, *supra* note 127 (arguing open government advocates and progressives should reconsider the high costs the Freedom of Information Act imposes on agencies).

[130] *See, e.g.*, Gabriel L. Levine, *Beyond "Big Government": Toward New Legal Histories of the New Deal Order's End*, 121 Mich. L. Rev. 1003 (2023) (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).

Indeed, recent empirical evidence suggests that the inability of agencies to build quickly and at scale stems in part from significant limitations in personnel capacity, including the ability to hire insourced rather than outsourced staff support quickly, and limitations on existing agency access to data and information.[131] These same concerns manifest not just in infrastructure, but across the board. The failures of agencies to innovate more effective systems for delivering public benefits and enabling simple, easy ways for Americans to enroll in new programs stem in part from many of these similar limitations on capacity, including excessive procedural requirements, limitations on staffing, and constraints on more nimble and effective use of data.[132]

4. Synthesizing the Critiques into an Anti-Domination Frame

These three perspectives on the failures of contemporary administrative institutions—economic power, equity, and capacity—have at times been seen either as distinct from, or even in tension with, one another. Take, for example, some of the debates over permitting reform and public participation in regulatory policy: There are strong equity and environmental justice considerations—as well as anti-capture rationales—for why environmental reviews and public participation may be essential, yet these processes are in the crosshairs of reformers seeking to streamline and accelerate the building of clean energy infrastructure.[133] Additionally, concerns about economic power and capture do not always bring an explicit race or gender lens to the analysis.

But despite these apparent tensions, there is a different way to read and incorporate each of these three critiques: They highlight the *complementary* dimensions of what a broader anti-domination vision of administration might look like.

First, given the account of domination sketched above, a central premise for an anti-dominating administrative state is the construction of *affirmative state powers and capacities* to check problematic forms

131 *See, e.g.*, Zachary Liscow, *State Capacity for Building Infrastructure*, *in* Aspen Inst., Strengthening America's Economic Dynamism 96, 104–18 (Melissa S. Kearney & Luke Pardue eds., 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5045644 [https://perma.cc/R7CK-68QR] (finding that challenges with personnel, procedure, and lack of data systems and long-term planning abilities make construction of major U.S. infrastructure expensive and slow).

132 *See, e.g.*, Jennifer Pahlka, Recoding America: Why Government Is Failing in the Digital Age and How We Can Do Better 11–12, 15–17, 263 (2023) (describing how agencies can more effectively use data, user-testing, and greater design expertise to develop more effective and seamless service delivery programs).

133 *See* sources cited *supra* note 123.

of private power and systemic injustice. This affirmative obligation to build *more* state power and capacity—for example, to monitor and curtail problematic exercises of managerial power in the workplace, monopoly power in the marketplace, or racial disparities in urban planning or societal discrimination—speaks to a shared concern across all three perspectives. We need affirmative state capacities to contest exercises of economic power, to protect against racialized and gendered forms of discrimination at the individual and systemic level, and to enable the state to act more aggressively and creatively to make impact at scale. We want government to act on public problems, recognizing how inertia and inaction can often perpetuate inequities.[134]

Second, the goals of curtailing domination in economic and social life—and within the exercise of state power itself—also animate a desire to *dismantle* some problematic forms of state power. Nick Bagley's "procedure fetish" critique,[135] for example, offers one application of this broader principle, as does the racial equity critique of overly arbitrary and coercive state powers on immigration, policing, punitive approaches to safety net programs, and other modes of administration that perpetuate racial subordination. While not often put in the same frame, the critiques from the capacity and racial justice standpoints can be viewed as motivated by a concern with how state institutional structures limit the state's ability to more effectively deliver anti-dominating policies—whether through better provision of safety net programs or through outright institutionalization of arbitrary coercive power.

Third, both critiques of economic power and equity highlight the importance of certain forms of participation, representation, and checks and balances within the construction and implementation of agency policies. From a domination standpoint, such processes are central to preventing the concentration of arbitrary power within state institutions themselves. But this does not counsel for the imposition of any and all forms of participation or procedural constraint; as the capacity critiques rightly note, some participatory mandates and procedural limits serve to entrench the veto power of particular (unrepresentative) actors and operate instead as a way to nullify potential state action on broader public problems. But viewed from an anti-domination standpoint,

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134 *See, e.g.*, Mansbridge, *supra* note 109, at 1 (arguing democratic action "requires coercion—getting people to do what they would not otherwise do through the threat of sanction and the use of force"); *see also* Josiah Ober, *The Original Meaning of 'Democracy': Capacity to Do Things, Not Majority Rule*, 15 Constellations 3, 7 (2008) ("*Demokratia* . . . refers to a *demos'* collective capacity to do things in the public realm, to make things happen.").

135 Bagley, *supra* note 17.

this tension is not a matter of fundamental principle; rather it is a tension at the level of *design*. The central question for anti-dominating administration, on this view, would be which modes of institutionalized representation, participation, and internal procedural structures enable both voice and accountability on the one hand and capacious state action on the other.[136]

Furthermore, while some of state incapacity may be traced to poor institutional design or merely out-of-date protocols and structures in need of modernization, an anti-domination framework helps make clearer the ways in which some of the biggest barriers to state capacity stem from a deeper moral disagreement over the purposes and beneficiaries of state action itself. The barriers to effective service delivery, for example, have their roots in a racialized and gendered opposition—regardless of party control of the Administration, for much of the late twentieth century—to the idea of truly empowering and inclusive guaranteed safety net benefits for poor and vulnerable communities.[137] Similarly, the unchecked growth of mass incarceration capacities and the surveillance state reflects a powerful bipartisan consensus around national security and its racialized undertones, fueling a massive growth in capacity in those domains.[138] Many of the most troubling institutional barriers to an active, anti-dominating state are not products of inertia or failed design, but rather stem from systematic campaigns—by those hostile to greater regulation of economic power and efforts to underwrite greater racial or gender equity—to magnify judicial and political pressure in ways that drive and compound pathologies of excess proceduralism, risk aversion, resource constraints, and limited capacity on the part of agencies themselves.

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Domination and anti-domination as a framework thus help synthesize the insights of each of these critiques from the standpoints of power, equity, and capacity. But the anti-domination framework also then orients us to a useful and productive set of downstream questions of *institutional design*. By clarifying core normative principles, this framework thus helps ground a greater flexibility for institutional design experiments in ways that need not compromise on the most

136 *See infra* Section III.B for further discussion of what this might look like.

137 *See* Herd et al., *supra* note 90, at 10–11 (challenging "ordeal mechanisms," which "offer[] policymakers a reassurance that burdens fulfill a useful social function by optimally targeting scarce resources to those most in need").

138 *See, e.g.*, Chertoff & Bulman-Pozen, *supra* note 63, at 747 (noting the cross-partisan support for growing power in the surveillance and carceral state).

foundational normative goals of how the state is structured and how it operates.

III
Anti-Domination as an Alternative Vision for Administration

Viewed from the standpoint of anti-domination, the administrative state has several central moral purposes. First, we need administrative regimes built to contest, mitigate, and perhaps even dismantle socioeconomic forms of domination. This requires administrative regimes in which the problems of concentrated private power—in the workplace, in the marketplace, and in racialized, gendered, or other hierarchies—are legible, central to the mission of administrative agencies, and tractable through policy interventions. By extension, we also need administrative regimes capable of neutralizing more systemic inequities baked into social, economic, and even physical structures of society—for example, through administering universal and widespread safety net programs, creating new guarantees for basic needs like healthcare, housing, or basic income. Reaching these goals requires administrative machinery that shares this mission and has the right tools to execute it effectively.

When it comes to the structure and nature of administrative authority itself, an anti-domination perspective also offers principles for how such state power should be built and constrained so as to prevent domination *from the state itself.* While this fear of state power is most often articulated in libertarian or left forms of anti-statism, an anti-domination perspective pushes us toward institutional design approaches that achieve the right forms of accountability, checks and balances, and structural constraints on power, *while retaining the kinds of capacities needed to contest private power and systemic inequities*. This orientation suggests the value of measures like participation, representation, and internal procedural checks and balances to help structure the formation and exercise of administrative authorities. But it also suggests the importance of (re)designing these mechanisms in ways that maximize the overall efficacy of administration itself. Indeed, not all forms of participation or procedure are equally enabling of state action. By the same token, where administrative power may be beyond the ability of such checks to contain the threat of domination—or where the nature of the administrative authority may be intrinsically dominating—this approach would call for something more severe: the outright dismantling of such unaccountable state powers.

The concepts of domination and anti-domination do not offer precise blueprints of how administration should operate. But as this discussion highlights, anti-domination points us in a particular direction. Administrative law is often concerned with questions of process, agency accountability, and the accuracy and legitimacy of agency actions. These considerations remain important but are somewhat secondary to other considerations that an anti-domination frame would bring to the fore.

From an anti-domination perspective, a first-order question is about the orientation and capacities of administrative authority in the first place. To what extent are agencies oriented to address the kinds of social and economic forms of domination that are especially troubling? What are the modern forms of agency authority most needed to address contemporary forms of domination in the economy, in society, and in the face of a changing climate?

Within agencies, then, there is a second set of design questions at the "meso" level of internal agency process and practice. How might we reimagine the inner structure and processes of bureaucracies to better foreground problems of domination and inequity—and to limit problematic forms of administrative domination or subordination? By the same token, are there processes and practices that need to be rethought or dismantled—either because they enervate the possibility of robust state action too much, or because they embed problematic forms of policymaking that accentuate or entrench (rather than dismantle) dominating social relations?

Finally, agencies do not act in a vacuum; they are embedded in a broader political, economic, and legal environment shaped by Congress, the courts, the balance of organized interests, the legitimating discourses of public policy, and common sense. What then might we need to structure differently in the external environment to enable anti-dominating administration—and disable reactionary administration—in the long run?

As a framework, then, anti-domination points us to a set of design questions for scholars, advocates, policymakers, and practitioners to consider—questions that often arise in conventional administrative law discourse but are easily overlooked by more conventional attention to doctrine and procedure. A full accounting of each of these three institutional design domains is beyond the scope of this Article, but we can at least begin to map the kinds of questions to consider in each. The rest of this Part offers a brief sketch of the kinds of policy and design questions that might follow in each of these three domains, highlighting some recent progressive regulatory reform efforts in each.

A. Anti-Domination and Agency Macrostructures

The first set of design questions focuses on the "macro"-structure of administrative agencies: the formation of agencies themselves, their mission, their structures, their authorities, and the scope of their jurisdiction. Historically, agencies have been created in part to forge new institutional structures empowered to tackle certain social and economic harms that required dedicated attention. The early twentieth-century concern with economic domination in the forms of monopoly and workplace power led to the formation of agencies like the Federal Trade Commission and the National Labor Relations Board, among others. Similarly, in the aftermath of the 2008 financial crisis, the systemic neglect of financial product engineering and promotion in consumer markets led to the creation of the Consumer Financial Protection Bureau. In response to systemic patterns of racial and gender discrimination, we created dedicated agencies like the Equal Employment Opportunity Commission and embedded within existing agencies new resources and authorities to tackle issues of discrimination and civil rights through Title VI of the Civil Rights Act.[139]

In each of these instances, the fact of endowing a new institutional structure with broad authorities, dedicated resources—both in terms of budget and staff—and a clear mission and mandate enabled new forms of public-protecting regulations.[140] The creation of consolidated, visible, and powerful agencies charged with clear missions of this sort can also bring policy questions previously hidden from the lay public into the foreground; instead of a complex bureaucratic terrain only legible and accessible to sophisticated players, the creation of a centralized mission-driven body can create a different political economy of policymaking by establishing new centers of policymaking activity and new discourses in which public harms could be discussed and remedied. Indeed, this is arguably what happened with the creation of the CFPB, which brought consumer financial regulation into a centralized agency, more visible

[139] For a broader account of how battles for equality and democracy helped drive the formation of these new institutional forms in the Progressive Era, New Deal Era, and Civil Rights Era, see, for example, Fishkin & Forbath, *supra* note 100; William J. Novak, New Democracy: The Creation of the Modern American State (2022).

[140] This is not to say each of these prior interventions is faultless and completely successful. But it is to remind us that, as social challenges evolve, a central tool for contesting domination lies in the creation of new (or wholesale remaking of old) administrative regimes with the goal of creating clearer mandates, stronger authorities, and deeper capacities.

and amenable to public demands, and less easily gamed by sophisticated industry players.[141]

The CFPB experience may be a model for this broader notion of reshaping the authority and jurisdiction of agencies to better address structural inequities. We might, for example, consider the creation of new agencies with more dedicated expertise, mission-orientation, and tools to tackle the new kinds of economic power, subordination, and vulnerability in the modern economy. Consider, for example, the proliferation of data-based surveillance of workers and communities, and algorithmic forms of discrimination. As these practices become endemic, are they best addressed through existing agencies—like the DOL, the FTC, the EEOC, or the CFPB—or might there be value to a more centralized data protection agency?[142] Similarly, given the future realities of climate change and climate shocks, is the current distribution of climate mitigation authorities across agencies like the EPA or FEMA desirable, or should we consider a different reorganization of authorities for a more integrated approach to addressing recurring climate disasters?

In each of these cases, a central question for the future of the administrative state will be how to revivify or institutionalize new agencies with the mission, authority, and core capacities needed to tackle modern forms of socioeconomic domination in the world. We might be able to get relatively far through more engaged forms of presidential coordination and agenda setting; but at some point, it may simply require the creation of new agencies with clear mandates and modern tools to better advance some of these objectives under contemporary conditions.[143]

A related set of questions runs in the opposite direction: Insofar as there are agencies and significant institutional structures whose mission and mandate are incompatible with principles of anti-domination, those agencies and institutions would have to be dismantled or restructured. We can see attempts at this reconsideration in the critiques of the

141 *See, e.g.*, Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321 (2013).

142 *See, e.g.*, Christine Bannan & Raj Gambhir, Does Data Privacy Need its Own Agency?, (New America Open Technology Institute 2021), https://d1y8sb8igg2f8e.cloudfront.net/documents/Does_Data_Privacy_Need_its_Own_Agency.pdf [https://perma.cc/86VB-XHB6]. For a broader discussion of data collection, surveillance, privacy, and the need for more ex ante regulatory approaches more generally, see Frank Pasquale, The Black Box Society: The Secret Algorithms that Control Money and Information (2015).

143 On the broader theory and practice of restructuring agencies, see generally Alejandro E. Camacho & Robert L. Glicksman, Reorganizing Government: A Functional and Dimensional Framework (2019).

immigration enforcement apparatus and the broader critique of carceral institutions. We can also see attempts to diagnose and dismantle direct forms of state domination in various attempts to unwind the racialized and gendered practices baked into administrative regimes—from the criminalization of poverty to the weaponization of administrative burdens—as a way to exacerbate racial and gender disparities and reduce the reach of critical safety net programs.[144] The orientation here would be not merely to mitigate or seek to better control these problems as instances of overreach; rather, the focus would be on exploring what structural changes to institutional authorities, organization, personnel, and culture might be needed to root out entirely the most troubling and domination-exacerbating forms of agency practice and power.

These are the kinds of questions that scholars, advocates, and policymakers might fruitfully bring back to the fore. And such an approach represents a notable shift from the terms of conventional policy advocacy: less about squeezing the most policy impact out of existing tools while subject to existing constraints, and more about wholesale transformation of administrative authorities and jurisdictions that might most effectively open up new policy possibilities and close down problematic practices.

B. Anti-Domination and Mesostructures: Internal Processes, Analyses, and Data

A second set of design questions operates at a "meso" level of the intra- and inter-agency processes that structure the exercise of judgment and authority. These measures are as much about shifting policy and process as they are about shifting agency culture and organizational dynamics. Consider, for example, the ways in which interagency review of policies by the Executive Office of the President—whether through White House coordination or through formal budgetary and regulatory review processes run by the Office of Management and Budget—shapes how agencies identify priorities and craft their policy judgments.[145] Or how the diet of data and information agencies are able to readily access can shape how public problems are conceptualized, interventions designed, and regulatory vision defined. These are structures internal

144 *See supra* Section I.B.

145 *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2285–303 (2001) (discussing how review, directives, and appropriation drove agency policy in the Clinton Administration); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1860 (2013) (describing OIRA's open door policy); Eloise Passachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182, 2207–43 (2016) (overviewing OMB's influence over administrative policymaking).

to the agencies and the interagency process. They operate at a more granular level than that of Congress establishing a new agency, for example. But they operate at a higher level than individual regulatory decisions, shaping the ways in which regulators prioritize issues, conceptualize problems, develop interventions, deploy their expertise, and exercise their judgment.[146]

From the standpoint of anti-domination, these meso-level structures and processes shape the degree to which agencies orient toward missions of contesting social and economic domination—and the degree to which agencies protect against their own power being deployed in ways that may be dominating.

On one level, internal processes and cultures might suffocate the creativity or capacity of agencies to innovate and drive aggressive solutions to pressing public problems. An increasing number of scholars and policymakers have highlighted the ways in which procedural burdens, cultures of risk-aversion, and limited resources can create vicious cycles that enervate agency capacity.[147]

On another level, these internal processes might embody and institutionalize particular ways of thinking that may be out of date or even inimical to more egalitarian approaches to policy. Think, for example, of the widespread critiques of agency analytical frameworks that efface the realities of disparities of economic power or of systemic racialized and gendered inequities,[148] or how the formalization of procedures combines with agency cultures to embed practices of arbitrary violence in places like immigration enforcement.[149]

By the same token, shifts in these internal processes and conceptual models can alter the tenor of agency actions in ways that unlock new

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146 *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 Mich. L. Rev. 1239, 1256–63 (2016) (defining internal administrative law and its profound impact); Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 Yale L.J. 1600 (2023) (exploring how agencies are impacted by public sentiment); *see also* Martin J. Williams, *Beyond State Capacity: Bureaucratic Performance, Policy Implementation, and Reform*, 17 J. Institutional Econ. 339, 344–47 (2021) (describing how internal relational and coordination dynamics shape bureaucratic capacity).

147 *See, e.g.*, Bagley, *supra* note 17, at 400–01 (arguing that over-reliance on procedure can have "complex, contingent, and often ambiguous connection to legitimacy and capture"). *See generally* Pahlka, *supra* note 132 (criticizing arcane procedural policies).

148 *See, e.g.*, Douglas A. Kysar, Regulating from Nowhere (2010) (criticizing traditional modes of environmental regulation); Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing (2005); Elizabeth Popp Berman, Thinking like an Economist: How Efficiency Replaced Equality in U.S. Public Policy (2022) (explaining how efficiency reigns supreme over equality in American public policy).

149 *See, e.g.*, Chertoff, *supra* note 68 (arguing that certain administrative agencies exert unchecked physical power).

possibilities. Indeed, one of the central themes of regulatory reform in recent years has been the attempt to rework the inner machinery of the administrative state to reorient more intentionally toward often-overlooked forms of domination. From equity, to market power, to an evolved approach to safety net programs, the Biden Administration undertook several major attempts to alter the culture and orientation of administrative agencies through changes to the intra- and inter-agency processes that shape the formulation of regulatory policy.[150] These interventions are by no stretch sufficient to embody an alternative approach to administrative capacity that more fully advances inclusive and equitable citizenship. But they offer useful starting points for imagining a more ambitious and transformative agenda going forward. While a detailed accounting of these mesostructures is beyond the scope of this Article, it is worth homing in on a few distinct types of interventions here: first, in setting overarching normative priorities through different forms of inter-agency coordination; second, in shifting the analytical frameworks agencies use to design policies; and third, in shifting the data and participatory inputs that agencies rely on to formulate priorities and policies in the first place.

It is also worth noting in brief the implications of this focus on meso-level processes and practices for the growing headline debate in administrative law about the unitary executive. On the one hand, a set of scholars and advocates from across the political spectrum has for a long time rightly criticized the ways in which agency procedures and practices might frustrate more robust and energetic forms of executive policymaking.[151] On the other hand, a growing set of critiques has highlighted how, taken to the extreme, such accounts of unitary executive power are normatively problematic, hollowing out internal checks and balances within the administrative state.[152] In addition,

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[150] For a longer discussion of both the notion of regulatory reform as culture change and the particular lessons learned from the Biden era experiments on issues like racial equity, see, for example, K. Sabeel Rahman, *Building the Government We Need: A Framework for Democratic State Capacity*, Roosevelt Inst. (June 2024), https://rooseveltinstitute.org/wp-content/uploads/2024/05/RI_Building-the-Government-We-Need_Report_062024.pdf [https://perma.cc/5R36-34Y3]; K. Sabeel Rahman, *Rewiring Regulation: Regulatory Review for a New Political Economy*, Roosevelt Inst. (Nov. 2024), https://rooseveltinstitute.org/wp-content/uploads/2024/10/RI_Rewiring-Regulation-New-Political-Economy_Brief_202411_v2.pdf [https://perma.cc/89XB-HTCK]; K. Sabeel Rahman, *Evolving Expertise: Structural Inequality and Bureaucratic Judgment*, 105 B.U. L. Rev. 1219 (2025).

[151] *See, e.g.*, Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2011); Bagley, *supra* note 17 (criticizing fetishization of procedure in rulemaking); Kagan, *supra* note 145, at 2339–46 (exploring effectiveness of presidential administration).

[152] *See, e.g.*, Michaels, *supra* note 108 (defending robust administrative checks on presidential power); Blake Emerson & Jon D. Michaels, *Abandoning Presidential*

the unitary executive view poses deep historical problems, both in its inconsistency with the originalist history of executive power[153] and in its historical association with ambitions of aggressive deregulation and quasi-autocratic control of government.[154] But rather than emphasize a sharp divide between unitary and non-unitary approaches to executive power, the discussion in this subsection suggests a different approach. If we foreground a more explicit normative north star—in this case, anti-domination—it will provide a guiding approach through which to consider how a range of internal processes and practices might be reformulated. The goal, then, is something more nuanced: a *mix* of constraints and enabling conditions that together construct a particular discourse, orientation, and set of tools for executive policymaking that is most conducive to advancing a broad set of normative goals—goals that require preventing authoritarian concentration of unchecked executive power *and* the opposite extreme of incapacitated administration.

1. Setting Cross-Cutting Priorities and Conceptual Orientations

One set of interventions in the mesostructure involves establishing new cross-cutting priorities and processes that create overarching normative principles to guide the policy judgments made by regulatory officials. Take, for example, the Biden Administration's attempt to foreground issues of equity. Through a day-one Executive Order,[155] the Administration established a new inter-agency process in which agencies across the federal government undertook an in-depth assessment of their approaches to policymaking, and identified new interventions that would help address systemic inequities along racial, gender, geographic, and other dimensions. This effort sought to create a different culture and mental model for policymaking that identified equity as a cross-cutting value. Similarly, the Biden Administration's renewed attention to market concentration and corporate power took the form not just of individual regulatory policies but also of a broader process seeking to reorient agencies across the executive branch to a better understanding of these harms and to incentivize new forms of

Administration: A Civil Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism, 68 UCLA L. Rev. Discourse 418 (2021) (advocating for abandonment of presidential administration); Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 Harv. L. Rev. F. 104 (2021) (arguing that the APA solidifies Congress as the primary powerbroker over agencies).

153 *See* Mortenson, *supra* note 70, at 1189–90 (examining the tension between originalism and the unitary executive theory).

154 *See* Rosenblum, *supra* note 70, at 7 ("It is not clear, though, that presidential administration is legally licensed.").

155 *See* Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

agency creativity in responding to these and other forms of economic dominance in the modern market economy.[156]

Going forward, we might imagine deeper and more transformative expansions of these experiments. Imagine, for example, incorporating concerns of equity and anti-subordination, or unequal economic power, more deeply into regulatory policy discourse. Or how agencies might be more effectively coordinated and organized to make individual regulatory initiatives add up to a more widespread form of impact. Following the suggestions above to consider consolidating and merging different agency functions, might the internal review and coordination of agency actions be better served by moving away from the review of individualized regulations or grant programs from a compliance standpoint, and instead towards a model prioritizing the kinds of coordination needed to knit together multiple actions—rules, grants, enforcement priorities—to add up to a greater structural and systematic impact on big public policy questions around climate, inequality, public health, and the like? These are questions for further study and debate, but they might raise significant implications for the structure of presidential review and coordination of agency action, including by agencies like OIRA and OMB.

2. Shifting Analytical Frameworks

A second set of mesostructures and interventions concerns the conceptual and analytical frameworks agencies use to analyze problems and design interventions. The Biden Administration's prioritization of equity and market competition was accompanied by efforts to evolve the analytical frameworks agencies used, in order to enable them to better recognize and respond to the Administration's prioritized problems. These efforts included, for example, shifting the analytical requirements for agency rulemaking. The Biden Administration revised OMB Circular A-4 and the standards for regulatory impact analysis that accompany "economically significant" rulemakings.[157] These revisions

156 *See, e.g.*, Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021) (elucidating unique ways to promote market competition).

157 *See* Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-4 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [https://perma.cc/A6M2-QC3P] [hereinafter OMB Circular A-4]; Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (creating Circular A-4); Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 15 (Jan. 20, 2021). For a more detailed account of the modernizing regulatory review proposals, see K. Sabeel Rahman, *Modernizing Regulatory Review*, Regul. Rev. (May 15, 2023), https://www.theregreview.org/2023/05/15/rahman-modernizing-regulatory-review [https://perma.cc/DDU8-XXFN]; K. Sabeel Rahman, *Rewiring Regulatory Review*, LPE Blog (May 1, 2023), https://lpeproject.org/blog/rewiring-regulatory-review [https://perma.cc/H4FS-YW6E]; K. Sabeel Rahman, *Building the Administrative State We Need*, Yale J. on

included, for example, new recommendations for agencies undertaking distributional analysis, as well as new guidance for agencies to better analyze the impacts of market concentration and of regulations that might enhance it.[158]

These changes were revoked by the second Trump Administration.[159] But this revocation raises a further question about what a more blue-sky and transformative approach to analysis might be going forward. Cost-benefit analysis, for many, promises to help rationalize policymaking, enhance transparency and accountability, reduce cognitive bias, and make policy outcomes more effective overall.[160] At the same time, there have been robust critiques of cost-benefit analysis, in particular the ways in which more conventional methods might efface precisely the kinds of economic and social domination and systemic inequities that an anti-domination framework ought to foreground.[161] One approach might be to start with the Biden Administration's approach and build from there. This approach involves embracing the flexibility and ecumenical capacities of cost-benefit analysis and expand its methods to better account for issues like systemic racism, structural disparities in economic power, and similar concerns.[162] More sophisticated accounts of

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Regul.: Notice & Comment Blog (June 29, 2023), https://www.yalejreg.com/nc/building-the-administrative-state-we-need-by-k-sabeel-rahman [https://perma.cc/8MSY-Y5LZ].

158 *See* OMB Circular A-4, *supra* note 157; Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, Guidance on Accounting for Competition Effects when Developing and Analyzing Regulatory Actions (2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf [https://perma.cc/SW2M-6E9A].

159 *See* Exec. Order No. 14,148, 90 Fed. Reg. 8237, 8239 (Jan. 20, 2025) (rescinding various Biden executive orders, including those on modernizing regulatory review); Exec. Order No. 14,192, 90 Fed. Reg. 9065, 9067 (Jan. 31, 2025) (supplanting Biden-era updates to OMB Circular A-4); *see also* Lisa A. Robinson, *Regulatory Benefit-Cost Analysis Under the Trump Administration*, Regul. Rev. (May 6, 2025), https://www.theregreview.org/2025/05/06/robinson-regulatory-benefit-cost-analysis-under-the-trump-administration [https://perma.cc/6QCJ-VJJU] (discussing the implications of President Trump's deregulatory push on cost-benefit analysis).

160 Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. Rev. 1983, 2010–22 (2013) (noting that cost-benefit analysis serves efficiency functions such as leading to relatively better outcomes, reducing cognitive bias, and informing agencies where and when to regulate, as well as non-efficiency functions such as limiting regulation, enhancing overall well-being, increasing transparency, and facilitating more effective monitoring of agencies).

161 *See*, *e.g.*, Berman, *supra* note 148 (explaining how efficiency reigns supreme over equality in American public policy).

162 *See, e.g.*, Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 Env't L. 53, 86–90 (2022) (explaining how cost-benefit could better account for race and socioeconomic status); Zachary Liscow, *Redistribution for Realists*, 107 Iowa L. Rev. 495, 534–42 (2022) (revealing a new approach to law and equity); 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*

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.[163]

A different approach might contemplate moving to different models of evidence-based regulatory policymaking that allow both for empirical rigor and dynamism. Some scholars have called for a shift in focus of agency analytical and internal review efforts from regulation-by-regulation assessments of costs and benefits to a more holistic analysis of difficult-to-quantify unpredictable risks and shocks.[164] Others seek to create analytical frameworks that are better optimized for highlighting problems of inequity and subordination, by having agencies focus, for example, on how harms might be particularly concentrated geographically or demographically.[165] Beyond the form of analysis, there are questions to grapple with about the way in which data and analysis feature into the policymaking process. For example, agencies might take more of a learning and evolutionary approach to policy: providing enough analysis and data on the front end to justify a new approach. In lieu of overly demanding analytical requirements that are difficult to address in highly complex and uncertain conditions, agencies might offset those demands instead by developing procedures for consultation with impacted stakeholders and methods for learning and evaluating

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the Balance, 89 U. Chi. L. Rev. 649 (2022) (noting that CBA fails to account for income distribution).

163 *See, e.g.*, Ahdieh, *supra* note 160, 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 Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost As Many Answers)*, 114 Colum. L. Rev. 167 (2014) (providing several hypothetical scenarios to illustrate the varied ways CBA is utilized in practice). For literature on cost-benefit analysis in the context of policing, compare Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 901 (2015) (advocating for a 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).

164 *See, e.g.*, Frank Pasquale, *Power and Knowledge in Policy Evaluation: From Managing Budgets to Analyzing Scenarios*, 86 Law & Contemp. Probs. 39 (2023) (examining "the epistemic disadvantages of CBA-driven management of regulatory initiatives"); *see also* Michael Livermore, *Catastrophic Risk Review* (Inst. for L. & AI, Working Paper 3-2022, 2022).

165 *See, e.g.*, Daniel A. Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, 3 Am. J.L. & Equal. 2 (2023); Alan Jenkins, Juhu Thukral, Kevin Hsu, Nerissa Kunakemakorn & Megan Haberle, *Promoting Opportunity Through Impact Statements: A Tool for Policymakers to Assess Equity*, Am. Const. Soc'y for L. & Pol'y (Apr. 2012), https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Promoting%20Opportunity%20ACS%20Issue%20Brief.pdf [https://perma.cc/6MX4-WNT].

impact over time to evolve and sharpen policies going forward. An iterated approach to evidence that allows for experimentation and innovation and learning, rather than requiring agencies to predict ex ante the impacts that might result could enable a better balance of rigor and dynamism. These are approaches all worth considering in future efforts to reconstruct administrative agency analytical frameworks.

3. Broadening Data, Informational, and Participatory Inputs

A third domain of intervention in the mesostructures lies not in the question of analysis but in the upstream question of inputs: What data and forms of participation are agencies relying on to develop their understanding of the issues in the world? Information is the lifeblood of regulatory policymaking. Gaps or biases in the information flow to agencies can skew agency understandings of the world and their ability to formulate different policies or interventions. Indeed, agencies are in reality often *not* the black boxes of caricature, but rather are highly porous and embedded in webs of information, input, and influence from a range of sources.[166] In many ways the central problem is not that agencies lack a tether to these inputs; it is 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.

Shifting these upstream inputs would be useful to reorient agency deliberations both toward policies that better address socioeconomic domination and away from the kinds of decisions that might employ more arbitrary and unchecked forms of power. In the Biden Administration, the efforts to foreground equity as a concept also included a host of efforts to improve basic data collection by agencies to gather more granular information about economic, racial, gender, geographic, and other disparities, so as to better inform policy designs.[167] Similarly, efforts to counteract newer forms of economic power require agencies like the FTC and SEC to have better access to more sophisticated real-time data and information about corporate practices, mergers, and investment flows.

From a participatory standpoint, while much of the attention to regulation centers on the notice-and-comment process, the more

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166 *See* Bernstein & Rodríguez, *supra* note 146, at 1637–50 (describing the "webs" of agency action).

167 *See, e.g.*, Equitable Data Working Grp., Vision for Equitable Data: Recommendations from the Equitable Data Working Group (2022), https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/04/eo13985-vision-for-equitable-data.pdf [https://perma.cc/V6DN-RP8A] (making suggestions for more equitable forms of data collection).

influential and often disparate forms of participation take place well before agencies have a rule to propose. The early-stage participation of influential stakeholders can shape agency priorities and early policy decisions, yet such upstream engagement is often ad hoc and not necessarily representative or inclusive. Recent proposals have sought to shift these practices to create more affirmative, proactive requirements for agencies to seek out and engage the most impacted and vulnerable communities on the front end.[168] Similarly, recent efforts have sought to free agencies from overly strict paperwork and legal compliance restrictions to better enable agencies to conduct focus groups and the kinds of interactive user-based engagement that allow agencies to meaningfully and effectively hear from those most dependent on government services.[169]

Participation is often avoided in policymaking, in part out of a fear that it will only exacerbate political conflict or procedural enervation. But insofar as participation contributes to the problems of excessive proceduralism and risk aversion, these pathologies are arguably less about participation per se and more about the problematic ways in which participation is institutionalized to facilitate veto points by more resourced players, rather than creating more genuine forms of engagement in the shared work of governing. For practitioners working on novel approaches to co-governance and participation, a common theme is that participation *can* be structured to be meaningfully inclusive *and* facilitative of robust governmental action and experimentation—but that requires approaches to participation that depart significantly from the conventional image of a community board meeting rife with

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168 *See, e.g.*, Off. of Mgmt. & Budget, Exec. Off. of the President, Study to Identify Methods to Assess Equity: Report to the President 30–35 (2021), https://eelp.law.harvard.edu/wp-content/uploads/2025/01/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf [https://perma.cc/N34Y-YG2E] (examining inequities in data collection); *see also* U.S. Gen. Servs. Admin., Fifth U.S. Open Government National Action Plan (2022), https://www.gsa.gov/system/files/NAP5-fifth-open-government-national-action-plan.pdf [https://perma.cc/T7N3-E56J]; Memorandum from Richard L. Revesz, Off. of Info. & Regul. Affs., to the Heads of Exec. Dep'ts & Agencies (July 19, 2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf [https://perma.cc/YF77-DBTX].

169 *See, e.g.*, Memorandum from Richard L. Revesz, Off. of Info. & Regul. Affs., to the Heads of Exec. Dep'ts & Agencies & Indep. Regul. Agencies (Nov. 21, 2024), https://bidenwhitehouse.archives.gov/wp-content/uploads/2024/11/PRA-Usability-Testing-Guidance-Memo.pdf [https://perma.cc/C2VB-GLJF]; *see also* Ben Bain & Jennifer Pahlka, *A Win for Good Government and Commonsense: New Guidance on the Paperwork Reduction Act*, Niskanan Ctr. (Nov. 26, 2024), https://www.niskanencenter.org/a-win-for-good-government-and-commonsense-new-guidance-on-the-paperwork-reduction-act [https://perma.cc/L3BG-7X4Z].

veto-holding players and opportunistic participants.[170] This kind of structured participation and engagement might be even more critical to incorporate into non-rulemaking agency policymaking: in the setting of priorities, the design and implementation of enforcement regimes, and the like.[171]

C. Anti-Domination and Enabling (or Disabling) External Conditions

A final set of design considerations relates to the external legal and political environment in which agencies sit. The capacity and energy with which agencies can advance anti-dominating policies—or, in the reverse, exacerbate conditions of domination—depends in large part on the external conditions surrounding the administrative apparatus, in terms of formal legal frameworks, accountability mechanisms and limits on agency discretion, and the broader politics and political economy surrounding agency action.

It is here that some of the more conventional questions of administrative law doctrine enter—for example, the appropriate mechanisms and nature of judicial review of agency actions, and the ways in which presidential oversight, congressional oversight, and various mechanisms of political accountability feature in the generation of agency initiatives and the imposition of constraints. These structures shape the political and legal terrain in which agencies are able to maneuver. Thus the stakes of shifting away from a regime of nominal judicial deference to agency interpretations of law, as the Supreme Court recently decided, has repercussions for the underlying capacity with which agencies can act, and the political space in which they can maneuver.[172] These external pressures and directives also shape the resources agencies have to deploy, particularly their budgets and staffing levels.

But the enabling and disabling conditions for agency action are shaped by more than the formal structures of legal accountability. The balance of organized interest groups plays a big role as well. The

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[170] *See, e.g.*, Rahman & Gilman, *supra* note 119; Rahman, *Policymaking*, *supra* note 119; Rahman & Simonson, *supra* note 119; Andrias & Sachs, *supra* note 116; Havasy, *supra* note 118; Samuel Bagg, *Two Fallacies of Democratic Design*, LPE Blog (July 13, 2023), https://lpeproject.org/blog/two-fallacies-of-democratic-design [https://perma.cc/F2PT-7LSK].

[171] For an excellent recent exploration of discretionary agency enforcement powers and the possibilities for more structured stakeholder participation, see Bijal Shah, *Presidential Administrative Discretion*, 100 N.Y.U. L. Rev. 2128 (2025).

[172] *See supra* Section I.A.

degree to which particular interests are organized and resourced to lobby, influence, and provide agencies with useful resources varies tremendously.[173] While the disparity in such civil society engagement may not be as wide as often believed—indeed on many major rules we can see publicly interested civic organizations engaged nearly as much as corporate and business organizations—many of the most vulnerable communities lack the kind of organized advocacy ecosystem that business, labor, or environmental groups might have.[174] And even where there are effective civic organizations, many of them are built to attempt to shape electoral and legislative, rather than regulatory, politics.

There is much more to be said here beyond the scope of this Article, but this line of inquiry should orient us toward bigger legal and structural questions like the following: How might we reimagine the foundational statutes of the modern administrative state, from the Administrative Procedure Act to the Freedom of Information Act, in ways that neutralize the damage to governing capacity wrought by overly aggressive far-right judges or excessive procedural constraints that tamp down state capacity? Similarly, how might less famous but highly influential statutory frameworks—like the Paperwork Reduction Act[175] or the Privacy Act[176]—be reworked to enable the kinds of effective internal processes and cultures described above? For all of these statutes, the design challenge ahead will be to find a better balance between the kind of anti-authoritarian constraints on state power that an anti-domination framework would call for while also retaining the capacity for agencies to move with speed and scale to tackle the kinds of social and economic forms of domination that require robust state capacity. And finally, what is the kind of civil society advocacy infrastructure

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173 *See* Jacob S. Hacker & Paul Pierson, *After the 'Master Theory': Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 PERSPS. ON POL. 643 (2014) (describing the central role of organized interests in shaping policy outcomes).

174 *See* Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37 (2019) (providing an overview of research noting the greater influence of organized interest groups in regulatory lobbying and participation). *But see* Maraam A. Dwidar, *Diverse Lobbying Coalitions and Influence in Notice-and-Comment Rulemaking*, 50 POL'Y STUDS. J. 199 (2022) (suggesting that more diverse coalitions of civic organizations may have greater influence than business interests).

175 Pub. L. No. 96-511, 94 Stat. 2812 (1980). For a rich current debate on the need to reform the PRA, see Ben Bain, *Paper Cuts: What Should We Do With the Paperwork Reduction Act?*, NISKANAN CTR. (Apr. 17, 2025), https://www.niskanencenter.org/paper-cuts-what-should-we-do-with-the-paperwork-reduction-act [https://perma.cc/7CUT-Z5EN].

176 Pub. L. No. 93-579, 88 Stat. 1896 (1974); *see also* Complaint at 2, Am. Fed'n of Gov't Emps. v. U.S. Off. of Pers. Mgmt., No. 25-CV-01237 (S.D.N.Y. Feb. 11, 2025) (referencing the Privacy Act as part of a complaint against DOGE).

needed to create a balance of power among organized interests capable of sustaining this kind of citizenship-expanding state capacity going forward and holding in check impulses toward reactionary visions of administration?

Crucially, the internal dynamics of capacity-building described above can be amplified and made more durable through shifts in these external conditions, but often such internal and external shifts do *not* move in lockstep. Indeed, much of the intra-executive branch reform efforts of recent administrations—whether those advancing a broadly progressive orientation in the Biden Administration or more reactionary forms in the first Trump Administration—have tended to operate amidst broadly hostile external conditions. During parts of both the first Trump Administration and the Biden Administration, the executive branch faced a skeptical Congress and significant judicial pushback. The specter of reactionary administration in the current moment is perhaps most troubling precisely because of the tailwinds provided by a supportive judiciary, Congress, and powerful organized interests like far-right social movements and technology and business oligarchs. For those seeking to build in the long run a different kind of state, premised on values of democratic inclusion and anti-domination, it will be critical to imagine a wider palette of reform initiatives that encompass not just intra-executive branch policy shifts but meaningful new forms of legislation and structural change to the external legal and political environment within which agencies operate.

Examining these deeper structural questions in the same frame as the inter-agency and intra-Executive branch dynamics raises important questions of design and sequence. For example, how much of the tensions seeking to balance executive power and executive constraint might be dissipated by a more restrained and predictable approach to judicial review and a more alert and capacious Congress?[177] Similarly, might there be more precise forms of restraint that zero in on the more dangerous forms of executive power—such as over-expenditures and law and immigration enforcement—balanced against more dynamic

[177] There is important literature calling for expanded congressional capacity. These scholars and reformers have highlighted, for example, the need to expand Congress's skills, expertise, staffing, and resources to enable more effective oversight and policy development. *See, e.g.*, Molly E. Reynolds, Improving Congressional Capacity to Address Problems and Oversee the Executive Branch (2019), https://www.brookings.edu/articles/improving-congressional-capacity-to-address-problems-and-oversee-the-executive-branch [https://perma.cc/Y4RU-VYTY]; The Am. Pol. Sci. Ass'n, Congressional Reform Task Force Report (2019). *See generally* Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers (2017) (foregrounding Congress's centrality to a well-functioning constitutional order).

approaches to social and economic regulation? Or rather than simply restoring doctrines of agency deference, should the opportunity arise, perhaps a more impactful approach might be to legislate specific new mandates for socioeconomic regulatory authority and civil rights capacities, in order to empower those agencies and bind them to an affirmative legislative mandate to act in a particular direction. These are questions beyond the scope of this Article, but they are crucial ones to engage in context of efforts to reimagine the administrative state.

Conclusion

In this moment of foundational transformations in the modern administrative state, how should we conceptualize the moral purposes and first-order structural principles that ought to animate a modern, twenty-first-century administrative apparatus?

The administrative state will face a series of continuing transformations in the coming years, both from the ongoing shifts in administrative law doctrine continuing the path the Supreme Court has now established through cases like *Loper Bright*[178] and *Corner Post*[179] and from the likely transformations of administrative structure and practice under the second Trump Administration and the policy vision expressed in documents such as the Heritage Foundation's Project 2025.[180] As this Article has suggested, we should consider these shifts to the right as evincing a coherent underlying vision of *reactionary administration*—a vision of the administrative state that combines deregulatory moves on the one hand, particularly around regulatory regimes that seek to contain excesses of economic power or instances of social discrimination and inequity, and a set of repressive moves on the other hand, where the administrative apparatus can be leveraged to target disfavored groups. The overarching result is a vision of administration that is tethered to a particular normative vision of social ordering: one that seeks to reassert traditional hierarchies along racialized, gendered, and class lines.

This vision of administration in turn raises a deeper question of what a rival, alternative vision of the administrative state might be. This Article offers a sketch of such a vision, drawing on concepts of domination and anti-domination. Reactionary administration raises a deep moral problem for democratic equality in two senses: the active

178 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).
179 Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024).
180 Mandate for Leadership, *supra* note 29.

weaponization of state coercion to harm particular groups, and the active *dismantling* of state policies that would otherwise protect groups from various forms of unaccountable private and systemic power in the marketplace and in society. Domination as a concept helps sharpen a vision of the administrative state that opposes this kind of reactionary administration. In this view, the moral purpose of administrative institutions is twofold: first, to provide the institutional power, capacity, and levers through which we establish limits on the ways in which private actors and socioeconomic systems exercise unchecked power over individuals and communities; and second, to provide institutional and procedural systems that shape the exercise of administrative authority itself so as to render it accountable, responsive, and non-arbitrary.

An anti-domination view of administration in turn points us toward a particular orientation to the rebuilding of administrative capacities with the goal of underwriting a more egalitarian and inclusive vision of citizenship. This approach to capacity and citizenship highlights several key implications and priorities for scholarship and advocacy going forward—implications that are not so readily visible in more conventional administrative law discourses.

First, while it is true that reactionary administration will likely raise a whole host of rule-of-law issues that ought to be contested and played out, the emphasis of this anti-domination vision is not necessarily to simply resist reaction and preserve existing administrative institutions. Of course, existing doctrines and norms of administrative good governance ought to continue to be deployed and enforced, particularly against potential administrative overreach. But it would be a mistake to think that the *near-term legal salience* of these doctrines and values also provides a *long-term moral and political foundation* for an affirmative vision of the administrative state going forward. A central premise of this Article has been that, going forward, the administrative state needs an affirmative vision that offers an alternative to reactionary administration, and that such a vision ought to start from a more openly moral and egalitarian standpoint of the kind anti-domination conceptions of freedom provide. Indeed, as noted in Part II above, this affirmative posture is necessary to capture both the dangers of reactionary administration and the many real limitations and challenges presented by already-existing administrative institutions, whether from the standpoint of capture, equity, or efficacy.

Put another way, if we limit ourselves to conventional procedural and neutral discourses of administrative law, the result will be a predominantly preservationist or restorationist orientation to administrative reform. By contrast, an anti-domination framework

pushes us to a *reconstructive* posture, acknowledging the limitations of both reactionary administration on the one hand, and the existing status quo of administrative structures on the other. Administrative agencies *do* need to be reimagined and built anew for the modern era. The moral vision shaping this rebuild should be not one of reactionary reassertion of hierarchy, but rather of a deeply democratic administrative state built to curtail dangerous concentrations of power and dismantle durable systems of inequity, in ways that are nonarbitrary and accountable.

Second, as a matter of policy and institutional design, this anti-domination vision for administration brings to the forefront a particular set of institutional design questions. At the macrostructural level, anti-domination highlights the fundamental principles about agency authorities, jurisdictions, and mandates. Do we have the right administrative structures in the first place to tackle the kinds of domination that need to be checked in the modern era? At the mesostructural level, anti-domination points us to a set of design questions around inter- and intra-agency processes. To what extent do the processes that structure agency decision-making and judgment actually help foreground questions of economic power, racial or gender equity, and the like—rather than effacing or submerging them? And finally, anti-domination clarifies how we ought to approach more familiar questions of legal and institutional design in the administrative state: to better balance the twin goals of *enabling* anti-dominating policymaking while *disabling* or *preventing* arbitrary, dominating exercises of state authority—and, in particular, pushing for an administrative apparatus that is capable and effective, yes, but also representative, inclusive, participatory, and accountable.

This orientation does not, it should be said, provide a precise blueprint of how exactly to balance these principles. There are judgment calls to be made at a finer-grain level of institutional design and structure than can be offered here. But nevertheless, an explicit orientation toward anti-domination provides a foundational way of thinking about *what kinds* of agency authorities and capacities we ought to build, what kinds we ought to dismantle and prevent, and how we might navigate more specific design questions.

Third and finally, it is worth noting that this orientation departs in important ways from the more conventional procedural neutrality of much of administrative law scholarship and discourse and may in many ways be an uncomfortable posture. Anti-domination does not provide a specific, comprehensive account of the good, but it does provide a normative directionality and orientation in a nonneutral manner. There are costs to such a shift. Not every political project will be consistent

with an anti-domination approach to administration. Of course, the reactionary administration vision would be inconsistent. But so too would be many neoliberal and libertarian accounts insofar as they seek to blunt the affirmative powers of the administrative state needed to counteract systemic disparities of economic power or systemic racial and gender inequities. In some ways this view departs from what had conventionally been a central value of administrative law: a discourse seeking to establish institutional processes and structures that would be durable and pliable regardless of which party holds office.

This move away from procedural neutrality is, in this moment in particular, the right one but perhaps an uncomfortable one. Proceduralism and neutrality are familiar approaches in public and administrative law, and both principles offer the allure of a conceptual framework that purportedly can command broad support across a divergent range of policy viewpoints. However, ultimately, the legal and political force of procedural neutrality trades on an underlying consensus on the boundaries of politics and a nominal agreement on the outer bounds of what the state ought to do. But in a world where visions of reactionary administration are front and center, we no longer operate in a political context where there is enough of a shared commitment to basic parameters of who is a valid member of the polity and what kinds of state powers are out of bounds for either party. As a result, appeals to political neutrality no longer work.

That being the case, any successful and effective vision of a progressive, democratic, egalitarian administrative state will have to rebuild from first principles about who and what an administrative state is *for*. The fault line for debates over the future of the administrative state needs 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 toward dismantling relations of subordination, and toward rebalancing economic power to make possible a more equitable and inclusive vision of democratic membership.[181] It is this

[181] This emphasis on a substantive, affirmative, moral vision for the future of the administrative state complements to some degree recent critiques of the excessive proceduralism of administrative law discourses and doctrines. *See, e.g.*, Bagley, *supra* note 17; *see also* Pozen, *supra* note 127. These critiques rightly highlight the ways in which norms of procedural restraint rest on a default state-skepticism drawn from both left and right, in ways that make more robust and transformative administrative action difficult. Here, I suggest that the costs of proceduralism are also manifest in the discursive and legitimizing power of alternative visions for the administrative state. Indeed, proceduralism's allure

directionality—and not norms of process—that can ground a new legitimacy for the administrative state.

These building blocks of a more democratic and egalitarian administrative state—an orientation toward 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.[182] This normative vision is part of a rich tradition of constitutionalism, and specifically administrative constitutionalism, in scholarship and social movements. 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,[183] but also the efforts by social movements and bureaucrats alike to leverage administrative processes and structures in advancing this vision. Administration, in this view, 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.[184]

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.[185] This vision for administration rests on a rich theoretical foundation that others have effectively surfaced.[186] 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

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arguably stems in part from a presumed skepticism that we might ever come to agreement on substantive moral visions for a good society and a good state. Safer, on this view, to litigate our disputes through neutral, broadly acceptable discourses of procedure and rule of law. But as suggested here, this is a self-defeating approach, particularly given the sociological and political reality of collapsed trust and loss of consensus (if there ever was one) around a common good or shared commitment to institutions. In this, I share a long-standing critique of thinner forms of neutrality offered by a range of political theorists for many years. *See, e.g.*, Michael Sandel, Liberalism and the Limits of Justice (1982); Katrina Forrester, In the Shadow of Justice (2020).

182 *See, e.g.*, Fishkin & Forbath, *supra* note 100.

183 *See, e.g.*, Rahman, *supra* note 16; Fishkin & Forbath, *supra* note 100.

184 On the critique of presidentialism and its unitary forms, see, for example, Rosenblum, *supra* note 70; Emerson & Michaels, *supra* note 152.

185 *See, e.g.*, Rahman, *supra* note 16; Rahman, *Policymaking*, *supra* note 119; Rahman, *Constructing Citizenship*, *supra* note 4.

186 *See, e.g.*, sources cited *supra* note 16.

the administrative state is central to realizing deeper conceptions of citizenship, equality, and inclusion.[187] 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.

[187] *See, e.g.*, K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671 (2018); *see also* administrative constitutionalism scholarship cited *supra* note 5.